

UNDRESSING DIFFERENCE: THE HIJAB IN THE WEST

Anita L. Allen
University of Pennsylvania Law School

Abstract

On March 15, 2006, French President Jacques Chirac signed into law an amendment to his country's education statute, banning the wearing of conspicuous signs of religious affiliation in public schools. Prohibited items included a large cross, a veil, or skullcap. The ban was expressly introduced by lawmakers as an application of the principle of government neutrality, *du principe de laïcité*. Opponents of the law viewed it primarily as an intolerant assault against the hijab, a head and neck wrap worn by many Muslim women around the world. In *Politics of the Veil*, Professor Joan Wallach Scott offers an illuminating account of the significance of the hijab in France. Scott's lucid, compact examination of the hijab complements previous feminist scholarship on veiling with a close look at its role in a particular time and place - contemporary France - where it has been the subject matter of a unique political discourse. How different is America's political discourse surrounding religious symbols in the schools as compared to the French? I offer a U.S. constitutional perspective on the rights of religious minorities and women in the public schools, and suggest that a ban on the hijab must be considered unconstitutional. A proposal for a national rule against the hijab in public schools or universities would fall flat in the United States. When compared to U.S. approaches to the hijab, the French experience examined by Joan Wallach Scott underscores an important point: there is more than one way to be a modern, multicultural western liberal democracy with a Muslim population, and some ways are better than others.

In February 2008 French President Nicolas Sarkozy defended a proposal to require that every ten-year-old in France learn the intimate biography of one of 11,000 French Jewish children killed in the Holocaust. [\[FN1\]](#) “[E]very French child should be entrusted with the memory of a French child-victim of the Holocaust,” the President said. [\[FN2\]](#) According to French Education Minister Xavier Darcos, the new curriculum would “create an identification between a child of today and one of the same age who was deported and gassed.” [\[FN3\]](#) The bold proposal that children adopt the memory of a victim of the Nazis generated intense concern. Critics suggested that this unorthodox approach to teaching history endorsed by President Sarkozy might even be cruel. And while secularity --*laïcité*--is a basic principle of French governance, critics also attacked the Holocaust lesson as an effort to impose a Judeo-Christian worldview within the schools. [\[FN4\]](#)

This was not the first time a French President drew criticism for embracing a daring education

policy. On March 15, 2006, French President Jacques Chirac signed into law an amendment to his country's education statute, banning in public schools the wearing of clothing or symbols that “exhibit conspicuously a religious affiliation.” [\[FN5\]](#) Prohibited items included “a large cross, a veil, or skullcap.” [\[FN6\]](#) The ban was expressly introduced by lawmakers as an application of the principle of government neutrality, “du principe de laïcité.” [\[FN7\]](#) Yet opponents of the law viewed it primarily as an intolerant assault against the hijab, a head and neck wrap worn by many Muslim women around the world. [\[FN8\]](#)

But why would the French government go after the hijab? A national law dictating that children not attend public school with their hair covered--and in the land of Liberté, Fraternité, Égalité at that--requires explanation. In *Politics of the Veil*, Professor Joan Wallach Scott offers an illuminating account of the significance of the hijab in France. “What is it about the headscarf,” she asks, “that makes it the focus of controversy, the sign of something intolerable?” [\[FN9\]](#) Prior to the ban, headscarves were barely present in the schools; only a few Muslim elementary, middle, and high school girls in France wore the hijab. Only fourteen percent of Muslim women in France said they wore the hijab at all, and a bare fifty-one percent said they actively practice their religion.” [\[FN10\]](#) Scott argues that despite the limited popularity of the Muslim hijab, termed foulard in the French language, the hijab is a form of “veiling,” which has become a threatening emblem of late twentieth century anti-Western Islamic politics. Even a few yards of fabric about the head and neck--leaving the face fully exposed--is reviled as a symbol of Muslim women's oppressive femininity and, inconsistently, their radical insouciance.

Indeed, a woman whose hair and neck are covered by the hijab, like the woman whose face is covered by the niqab, or whose full body is covered by the burqa, is a troubling figure for Westerners. She is “veiled,” and Scott points out, some Westerners readily lump together different forms of Islamic modesty dress, conceptualizing and problematizing all as “veiling.” [\[FN11\]](#) Many Western observers are uneasy about the veiling embraced or imposed in Islamic countries and even more so about the practice when it accompanies immigrants to Western countries, including the United States. The main focus of Scott's book is the commotion in France over the hijab. Scott joins other

U.S. scholars who have studied “veiling” and the Western discomfort surrounding the practice. Professor Nancy Hirschmann, for example, has assessed the normative significance of veiling within Islam and from a liberal feminist perspective, unstymied by cultural relativism. [FN12] Scott's lucid, compact examination of the hijab complements previous feminist scholarship on veiling with a close look at its role in a particular time and place--contemporary France--where it has been the subject matter of a unique “political discourse.” [FN13]. Professor Scott argues that the study of political discourse is best undertaken through close readings of arguments advanced in their specific political and historical contexts. [FN14]. Studying political discourse entails examining the language through which cultures create shared realities and values. Scott's excellent analysis of French political discourse is valuable for what it teaches readers about the political status of minority women and religions in France. But, the book also has value as a cautionary tale for other liberal democracies. Scott persuasively argues that the French made mistakes other countries will want to avoid.

How different is American political discourse surrounding religious symbols in the schools as compared to the French? Reserving a full comparative assessment for others, I will offer a U.S. constitutional perspective on the rights of religious minorities and women in the public schools, and suggest that a ban on the hijab must be considered unconstitutional. I believe a proposal for a national rule against the hijab in public schools or universities would not gain traction in the United States. In fact, an official ban on the hijab in the U.S. is virtually unthinkable. The European Court of Human Rights has held that governments are within their rights when they prohibit head wraps in schools. [FN15] Even some Muslim leaders believe sovereign nations are entitled to pass laws banning the hijab. [FN16] Yet if the hijab seems exotic to the French, the French seem exotic to Americans, who view clothing styles dictated by religion and culture as private matters largely--though not entirely--outside the realm of legitimate state intervention. When compared to U.S. approaches to the hijab, the French experience examined by Joan Wallach Scott underscores an important point: there is more than one way to be a modern, multicultural Western liberal democracy with a Muslim population, and some ways are better than others.

I. Unthinkable in the United States?

In 2005, an eleven-year-old Oklahoma Muslim American named Nashala Tallah Hearn was suspended from Muscogee School District's Benjamin Franklin Science Academy. [\[FN17\]](#) Her sole offense was a refusal to remove her hijab. Citing a school dress code against wearing hats, bandanas and other head coverings in the classroom, a teacher had ordered Nashala to take off her hijab. When Nashala refused, school administrators punished her for disobedience. [\[FN18\]](#) Muslim civil rights groups protested the girl's suspension from school. The United States Justice Department Office of Civil Rights announced that it would intervene on behalf of a Muslim girl's right to wear the hijab. [\[FN19\]](#) Feeling the pressure, the Muscogee School District school board decided to overturn the suspension. Nashala returned to school victorious, proudly wearing her hijab.

The United States government did not have to involve itself in Nashala Hearn's case. But it is not surprising that government attorneys would voluntarily elect to support a pupil's right to wear the hijab. In the United States, the hijab is commonly worn both by Muslims of recent foreign extraction, but also by indigenous black Muslims. Banning Muslim headscarves potentially discriminates against both African-American and non-African-American Muslims. Although the United States Supreme Court has upheld laws aimed at compelling religious minorities to conform to a variety of majority practices, a range of federal cases point to recognition of a constitutional right of minority group members to wear distinctive religiously inspired garb in educational settings. The United States Supreme Court has not addressed restrictions on headscarves. However, especially where the garb in question is called for by a woman's modesty, it is very likely that the United States would favor preferences of the individual over those of the state.

A. Embracing Difference

United States federal courts have shown that they are capable of permitting bans on minority group practices loathed by and threatening to the majority. For example, the unreputed, late nineteenth century decision, *Reynolds v. United States*, upheld a law applicable to the U.S. territories, banning the practice of polygamy among the Mormons. [\[FN20\]](#) Petitioner Reynolds was a

prominent Utah Mormon who took a second wife with the approval of Mormon officials, flouting a polygamy ban enacted by Congress. Reynolds wanted to test the legitimacy of the national ban, and so he cooperated with his own prosecution, eager to appeal his conviction. Although the First Amendment clearly protects religious freedom, the Supreme Court held that the right of free exercise is a right to believe what one wishes, not a right to do what one wishes when what one wishes to do violates laws of general application. Plural marriages were “odious” to the civilized West, argued the Court. [\[FN21\]](#) And they were odious in part because of the shame they brought on women and children of such relationships, who were stained with an aura of illegitimacy.

The Reynolds Court's interpretation of free exercise played a role in the Court's decision many years later in *Employment Division of Human Resources of Oregon v. Smith*. [\[FN22\]](#) In that case members of a Native American church lost their social services jobs due to admitted use of sacramental peyote in worship. They were denied unemployment benefits on the ground that they lost their jobs “for cause”--using illegal drugs. The Court held that the First Amendment did not require that the men's use of sacramental peyote be treated any differently from the use of other illegal drugs. The state interest in protecting the public from the dangers associated with drug use is a weighty one, reasoned the Court.

Reynolds and Smith evidence a lack of regard for preserving minority religious differences. But other lines of Supreme Court cases are relevant to the issue of embracing difference in education, raised by the question of the school girl's hijab. This other case law reflects a distinct constitutional distaste for imposing majority practices on well-meaning minority families seeking to educate their children consistent with their religion.

Meyer v. Nebraska evidences a strong abhorrence to public laws whose sole purpose is to ensure assimilation. [\[FN23\]](#) In this case, the Supreme Court struck down a state law prohibiting instruction in the German language in a parochial school. [\[FN24\]](#) The law in question criminalized teaching German to children younger than thirteen, a crime for which Robert Meyer, a teacher at Zion Parochial School was prosecuted. The apparent purpose of the Nebraska law was assimilation--to ensure that young children became well-assimilated citizens who spoke and thought like “Americans.”

The Court held that the Fourteenth Amendment does not permit compelling English language instruction.

[The Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. [\[FN25\]](#)

In *Wisconsin v. Yoder*, the Supreme Court struck down convictions of members of the Old Order Amish religion who refused to send their children to school for formal education beyond the eighth grade. [\[FN26\]](#) A Wisconsin state law mandated that children attend private or public school until the age of sixteen years. The court stressed that the application of the compulsory school attendance law could very well destroy the ability of the Amish to perpetuate their unique way of life. Only the Amish youth's absence from school was at issue in the *Yoder* case, not the “different” clothing they wore to school when they attended. Yet part of the Amish way of life the Court seemed reluctant to disturb included the Amish style of dress. [\[FN27\]](#) The Old Order Amish reject what they call “English” dress. Instead they wear simple rural attire, not unlike their nineteenth century ancestors. Deference shown to the Amish way of life and educational values suggest that other groups' religiously inspired requirements of their school-aged children would be similarly protected by the Court. If government may not constitutionally ban instruction in a minority language in a parochial school or require formal secondary education for members of a minority religious group, it arguably cannot ban the hijab, an article of clothing worn by a religious minority.

B. Dress Codes

The Supreme Court has not been asked to address the constitutionality of a hijab ban. However, it has been asked to review decisions that concern the constitutionality of dress and uniform codes for school children, public employees, and members of the armed forces. The Court's dress and uniform cases are further evidence of how it might assess the constitutionality of a hijab ban.

Wearing a Muslim headscarf to school could be compared to wearing a particular hairstyle and choice of clothing. May public schools demand a uniform appearance of their pupils? In the late 1960s and 1970s, many public secondary schools adopted strict hairstyle codes in response to the popularization of the long styles preferred by entertainers, college students, and “hippies.” In the 1990s there was a resurgence of school uniform requirements in urban public schools. Uniforms appear to improve school discipline and promote safety. [FN28] On a number of occasions the federal courts have addressed the question of whether school children are constitutionally entitled to wear their hair in styles prohibited by school administrators. Analogous questions have arisen in relation to public employees' hairstyles.

In *Stull v. School Board of Western Beaver, Junior-Senior High School*, the Third Circuit Court of Appeals recognized that “the length and style of one's hair is implicit in the liberty assurance of the due process clause of the Fourteenth Amendment.” [FN29] A school rule prohibited styles in which a boy's hair covered his ears or fell below his collar line. The court held the policy invalid and unenforceable, “except as applied to shop classes,” where safety was an apparent issue.

In *Kelly v. Johnson*, the Supreme Court refused to invalidate hair length regulations promulgated by a police department. [FN30] Chief Justice Rehnquist argued for the majority that: “choice of organization, dress, and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the state's police power” [FN31] The requirement that police officers wear their hair in short styles was a requirement of uniform and uniformity. In a dissent joined by Justice Brennan, Justice Marshall made the case for individuality. Justice Marshall's reasoning was in line with that of the Third Circuit Court of Appeals in *Stull*, which struck down a categorical hairstyle requirement for high school boys:

[A]n individual's personal appearance may reflect, sustain, and nurture personality and may well be used as a means of expressing his attitude and lifestyle. In taking control over a citizen's personal appearance, the government forces him to sacrifice substantial elements of his integrity and identity as well. To say that the liberty guaranteed of the Fourteenth

Amendment does not encompass matters of personal appearance would be fundamentally inconsistent with the values of privacy, self identity, autonomy, and personal integrity that I have always assumed the Constitution was designed to protect. [\[FN32\]](#)

Kelly v. Johnson is Supreme Court precedent for this principle: courts should presume the validity of uniform grooming requirements that confer public benefits, notwithstanding any individual's interest in individuality. Following this principle, one reasonably could conclude public schools constitutionally may impose uniform dress requirements that impair individuality, as indeed many public and private schools do. Some schools have uniform requirements that dictate clothing style and color. Boys are often asked to wear khaki pants and polo shirts in conservative colors. Girls are sometimes asked to wear plaid “jumpers” or skirts and blouses. Short of a strict uniform requirement, some schools ban logo shirts, excessively baggy pants, short shorts, tank tops, baseball caps, and ostentatious jewelry. Certain clothing is prohibited because it can be used as a place to conceal contraband. Some school districts are persuaded that school uniform requirements further the goal of instilling pride and improving school discipline. [\[FN33\]](#)

It is one thing to tamp down individuality and something else to interfere with a person's religion. Schools with uniform requirements could be constitutionally required to make exceptions to accommodate bona fide religious difference among their pupils. Some schools explicitly exempt from dress code requirements the hijab and yarmulke, a Jewish head covering worn by men and boys. In Shermia Issac's Howard County, Maryland, public school, hats and other head-coverings were prohibited in the classroom, but an exception was made for the yarmulke and hijab. [\[FN34\]](#) An African-American eighth grader of Jamaican ancestry, Shermia lost her court battle to wear an ethnically inspired head dress to school. The girl admitted that the multicolored head wrap her school forbade was not required by her religion or cultural traditions, and that she chose to wear it some days for style to conceal a “bad hair day.” However the wraps were an expression of her ethnic pride, and were of a sort commonly worn by her mother. Shermia Issac's case suggests that head coverings not dictated by religion or cultural traditions of modesty need not receive the deference given a schoolgirl's hijab.

Some schools with dress codes, like the Maryland school cited above, have concluded that they should or must make exceptions for bona fide religious attire. As a logical matter, the constitutionality of dress codes and school uniform requirements does not entail the constitutionality of banning the hijab or other religious attire. The case must be made that the First and Fourteenth Amendments permit a substantial interference with religious liberty. Based on the precedent of Meyer and Yoder, and the evidence of the Hearn case and public reaction to it, I believe it is unlikely that a federal court would sustain a school dress code or uniform requirement that did not make an exception for pupils' bona fide religious or cultural modesty garb.

The courts should--and I predict would--distinguish schools from the military, a limited context where concerns about uniformity have been held to trump religious expression. The Supreme Court has upheld military policies limiting the right to wear the yarmulke. In *Goldman v. Weinberger*, the Court held that a Jewish rabbi and clinical psychologist, serving as an active duty member of the military could be prohibited from wearing a yarmulke. [\[FN35\]](#) The case for permitting the military to ban religious headgear was based on the same reasoning used to make the case for permitting municipal police departments to prohibit long hairstyles--the importance of uniformity. Uniforms and uniformity communicate discipline, professionalism, and submission to a common authority.

It can be argued that categorical uniformity in the military--and in law enforcement--is a legitimate, important, or even compelling state interest. The case for categorical uniformity in school is less strong. The needs of schools on the one hand, and police departments and the military on the other, are sufficiently different to warrant constitutionally different approaches to religious or cultural exceptions. A boy in khakis, a polo shirt, and yarmulke, like a girl in a plaid jumper and hijab, inherently offends no legitimate state interest such as school discipline or safety. Categorically banning religious or cultural headgear in schools is incompatible with due respect for the religious and expressive freedom of children and their families.

C. Modesty

Religious Muslims sometimes say that wearing the hijab is an expression both of religious

identity and of modesty required by religion. [\[FN36\]](#) Thus another pertinent angle from which to view government imposed restrictions on the hijab would be U.S. modesty laws. By “modesty laws,” I mean the dispersed set of legal norms that dictate that adults cover up their bodies for the sake of chastity, humility, decency, or morality. [\[FN37\]](#)

One notable manifestation of constitutional respect for women's modesty is the Supreme Court case, *Union Pacific Railroad v. Botsford*. [\[FN38\]](#) This case is a landmark of the Court by virtue of its immediate recognition of the “right to be let alone” defended by Samuel Warren and Louis Brandeis the year before. [\[FN39\]](#) The case held that a woman who filed a tort action alleging physical injuries need not submit to a medical exam at the request of the defendant. The woman's modesty was at stake. The *Botsford* decision has been effectively overruled by modern rules; rules of civil procedure now authorize courts to order the examination of personal injury plaintiffs. But what endures is the sentiment about the importance of privacy advanced in the *Botsford* case: “No right is held more sacred, or more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from restraint or interference of others, unless by clear and unquestionable authority of law.” [\[FN40\]](#)

The choice of modesty is a prerogative of U.S. women who want it. This is not to say women have not had to fight for the right to wear Islamic dress to work. Women wearing the hijab have been denied employment opportunities, belittled, and harassed. [\[FN41\]](#) Still, in the U.S., the salient legal modesty battles of our time are mainly about women seeking the freedom to dress less modestly than others expect, and only occasionally about women seeking freedom to be more modest than expected. Without success, tavern dancers and owners have gone to the Supreme Court seeking a right to totally nude performances. A battle for compelled modesty has been symbolically won in the Supreme Court in cases concerning bans on totally nude dancing. [\[FN42\]](#) Over First Amendment objections, the Supreme Court has twice upheld laws that require women to cover up, a little. The Court has bought the argument that public safety in some communities hinges on the difference between total nudity and the donning of “G strings” covering the genitalia and “pasties” covering the nipples of performers. In a country in which states attempt to impose a symbolic vestige of modesty

on its female citizens to such an absurd degree, it is unlikely that women and girls exhibiting greater than average modesty would ever be required to remove modesty garments, solely for the sake of uniformity or cultural assimilation.

The Court's refusal to let go of the pastie and G-string reflects a cultural nudity taboo. Judge Richard Posner has argued that a "nudity taboo" is a feature of American society that requires deference under the Eighth Amendment even in the context of prison life, where providing same-sex guards is an administrative inconvenience and employment rights issue. [\[FN43\]](#) Judge Posner made the case for respecting "Judeo-Christian" modesty values, [\[FN44\]](#) and his argument is easily extended to Islamic modesty values embraced by many Muslim Americans. One domain for respecting the Muslim modesty values would be the context at issue here--prohibiting dress codes that would compel Muslim girls to remove the hijab.

I am not arguing that there is no context in the U.S. where a woman might be lawfully asked to remove Muslim modesty dress. It seems reasonable to expect that even a very religious woman can be asked to remove her veil briefly to take a driver's license or passport photograph, or to go through airport security. At least one court has held that for purposes of being photographed for a state driver's license photo, a religious Muslim can be required to momentarily remove her niqab--the veil that covers her entire face except her eyes. [\[FN45\]](#) Requiring momentary removal of the niqab does not substantially impair religion and is reasonable. Without a facial photo a driver's license could not serve as meaningful driver identification.

The events of September 11, 2001, unfortunately left many Americans with a bad taste for Islam and a phobic suspicion of religious Muslims and people suspected of being from Muslim countries. Even the events of 9/11 did not result in calls for banning the veil, however. Post 9/11 air travel is one of the few contexts in American life where modesty garments have come into potentially serious conflict with public purposes. Screening policies require that all women be asked to remove head gear, jackets, and shoes when passing through inspection. Authorities have not sought to deny categorical passage to veiled Muslim women; though there have been outrageous casualties. One American-born Muslim woman was strip searched after refusing to remove her hijab in a public

passenger screening area of an airport. [\[FN46\]](#) Authorities have struggled to devise respectful means of screening veiled women for security purposes, but are supposed to provide screening by a female professional in a secluded area.

I have ventured the argument that a national ban on the hijab would be unconstitutional and virtually unthinkable in the United States where religious expression and voluntary modesty are greatly valued. That the situation is so different in France, a country that shares our political traditions, is curious. Why did the French take up arms against the hijab?

II. Why in France?

In light of the respect for cultural difference and the promotion of feminine modesty evinced by U.S. courts, the French hijab ban measure looks unreasonable and inexplicable. The French ban cannot be well-defended as a way of limiting the influence of radical Islam or combating terrorism. The measure only affected girls in French public school who in fact wore the hijab. The measure did not address the dress of Muslim females outside of schools, nor prohibit less ostensible Muslim religious symbols in schools. Determined terrorists would not push back or be pushed back simply because Muslim school girls in public schools were not veiled. One of the most useful contributions of Joan Wallach Scott's incisive book is that it explains why the French banned the hijab when it seems apparent that doing so would not curtail the influence of radical Islam or terrorism. Scott helps to make sense of what otherwise does not.

Scott's book is a proving ground for a method as well as a thesis. Her central thesis is that outlawing the veil, “even though it was worn by very few students in French public schools, was an attempt to enact a particular version of reality, one which insisted on assimilation as the only way for Moslems to become French.” [\[FN47\]](#) Scott defends her thesis through an examination of political discourse which she “undertake[s] through close readings of arguments advanced in their specific political and historical context.” [\[FN48\]](#) In defense of her method Scott persuasively maintains that the “situation of Muslim immigrants in Western European countries can be grasped fully only if the local context is taken into account.” [\[FN49\]](#)

The French hijab ban was a symbolic political discourse of national identity, Scott explains. The main reason for the French ban was a desire to signal to French immigrant minorities the felt importance of integration and assimilation. The ban on the veil presupposed that a French identity and loyalty to the French government required the subordination of religiosity. [\[FN50\]](#) To allow the tiny cross, the tiny star of David, the tiny Koran, but not the Orthodox garb of yarmulke and foulard, [\[FN51\]](#) was a way of raising flag above faith, says Scott.

To explain the attack on the hijab, Scott systematically considers the roles of several causative factors. They include: (1) old-fashioned racism and colonialism towards people of north African and Muslim descent; (2) secularism --laïcité as a public philosophy in France; (3) individualism as a public philosophy in France; and (4) residual sex inequality as an embarrassment to French liberalism.

First, as for racism and colonialism, Scott links the Western obsession with the veil to sexual fantasies harbored by colonialists who encountered veiled women abroad: “the veil was a sexual provocation, and a denial of sex, a come-on and a refusal.” [\[FN52\]](#) A veiled woman might be an unruly prostitute or a slave to a husband. For the confused colonial, “Islam [was] a cruel and irrational system of religious and social organization.” [\[FN53\]](#)

Next, according to Scott, “French supporters of the law banning headscarves defined themselves as apostles of secularism.” [\[FN54\]](#) Scott dates secularism in French schools back to the mid-nineteenth century, when primary education was made compulsory for boys and girls and when religion was no longer taught in the classroom by Catholic priests and nuns. Yet while “militantly secular in theory,” she argues “French schools were more flexible” in allowing dimensions of religion if only in recognition of the historic significance of Catholicism. [\[FN55\]](#) Some of this flexibility is seen in the way the French approached the head scarf ban. Scarves were not banned in private schools; they were not banned for women going about their business in the streets; nor were they banned for women workers who were employed by the state. [\[FN56\]](#) On the other hand, the law has sometimes been interpreted as a more general expression of official disapproval of veiling, such as the chastising of women who wished to wear the veil in French naturalization ceremonies. [\[FN57\]](#) Non-Muslims were victims of the attack on the hijab, which had to be framed in neutral terms to

facially comport with liberalism. The education law amendment made an issue of what had not been much of an issue in France in the past, namely the wearing of skullcaps by Orthodox Jews and turbans by Sikhs. [\[FN58\]](#) Jews and Sikhs were victims of a kind of collateral damage in a war whose real enemy was Islamic difference. [\[FN59\]](#)

Scott next argues that individualism was an important dimension of the political discourse that led to the ban on the headscarf. One might suppose that individualism would point to freedom of religious choice, as it quite often has in the U.S. According to Scott, a committee that studied Muslim girls in French schools concluded that many girls found the hijab oppressive. The foulard was not their individual preference at all. The ban on the scarf was thus presented in political discourse as a way to liberate and emancipate individual Muslim girls constrained by family and cultural pressures to cover-up.

French policy-makers further imagined that the hijab might be a way Muslim parents dominated their helpless children, recruiting them willy-nilly into “an international Islamist movement reaching to France from Pakistan, Iran, and Saudi Arabia.” [\[FN60\]](#) It is worth asking whether individualism is a public value that justifies interfering with religious choices made by parents of young children or teens. Recall that no such rescue of Amish children was endorsed by the U.S. Supreme Court, though dissenting justices wondered if teenage Amish children's own desires might be subordinated to, or conflated with, their parents unfairly.

Finally, Scott explores a political discourse of sexual equality reflected in the assault on the hijab. She argues that by banning the headscarf, French legislators believed they were “removing the sign of women's inequality from the classroom” and “declaring that the equality of women and men is the first principle of the Republic.” [\[FN61\]](#) Such declarations are admirable, but the choice of the hijab is xenophobic, as Scott observes. The fixation on hijab--as opposed to skirts or ponytails--as the symbol of gender inequality can only be explained by the “foreign” character of this particular feminine emblem. U.S. moms have sometimes fixated on the Barbie doll or the color pink as the item to purge from their daughters' lives to insure their equality with boys. But the truth of the matter is that Muslim girls without hijab, like ribbon-less American girls in dungarees, are still subject

to discriminatory treatment and unequal opportunities at home, in schools, and in the larger society. It is tempting to think that if we are all to be the same, symbols of difference must be abolished; but another option is always to spare the symbols and change the underlying reality. For example, in the 1980s, when women flocked into the legal profession for the first time, dresses were a symbol of girly vulnerability. We female lawyers on Wall Street were encouraged to wear severe, man-tailored suits with foulard ties to work. But eventually firms and clients got used to having competent women around; women lawyers abandoned the ties and put dresses on the menu of acceptable office attire. Over time, French students and teachers might have gotten used to the hijab. The hijab might eventually have lost some of its power as a symbol of an unassimilated minority and repressed women.

III. Beyond Tolerance (or, How to Live Together Without Attitude)

Immigrant and native diversity are features of Western nations. To deal with difference, a country may seek to obliterate its symbols. But undressing Muslim girls from the neck up is a very poor way to create a unified society. This is Joan Wallach Scott's conclusion, and it is mine as well. We must hope it is possible for modern liberal democracies to truly incorporate people of various racial, religious, cultural, and national origins in a single body politic. Legislating against symbols of difference is not the way to go.

In the final pages of her book, Scott considers competing ideals of nation sharing. Scott believes political leaders must stop acting as if historically established communities are essences. She notes that French leaders have treated French nationality as an essence rather than as a dynamic, fluid construct. [\[FN62\]](#) “In order to come to terms with its North-African/Muslim population,” Scott urges, “French politicians and intellectuals need to come up with new ways of addressing difference, ways that acknowledge its existence rather than refusing to engage.” [\[FN63\]](#)

It is formulating an adequate ideal of nation-sharing that Scott seems to think is the great obligation of contemporary multicultural democracies. And she is right. What ideal, though, can a liberal democracy strive for? Is it integration? Is it tolerance? Could it be multiculturalism? Scott

finds fault in some of the usual ways of naming the inclusive political idea. Integration implies a loss of identity to assimilation. Toleration sounds snotty; to tolerate is to accept that which one finds offensive. The multicultural ideal, which has had a significant life in American political discourse, starting in the 1980s, envisions a nation of people of different sorts, each maintaining loyalty to an identity group, while mysteriously composing a functioning political unit.

The U.S. is a better place for its acceptance of the hijab in schools. But the U.S., like France, struggles with how to incorporate religious and cultural minorities fully and equally into the life of the society. The United States has had to learn the hard way that racial segregation of African Americans causes children to grow up feeling inferior to others, and less entitled to public resources and opportunities. Racial segregation impairs the preparation of youth for life in a pluralistic, self-governing society, and interferes with the efficiency, productivity, and equality of the workplace. But the French surely know this by now. They have had their own hard lessons, too.

Restless disenfranchised minority youth took to rioting in U.S. cities in the mid-1960s. A National Advisory Commission on Civil Disorders was convened by President Lyndon Johnson in 1967 to study the causes of rioting in the black “ghettos.” The Kerner Commission, as it came to be called, issued a Report that interpreted the rioting as African Americans' demand for equality and inclusion. The U.S. rioters wanted more just police practices, jobs, housing, education, recreational facilities, political power, fair lending, and respectful racial attitudes. Something analogous to the U.S. riots happened in France in 2005 and 2006. A clash with police over the deaths of two Muslim teenagers on October 27, 2005, in Clichy-sous-Bois, a Paris suburb, sparked dozens of racially-charged rebellions throughout the country, leading to loss of life, property destruction, injuries, and arrests. [\[FN64\]](#) Lack of opportunity, isolation, and discrimination fueled the frustration of young people who participated in the rioting. Doubtless, ghetto-ized French minorities living in the cités HLM--the public housing projects--want the same things ghetto-ized U.S. blacks have wanted. [\[FN65\]](#)

Disaffected young men waiting to blow are a real, concrete problem for French democracy. The school girl's hijab emerged in French political discourse as a problem too, but one the French could

remedy. It was easier by far to muster political will to “liberate” Muslim school girls than to adequately house, educate, and employ their brothers. Maybe the frank lesson embracing Jews and the Holocaust sought by President Sarkozy should be accompanied by a frank lesson embracing Muslims, the HLM, and the hijab.

[FN1]. Elaine Sciolino, *By Making Holocaust Personal To Pupils, Sarkozy Stirs Anger*, N.Y. Times, Feb. 16, 2008, at A1 (“President Nicolas Sarkozy dropped an intellectual bombshell this week, surprising the nation and touching off waves of protest with his revision of the school curriculum: beginning next fall, he said, every fifth grader will have to learn the life story of one of the 11,000 French children killed by the Nazis in the Holocaust. ‘Nothing is more moving, for a child, than the story of a child his own age, who has the same games, the same joys and the same hopes as he, but who, in the dawn of the 1940s, had the bad fortune to be defined as a Jew,’ Mr. Sarkozy said.”).

[FN2]. *Id.*

[FN3]. *Id.*

[FN4]. *Id.* (“Mr. Sarkozy wrapped his plan in the cloak of religion, placing blame for the wars and violence of the last century on an “absence of God” and calling the Nazi belief in a hierarchy of races “radically incompatible with Judeo-Christian monotheism.” Secularists accused Mr. Sarkozy, who is already under fire for his frequent praise of God and religion, of subverting both the country’s iron-clad separation of church and state and the national ideal of a single, nonreligious identity for all.”).

[FN5]. Law No. 2004-228 of Mar. 15, 2004, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Mar. 17, 2004, 5190 (reporting an amendment to the Education Code and inserting a new article prohibiting “manifestant ostensiblement” articles of religion).

[FN6]. Joan Wallach Scott, *Politics of the Veil (The Public Square)* 1.

[FN7]. Law No. 2004-228 of Mar. 15, 2004, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Mar. 17, 2004, 5190 (“en application de principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse”).

[FN8]. Elaine Sciolino, *The Reach of War: Religious Symbols; Ban on Head Scarves Takes Effect in a United France*, N.Y. Times, Sept. 3, 2004, at A8 (“Although the ban on ‘conspicuous’ religious symbols also applies to Jewish skullcaps and large Christian crosses, there was never any doubt that it was primarily aimed at France’s five million Muslims and what is widely perceived as creeping fundamentalism in their midst.”).

[FN9]. Scott, *supra* note 6, at 3.

[FN10]. *Id.* at 3.

[FN11]. *Id.* at 16.

[FN12]. Nancy J. Hirschmann, *The Subject of Liberty: Toward a Feminist Theory of Freedom* (2002).

[FN13]. Scott, *supra* note 6, at 8.

[FN14]. *Id.*

[FN15]. [Leyla Sahin v. Turkey](#), App. No. 44774/98, Eur. Ct. H.R. (2005), (Plaintiff, a Turkish woman, objected to ban on the hijab in Turkish universities).

[FN16]. [Reuters, Muslim Leader Says France Has Right to Prohibit Head Scarves](#), N.Y. Times, Dec. 31, 2003, at A5.

[FN17]. [Brian Knowlton, Bush administration intervenes to allow Muslim schoolgirl to wear scarf: U.S. takes opposite tack from France](#), Int'l Herald Trib., April 2, 2004, available at http://www.ihf.com/articles/2004/04/02/islam_ed3_.php.

[FN18]. [Id.](#)

[FN19]. [Cf. Neil A. Lewis, Justice Dept. Reshapes Its Civil Rights Mission](#), N.Y. Times, June 14, 2007, at A1. (Justice Department expanding its traditional civil rights mission to include protection of religious minorities and women imported from abroad to work in brothels).

[FN20]. [Reynolds v. United States](#), 98 U.S. 145, 166 (1878) (“Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices.”).

[FN21]. [Id.](#) at 164.

[FN22]. [Employment Div., Dep't. of Human Res. of Oregon v. Smith](#), 494 U.S. 872, 878-79 (1990) (“We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate.”).

[FN23]. [Meyer v. Nebraska](#), 262 U.S. 390 (1923).

[FN24]. [Id.](#) at 403 (“Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution--a desirable end cannot be promoted by prohibiting means.”) (“It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child.”).

[FN25]. [Id.](#) at 399.

[FN26]. [Wisconsin v. Yoder](#), 406 U.S. 205, 206 (1972) (“[T]he record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.”).

[FN27]. [Id.](#) at 217.

[FN28]. [Lisa Rich, Students dress up for school: Trenton shows off potential uniforms for September](#), The Times, Feb. 22, 2008, at A1. (“According to the federal government's ‘Manual on School Uniforms,’ a unified wardrobe is one way to reduce discipline problems and increase school safety.”).

[FN29]. [Stull v. Sch. Bd. of W. Beaver Junior-Senior High Sch.](#), 459 F.2d 339, 347 (3d Cir. 1972).

[FN30]. [Kelly v. Johnson](#), 425 U.S. 238 (1976).

[FN31]. [Id.](#) at 238.

[FN32]. [Id. at 250-51.](#) (Marshall, J., dissenting).

[FN33]. Cf. Lisa Rich, *Outfitting students for unity, security: Presentation of uniforms set for tomorrow in city*, *The Times*, Feb. 19, 2008, at A3.

[FN34]. [Isaacs ex rel. Isaacs v. Bd. of Educ. of Howard County, Md., 40 F. Supp. 2d 335 \(D. Md. 1999\).](#)

[FN35]. [Goldman v. Weinberger, 475 U.S. 503 \(1986\)](#) (Orthodox Jew in Air Force sued under First Amendment for right to wear yarmulke).

[FN36]. See, e.g., Hirschmann, *supra* note 12, at 175-85 (Professor Hirschmann discusses various reasons given by Muslim women for wearing a veil and explores ““the veil” as discursive and social symbolization.”).

[FN37]. Anita L. Allen, *Disrobed: The Constitution of Modesty*, 51 *vill. l. rev.* 841 (2006).

[FN38]. [Union Pac. R.R. v. Botsford, 141 U.S. 250 \(1891\).](#)

[FN39]. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193 (1890) (arguing for judicial recognition of a free standing right to privacy). The idea caught on, and by 1905 the first state supreme court had embraced the right. See [Pavesich v. New England Life Ins. Co. 50 S.E. 68 \(Ga. 1905\).](#)

[FN40]. [Botsford, 141 U.S. at 251.](#)

[FN41]. See, e.g., [Campbell v. Avis Rent A Car System, Inc., No. 05-74472, 2006 WL 2865169, \(E.D. Mich. Oct. 5, 2006\)](#) (Woman employee of rental car company claims harassment due to wearing the hijab and praying at work); [Wiley v. Pless Sec., Inc., No. 1:105-CV-332-TWT, 2006 WL 1982886, \(N.D. Ga. July 12, 2006\)](#) (Woman employed in security business claimed job reassignment prompted by her religious use of the hijab violated rules against discrimination in employment); [Alsaras v. Dominick's Finer Foods, Inc., No.00-1990, 2000 WL 1763350, \(7th Cir. Nov. 22, 2000\)](#) (Woman employee of Dominick's alleged that the real reason she was fired was that she wore a hijab and used break time to pray).

[FN42]. [City of Erie v. Pap's A.M., 529 U.S. 277 \(2000\)](#) (upholding constitutionality of city ordinance prohibiting public nudity); [Barnes v. Glen Theatre, Inc. 501 U.S. 560 \(1991\)](#) (upholding constitutionality of state statute prohibiting public nudity).

[FN43]. [Johnson v. Phelan, 69 F.3d 144, 152 \(7th Cir. 1995\)](#) (Posner, J., concurring and dissenting) (“The nudity taboo retains great strength in the United States. It should not be confused with prudery. It is a taboo against being seen in the nude by strangers, not by one's intimates. Ours is a morally diverse populace and the nudity taboo is not of uniform strength across it. It is strongest among professing Christians, because of the historical antipathy of the Church to nudity; and as it happens the plaintiff alleges that his right ‘to practice Christian modesty is being violated.’ The taboo is particularly strong when the stranger belongs to the opposite sex. There are radical feminists who regard ‘sex’ as a social construction and the very concept of ‘the opposite sex,’ implying as it does the dichotomization of the ‘sexes’ (the ‘genders,’ as we are being taught to say), as a sign of patriarchy. For these feminists the surveillance of naked male prisoners by female guards and naked female prisoners by male guards are way stations on the road to sexual equality. If prisoners have no rights, the reconceptualization of the prison as a site of progressive social engineering should give us no qualms. Animals have no right to wear clothing. Why prisoners, if they are no better than animals? There is no answer, if the premise is accepted. But it should be rejected, and if it is rejected, and the duty of a society that would like to think of itself as civilized to treat its prisoners humanely therefore acknowledged, then I think that the interest of a prisoner in being free from unnecessary cross-sex surveillance has priority over the unisex-bathroom movement and requires us to reverse the judgment of the district court throwing out this lawsuit.”).

[FN44]. Posner's attack against “radical” feminists is potentially misleading. See *id.* Readers unfamiliar with multiple strands of feminist thought might assume all feminists are “radicals” intent upon extinguishing all

distinctions among the sexes.

[FN45]. [Freeman v. State, No. 2002-CA-2828, 2003 WL 21338619, \(Fla. Cir. Ct. June 6, 2003\).](#)

[FN46]. [Kaukab v. Harris, No. 02 C 0371, 2003 WL 21823752, \(N.D. Ill. Aug. 6, 2003\).](#)

[FN47]. Scott, *supra* note 6, at 7.

[FN48]. *Id.* at 8.

[FN49]. *Id.* at 9.

[FN50]. *Id.* at 10.

[FN51]. Law No. 2004-228 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190.

[FN52]. Scott, *supra* note 6, at 60.

[FN53]. *Id.*

[FN54]. *Id.* at 97.

[FN55]. Scott, *supra* note 6, at 99-100.

[FN56]. *Id.* at 106.

[FN57]. *Id.* at 179.

[FN58]. *Id.* at 107.

[FN59]. *Id.* at 134.

[FN60]. *Id.* at 131.

[FN61]. *Id.* at 168.

[FN62]. *Id.* at 20.

[FN63]. *Id.* at 180.

[FN64]. See, e.g., Paul Silverstein & Chantal Tetreault, Algeria-Watch, Urban Violence in France, Nov. 2005, http://www.algeria-watch.org/en/policy/urban_violence.htm (last visited March 9, 2008) (“On October 27, after playing an informal soccer match with friends at a stadium in Clichy-sous-Bois (a municipality neighboring Saint-Denis), Muhittin Altun, 17, Zyed Benna, 17, and Bouna Traoré, 15, were heading home to end their Ramadan fast when they heard police sirens. Bouna told the others to run, claiming that members of the Anti-Criminal Brigade were in pursuit. A security guard from a nearby construction site had called the police because he believed the teens were trespassing; other young men present deny ever having entered the site. Muhittin, Zyed and Bouna jumped the fence of a nearby electrical substation to escape the police, but only Muhittin survived. Zyed and Bouna were fatally electrocuted. The police have denied seeing the three teens enter the substation. As word spread about Zyed and Bouna's deaths, young men from the surrounding housing projects gathered in protest. In a minor set-to with police,

they burned 15 cars. The following evening, the conflict had expanded, pitting as many as 400 local youth against perhaps 300 riot police and military gendarmes called in to maintain order.”).

[FN65]. The HLM (habitation à loyer modéré) is low- and moderate-income public housing in French cities and suburbs. Many immigrants from North Africa live in these facilities.

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