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The Sikh Turban: Post-9/11 Challenges to this Article of Faith

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THE SIKH TURBAN: POST-911 CHALLENGES TO THIS ARTICLE OF FAITH

Neha Singh Gohil¹
Dawinder S. Sidhu²

Turbans have been worn by different people around the world for at least the past 3,000 years. For one community, the Sikhs, the turban carries deep religious significance. Members of the Sikh faith—the fifth largest religion in the world—are required to wear a turban pursuant to religious mandate.

In the aftermath of the terrorist attacks of September 11, 2001, Sikh turbans have taken on a new meaning. Because non-Sikhs tend to associate Sikhs' turbans with Osama bin Laden, Sikhs with turbans have become a superficial and accessible proxy for the perpetrators of the 9/11 attacks. As a result, turbaned Sikhs in America have been victims of racial violence and have had their identity challenged by calls for immigrant groups to assimilate into Western societies.

This essay examines how the turban has transformed from a sacred piece of attire for Sikhs to a target for discriminatory conduct and an object of marginalization after 9/11. Part I provides an introduction to Sikhism, which originated in 17th century South Asia, and discusses the religious significance of the Sikh turban. Part II examines incidents of discrimination in several contexts involving turbaned Sikhs in America. Part III analyzes the debate surrounding assimilation that has been taking place in the West, which implicates conspicuous articles of faith, including the Sikh turban. The essay also explores the legal remedies available to turbaned Sikhs affected by discriminatory conduct or by broader policies on the wearing of turbans.

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The essay attempts, for the first time, to report on Sikh concerns, which, until now, have largely been subsumed in broader discussions of the post-9/11 climate.

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Introduction

Ten to twenty feet of cloth, neatly folded and wrapped around one's head until it completely covers one's hair. This particular headdress has been worn for hundreds of years and for a variety of reasons—from protection against the weather to signifying royal status.

For members of the Sikh religion, however, the turban is not a fashion trend or indicia of social standing—it is an essential part of their faith. Sikhs are required to wear turbans pursuant to religious mandate. They consider it to be an outward manifestation of their devotion to God and solemn adherence to the strictures of their religion. It has been this way ever since the Sikh religion was formally established in the Punjab region of South Asia in 1699.

Over three hundred years later, in the aftermath of the terrorist attacks of September 11, 2001, the turban has been assigned a different meaning. In contemporary post-9/11 America, the perceived similarity of Sikhs with turbans to Osama bin Laden has made the turbaned Sikhs, already one of the most visible minority groups in the United States, a superficial and accessible proxy for the elusive bin Laden and his distant al-Qaeda regime.³

As a result, some Americans have directed their post-9/11 rage towards Sikhs. In particular, Sikhs with turbans in the United States have been murdered, stabbed, assaulted, verbally harassed, discriminated against in the workplace, and refused service in places of public accommodation, among other things.

At the same time, turbaned Sikh-Americans have also faced a broader attack on their identity, leading them to question whether and to what extent their faith is compatible with Western society. In several democratic nations, conspicuous religious clothing, especially the Muslim veil, are considered marks of separation and demonstrative proof of a stubborn refusal to assimilate into mainstream society. This largely European debate concerning the proper balance between multiculturalism and integration has necessarily placed visible articles of faith, including the Sikh turban, under intense scrutiny in the United States as well.

These tangible and intellectual challenges to the Sikh turban⁴ have resulted in serious consequences for turbaned Sikhs in America. More than physical violence, Sikhs

³ See Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1590 (2002) (“Sikh men, who are religiously mandated to wear turbans, have been conflated with Osama Bin Laden and have suffered significant violence[.]”).

⁴ As used in this Article, the “tangible” challenge is characteristically direct in nature, is generally carried out by ordinary citizens, and its immediate impact is local, that is to the victims and to members of the Sikh community in that region, though the long-term aggregate effects may be broader. The “intellectual” challenge is, by contrast, more abstract in nature, is generally engaged in by government agents or influential media outlets, and is, at a minimum, national in terms of impact, due to the question of whether individuals who wear certain religious clothing should be permitted to wear those articles of faith in a particular society.

in America are wondering whether they are truly members of this political community⁵ and whether the American legal system is sufficient to protect them from the post-9/11 emotion.⁶ They are also wrestling with the importance of the turban itself, despite the longstanding belief that it must be worn.⁷ In short, the Sikh sense of belonging to the American experiment, their faith in the rule of law in America, and Sikh identity itself are in jeopardy.

The central purpose of this Article is to examine the turban as a sacred piece of attire for Sikhs and as a target for discriminatory conduct and an object of marginalization after 9/11. While the post-9/11 backlash has been discussed in other contexts,⁸ particularly as it relates to Muslims, Arabs, and South Asians,⁹ serious study

⁵See Videotape, *Dastaar: Defending Sikh Identity*, available at <http://www.mrsikhnet.com/index.php/2006/08/23/dastaar-defending-sikh-identity> [hereinafter *Dastaar Video*]. Amric Singh Rathour, a turbaned Sikh who was asked to remove his turban in order to serve with the New York Police Department, noted, “[w]hen you’re ridiculed and discriminated against, you feel inhuman, you feel different, and you want to feel the same. Even though I was born and raised here, I felt that this wasn’t my country.” *Id.*

⁶For example, previous legal commentary has indicated that it is unclear whether American law would prohibit legislation similar to the French ban on conspicuous articles of faith in public schools, which includes a ban on Sikh turbans. *See infra* Part III.

⁷See Jeremy Page, *Sikhs head for the barber and turn their backs on tradition*, TIMES ONLINE (UK), Nov. 24, 2006, available at <http://www.timesonline.co.uk/tol/news/world/asia/article648044.ece> [hereinafter *Sikhs head for the barber*]. “Western intolerance of religious symbols and a series of street attacks are prompting young men to shed their hair and turbans Many young Sikh men who have cut their hair say that they did so to escape the humiliation of turban searches at Western airports or to avoid being mistaken for Muslims. They cite Balbri [sic] Singh Sodi [sic], a petrol station owner shot dead in Arizona on September 15, 2001. His American killer, bent on revenge for 9/11, thought that Mr Sodi’s [sic] turban indicated that he was an Arab But worrying as racist attacks are, Sikh elders are even more concerned by a broader official crackdown on overt expressions of religious identity in the West, especially in Europe.” *Id.*

⁸Existing articles have discussed, for example:

- 1) Racial profiling, including: Racial Farah Brelvi, *Un-American Activities: Racial Profiling and the Backlash after Sept. 11*, 48 FED. LAW. 69 (2001) (offering a critical analysis of racial profiling during times of war); Thomas M. McDonnell, *Targeting the Foreign Born by Race and Nationality: Counter-Productive in the “War on Terrorism,”* 16 PACE INT’L L. REV. 19 (2004) (criticizing the effectiveness and morality of profiling of Arabs, Muslims, Sikhs, and South Asians in the aftermath of 9/11);
- 2) Government policies, including immigration: Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259

of Sikhs, the community that is said to have “borne the disproportionate brunt of hate violence in the aftermath of September 11,”¹⁰ has not been offered.¹¹ This Article

(Oct. 2004) (discussing public and private racial violence against Muslims, Arabs, South Asians, and Sikhs after 9/11); Sameer M. Asha, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling after September 11*, 34 CONN. L. REV. 1185 (2002) (discussing immigration enforcement following the 9/11 attacks); 3) Identity issues: Volpp, *supra* note 3, at 1526 (“suggest[ing] that September 11 facilitated the consolidation of a new identity category that groups together persons who appear Middle Eastern, Arab, or Muslim, whereby members of this group are identified as terrorists and dis-identified as citizens.”); Jagdish J. Bijlani, *Neither Here Nor There: Creating a Legally and Politically Distinct South Asian Racial Identity*, 16 BERKELEY LA RAZA L.J. 53, 54 (2005) (exploring “the argument that because of their collective racialized experience, South Asians should be identified as a legally and politically distinct racial group for the limited purpose of encouraging group empowerment.”); and 4) Civil liberties generally after 9/11: Erwin Chemerinsky, *Civil Liberties and the War on Terrorism*, 45 WASHBURN L.J. 1 (2005) (arguing that civil liberties are in a state of peril after 9/11).

⁹ A number of excellent resources exist on challenges to these communities after 9/11. See Deborah Ramirez & Stephanie Woldenberg, *Balancing Security and Liberty in a Post-September 11th World: The Search for Common Sense in Domestic Counterterrorism Policy*, 14 TEMP. POL. & CIV. RTS. L. REV. 495, 495 (2005) (arguing that “racial profiling of Arabs and Muslims does not make operational sense because it fails to help in narrowing down a list of potential terrorist subjects and succeeds only in alienating . . . the largely untapped linguistic and cultural expertise that the Arab and Muslim communities can bring to the table with law enforcement in a joint effort to prevent future acts of terrorism.”); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002) (examining the demonization of Arabs and Muslims); Dalia Hashad, *Stolen Freedoms: Arabs, Muslims, and South Asians in the Wake of Post 9/11 Backlash*, 81 DENV. U. L. REV. 735, 735 (2004) (chronicling “government-instituted discrimination and racist implementation of policy” after 9/11).

¹⁰ Ahmad, *supra* note 8, at 1330 n.174 (“Many Sikh men, who wear turbans and long beards, were targeted in post-September 11 hate violence because they were mistaken to be Muslim. As a result, Sikhs have borne the disproportionate brunt of hate violence in the aftermath of September 11.”). See Tamar Lewin & Gustav Niebuhr, *A Nation Challenged: Violence, Attacks, and Harassment Continue on Middle Eastern People and Mosques*, N.Y. TIMES, Sept. 18, 2001, at B5 (“Perhaps even more than Muslims, Sikhs in the United States have been singled out for harassment since the terrorist attacks, perhaps because the long beards and turbans prescribed by their Indian religion give them a visual resemblance to the terrorist Osama bin Laden and the Taliban.”); Laurie Goodskin, *American Sikhs Contend They Have Become a Focus of Profiling at Airports*, N.Y. TIMES, Nov. 10, 2001, at B6 (“Sikh travelers say that since the Sept. 11 terrorist attacks they have been singled out for questioning by the police and security workers at

represents a modest attempt to shed light on a group whose experiences have largely been subsumed in broader discussions of post-9/11 issues, including bias incidents and legal responses.

Over a hundred years after Sikhs first set foot in America, they continue to experience discrimination, suggesting strongly that ignorance about Sikhs and the significance of their turban is still rampant in the West. Precisely because of this ignorance and continuing discriminatory conduct against Sikhs, a meaningful overview of Sikhism and the Sikh turban should be offered not only for the benefit of those interested in civil rights and pluralism, but also for those who represent or hear cases against Sikhs.¹² Indeed, as Amardeep Singh, Executive Director of the Sikh Coalition, a

American airports.”); U.S. Sikhs Bear Brunt of Backlash, CBS NEWS, Sept. 25, 2001, available at <http://www.cbsnews.com/stories/2001/09/24/archive/main312265.shtml> (“[M]any Sikhs say they have been singled out most; they blame their resemblance to the suspected perpetrator, Osama bin Laden, who also has a flowing beard and wears a turban. ‘The picture of Osama bin Laden is constantly being flashed on TV sets,’ says Prabhjot Singh, director of the United Sikhs In Service of America (USSA), a prominent Sikh organization. Ironically, he says, Sikhs here look more like bin Laden than most Muslims do.”). Cf. Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 98 (2004) (“Whether through government investigations and raids or ‘private’ vigilance, the brunt of the internal war has fallen on Muslims, particularly those of Arab descent (now that Americans seem to have learned the difference between Sikhs and Muslims.)”); Susan Martin & Philip Martin, *International Migration and Terrorism: Prevention, Prosecution and Protection*, 18 GEO. IMMIGR. L.J. 329, 342 (2004) (“An Amnesty International report issued the first week in October 2001 cited more than 540 attacks on Arab-Americans and at least 200 on Sikhs in the week following the attacks on the World Trade Center and Pentagon.”).

¹¹ Perhaps the article that comes close to achieving the purpose of this essay is Mark Stromer, Note, *Combating Hate Crimes against Sikhs: A Multi-Tentacled Approach*, 9 J. GENDER RACE & JUST. 739 (2006), which describes the backlash against Sikhs generally, but focuses on one aspect of the backlash (i.e., hate crimes) and argues how hate crimes legislation may be improved.

¹² The purpose of Parts I & II is to achieve greater understanding of Sikhs, not to differentiate Sikhs from any other group, including Muslims, such that other groups are to be thought of as the more appropriate objects of post-9/11 animus. Some Sikhs in America have engaged in the enterprise of deflecting negative attention away from themselves and towards Muslims. See Volpp, *supra* note 3, at 1590 (commenting on Sikhs and South Asians claiming, in response to racial attacks, that they have been misidentified, “rather than condemn[ing] violence regardless of its target”); Gregory Rodriguez, *Aftermath: Identify Yourself: Who’s American?*, N.Y. TIMES, Sept. 23, 2001, at A1 (“Since the Sept. 11 attacks, there has been a notable number of hate crimes against Arab-Americans and Muslims. Frightened by a wave of violence, American Sikhs are explaining to the public that despite their turbans and beards, they are not Muslims[.]”).

leading Sikh advocacy organization, noted, “Litigation in the Sikh community is unlike litigation in any other community you can think of because what we’re doing . . . is beyond arguing the law; we’re giving a little mini-history and religion lesson” on the Sikhs.¹³ “How can you apply the law against a group you don’t understand?” he added.¹⁴ Part I will thus present an introduction to Sikhism, including its founding, doctrinal development, and the historical establishment of the requirement for adherents to wear turbans. It will also describe the symbolic importance and physical aspects of the Sikh turban.

Part II of this Article will summarize prominent incidents¹⁵ in several areas in which Sikhs with turbans have been subject to discriminatory conduct in post-9/11 America:¹⁶ harassment, detention by law enforcement, racial violence, denial of entry into public places, employment discrimination, and airport profiling. These incidents cover not only a wide range of discriminatory behavior, but also span each of the years since the 9/11 attacks. As such, this section will convey both the scope and continuing nature of the post-9/11 backlash against Sikhs. In addition to the factual circumstances, actual and possible legal resolutions of the incidents will also be mentioned, where appropriate.

Part III will examine the Western debate surrounding assimilation, spurred on by the specter of terrorist activity after 9/11 and the London bombings of July 7, 2005. The notion that religious minority groups should abandon their articles of faith in order to adopt a more homogeneous, national appearance has called into question not only the Muslim veil, but also the Christian cross, the Jewish yarmulke, and the Sikh turban. This section will discuss how several Western democracies initially absorbed the entry of Sikhs to their nations, the global challenge to religious identity after 9/11, and finally whether the American legal apparatus could tolerate some of the drastic restrictions to

This Article attempts no such thing. Again, the intent in crafting Parts I & II is to educate the reader about one group, not to isolate or endanger another.

¹³ Dastaar Video, *supra* note 5 (Statement of Amardeep Singh, Executive Director, Sikh Coalition).

¹⁴ *Id.*

¹⁵ These examples were selected in consultation with the executive directors of the two leading Sikhs civil rights organizations assisting Sikhs after 9/11, Rajbir Singh Datta of the Sikh American Legal Defense and Education Fund and Amardeep Singh of the Sikh Coalition.

¹⁶ It should be noted that not all Sikhs wear turbans. *See Sikhs head for the barber, supra* note 7. In fact, some Sikhs have cut their hair in direct response to the treatment they received after the 9/11 attacks. *See* Michael Winerip, *The High Cost of Looking Like an All-American Guy*, N.Y. TIMES, Oct. 21, 2001, at A33 (noting that a young Sikh man cut his hair after being subject to harassment). In each of the incidents described in this Article, however, Sikhs with turbans are the targets of the discriminatory actions.

religious attire that have been enacted elsewhere in the wake of 9/11. Part IV will conclude.

Before we begin this discussion, a few cautionary statements are in order. First, the scope of this Article is limited to challenges to turbaned Sikhs in the context of the post-9/11 backlash in America. As a result, it does not focus on other groups that have also been subject to acts of hate and to calls to integrate, including Muslims, Arabs, and South Asians.¹⁷ Second, this Article does not dismiss the difficult circumstances that the country finds itself in following the terrorist attacks in Washington, New York, and Pennsylvania. Third, this Article acknowledges that those circumstances have given way to encouraging developments, with the backlash reportedly waning,¹⁸ leading public figures to appeal for tolerance¹⁹ and reach out to targeted groups,²⁰ and federal courts

¹⁷ This is not an exclusive list of communities subject to post-9/11 discrimination. See Volpp, *supra* note 3, at 1599 n.2 (“Persons of many different races and religions have been attacked as presumably appearing ‘Middle Eastern, Arab, or Muslim.’ South Asians, in particular, along with Arabs and persons of Middle Eastern descent, have been subject to attack, although Latinos and African Americans have also been so identified.”).

¹⁸ See Eric Treene, *American Muslims and Civil Rights: Testimonies and Critiques*, 19 J.L. & RELIGION 89, 89 (2003-2004) (“After 9/11 we saw a sharp spike in bias-crimes against Muslims and Arab-Americans, as well as those perceived to be Muslim or Arab, such as Sikhs, who are targeted because of their distinctive turbans. Thankfully, this spike in bias crimes has subsided to roughly pre-9/11 levels, although we do not have accurate statistics on bias crimes against Arab and Muslim Americans before 9/11 to provide a baseline for comparison.”); Stephen J. Ellmann, *Changes in the Law Since 9/11: Racial Profiling and Terrorism*, 19 N.Y.L. SCH. J. HUM. RTS. 305, 360 n.43 (2003) (“A count by my research assistant of the airport incident reports, however, strongly suggests that this problem has now been addressed[.]”) [hereinafter Ellmann].

¹⁹ See Press Release, *President Pledges Assistance for New York in Phone Call with Pataki, Giuliani, White House*, Sept. 13, 2001, available at <http://www.whitehouse.gov/news/releases/2001/09/20010913-4.html> (“our nation must be mindful that there are thousands of Arab Americans who live in New York City who love their flag just as much as the three of us do. And we must be mindful that as we seek to win the war that we treat Arab Americans and Muslims with the respect they deserve. I know that is your attitudes, as well; it’s certainly the attitude of this government, that we should not hold one who is a Muslim responsible for an act of terror.”). See also, *Continuing Story: Elected Officials Respond to Backlash* The Pluralism Project, <http://www.pluralism.org/news/index.php?xref=Elected+Officials+Respond+to+Backlash> (other statements by elected officials responding to backlash post September 11).

²⁰ See Hon. Mary Murphy Schroeder, *Guarding Against the Bigotry that Fuels Terrorism*, 48 FED. LAW. 26, 27 Dec. (2001) (noting that “by visiting a mosque soon after the attacks, the President sent a good signal.”).

writing in defense of pluralism and the religious freedom of Sikhs.²¹ That said, this Article discusses ongoing challenges to the Sikh turban despite these efforts. Moreover, remaining challenges may intensify and new ones may arise if future attacks occur. Thus, attempts to foster understanding of Sikh identity and the Sikh experience continue to be relevant and necessary.²²

²¹ See *U.S. v. James*, 328 F.3d 953, 957 (7th Cir. 2003) (“Tolerance usually is the best course in a pluralistic nation. Accommodation of religiously inspired conduct is a token of respect for, and a beacon of welcome to, those whose beliefs differ from the majority’s[.]”). See also *Multani v. Commission scolaire Marguerite-Bourgeoys*, *Multani c. Marguerite-Bourgeoys*, 264 D.L.R. 4th 577 (2006) (The Court held that “an absolute prohibition against wearing a kirpan infringes the freedom of religion of the student in question under section 2(a) of the Canadian Charter of Rights and Freedoms [hereinafter Canadian Charter]. The infringement cannot be justified under section 1 of the Canadian Charter, since it has not been shown that such a prohibition minimally impairs the student’s rights.”).

²² The potential for racial violence arguably exists as long as the possibility of war or crisis exists, thus rendering individual incidents of a backlash worthy of our attention, such that we may learn from our mistakes and refuse in the future to manifest national anger, fear, and ignorance in the form of discriminatory actions. See William H. Rehnquist, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 221 (2000) (arguing that the nation’s past will not repeat itself); see also Mark V. Tushnet, *Defending Korematsu? Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 273 (2003) (arguing that we have learned from our past mistakes only not to repeat those precise mistakes, rather than more general lessons).

I. Sikhism and the Sikh Turban

*Truth is high, but higher still is truthful living.*²³

- Guru Nanak

A. Founding and Early Development of Sikhism

In 1469, a man named Nanak was born in Punjab—the region now split between present-day northwest India and eastern Pakistan.²⁴ Historians contend that Nanak lived in a time of “tumult of hate and falsehood” involving Hindus and Muslims, where tension existed between the two communities and where the religious practices of both groups were generally becoming more ritualistic and less meaningful.²⁵ At the age of 30, Nanak emerged from a period of intense meditation with a vision of unity and spiritual renaissance: “There is no Hindu, there is no Mussulman,” he declared.²⁶

According to Sikh history, at this age, Nanak also penned a brief verse that is recognized as the fundamental summation of Sikh philosophy and theology. Hence, this verse is called the *mul mantar*, or “root formula.”²⁷ The importance of the *mul mantar* in Sikhism is clear, as it serves as the opening passage to the Sikh holy book, the *Sri Guru Granth Sahib*, which totals 1,430 pages.²⁸ The text of the *mul mantar*, as translated to English, is as follows:

God is only One.
His name is True.
He is the Creator.

²³ Sikh Values, sikh.net (2002), available at <http://www.sikh.net/Sikhvalu.htm> [hereinafter Sikh Values].

²⁴ See Stromer, *supra* note 11, at 741; Jaideep Singh, ‘No Sikh Jose:’ Sikh American Community Mobilization and Interracial Coalition Building in the Construction of a Sacred Site, 8 ASIAN PAC. AM. L.J. 173, 175 (Spring 2002).

²⁵ KHUSHWANT SINGH, A HISTORY OF THE SIKHS, Vol. 1: 1469-1839, 29 (1978).

²⁶ *Id.* at 32-33.

²⁷ Pashaura Singh, *Sikhism and Restorative Justice: Theory and Practice*, in THE SPIRITUAL ROOTS OF RESTORATIVE JUSTICE 204 (Michael L. Hadley ed., State University of New York Press 2001).

²⁸ See Satvinder S. Juss, *The Constitution and Sikhs in Britain*, 1995 B.Y.U. L. REV. 481, 492 (1995).

He is without fear.
He is inimical to none.
He never dies.
He is beyond births and deaths.
He is self-illuminating.
He is realized by the kindness of the True Guru.
Repeat his Name.
He was True in the Beginning.
He was True when the ages commenced and has ever been True.
He is also True now.
Nanak says that He will certainly be True in the future.²⁹

In addition, Nanak established what are generally understood to be the three essential aspects of Sikh life: 1) remembering and meditating upon God's Name (*naam japna*); 2) living a truthful and honest life (*kirat karni*); and 3) giving one's resources and labor to help others in the community, particularly the less fortunate (*vand ke chhakna*).³⁰ These three activities blend solitary reflection with active service to society.³¹

Nanak also believed in the equality of all people, including the downtrodden.³² This was a groundbreaking principle, given the rigid social hierarchy that existed at the time.³³ As a result of this doctrinal tenet, Nanak contended that every person, regardless of circumstance, could realize God by following the three aforementioned rules. He also rejected all forms of caste systems³⁴ and extolled the equality of the sexes, a progressive

²⁹ Select Writings: Japji Sahib by Guru Nanak Dev, The Sikhism Home Page, 1998, available at <http://www.sikhs.org/japji/jp1.htm>.

³⁰ Wand Kay Shako, *SikhiWiki*, Nov. 8, 2006, available at http://www.sikhiwiki.org/index.php?title=Wand_kay_Shako.

³¹ See Khushwant Singh, *supra* note 25, at 39-43 (elaborating on the teachings of Nanak, including "strict monotheis[m]," rejection of "ascetic isolation" and social "detachment," and belief in "righteous conduct towards one's neighbors").

³² See *id.* at 43 ("Nanak's writings abound with passages deploring the [caste] system and other practices which grew out of the caste concepts[.]").

³³ See *id.* at 97 (noting that, despite the social order that was embedded in Punjab, "The doors of Sikh temples were thrown open to everyone and in the Guru's *langar* [or free kitchen] the Brahmin and the untouchable broke their bread as members of the same family.").

³⁴ See *id.*

position at the time.³⁵

Nanak spread his message across South Asia and the Middle East, traveling from the foothills of the Himalayan Mountains to Baghdad and as far south as Sri Lanka.³⁶ Mardana, a Muslim and a trained musician, usually accompanied Nanak.³⁷ Nanak's teachings were thus recited to music, making the hymns easier for the masses to memorize.³⁸

Nanak became the first of ten teachers, or Gurus, whose disciples were named "Sikhs," literally students or seekers of truth.³⁹ Nanak, the man, is therefore called "Guru Nanak." While Nanak and the Gurus are revered by Sikhs, Nanak made it clear that the Gurus were "ordinary" men, not supernatural figures to be idolized.⁴⁰

The nine Gurus that followed Nanak continued to develop his message and expanded the faith's base.⁴¹ The fifth Guru, Arjun, was a prolific proponent of Nanak's philosophy and authored a majority (2,218) of the hymns that are in the *Sri Guru Granth Sahib*, Sikhism's holy text.⁴² Importantly, Arjun is known for refusing to give in to the demands of the Mughal⁴³ Emperor of the time, Jahangir, who was concerned about the

³⁵ See Jaideep Singh, *supra* note 24, at 175 (noting that Guru Nanak "proclaimed [women] the equals of men in every respect-- political, social, and religious--over two and a half centuries before the founding of the United States.").

³⁶ See Khushwant Singh, *supra* note 25, at 33-34.

³⁷ *Id.* at 31.

³⁸ *Id.*

³⁹ See SikhiWiki, *Glossary of Sikh Terms* (last modified Oct. 18, 2007), available at http://sikhiwiki.org/index.php/Glossary_of_Sikh_Terms (defining a "Sikh" as Literally "student, disciple" [A] Sikh is someone who believes in God, the ten Sikh Gurus, in the Guru Granth Sahib, in the importance of the Khalsa initiation, and in no other religion; "Seeker of Truth").

⁴⁰ See Khushwant Singh, *supra* note 25, at 34 ("[T]he guru, insisted Nanak, was to be regarded as a guide and not as a god. He was to be consulted and respected but not worshipped.").

⁴¹ For a brief overview of the contributions and lives of each Guru, see *The Sikhism Home Page, The Sikh Gurus*, available at: <http://www.sikhs.org/10gurus.htm> (last visited: Nov. 30, 2007).

⁴² Sri Guru Granth Sahib: Authors & Contributors, *The Sikhism Home Page* (1998), available at <http://www.sikhs.org/granth2.htm>.

⁴³ The Mughals were adherents of Islam. See National Library of Medicine, *Islamic Medical Manuscripts*, Glossary of Terms (Feb. 23, 2006), available at <http://www.nlm.nih.gov/hmd/arabic/glossary.html> (noting that the term "Mughal" is a

spread of Sikhism. Arjun refused to convert to Islam and was eventually tortured to death by Jahangir in 1606.⁴⁴

Whereas Arjun adopted a pacifist approach to Mughal demands, the sixth Guru, Hargobind, advanced a more aggressive approach to threats from the Mughal leadership.⁴⁵ While Arjun calmly chose death over conversion to Islam, Hargobind thought that Sikhs were morally obligated to defend their faith.⁴⁶ Hargobind, for example, asked Sikh followers to donate weapons and horses, with which he established a cavalry.⁴⁷ This militaristic mentality was later embraced by the tenth Guru, Gobind Singh.⁴⁸

Gobind Singh led the Sikh people after his father, Tegh Bahadur, who was beheaded at the command of the Muslim emperor, Aurangzeb.⁴⁹ Gobind Singh, a fierce warrior, created a religious army to resist the persecution by the Mughal rulers. On or about April 14, 1699, Gobind Singh called together approximately 80,000 Sikhs in the small town of Anandpur in Punjab, “specifically exort[ing] the Sikhs to come with their hair and beards unshorn.”⁵⁰ There, Gobind Singh formally organized Sikhs into an army of God, a community of saint-soldiers, known as the *Khalsa*, or the pure.⁵¹ Gobind Singh

“name given the Muslim rulers, or emperors, who controlled western India, with decreasing effectiveness, from 1526 to 1858 (932-1274 H).”).

⁴⁴ *Martyrdom of Guru Arjun Saheb Ji-Part 2*, Gurmat Studies Foundation, July 2003, available at <http://www.gurmatstudies.com/articles/5guru1.htm>.

⁴⁵ See Juss, *supra* note 28 at 491.

⁴⁶ Guru Hargobind Sahib, Shiromani Gurdwara Parbandhak Committee (“Guru Sahib converted the peaceful sect into a warlike community, ready to defend their interests with the swords and it was the need of the hour.”) available at <http://www.sgpc.net/gurus/guruhargobind.asp>.

⁴⁷ See Prithi Pal Singh, *The History of Sikh Gurus*, 81 (2007) (noting that Guru Hargobind “advised his followers to make offerings of arms, weapons, and horses.”).

⁴⁸ See Juss, *supra* note 28 at 491 (identifying Guru Hargobind and Guru Gobind Singh as the only two Sikh Gurus who “took up arms.”).

⁴⁹ See Khushwant Singh, *supra* note 25, at 74-76.

⁵⁰ See *id.* at 82; see also *Sikhs and the Arts of Punjab*, Victoria and Albert Museum, available at http://vanda.london.museum/vastatic/microsites/1162_sikhs/sikhism/sikhism.htm.

⁵¹ Gobind Singh instructed all Sikh men to adopt the surname “Singh” (meaning lion) and all women the surname “Kaur” (meaning lioness or princess). See Juss, *supra* note 28 at 533 n. 42 (This was done again to abolish any distinctions, based on caste or occupation, and to foster a sense of unity.); Michael Rosensaft, *The Right of Men to Change their*

bestowed upon all Sikhs the duty to follow Nanak's teachings and to fight injustice in all of its forms,⁵² a principle originally set forth by Hargobind and made even more pressing after the death of Tegh Bahadur.

All members of the Khalsa were instructed by Gobind Singh to keep five articles of faith—also called the “5 K's,” these five articles are: unshorn hair (*kes*), a small comb to keep the hair neat (*khanga*), a steel bracelet (*kara*), a ceremonial dagger or sword (*kirpan*), and long underwear (*kaachera*).⁵³ These constitute the fundamental elements of the “uniform” of the *Khalsa*.⁵⁴

B. Significance and Physical Aspects of the Sikh Turban

Though the turban is not one of the 5 K's, wearing of the turban was nonetheless included in the Sikh Code of Conduct, or *Rehat Maryada*, a codification of the rules of proper Sikh conduct that were promulgated by the Gurus.⁵⁵ The meaning of the 5 K's have been the subject of considerable discussion, as historians are generally not in agreement as to why these specific items were selected by Gobind Singh.⁵⁶ Scholars

Names upon Marriage, 5 U. PA. J. CONST. L. 186, 191 (2002) (“Among the Sikhs, in India and around the world, all women adopt the surname Kaur and all men adopt the surname Singh to show a renouncement of family lineage and to create a casteless society.”).

⁵² See I. J. SINGH, *THE SIKH WAY: A PILGRIM'S PROGRESS* 85 (2001) (“The Khalsa was created to protect, not possess, to defend, not conquer, any people or their territory.”). Chapter Nine of this book also contains an in-depth account of the events and significance of April 13, 1699.

⁵³ See Khushwant Singh, *supra* note 25, at 84. See also *Cheema v. Thompson*, 67 F.3d 883, 884 (9th Cir. 1995) (listing the “5 K's”).

⁵⁴ See Stromer, *supra* note 11, at 742 (“Guru Gobind also stated that the Guru-hood would forever reside in the collected poems and sayings of the Gurus and other spiritual luminaries (including Hindus and Sufis), which is known as the Guru Granth Sahib.”). Sikhs pray and meditate on the verses in this holy book in a *gurdwara*, or temple. See *The Sikhism Home Page, Gurdwaras*, available at <http://www.sikhs.org/gurdwara.htm>.

⁵⁵ See Rahitnama Prahlad Rai & Bhai Nand Lal, *Sikh Code of Conduct No. 14152 bb2*, translated in TRILOCHAN SINGH, *THE TURBAN AND THE SWORD OF THE SIKHS: ESSENCE OF SIKHISM* 303 (1997) (“Cursed is a Sikh who goes out in the society without a turban or wears a cap instead of a turban.”).

⁵⁶ See *id.* at 86, n.20.

similarly have provided several theories as to why the turban is an integral part of a Sikh's "religious and cultural personality."⁵⁷

First, there is the practical justification that *kes*, one of the five Sikh articles of faith, should be kept tidy and that the turban may guard the hair from the elements.⁵⁸ Second, the turban ensures a common, visible identity for all Sikhs.⁵⁹ Third, the turban signifies equality.⁶⁰ It is not reserved for the aristocracy or social elite, as it had been before. Fourth, as Sikhs may be identified on the basis of their turban, the turban makes every member of the faith an ambassador of Sikhism.⁶¹ Fifth, and relatedly, the easily recognizable aspects of the turban and a Sikh's distinct appearance serve as "helpful deterrents against undesirable acts and behaviour [sic] and keep [Sikhs] on the right path."⁶² It is a reminder to the Sikh that he is to act in accordance with the teachings of the Gurus and that any transgressions may be easily noted by non-Sikhs who can quickly

⁵⁷ *Id.* at 228.

⁵⁸ W.H. McLeod, *Sikhs and the Turban*, in *SIKH: FORMS AND SYMBOLS* 95, 103-04 (Mohinder Singh ed., 2000). In addition to providing such protection, W.H. McLeod, a preeminent British historian who studied the Sikhs during the British Empire, identifies a number of reasons why the turban is desirable for Sikh men today. These include: because the turban is hygienic, because it is comfortable in hot and cold weather, because it is easy and inexpensive to learn, because it is firmly fixed on the head, and because it is more suitable than the bare head for people dealing with food.

⁵⁹ See Manvir Singh Khalsa, *Who Are Sikhs?*, Oxford Sikhs (Mar. 20, 2005), available at <http://www.oxfordsikhs.com/SikhAwareness/117.aspx> ("The turban and unshorn hair is part of the Sikh uniform.").

⁶⁰ See SikhCoalition.org, *Sikh Theology: Why Sikhs Wear a Turban*, The Sikh Coalition, available at <http://www.sikhcoalition.org/Sikhism11.asp> [hereinafter *Why Sikhs Wear a Turban*]. ("The Sikh Gurus . . . sought to uplift the downtrodden and make them the equals of the highest of the high."). See also Jeremy Waldron, *One Law for All? The Logic of Cultural Accommodation*, 59 WASH. & LEE L. REV. 3, 7 (2002) ("[T]he Sikh's religious obligation is an obligation to present himself in public as a combination of saint and warrior.").

⁶¹ See *Why Sikhs Wear a Turban*, *supra* note 60, ("[T]here is a great deal of responsibility accompanied by the turban. A person's actions are no longer just tied to him or her. Since Sikhs who wear the turban represent the Guru, their actions too reflect on the Guru and the Sikh Nation.").

⁶² Ganda Singh, *Importance of Hair and Turban* in *SIKH: FORMS AND SYMBOLS*, *supra* note 58, at 39, 43.

spot a Sikh.⁶³ Sixth, as a Sikh is easily identifiable, anyone who was being persecuted, and needed help could quickly locate a Sikh who was obligated to help them. Seventh, the turban is an indication of the wearer's commitment to Sikhism, general discipline, and willpower to wear the turban in the face of persecution.⁶⁴ Sikhs with turbans may wear turbans for one or some combination of these reasons, though perhaps some Sikhs wear a turban simply to adhere to the religious mandate.⁶⁵

Because Sikhs aren't permitted to cut their hair, their hair can grow quite long.⁶⁶ A Sikh male therefore ties his hair into a knot towards the front of his head; the knot and surrounding hair on the male's head are then covered by a turban.⁶⁷ Although there are a number of different ways of tying a turban, generally, a Sikh adult wraps the cloth around the sides of his or her head several times until the cloth covers all of the hair and is then fastened under a preceding layer.⁶⁸ This process generally takes between ten and fifteen minutes to complete.⁶⁹ The wrapping of the different layers will generally create a

⁶³ See *Why Sikhs Wear a Turban*, *supra* note 60, (“[T]he turban serves to increase a Sikh's commitment to Sikhism and lends to him or her becoming a more disciplined and virtuous person.”).

⁶⁴ See *id.* (“When many discarded their turbans, those that proudly adorned them in those times, even though it meant certain death, fully appreciated its significance. After all, it is in times of adversity that faith is tested and one must prove true to core values.”).

⁶⁵ See *Why Sikhs Wear a Turban*, *supra* note 60 (claiming that “the reason all practicing Sikhs wear the turban is just one - out of love and obedience of the wishes of the founders of their faith.”).

⁶⁶ See Commentary, *Reflections on September 11: Reconsidering Social Change in the Wake of Tragedy*, 26 N.Y.U. REV. L. & SOC. CHANGE 431, 449 (2000-2001) (“Sikh men are very distinct in appearance because they are required by their religion not to cut their hair. They often have long beards and gather their long hair in V-shaped turbans.”); Karen McBeth Chopra, Comment, *A Forgotten Minority An American Perspective: Historical and Current Discrimination against Asians from the Indian Subcontinent*, 1995 DET. C.L. MICH. ST. U. L. REV. 1269, 1275 (Winter, 1995) (noting that Sikhs wear “turbans to cover their long hair[.]”).

⁶⁷ See *Why do Sikhs wear turbans?* SikhNet, available at <http://www.sikhnet.com/s/WhyTurbans> (“The long hair of a Sikh is tied up in a Rishi knot (Joora) over the solar center (top of the head), and is covered with a turban, usually five meters of cotton cloth. (The man's solar center is nearer the front of the head. The woman's solar center is further back.)”).

⁶⁸ For specific instructions on tying a Sikh turban, see SikhNet, *How to Tie a Turban*, available at <http://www.sikhnet.com/s/tyingturbans>.

⁶⁹ U.S. Department of Justice, *Common Sikh American Head Coverings*, available at http://www.usdoj.gov/crt/legalinfo/sikh_poster.pdf [hereinafter DOJ Poster].

“peaked” look to the turban, whereas turbans worn by other groups will not have this peak. A helpful guide published by the *Seattle Times* to help educate the public about Sikh turbans (called a *dastaar*, *pagh*, or *paghri*) after 9/11 illustrates the differences between the “peaked” Sikh turban and other turbans.⁷⁰

[25] Although some Sikh women wear turbans to cover their hair, many choose not to.⁷¹ Generally, in the United States, female converts to Sikhism often wear turbans, while South Asian Sikh women tend to opt for a thin chiffon scarf, or *chhuni*, to cover their hair.⁷² Sikh boys start wearing full turbans in their teenage years. Until then, they usually wear a *patka*, a smaller under-turban akin to a large bandana that is wrapped around the boy’s knot and/or scalp.⁷³ Adult male athletes may also wear a *patka* while they are playing sports or engaging in physically demanding activities.⁷⁴

C. Turbans in Other Communities

While the turban has special importance in the Sikh community, the turban is by no means an exclusively Sikh piece of attire. Turbans have been worn in different parts

⁷⁰ Eli Sanders, *Understanding Turbans: Don’t link them to terrorism*, SEATTLE TIMES, Sept. 27, 2001, available at <http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=turban270&date=20010927>.

Accompanying images, available at http://seattletimes.nwsource.com/news/lifestyles/links/turbans_27.html [hereinafter *Understanding Turbans*]. The purpose of these images and text is to educate the reader about Sikhs, not to differentiate Sikhs from other groups such that non-Sikhs should be thought of as the proper targets of post-9/11 hate. See Dastar Video, *supra* note 5.

⁷¹ See Janet Caggiano, *SIKH: The world’s fifth-largest religion*, RICHMOND TIMES-DISPATCH, June 11, 2006, at G-1, available at <http://www.saldef.org/content.aspx?a=1480&z=8&title=SIKH: The world> (noting that “[w]earing a turban is optional for Sikh women[.]”).

⁷² See I. J. SINGH, *SIKHS AND SIKHISM: A VIEW WITH A BIAS* (1998), available at <http://www.sikh.net/publications/View/symbols.htm> (“Certainly there is no bar to women wearing a turban and some Sikh women in India do; almost all of the Western converts to Sikhism do.”); see also DOJ Poster, *supra* note 69 (providing pictures of a Sikh-American convert wearing a turban and a South Asian Sikh wearing a headscarf).

⁷³ See DOJ Poster, *supra* note 69 (providing a picture of a Sikh boy wearing a *patka*).

⁷⁴ See James Lawton, *Panesar’s artistry offers England a turning point*, INDEPENDENT (UK), Dec. 1, 2006, available at <http://sport.independent.co.uk/cricket/article2029219.ece> (noting that Monty Panesar, a celebrated Sikh cricketer in England, wears a “bright blue patka”).

of the world for at least the past 3,000 years.⁷⁵ Although it remains unclear when or where they originated, they were used in the Egyptian civilization, and depicted in Assyrian carvings—long before the advent of Christianity and Islam, let alone Sikhism.⁷⁶ The Old Testament has a number of references to turbans, including a turban worn by Moses as a symbol of his status as a prophet, holiness, and divine power.⁷⁷ Wearing turbans is also closely related to Islam. A specific *hadith*, or an Islamic tradition, tied to the Prophet Muhammad, identifies turbans as being “a true mark of sovereignty and a crown.”⁷⁸

In South Asia, turbans were worn by a number of different groups for various reasons. The wealthy, for example, wore elaborate bejeweled turbans as a symbol of their power, prestige, and royalty.⁷⁹ Similarly, high caste Hindus wore turbans to differentiate themselves from lower castes.⁸⁰ More practically, men from the desert regions and rural farmers wear turbans to protect themselves from dust and the heat.⁸¹ Men also swapped their turbans to show good faith and hospitality in a dealing or agreement.⁸² Similarly, turbans may be worn by male members of bridal parties during Hindu wedding ceremonies.⁸³ Turbans have also been used to demonstrate one’s political affiliation.⁸⁴

⁷⁵ Eli Sanders, *Understanding Turbans*, *supra* note 70.

⁷⁶ *Id.*

⁷⁷ *See* Why Sikhs Wear a Turban, *supra* note 60. *See also* The Sikh Coalition, available at <http://www.sikhcoalition.org/Sikhism11.asp>.

⁷⁸ *See* Why Sikhs Wear a Turban, *supra* note 60.

⁷⁹ *See* Understanding Turbans, *supra* note 70 (describing Indian men as “sometimes wear[ing] turbans to signify their class, caste, profession or religious affiliation”).

⁸⁰ *Id.*

⁸¹ *Id.* (“Desert peoples have long used the turban to keep sand out of their faces[.]”).

⁸² *See, e.g.,* *The Koh-i-noor Diamond*, BBC, June 6, 2002, available at <http://www.bbc.co.uk/dna/h2g2/A730801> (noting that, in 1739, Nadir Shah of Persia obtained the Koh-i-noor diamond by “exchang[ing] turbans,” which “would symbolise their close ties and eternal friendship.”).

⁸³ *See* I. J. SINGH, BEING AND BECOMING A SIKH 56 (2003).

⁸⁴ *See* CNN.com, *Why turban matters in Punjab polls*, CNN-IBN, Feb. 7, 2007, available at <http://www.ibnlive.com/news/why-turban-matters-in-punjab-polls/32933-4.html>.

More recently, the turban has also emerged as a stylish accessory for American artists. Legendary jazz musician Dr. Lonnie Smith wears an “authentic Sikh” turban⁸⁵ apparently for “no particular reason.”⁸⁶ In addition, André “3000” Benjamin, one half of the Grammy award winning hip-hop group Outkast, wanted to cover his hair as it grew out and used the turban to serve this function because it “looked cool.”⁸⁷ A FOX News report noted that several celebrities, including Jennifer Lopez and Katie Holmes, have worn turbans, while “designers such as Ralph Lauren, Marc Jacobs, and Prada are offering fashionable turbans with a whopping \$700 price tag.”⁸⁸ The report suggested that those wearing turbans should be mindful of the fact that the turban has “religious or cultural significance” and acknowledged that “turban-wearing” Sikhs have been attacked after 9/11.

⁸⁵ Bill Milkowski, *Dr. Lonnie Smith: The Doctor Is In!*, JAZZ TIMES, Jan./Feb. 2005, available at http://jazztimes.com/columns_and_features/table_of_contents/article_excerpts/index.cfm?article_id=15242.

⁸⁶ For information on Dr. Lonnie Smith, see [emusic.com](http://www.emusic.com/artist/11682/11682291.html?fref=700610), *Dr. Lonnie Smith*, available at <http://www.emusic.com/artist/11682/11682291.html?fref=700610>.

⁸⁷ Mark Binelli, “*The Funk Soul Brothers*,” ROLLING STONE, Mar. 18, 2004, available at http://www.rollingstone.com/news/coverstory/outkast_funk_soul_brothers/page/3.

⁸⁸ Richelle Putnam, “*Will Consumers Try The ‘Turban’ Look?*”, ALL HEADLINE NEWS, Feb. 7, 2007, available at <http://www.allheadlinenews.com/articles/7006384944>.

II. The Tangible Challenge to the Sikh Turban: Violence and Discriminatory Conduct

*We must not descend to the level of those who perpetrated Tuesday's violence by targeting individuals based on their race, their religion, or their national origin. Such reports of violence and threats are in direct opposition to the very principles and laws of the United States and will not be tolerated.*⁸⁹

- Attorney General John Ashcroft,
on September 13, 2001

Prior to the terrorist attacks of 9/11, Sikhs with turbans encountered negative reactions to their distinct appearance in a variety of arenas.⁹⁰ September 11th, however dramatically worsened the frequency and severity of hostility against turbaned Sikhs.⁹¹ Turbans, as noted above, are not a uniquely Sikh item of clothing.⁹² Still, according to community advocates, 99% of people who wear turbans in America are Sikh.⁹³

⁸⁹ Janelle Brown, *Anti-Arab passions sweep the U.S.*, SALON.COM, Sept. 13, 2001, available at <http://archive.salon.com/news/feature/2001/09/13/backlash/index.html>.

⁹⁰ See Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441, 446 (2002) (“As they have been recently, turban-wearing Sikhs were victimized historically. When they arrived in the 1800s, Sikh men continued to wear turbans, because not cutting their hair is a requirement of their religion. As a result, they endured being called ‘ragheads.’”). Cf. JOAN JENSEN, *PASSAGE FROM INDIA* 281 (1988) (noting that Indian professionals who took advantage of generous changes in immigration laws in the 1960’s “experienced a relatively smooth transition from life in India to life in America. The professionals, who were mostly male college graduates between twenty and forty years of age, found well-paid employment in hospitals, corporations, and academic institutions.”).

⁹¹ See D.C., M.D., AND V.A. ADVISORY COMMS., U.S. COMM’N ON CIVIL RIGHTS, CIVIL RIGHTS, CONCERNS IN THE METROPOLITAN WASHINGTON, D.C., AREA IN THE AFTERMATH OF THE SEPTEMBER 11, 2001, TRAGEDIES 1 (2003) [hereinafter Civil Rights Commission Report] (“The attacks against the World Trade Center and the Pentagon on September 11, 2001, by terrorists from Middle Eastern countries led to a dramatic surge in hate violence and discrimination against people in the United States perceived to be of Arab or Muslim background . . .”).

⁹² See discussion of turbans in other communities, *supra* Part I.

⁹³ See Amardeep Singh, *Remarks at the Commissioners Meeting Open Session*, U.S. Equal Employment Opportunity Commission, Dec. 11, 2001, available at <http://www.eeoc.gov/abouteeoc/meetings/12-11-01-transcript.html> (“I can say with great assurance that 99 percent of the persons who wear turbans in this country are Sikh

Those responsible for planning the 9/11 attacks, most notably bin Laden, also wear turbans and long beards.⁹⁴ This physical similarity resulted in a serious backlash against Sikhs, who are “conflated with bin Laden” and his cronies⁹⁵—despite the separate doctrinal views, different geographic homeland, different native languages, and distinct turban styles of Sikhs.⁹⁶

This section presents examples of anti-Sikh discrimination in America after 9/11 in multiple contexts.⁹⁷ It also notes the actual and possible legal resolutions of the incidents, where appropriate. While this discussion focuses on Sikhs, it is important to remember that the post-9/11 backlash impacted not only Sikhs, but Muslims and all those perceived to be Muslim, including Arabs and South Asians.⁹⁸

Americans, and therein lines the very cruel irony of the Sikh American experience since the 11th.”).

⁹⁴ According to one survey, “nine out of 10 educated Americans identified Sikhs with Muslims.” *Osama becomes a pain for American Sikhs*, THE FIN. EXPRESS, July 10, 2006, available at http://www.financialexpress.com/latest_full_story.php?content_id=133438.

⁹⁵ Volpp, *supra* note 3, at 1590. See also Stromer, *supra* note 11, at 740 (“Since the terrorist attacks of September 11, 2001, videos and images of Osama bin Laden have created an air of hostility towards Sikhs, with an uninformed American public equating the appearance of Sikh men with bin Laden’s beard and Afghani-style turban.”).

⁹⁶ See discussion of Sikhs, *supra* Part I. See also Pratheep Sevanthinathan, *Shifting from Race to Ethnicity in Higher Education*, 9 SCHOLAR 1, 36 (2006) (“Although the Sikh are from northern India, speak languages altogether different than Arabic, and are not Islamic, most people who look at a Sikh will associate that person with an Arab country because Sikh’s wear turbans, and turbans are commonly associated with Muslims.”). The attack against turbaned Sikhs, who “stick out” because of their headdresses, is also curious given the fact that the al Qaeda operatives intended to blend into American society. See MIGRATION POLICY INSTITUTE, AMERICA’S CHALLENGES: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11 7 (2003), available at http://www.migrationpolicy.org/pubs/Americas_Challenges.pdf (“al Qaeda’s hijackers were carefully chosen to avoid detection: all but two were educated young men from middle-class families with no criminal records and no known connection to terrorism.”).

⁹⁷ The individual incidents are discussed descriptively. Questions of larger responsibility for this backlash, including any government influence, is beyond the scope of this discussion. See Ahmad, *supra* note 8, at 1319 (exploring the relationship between the government response to terrorism and private reactions to Muslim-looking people).

⁹⁸ Though the post-9/11 backlash has affected these groups, the exact number of bias incidents against them is unclear. See Rachel Saloom, *I Know You Are, But What am I? Arab-American Experiences Through the Critical Race Theory Lens*, 27 HAMLINE J. PUB. L. & POL’Y 55, 71 (2005) (claiming that Human Rights Watch “argues that the full extent

A. Harassment

The concern that the physical resemblance of the Sikh turban to bin Laden would “have terrible repercussions”⁹⁹ for Sikhs was realized minutes after the World Trade Center was attacked:¹⁰⁰

Amrik Singh Chawla, 33, had been headed downtown on business on the morning of September 11, 2001, when he learned that the World Trade Center was on fire. He was leaving the island on foot when he saw the second plane hit. After climbing out from under the scaffolding and helping a woman out from under some debris, he began his panicked journey off the island. Suddenly, as he rounded a corner on Broadway, two men approached him. One pointed at him and yelled, “Hey, you ****ing terrorist, take that turban off!” They chased him into a subway station, where Amrik jumped on a train, narrowly escaping their angry threats.¹⁰¹

of post 9/11 hate crimes in America will never fully be understood because of underreporting.”). Figures have ranged from around four-hundred to over a thousand hate crimes committed. *Compare We Are Not the Enemy: Hate Crimes Against Arabs, Muslims, and Those Perceived to be Arab or Muslim After September 11*, HUMAN RIGHTS WATCH (Nov. 14, 2002), available at <http://www.hrw.org/reports/2002/usahate/> (noting that, according to the FBI, “anti-Muslim hate crimes in the United States rose 1700%,” from twenty-eight in 2000 to four-hundred-eighty-one in 2001) with Ahmad, *supra* note 6, at 1261 (“[I]n the days and weeks after September 11, over one thousand bias incidents against Arabs, Muslims, and South Asians were reported.”).

⁹⁹ Vijay Sekhon, Note, *The Civil Rights of “Others”: Antiterrorism, the Patriot Act, and Arab and South Asian American Rights in Post-9/11 American Society*, 8 TEX. F. ON C.L. & C.R. 117, 117 (Spring 2003).

¹⁰⁰ It should be noted that the summary of incidents in this section is intended to serve as a representative sample of the climate that Sikhs encountered after 9/11, and is in no way an attempt to serve as an exhaustive review of each incident, much less each type of incident, against a Sikh wearing a turban in the United States. For other incidents, see *American-Arab Anti-Discrimination Committee, Report on Hate Crimes and Discrimination Against Arab Americans: The Post-September 11 Backlash September 11, 2001 – October 11, 2002* (Ibish, ed., 2003) [hereinafter ADC Report]; *Sikh Coalition, Incidents and Hate Crimes*, available at <http://www.sikhcoalition.org/ListReports.asp> [hereinafter Sikh Coalition Database].

¹⁰¹ Press Kit, *Divided We Fall* 32, available at <http://www.dwf-film.com/presskit/DWFPressKit.pdf>.

Once Chawla arrived in Brooklyn, “he slipped into a shop, stuffed his turban into his briefcase and wore his hair in a ponytail for the rest of the day.”¹⁰²

No legal action was taken against those who chased and verbally abused Chawla. This incident is significant in at least two respects. First, the attack on Sikhs with turbans occurred almost immediately after the towers were struck, meaning turbaned Sikhs were imperiled as soon as the attack occurred. As a result, the Sikh community had to rapidly mobilize, in an already emotional and uncertain moment, to educate others, appeal for tolerance, and assert their rights. Second, verbal harassment of Sikhs, such as being called “bin Laden,” “raghead,” or “towelhead,” is commonplace, but generally happens without any formal legal consequence.¹⁰³

On September 14, 2001, Manga Singh, a cab driver in the New York City area, picked up a passenger who proceeded to reach through the open partition and tried to beat him with an umbrella while yelling, “I hate you, *I hate you and your turban.*”¹⁰⁴ Manga Singh’s father, Surinder Singh, “recalled a rider who said to him, ‘You do [sic] that, you attacked the World Trade Center!’” He responded “No, I am an American Sikh Osama bin Laden has a turban, but it’s very different.”¹⁰⁵ There are no reports of legal action being pursued in this case either, again supporting the contention that verbal harassment, however hateful and hurtful, generally occurs without legal repercussions.

Sikh youth are particularly vulnerable to being bullied by other students. For example, Mandeep Singh, a ninth grade student from the Philadelphia area, was regularly harassed in school.¹⁰⁶ He was called “bin Laden” and told to go back to “turbanland,” among other things.¹⁰⁷ The Pennsylvania Human Relations Commission investigated the

¹⁰² Somini Sengupta, *Arabs and Muslims Steer Through an Unsettling Scrutiny*, N.Y. TIMES, Sept. 13, 2001, available at <http://query.nytimes.com/gst/fullpage.html?res=9403E4DC1038F930A2575AC0A9679C8B63&n=Top/Reference/Times%20Topics/Subjects/S/Sept.%2011,%202001>.

¹⁰³ See e.g., Beth Velliquette, *3 teens held in Sikh assault*, The Herald-Sun (Durham, Chapel Hill, NC), Apr. 2, 2004 (discussing the story of turbaned Sikh, Gagandeep Bindra, who claimed that being called “Osama bin Laden” or “terrorist” was “a normal occurrence after 9/11” and whose harassers were apprehended only when assault was involved).

¹⁰⁴ Chastity Pratt and Melanie Lefkowitz, *Arab, Shik [sic] Cabbies Offer Free Rides, Volunteers help families, hope to avoid harassment*, NEWSDAY, at W33, Sept. 16, 2001.

¹⁰⁵ *Id.*

¹⁰⁶ *Coalition Helps End Student’s Suffering From Bullying In School*, The Sikh Coalition, Feb. 27, 2006 [hereinafter *Coalition Helps End Student’s Suffering*] available at http://www.sikhcoalition.org/advisories/student_hair.htm.

¹⁰⁷ *Id.*

matter and ordered an immediate end to the harassment.¹⁰⁸ This case indicates that, in specialized institutional contexts, such harassment may be effectively addressed through formal means.

B. Detention

On September 12, 2001, Sher Singh, a turbaned Sikh man, was taken off an Amtrak train, bound from Boston to New York, in handcuffs. Members of the crowd that assembled during the arrest were reported as saying, “Kill him!”, “Burn in Hell”, and “You killed my brother.”¹⁰⁹ The arresting officers joined in, asking Singh how bin Laden was doing.¹¹⁰ News stations replayed the video of his arrest in connection with its coverage of the attacks, thus associating Singh with the terrorists that carried out the attacks.¹¹¹ Thus any connection between terrorists and a turbaned male with a long, flowing beard was further embedded in the hearts and minds of emotional Americans.¹¹²

¹⁰⁸ *Id.*

¹⁰⁹ ADC Report, *supra* note 100, at 43.

¹¹⁰ *Id.*

¹¹¹ See Jaideep Singh, *Confronting Racial Violence: Sikh Americans Have Been Targeted for Harassment and Attack More Than Any Group Since 9/11*, COLORLINES Spring 2003, at 23-26 (“The news that a possible terrorist had been arrested spread like wildfire, and national media outlets quickly picked up the story. Almost immediately, video clips of a young man with a green turban and a long, flowing beard being led away in handcuffs flooded the airwaves. CNN, Fox, and the Associated Press carried video and photos of Sher Singh[.]”).

¹¹² Speaking of media images, the relationship between turbans and terrorists was reinforced in the 2003 film, *Dysfunktional Family*, starring comedian Eddie Griffin. Specifically, Griffin points to a Sikh man wearing a turban and yells to him, “bin Laden, I knew you was [sic] around here!” See Petition to Miramax to stop spreading hate against Sikhs, The Sikh Coalition (Mar. 26, 2003), available at http://www.sikhcoalition.org/miramax_petition.asp. The impact of this joke was increased by the fact that this particular scene was shown in commercials for the film, meaning that it appeared on television and to people who ultimately did not see the movie. See also Dawinder S. Sidhu, *The Revolution Must be Televised: Can the arts succeed where political discussion falls short?*, PENNSYLVANIA GAZETTE, Mar./Apr. 2004 (arguing that including positive elements of South Asians in popular culture “represent a tremendous opportunity for South Asians . . . to obviate the driving force behind the wave of post-9/11 hate crimes, namely ignorance.”), available at <http://www.upenn.edu/gazette/0304/0304voices.htmls>.

Ultimately, it was announced that Singh was apprehended for carrying a concealed weapon, a *kirpan*,¹¹³ which by definition was hidden under Singh's clothing and would only have been discovered after the swarm of officials aggressively ejected Singh from the train.¹¹⁴ There was no reason—beyond the turban and long beard—for the public or law enforcement personnel to be concerned about his presence on a train. In other words, he did nothing to arouse suspicion, aside from looking the way he did and be in public space.

C. Violence

A database created on 9/11 by the Sikh civil rights organization, the Sikh Coalition, contains twenty-two reported cases of bias incidents against Sikhs on that day alone.¹¹⁵ In the first week following 9/11, 645 bias crimes were directed at those perceived to be Middle Eastern.¹¹⁶ In the first eight weeks after 9/11, over a thousand bias incidents were reported, including nearly nineteen murders, assaults, harassment, and acts of vandalism.¹¹⁷

One of those murders realized the Sikh-American community's worst fears. On September 15, 2001, Balbir Singh Sodhi, a turbaned Sikh who owned a gas station in Mesa, Arizona, went to Costco to purchase an American flag and donated \$75 to a fund established for the families of victims of the 9/11 attacks.¹¹⁸ Upon returning to his gas station, Sodhi began attending to his landscaping outside of the gas station when Frank Roque drove by and fired five shots.¹¹⁹ Sodhi died at the scene.¹²⁰ With his death, Sodhi became "the first murder victim of the 9/11-related hate crime backlash in America."¹²¹

¹¹³ See discussion of the Sikh articles of faith, *supra* Part I.

¹¹⁴ See Jaideep Singh, *supra* note 111, at 23-26.

¹¹⁵ Sikh Coalition Database, *supra* note 100.

¹¹⁶ SOUTH ASIAN AMERICAN LEADERS OF TOMORROW, AMERICAN BACKLASH: TERRORISTS BRING WAR HOME IN MORE WAYS THAN ONE, Nov. 2002, available at <http://www.911digitalarchive.org/documents/BiasReport.pdf> [hereinafter American Backlash].

¹¹⁷ See Ahmad, *supra* note 8, at 1261-1262.

¹¹⁸ See AM. CIVIL LIBERTIES UNION OF N. CAL., CAUGHT IN THE BACKLASH: SUKHPAL AND BALBIR SINGH SODHI, SAN FRANCISCO & MEZA, AZ, available at <http://www.aclunc.org/911/backlash/sodhi.html>.

¹¹⁹ See Nick Martin, *Sikhs still living in shadow of Sept. 11*, EAST VALLEY TRIBUNE, Sept. 16, 2006, available at <http://www.eastvalleytribune.com/story/48149>; Arizona Department of Corrections, Inmate Profile: Frank Roque, available at <http://www.azcorrections.gov/DeathRow/ProfilesBase.asp?inmate=RoqueF>.

After shooting Sodhi, Roque visited a nearby sports bar where he announced, “They’re investigating the murder of a turban-head down the street.”¹²² On the day charges were filed against Roque, Maricopa County Attorney Rick Romley noted, “Sodhi was apparently killed for no other reason than because he was dark-skinned, bearded, and wore a turban.”¹²³ At trial, Roque’s co-worker at Boeing testified that Roque said he wanted to shoot some “ragheads.”¹²⁴

Roque was later convicted of the racially motivated murder of Sodhi, and was sentenced to death, though the Arizona Supreme Court commuted the death sentence on August 14, 2006, citing Roque’s “mental illness and low IQ [as] mitigating factors [that] should have resulted in the lesser sentence of life in prison with no chance of parole.”¹²⁵

One of the most brutal attacks on a turbaned Sikh occurred almost three years after 9/11. On July 11, 2004, in Queens, New York, several men began taunting Rajinder Singh Khalsa. The perpetrators made several remarks in reference to Khalsa’s turban. One said, “Look, somebody stole my curtains. . . . Why did you steal my sheets from my house?”¹²⁶ Another joined in, “Give me my curtain.”¹²⁷ Khalsa testified that he asked in response, “What do you mean, ‘Give me my curtain?’”¹²⁸ One of the men replied, “You

¹²⁰ CNN.com, *Man questioned in shooting death of Sikh*, CNN Sept. 16, 2001, available at <http://archives.cnn.com/2001/US/09/16/gen.mesa.shooting/>.

¹²¹ Fed. Bureau of Investigations, *Protecting Your Civil Rights: Spotlight on Hate Crimes* Oct. 30, 2003, available at <http://www.fbi.gov/page2/oct03/103003protectrights.htm>.

¹²² Southern Poverty Law Center, *The Forgotten: Balbir Singh Sodhi*, available at <http://www.splcenter.org/intel/intelreport/article.jsp?pid=251>.

¹²³ CNN.com, *Trial Begins for Man Charged with Killing Sikh Immigrant*, CNN Aug. 18, 2003, available at <http://www.cnn.com/2003/LAW/08/18/attacks.sikhshooting.ap/index.html>.

¹²⁴ State of Ariz. v. Roque, CR-03-0355-AP (Ariz. 2006) (Summary of Oral Arg.).

¹²⁵ Michael Kiefer & Jim Walsh, *9/11-tied slayer won’t be executed*, THE ARIZ. REPUBLIC, Aug. 15, 2006, available at <http://www.azcentral.com/arizonarepublic/local/articles/0815roque0815.html>.

¹²⁶ Herbert Lowe, *5 tried in Sikh’s beating: Prosecutors call assault an unprovoked hate crime but defense attorneys say religious leader escalated fight*, NEWSDAY, Nov. 1, 2005, at A14 [hereinafter Lowe article].

¹²⁷ Herbert Lowe, *Sikh testifies in case*, NEWSDAY, Nov. 2, 2005, at A29.

¹²⁸ *Id.*

still here?” “Go to your home. Go to your country.” A Sikh man with Khalsa responded, “this is my country. This is my home, too.”¹²⁹

After this exchange, the group of five men then began assaulting Khalsa. According to the Queens District Attorney’s office:

[They] repeatedly punched the victim Khalsa in the face, knocking him to the ground where they kicked him until he lost consciousness. Khalsa was later treated at a hospital for multiple contusions, abrasions, swelling and substantial pain to his eye and face. A CAT scan revealed that Khalsa had sustained multiple fractures to the left orbital bone, as well as complex, obstructive fractures of the nose which required facial reconstruction surgery to enable him to breathe.¹³⁰

After the perpetrators finished beating Khalsa, “they took off his turban and threw it away,”¹³¹ adding religious insult to significant physical injury. Assistant District Attorney Elizabeth Parke noted that the assault on Khalsa “was a truly vicious, despicable act of hate.”¹³²

Following a five-week trial, the five men were convicted: two were found guilty of second-degree assault, two were found guilty of second-degree aggravated harassment as a hate crime, and the fifth defendant was found guilty of harassment in the second-degree.¹³³ The men received sentences ranging from five days in jail to two years that included community service for three of them.¹³⁴

The *Khalsa* case is notable because of the egregious nature of the clear animus and degree of brutality involved. It is also important because it is one of the exceptional cases in which the perpetrators verbalized their hate and thus provided authorities with colorable evidence of a hate crime. Hate crimes statutes generally are designed to punish those who attack or threaten individuals on the basis of an immutable characteristic, such as one’s race or national origin. The federal hate crime statute “prohibits willful injury, intimidation, or interference or attempt to do so, by force or threat of force of any person

¹²⁹ *Id.*

¹³⁰ Press Release, Queens County District Attorney’s Office, D.A. Brown: *Five Sentenced to Incarceration in Bias-Related Attack on Sikh Man in Richmond Hill*, Dec. 22, 2005 [hereinafter D.A. Press Release].

¹³¹ Kenji Yoshino, *Uncovering Muslim Identity*, TOWARD FREEDOM, Nov. 23, 2005, available at <http://www.towardfreedom.com/home/content/view/674/54/> [hereinafter Yoshino article].

¹³² Lowe article, *supra* note 126.

¹³³ D.A. Press Release, *supra* note 130.

¹³⁴ *Id.*

because of race, color, religion, or national origin[.]”¹³⁵ “Sikhs are protected by hate crime statutes, even if the perpetrator believes the Sikh to be a Muslim terrorist.”¹³⁶ But, a substantial difficulty in prosecuting hate crimes is obtaining evidence of hate. Thus, differentiating between a simple assault on an individual who happens to be Sikh and an assault on a turbaned Sikh where the perpetrator selected the Sikh because of his actual or perceived national origin is often difficult. *Khalsa* represents a rare instance in which the hate was revealed in the course of the attack.

Hate crimes statutes have become especially relevant in a post-9/11 America. Despite their value in today’s America, legal commentators have claimed that federal hate crimes statutes are “inadequate,”¹³⁷ “completely unworkable,”¹³⁸ and have “failed in [their] deterrent aspect.”¹³⁹ Accordingly, to the extent that federal hate crimes statutes are ineffective due to the evidentiary problem, its limited applicability, and other issues, a compelling case can be made that hate crimes statutes are not effective and that stronger hate crime enactments are needed.

Today, six years on from the 9/11 attacks, the violence continues, lending credence to the suggestion that hate crimes laws are presently insufficient to deter hate crimes. Standing outside his garage with his granddaughter, Iqbal Singh, a turbaned Sikh, was stabbed in the neck with a steak knife on July 29, 2006. He had been waiting to go to the temple near his home in Santa Clara, California.¹⁴⁰ According to the local prosecutor, Jay Boyarsky, the perpetrator “wanted to seek revenge for Sept. 11 and attack a member of the Taliban.”¹⁴¹

¹³⁵ 18 U.S.C. § 245 (1996).

¹³⁶ Stromer, *supra* note 11, at 755.

¹³⁷ FREDERICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* 157 (1999).

¹³⁸ Jason A. Abel, *Americans Under Attack: The Need for Federal Hate Crime Legislation in Light of Post-September 11 Attacks on Arab Americans and Muslims*, 12 *ASIAN L.J.* 41, 45 (2005).

¹³⁹ Stromer, *supra* note 11, at 757.

¹⁴⁰ John Coté, *Hate crime alleged in stabbing of Sikh Santa Clara suspect could face life term if he is convicted*, *SAN FRANCISCO CHRONICLE*, Aug. 2, 2006, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/08/02/BAGBUK9HTO1.DTL>.

¹⁴¹ *Id.*

D. Denial of Entry into Public Places

In addition to the violent backlash against Sikhs, the targeting of the turban after 9/11 has also led to Sikhs being denied entry into various public buildings and places of public accommodation, such as courthouses,¹⁴² postsecondary institutions,¹⁴³ and political events.¹⁴⁴ For example, on September 23, 2001, Kabeer Singh was told to remove his turban or leave the Hard Times Café and Santa Fe Cue Club in Springfield, Virginia—despite the fact that prior to September 11, 2001, Sikh patrons, including Singh, had been permitted to wear turbans at this establishment.

The DOJ conducted an investigation and concluded that F & K Management, Inc. [hereinafter F & K], the owner and operator of the establishment, “had engaged in a pattern or practice of discriminating against Sikhs, Muslims, Indian-Americans and other Asian Americans who wear certain kinds of head coverings, such as turbans, for religious or ethnic cultural reasons.”¹⁴⁵ The DOJ found F & K in violation of Title II of the Civil Rights Act [hereinafter Title II], which provides that, “All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination on the ground of race, color, religion, or national origin.”¹⁴⁶ The DOJ entered into a settlement agreement with F & K, which specified that the establishment was required, in part, to adopt a non-discriminatory dress code and apologize to Singh, his family, and to other Sikhs.¹⁴⁷

This appears to be a relatively “easy” case as the same individual who went to this venue was only denied entry after the terrorist attacks. The settlement agreement could serve as a benchmark regarding the seriousness with which such discrimination in places of public accommodation is viewed. However, cases involving turbaned Sikhs being

¹⁴² See, e.g., Sikh American Legal Defense and Education Fund, Georgia Court Apologizes for Denying Sikh American Man Entrance to Court, *available at* <http://www.saldef.org/content.aspx?a=1391>.

¹⁴³ See, e.g., Sonja Sharp, *Students Rail Scrutiny of Sikh*, THE DAILY CALIFORNIAN, Sept. 24, 2004, *available at* <http://www.dailycal.org/article.php?id=16228>.

¹⁴⁴ See, e.g., Ralph Ranalli, *Sikh student detained by Secret Service*, BOSTON GLOBE, July 30, 2004, *available at* http://www.boston.com/news/local/articles/2004/07/30/sikh_student_detained_by_secret_service/.

¹⁴⁵ DOJ Settlement Agreement, United States and F & K Management, Inc., d/b/a Hard Times Café and Santa Fe Cue Club, Feb. 28, 2003, *available at* <http://www.usdoj.gov/crt/legalinfo/discrimupdate.htm>.

¹⁴⁶ 42 U.S.C. § 2000a (2007).

¹⁴⁷ *Id.*

denied entry to places of public accommodation are not always this straightforward. On January 25, 2007, a turbaned Sikh, Sanjum Paul Singh Samagh, was not permitted to enter the Pierce Street Annex bar in Costa Mesa, California, on account of the bar's "no-hats" policy,¹⁴⁸ though a Sikh turban, as noted in Part I, is not merely a form of headgear. A Sikh legal defense group considers the bar's actions to be "blatantly discriminatory," though UCLA law professor Eugene Volokh, a leading constitutional scholar, did not think a federal case was a slam dunk for Samagh.¹⁴⁹

Where the discriminatory application of a neutral "no-hats" policy is this more evident, as with the F & K case, the ability of plaintiffs and civil rights groups to achieve a favorable result, and the likelihood that the government will intervene, is surely greater. Indeed, the F & K case involved the same individual going to the same establishment both before and after 9/11. It is unlikely that other cases will be as clear-cut. Thus turbaned Sikhs like Samagh will have a greater burden to prove that their rights were violated, even though the F & K and Samagh cases both featured Sikhs being denied access to places of public accommodation after 9/11 on the basis of their turbans.

The scope of Title II's protections, however strong, are in any case limited to places that fall within the definition of a "public accommodation," and thus do not include areas such as airports or courtrooms where Sikhs are being asked to remove their turbans to enter beyond a certain point.¹⁵⁰

E. Employment Discrimination

Employment discrimination against Sikhs became especially problematic in the immediate wake of the 9/11 attacks.¹⁵¹ Major companies, such as Disney and Subway,

¹⁴⁸ See Lisa Petrillo, *Sikh wants apology from bar owner*, UNION-TRIBUNE, Feb. 9, 2007, available at <http://www.signonsandiego.com/news/northcounty/20070209-9999-1mi9turban.html>.

¹⁴⁹ Jeff Overley, *'No hats' rule protested*, ORANGE COUNTY REGISTER, Feb. 8, 2007, available at http://www.ocregister.com/ocregister/homepage/abox/article_1568186.php.

¹⁵⁰ For example, in 2003, a judge informed Kuldip Singh, a defendant in a criminal matter, that he would have to remove his turban to appear for trial before a jury. The Sikh Coalition, *The Sikh Coalition*, "Incidents: Ref# 367: Turban Not Allowed in Court, Nov. 17, 2003, available at <http://www.sikhcoalition.org/hatecrime.asp?mainaction=viewreport&reportid=367>.

¹⁵¹ See Charu A. Chandrasekhar, "Flying While Brown: Federal Civil Rights Remedies to Post-9/11 Airline Racial Profiling of South Asians," 10 ASIAN L.J. 215, 252 n.5 (2003) (listing several sources that documented incidents of harassment and employment discrimination against Sikhs and Muslims post-9/11).

refused to employ Sikhs or harassed Sikh employees, apparently because turbaned Sikhs did not conform to their conceptions of what a presentable employee looks like.¹⁵²

The post-9/11 environment has led to increased attention on the rights of Sikhs in government jobs too. Although Sikhs are members of police forces in other nations,¹⁵³ Sikhs with turbans have faced difficulty in police departments in the United States after 9/11. Surprisingly, the most prominent examples of employment discrimination affecting the Sikh community, in the police or otherwise, are alleged to have occurred in one of the country's most diverse corners: New York City.

On his first day of work, September 21, 2001, Jasjit Singh Jaggi, was told by his employer, the New York City Police Department (NYPD), that he could not wear a turban at work.¹⁵⁴ Jaggi claimed to have offered a compromise to his employer: to wear a white turban with the NYPD logo affixed to it, however the compromise was rejected.¹⁵⁵ Faced with the option of resigning or being terminated, Jaggi resigned.¹⁵⁶ He subsequently filed a complaint against the NYPD with the New York City Human Rights Commission.¹⁵⁷ An administrative law judge ruled in favor of Jaggi, concluding that the petitioner sufficiently established that he was discriminated against in violation of Title VII of the Civil Rights Act of 1964 (Title VII), which generally requires employers to accommodate the reasonable religious needs of employees, unless the accommodation would present an undue hardship,¹⁵⁸ and recommending that Jaggi be reinstated and

¹⁵² See Hair Growth News, *Disney lifts rule on shaving*, available at <http://www.hairgrowthnews.com/ar/ar017.shtml> (noting that Disney permits employees to grow mustaches, but must shave other facial hair, though “[f]or Sikhs, it is unacceptable to cut any hair.”); CBC, *Sikh files human rights complaint over company’s refusal to allow turban*, Dec. 11, 2003, available at http://www.cbc.ca/canada/story/2003/12/11/subway_sikh031211.html (“A Sikh man who owns four Subway sandwich shops says he was told he couldn’t wear his turban in his own stores.”).

¹⁵³ See, e.g., CBC, *Sikh Mounties permitted to wear turbans*, Mar. 15, 1990, available at http://archives.cbc.ca/IDC-1-73-614-3302-11/that_was_then/politics_economy/sikh_mounties_turban (recounting the acceptance of a turbaned Sikh into the Royal Canadian Mounted Police).

¹⁵⁴ *Jaggi v. N.Y. City Police Dep’t.*, CHR Compl. No. M-E-C-02-1012382-E, (N.Y. City Comm’n on Human Rts. Apr. 28, 2004).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ 42 U.S.C. § 2000e(j) (2007).

permitted to wear a turban while on duty.¹⁵⁹ A settlement was reached in Jaggi's case, leading to his reinstatement.¹⁶⁰

Similarly, in early 2002, a turbaned Sikh New York City Police officer, Amric Singh Rathour, was terminated for refusing to remove his turban only a few weeks after he had completed training and been inducted into the NYPD.¹⁶¹ Despite widespread news coverage and several petitions to NYPD, the City ignored his case.¹⁶² As a result, he filed suit under Title VII against the New York City Police Commissioner and the NYPD to regain his employment.¹⁶³ The parties reached a settlement that paralleled the Jaggi settlement, and Rathour was reinstated.¹⁶⁴

Sat Hari Singh¹⁶⁵, a turbaned Sikh train operator with the New York Metropolitan Transit Authority (MTA), was honored for driving his train in reverse on 9/11, away from the towers and towards safety.¹⁶⁶ Singh had worked for the MTA for over twenty years.¹⁶⁷ Nevertheless, after the attacks, Singh was informed by the MTA that he would have to either remove his turban or wear an MTA logo on his turban if he wished to work around passengers, otherwise he would be forced to work in the rail-yard.¹⁶⁸ Rather than accept a transfer to this inferior position or be terminated for failing to comply with his

¹⁵⁹ *Id.*

¹⁶⁰ James Barron, *Two Sikhs Win Back Jobs Lost by Wearing Turbans*, N.Y. TIMES, July 29, 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=9D07E4D6133DF93AA15754C0A9629C8B63>.

¹⁶¹ The Sikh Coalition, *Sikh Coalition Challenges NYPD on Rule Disallowing Turbans*, available at <http://www.sikhcoalition.org/amricsingh1.asp>.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Singh, an American convert to Sikhism, is also known as Kevin Harrington. See Gurpreet Kaur, *Sikh Americans' Political Roles after September 11, 2001*, Mar. 11, 2005, <http://www.pluralism.org/research/profiles/display.php?profile=73944>.

¹⁶⁶ The Sikh Coalition, *Five More Sikhs to Resist MTA Turban Branding Policy*, Jul. 18, 2005, available at http://www.sikhcoalition.org/advisories/mta_press.htm.

¹⁶⁷ The Sikh Coalition, *Petition to MTA New York City Transit*, Aug. 16, 2004, http://www.sikhcoalition.org/mta_sikh_petition.asp.

¹⁶⁸ *Harrington v. N.Y. City Trans. Auth., et al.*, No. 05-CV-3341 (E.D.N.Y. 2005) (Am. Compl.).

employer's directives, Singh eventually and reluctantly agreed to wear a logo on his turban.¹⁶⁹

The Sikh Coalition has filed suit on behalf of Singh.¹⁷⁰ The DOJ has also filed suit on behalf of Singh. The case is still pending as of February 2008.

If the Jaggi and Rathour cases were precedential, should have a strong case against the MTA. It should be noted, however, that the Jaggi and Rathour resolutions were ultimately reached via settlement, not via judicial determination.

What of the courts? Some legal scholars, including Circuit Judge Michael W. McConnell, have claimed that the courts have eviscerated religious rights in the workplace,¹⁷¹ a situation that would ostensibly imperil turbaned Sikhs from bringing successful Title VII claims. For example, the Supreme Court has held that employers need not bear more than a *de minimis* cost to accommodate religious employees,¹⁷² and that employers are not required to accept a particular accommodation suggested by the employee.¹⁷³ Courts have also allowed employers to defend themselves against undue hardship by claiming that the accommodation would negatively affect business operations,¹⁷⁴ impose on co-worker rights,¹⁷⁵ or endanger public health or safety.¹⁷⁶

¹⁶⁹ *Id.*

¹⁷⁰ *See id.*

¹⁷¹ *See* Michael W. McConnell, Symposium, *Religion in the Workplace: Proceedings of the 2000 Annual Meeting of the Association of American Law Schools Section on Law and Religion*, 4 EMPLOYEE RTS. & EMP. POL'Y J. 87, 98 (2000) (noting that "the Supreme Court's decisions in *Hardison* and *Philbrook* have made mincemeat of the congressional intention in Title VII."); *see also* Thomas D. Brierton, "'Reasonable Accommodation' Under Title VII: Is it Reasonable to the Religious Employee," 42 CATH. LAW. 165, 182-186 (2002) (describing the ways in which the "[t]he courts have weakened reasonable accommodation rights in the workplace[.]" [hereinafter Reasonable Accommodation]).

¹⁷² *See* *TWA v. Hardison*, 432 U.S. 63, 84 (1977) ("To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship.").

¹⁷³ *See* *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986) ("We find no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation. By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation.").

¹⁷⁴ *See* *EEOC v. Sambo's of Ga. Inc.*, 530 F. Supp. 86, 91 (N.D.Ga. 1981) (disagreeing that "customer preference is an insufficient justification or defense as a matter of law[.]").

¹⁷⁵ *See* *Weber v. Roadway Express Inc.*, 199 F.3d 270, 274 (5th Cir. 2000) (finding that an accommodation is "more than a *de minimis* expense because [it] unduly burdens his co-workers.").

Generally, as explained in Part I, it would seem that the protection Title VII affords to turbaned Sikhs is quite limited.

As a historical matter, the courts have not been kind to Sikh claims of employment discrimination. *Kalsi v. New York City Transit Authority* (NYCTA),¹⁷⁷ a 1998 case, is one of the more discouraging cases for Sikhs with turbans in the public safety context. The case was brought by Charan Singh Kalsi, a Sikh car inspector trained by the NYCTA to work on subway cars, which involved working in pits under the cars, alongside the cars, and in other areas where there was a threat to his head. Kalsi was told to remove his turban and don a hard hat during the training session and, when he refused, was eventually fired. Kalsi brought claims against NYCTA alleging violations of the First Amendment, Title VII, and the New York State Constitution.¹⁷⁸

The defendants moved for summary judgment, which the district court granted. With regards to the Title VII claim, the Court held that Kalsi had failed to prove a *prima facie* case of discrimination or disparate impact: although he was a member of a protected group, he failed to show that his discharge occurred under “circumstances giving rise to an inference of discrimination.”¹⁷⁹ Also, although Kalsi had a *prima facie* case for his reasonable accommodation claim, he could not be accommodated without undue hardship to the employer (and the employer’s safety standards).

An oft-cited employment discrimination case, *EEOC v. Sambo’s of Georgia*,¹⁸⁰ also produced a disappointing result for a turbaned Sikh. In this case, a Sikh man applied for a managerial position with the Sambo’s chain of restaurants in Atlanta, and his application was rejected from the very outset on the basis that if he were to obtain the position, he would not be able to shave his beard and moustache in compliance with Sambo’s grooming policy. The company claimed that the wearing of a beard, moustache, and headgear was not permitted because they do not “comply with the public image that Sambo’s has built up over the years”,¹⁸¹ and that because Sambo’s was a family restaurant, their customers would react adversely to a bearded and turbaned manager. The court held, in part, that even if the refusal of an employer to hire a non-clean shaven man was discriminatory, being clean-shaven is a bona fide occupational qualification for a restaurant that relies on the family trade, and therefore constitutes a Title VII exception:

¹⁷⁶ See *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984).

¹⁷⁷ 62 F. Supp. 2d 745 (E.D.N.Y. 1998).

¹⁷⁸ *Id.* at 748. *Kalsi* also brought a claim under the RFRA, but this was dismissed as a result of *Boerne*, which declared RFRA unconstitutional as applied to state actions. *Id.* at 748-49.

¹⁷⁹ *Id.* at 753.

¹⁸⁰ *EEOC v. Sambo’s*, 530 F. Supp. at 89.

¹⁸¹ *Id.* at 89-90.

The requirement that Sambo's restaurant managers be clean-shaven is tailored to actual business needs, has a manifest and demonstrable relation to job performance, and is necessary to the safe and efficient operation of Sambo's Restaurants.¹⁸²

The *Sambo's* case is significant because it considered important evidence "prov[ing] that a significant segment of the consuming public would not accept restaurant employees with beards."¹⁸³ The appearance-employment discrimination cases are particularly salient after 9/11. In 2003, the Subway fast-food chain, for example, began to "crack down" on Sikh men (many of whom are store owners) appearing in front of customers with their turbans on, saying that the turban does not "present a professional image," and requiring employees to wear black hats or visors instead.¹⁸⁴

Subsequent to *Sambo's*, however, several courts declared that preferences for personal appearance when an employee is dealing with the public are insufficient to defend a Title VII claim.¹⁸⁵ In addition, in a pamphlet published after 9/11, the EEOC clarified that employment decisions cannot be based on customers being uncomfortable with religious attire. In an example, in the pamphlet the EEOC noted:

Narinder, a South Asian man who wears a Sikh turban, applies for a position as a cashier at XYZ Discount Goods. XYZ fears Narinder's religious attire will make customers uncomfortable. What should XYZ do?

¹⁸² *Id.*

¹⁸³ Brierton, *Reasonable Accommodation*, *supra* note 171.

¹⁸⁴ See Jill Mahoney, *Sikh says Fast-Food Boss Banned 'Diaper' on Head*, GLOBE AND MAIL, Dec. 11, 2003, available at <http://www.globeandmail.com/servlet/story/RTGAM.20031211.wturban1211/BNSStory/National/>.

¹⁸⁵ See Bryan P. Cavanaugh, *September 11 Backlash Employment Discrimination*, 60 J. MO. B. 186, 192 (2004) (citing *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1214 (8th Cir. 1985); *Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1560 n.13 (9th Cir. 1994); *Platner v. Cash & Thomas Contractors, Inc.*, 908 F.2d 902, 905 n.5 (11th Cir. 1990)). This commentator noted that, "a restaurant's customers' anxiety about the manager's Middle Eastern appearance cannot justify national origin discrimination, even with a clear link between the manager's Middle Eastern national origin and the loss of revenue. Although one may empathize with these employers, the law does not permit customers' bias to justify an employer's unlawful discrimination." *Id.*

XYZ should not deny Narinder the job due to notions of customer preferences about religious attire. That would be unlawful. It would be the same as refusing to hire Narinder because he is a Sikh.¹⁸⁶

Accordingly, to the extent that *Sambo's* stands for the proposition that discomfort with, or loss of business associated with public discomfort with, the Sikh turban or general appearance, *Sambo's* may no longer be considered a sound statement on Title VII's protections. Moreover, employers such as Disney and Subway may want to reconsider their employment decisions as they relate to placing turbaned Sikhs in the public eye. On the other end of the spectrum, cases like *Kalsi* have firmly established that an employer may reliably defend a Title VII suit on the grounds that the accommodation will present a health or safety concern.¹⁸⁷

The Sat Hari Singh case against the MTA does not appear to be one implicating health or safety, as Singh was instructed to wear a MTA logo on his turban in the course of his saga: a logo hardly serves as a protective tool but instead may have been a means to inform the riding public that Singh indeed was an MTA employee and dissipate any concerns that the turbaned man at the helm of a New York City train was dangerous. The turban itself does not seem to present an undue burden since the employer required that a logo be affixed to the turban, not that the turban be removed or replaced with a hat. In this respect, the MTA case resembles *Sambo's* and the courts may be expected to resolve the case accordingly.

Aside from the "customer comfort" issue, overall, Sikhs facing alleged discriminatory conduct in the workplace with regards to their turbans may face difficulty in asserting their claims, particularly due to the *de minimus* undue burden test¹⁸⁸ and in the cases where public health or safety are at issue.¹⁸⁹ Accordingly, these Sikhs may turn

¹⁸⁶ U.S. Equal Employment Opportunity Commission, QUESTIONS AND ANSWERS ABOUT EMPLOYER RESPONSIBILITIES CONCERNING THE EMPLOYMENT OF MUSLIMS, ARABS, SOUTH ASIANS, AND SIKHS (2005), available at <http://www.eeoc.gov/facts/backlash-employer.html>.

¹⁸⁷ See Huma T. Yunus, Note, *Employment Law: Congress Giveth and the Supreme Court Taketh Away: Title VII's Prohibition of Religious Discrimination in the Workplace*, 57 OKLA. L. REV. 657, 672 (2004) ("Generally, cases that implicate public health or safety regulations have predictable outcomes. Courts have consistently held that any accommodation that requires employers to violate a state or business imposed health or safety procedure constitutes an undue hardship.").

¹⁸⁸ See *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004) (holding that requiring employer to permit an employee, a member of the Church of Body Modification, to wear numerous uncovered facial piercings would be an undue burden).

¹⁸⁹ See Heather Payne & Norman Doe, *Public Health and the Limits of Religious Freedom*, 19 EMORY INT'L L. REV. 539, 551 (2005) (suggesting that "Sikhs may not enjoy legal protection to wear beards or turbans when an employer's rule is justified in the workplace on grounds of hygiene.") [hereinafter Payne & Doe].

to extra-legal remedies, such as the assistance of Sikh action groups in encouraging employers to change their policies before an incident occurs or to settle in case one does arise. In other words, Title VII may be most effective for Sikhs where they are able to convince employers, without formal judicial proceedings, to accommodate the Sikh turban in the workplace.¹⁹⁰ The legal avenues available to Sikhs, though, may improve if a Workplace Religious Freedom Act, which would generally require employers to afford greater protections to religious employees, was finally passed by Congress.¹⁹¹ Until then, negotiations and settlements may be a more productive route than private litigation for turbaned Sikhs.

F. Profiling

In 2004, Amnesty International reported that racial profiling of those appearing to be Muslim was still prevalent.¹⁹² An obvious setting for discrimination against Sikhs with turbans after the hijacking of four airliners on 9/11 is airports. Accordingly, one of the most widespread problems for turbaned Sikhs after 9/11 has been airline racial profiling.¹⁹³

¹⁹⁰ See Remarks of Amardeep Singh, Legal Director, *The Sikh Coalition*, Meeting of the U.S. Equal Employment Opportunity Commission, *Employment Discrimination in the Aftermath of September 11*, Dec. 11, 2001 (encouraging the E.E.O.C. to take steps to “inform[] employers on how they can conform their corporate behavior to the requirements of the law when a situation that may possibly involve unlawful bias occurs. [Such measures] can serve as a way to proactively prevent discrimination before it occurs.”).

¹⁹¹ See Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575, 628-629 (2000) (arguing that the Act would broaden Title VII protections for religious employees).

¹⁹² Amnesty International USA, *Racial Profiling: Threat and Humiliation: Racial Profiling, National Security, and Human Rights in the United States*, available at http://www.amnestyusa.org/racial_profiling/report.

¹⁹³ See Ellmann, *supra* note 18, at 360 n.43 (“Because Sikh men wear turbans as a matter of religious duty, and because they are Asians, they became the victims of many unpleasant and intrusive incidents in airports after September 11.”). See generally Albert W. Alschuler, *Racial Profiling and the Constitution*, U. CHI. LEGAL F. 163, 163 (2002) (noting “a shift in sentiment” related to racial profiling after 9/11, with “81 percent of . . . respondents to a 1999 Gallup poll declar[ing] their opposition” to racial profiling and, shortly after 9/11, “58 percent of the respondents to a Gallup poll sa[y]ing that airlines should screen passengers who appeared to be Arabs more intensely than other passengers.”).

The concern of “airport profiling”—or “Flying while Brown”—at airports has generated significant anxiety in the Sikh community, as “airline profiling can be an utterly degrading and humiliating experience.”¹⁹⁴

The case of Hansdip Singh Bindra is particularly illustrative of the mistreatment that Sikhs with turbans have encountered during air travel. On November 26, 2002, Bindra was set to board Delta Airlines Flight # 6237 from Cincinnati, Ohio to Dayton, Ohio.¹⁹⁵ As the passengers made their way to their respective seats, a stewardess told several passengers in the rear of the plane that there may be “trouble” and said of Bindra, who was seated towards the front of the plane, “see the man up front with the turban on, he’s the one who is going to cause trouble.”¹⁹⁶ The stewardess later told Bindra to keep a “low profile”, “stay seated”, and not to “cause any problems.”¹⁹⁷ The stewardess also attempted to communicate her views of Bindra and a passenger who came to the aid of Bindra to the pilots as well as to other passengers.¹⁹⁸ Bindra filed suit against Delta in the U.S. District Court for the District of New Jersey.¹⁹⁹ Despite motions to dismiss filed by the Defendant-airline, the case was eventually settled by the parties.²⁰⁰

G. Conclusion

In sum, while discrimination against Sikhs with turbans in America is nothing new, problems with Sikh turbans in various contexts have escalated rapidly post September 11, 2001. Because of the visual similarity between turbaned male Sikhs and al-Qaeda leadership and the Taliban, Sikhs appear to be singled out for hate crimes, racial profiling, and exclusion from public spaces as a result of their appearance. Given the

¹⁹⁴ See Chandrasekhar, *supra* note 151, at 224 (offering examples of racial profiling incidents in the airline context as well as remedies being pursued by South Asians against the airlines).

¹⁹⁵ Bindra v. Delta Airlines (D.N.J. Sept. 16, 2003) (Complaint).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Paige Mudd, *Richbrau shuts out turban wearer*, RICHMOND TIMES DISPATCH, Nov. 25, 2006, available at <http://www.saldef.org/content.aspx?a=1611&z=8&title=RICHMOND%20Brewpub%20shuts%20out%20turban%20wearer> (four years later, Bindra was denied entry in a Virginia restaurant due to his refusal to remove his turban and comply with the establishment’s no-headgear policy).

continuing nature of the backlash against Sikhs with turbans and the potential for residual hostility after 9/11 to increase with another terrorist attack, the need for legal protections for Sikhs with turbans has become exceedingly urgent, though the availability of legal remedies for Sikhs in various areas, including verbal harassment and most employment discrimination cases, appears limited. Sikh civil rights groups will need to continue to resolve cases through settlements, as the courts may not provide reliable protection where it is necessary.

III. The Intellectual Challenge to the Sikh Turban: Assimilation by way of Eliminating Conspicuous Articles of Faith

*“[O]ur government will do everything we can. . . to treat every human life as dear and to respect the values that made our country so different.”*²⁰¹

- President George W. Bush

A. The Introduction of the Sikh Turban to the West

While Sikh turbans are common in India and Pakistan, they are generally an unusual sight for those outside of the South Asian subcontinent.²⁰² Sikh immigration to other parts of the world, particularly Europe and North America, has forced Sikhs to endure gawks, awkward questions, and resulting attitudes about them.²⁰³ At the same

²⁰¹ Press Release, *President Welcomes Sikh Leaders to White House Remarks by the President in Meeting with Sikh Community Leaders*, Office of the Press Secretary, The White House, (Sept. 26, 2001), available at: <http://www.whitehouse.gov/news/releases/2001/09/20010926-1.html>.

²⁰² For example, of the approximately 23 million Sikhs in the world, over 19 million of them are in India. See *Sikhism*, Adherents.com, available at http://www.adherents.com/Na/Na_603.html (citing *Census of India 2001, Data on Religion*, Office of the Registrar General, India) for figures of Sikhs in India, and http://www.adherents.com/Na/Na_606.html (citing Russell Ash, *The Top 10 of Everything 1999 77* (1998)) for figures of Sikhs worldwide.

²⁰³ See, e.g., Narinder Singh, Letter, *The Awakened Giant: How Will It Strike Back?; The Faces of America*, N.Y. TIMES, Sept. 24, 2001, available at [http://query.nytimes.com/gst/fullpage.html?res=9B02E3DB143AF937A1575AC0A9679C8B63&n=Top/Reference/Times%20Topics/Subjects/S/Sikhs%20\(Sect\)](http://query.nytimes.com/gst/fullpage.html?res=9B02E3DB143AF937A1575AC0A9679C8B63&n=Top/Reference/Times%20Topics/Subjects/S/Sikhs%20(Sect)) (“When I go to a mall or a grocery store, people stare at me[.]”); Ranbir Singh Sandhu, *Sikhs In America: Stress And Survival*, SIKH SPECTRUM, Sept. 2004, available at <http://www.sikhspectrum.com/092002/survival.htm> (“A turbaned Sikh is still an unusual figure and children will ask: ‘Are you a genie?’ People are asked by perhaps well-meaning strangers: ‘Do you plan to go back to your own country?’”).

time, native residents of those lands are expected to make sense of these newcomers and to determine whether and to what extent their own customs, laws, and principles could absorb this new community and their turbans.²⁰⁴

The British Empire gave Sikhs their first opportunity to leave India in large numbers, transporting them to places as far flung as Kenya, Fiji, Australia, and Singapore as students, engineers, railway laborers, and entrepreneurs.²⁰⁵ Turbaned Sikhs also made up regiments in the British Indian Army, and were sent to destinations around the world, including Japan, France, and Trinidad.²⁰⁶ The recent wave of Sikh immigration into the UK and other Western countries occurred primarily in the form of Sikhs leaving India in search of professional jobs abroad, or as a result of strong anti-Sikh sentiment in India during the mid-1980s.²⁰⁷ Today there are around 400,000 Sikhs living in the UK alone.²⁰⁸

²⁰⁴ See, e.g., Elyse Amend, *Teachers ask for accommodation guidelines*, Nov. 27, 2007, available at <http://www.westislandchronicle.com/article-162144-Teachers-ask-for-accommodation-guidelines.html> (noting that members of a teachers' union "said teachers need guidelines to appropriately apply reasonable accommodation in their schools. 'We need to realize the situation teachers are in,' said union president Andrée Aubut, adding the numerous cultures in the West Island and the close interaction with the anglophone population constantly change the face of what 'living together' means. 'There is a heavy responsibility there.' Aubut said teachers are often the 'first line' in integrating immigrants and that they need some sort of guidelines to make sure this is done appropriately.").

²⁰⁵ See Jasmit Singh, *Our Roots on the North American Soil*, SIKH SPECTRUM, Sept. 2002, available at <http://www.sikhspectrum.com/102002/jasmit.htm>.

²⁰⁶ See *id.*

²⁰⁷ Human Rights Watch, *See India: Arms and Abuses in Indian Punjab and Kashmir*, HUMAN RIGHTS WATCH Sept. 1994 Vol. 6, No.10. (noting that in 1984, "Hindu mobs slaughtered thousands of Sikhs in New Delhi and other cities throughout northern India. The complicity of local officials in the massacres and the failure of the authorities to prosecute the killers alienated many ordinary Sikhs who had not previously supported the militant cause."), available at <http://www.hrw.org/campaigns/kashmir/1994/kashmir94-03.htm>; Daniel C. LaPenta, *Fighting Terrorism Through the Immigration and Nationality Act: Dangers of Limiting the INA's Breadth Under Cheema v. Ashcroft*, 40 NEW ENG. L. REV. 165, 170 (2005) ("According to the Punjab State Magistracy, the Indian government has murdered over 250,000 Sikhs since 1984. Moreover, there are reportedly over 50,000 Sikhs being held in India 'as political prisoners . . . without charge or trial,' some since 1984." (quoting 150 CONG. REC. E1705 (daily ed. Oct. 1, 2004) (statement of Rep. Towns))).

²⁰⁸ Human Rights Watch, *World Atlas: United Kingdom*, HUMAN RIGHTS WATCH, available at http://go.hrw.com/atlas/norm.htm/untdk_gdm.htm.

Given the relatively large proportion of Sikhs in their population, as well as the long history of Sikh interaction with the British through its Empire, British citizens can generally identify a Sikh, though the backlash against “homegrown terrorists” following the July 7, 2005 bombings in London nonetheless placed British Sikhs in peril.²⁰⁹ The UK also created a number of accommodations that make it easier for Sikhs to maintain the basic tenets of their religious faith—and especially the turban—while still forging their British identity.²¹⁰ Perhaps the most significant protection for British Sikhs is their inclusion as a separate racial group, on the basis of their unique culture and identity, for purposes of the Race Relations Act of 1976.²¹¹

Sikhs first arrived in Canada over a century ago, around 1903, as British colonial subjects seeking to benefit from the economic opportunities of the land.²¹² Sikh immigrants to Canada were met with fierce racism from the very start. The anti-Asiatic riots and the Asian Expulsion League, formed in 1907 specifically to target the Sikh community,²¹³ serve as examples of this almost immediate hostility, which persisted

²⁰⁹ See *Mistaken identity*, THE GUARDIAN (UK), Sept. 5, 2005 (quoting a Sikh community leader as saying “[t]he turban-wearing Sikh community is under siege” in Britain after the 7/7 attacks), available at <http://www.guardian.co.uk/g2/story/0,,1562696,00.html>; see also BBC.com, *Attacker pulls off Sikh’s turban*, (“A Sikh man had his turban pulled off and was racially abused in a town in Northants[.]”), available at http://news.bbc.co.uk/2/hi/uk_news/england/northamptonshire/4157254.stm.

²¹⁰ See e.g. John deP. Wright, *Wigs*, 9 GREEN BAG 2d 395 (2006) (“[I]n the latter part of the 1800s, when the first Sikh sought entry to the English Bar, the wearing of the wig by Sikhs was considered something that could be dispensed with.”); Payne & Doe, *supra* note 189, at 550 (“In the United Kingdom, Sikhs are exempt from the requirement to wear a crash helmet in place of their turban.”).

²¹¹ See Steven Vertovec, *Islamophobia and Muslim Recognition* in BRITAIN MUSLIMS IN THE WEST: FROM SOJOURNERS TO CITIZENS 25 (2002) (Yvonne Yazbek Haddad, ed.) (“An important ruling by the House of Lords in 1983 (*Mandla v. Dowell-Lee*, following a head teacher’s refusal to allow a Sikh boy to wear a turban in school) established that Sikhs- and, by extension, Jews- are considered an ethnic group and therefore are protected by the 1976 Race Relations Act.”).

²¹² Hugh Johnston, *Sikhs Origin*, MULTICULTURAL CANADA, available at <http://www.multiculturalcanada.ca/ecp/content/sikhs.html>.

²¹³ See Tarik Ali Khan, *Canada Sikhs*, HIMAL SOUTH ASIAN, Dec. 12, 1999, available at <http://www.himalmag.com/99Dec/sikhs.htm>. (“The increasing number of Sikhs and other Asian migrants (Chinese and Japanese) created a violent backlash from the white settlers on the west coast. By 1907, the Asian Expulsion League in British Columbia had lobbied successfully to disenfranchise all people arriving from India. They were referred to simply as “Hindus” (although almost all of them were Sikhs), and in spite of their being British citizens and Canada itself being a British dominion, the government of British Columbia stripped them of the right to vote, purchase Crown timber, and work in certain

decades later. For example, Sikhs were prohibited from voting in British Columbia until 1947.²¹⁴ They were not permitted to move into certain neighborhoods because of widespread fear of the “tide of turbans,” which many felt needed to be pushed back.²¹⁵ Accordingly, Sikhs were disliked and resented by the locals, and those who were willing to give them jobs often did so only in honor of their representation in the British army.²¹⁶

Conditions changed in the aftermath of World War II, with increased Sikh emigration out of newly independent India. Canadian immigration policies opened up to allow in more Indian citizens after this period.²¹⁷ To complement the influx of immigrants, the government stressed a policy of “multiculturalism” and recognized the diversity of its citizens.²¹⁸ The Royal Canadian Mounted Police also relaxed its uniform requirements permitting Sikh officers to wear their turbans on the job.²¹⁹ Prior to 9/11, Canadians and their government appeared increasingly willing to accommodate the Sikhs that now live in their midst.²²⁰ For example, there have been Sikh members of parliament, including turbaned Sikhs Gurbax S. Malhi and Navdeep S. Bains, in recent

professions. The same year, farther down the coast in Bellingham, Washington, an “anti-Hindu” riot erupted and angry white sawmill workers fearful for their jobs chased 300 Sikhs out of town.”).

²¹⁴ *See id.* (“The Sikhs eventually won the right to vote in 1947 and the slow integration into the mainstream continued.”).

²¹⁵ RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* 294 (1989).

²¹⁶ BHAGAT SINGH, *CANADIAN SIKHS: THROUGH A CENTURY* 181 (2001).

²¹⁷ NARINDAR SINGH, *CANADIAN SIKHS: HISTORY, RELIGION, AND CULTURE OF SIKHS IN NORTH AMERICA* 73-74 (1994).

²¹⁸ *See generally* Senator Vivienne Poy, *Multiculturalism*, available at http://www.sen.parl.gc.ca/vpoy/english/Special_Interests/multiculturalism.htm. (“In 1971, Canada became the first country in the world to adopt a multiculturalism policy. In 1986 the government passed the Employment Equity Act and in 1988 it passed the Canadian Multiculturalism Act. These documents affirm Canada’s commitment to recognize and respect ethnic and racial diversity.”).

²¹⁹ *See* Pauline Côté & T. Jeremy Gunn, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Canada*, 19 EMORY INT’L L. REV. 685, 735 (2005) (“In . . . *Grant v. Canada* (Attorney General), the federal court upheld a RCMP regulation allowing Sikhs to wear their headcovering, the explicit purpose of which was to help recruit minorities.”).

²²⁰ *See, e.g., Multani c. Marguerite-Bourgeois*, *supra* note 21, at 82 (affirming the right of a Sikh student to wear a kirpan in a Quebec school).

years. Sikhs even have their own commemorative stamp, issued on the 300th birthday of the year when Guru Gobind Singh created the *Khalsa*.²²¹

Sikhs immigrated to the United States as early as 1899, settling mainly in the West “to build railroads, farm, or work in mills and foundries.”²²² Sikh agricultural skills combined with the similarities of the fertile land of California with that of Punjab made the Western region of America a natural home for many Sikhs.²²³ Although there has been a vibrant Sikh community in Central California since the late 19th century, most of the Sikhs currently living around the country arrived after the 1965 immigration laws nullified immigration quotas.²²⁴ “After 1965 in the United States . . . immigration laws were revised to admit Indians in numbers equal to those for people of other countries.”²²⁵ As a result of the change in laws, which favored professionals, Sikhs were among the approximately “hundred thousand engineers, physicians, scientists, professors, teachers, business people and their dependents [who] had entered the United States by 1975.”²²⁶

There are approximately 500,000 Sikhs in the United States today, one third of whom reside in California and New Mexico. Many of them wear turbans and keep long beards as symbols of their faith.²²⁷ Despite the discrimination that Sikhs have faced in the United States, they have prospered in various aspects of American life, including politics and business.²²⁸

²²¹ See SikhTimes.com (image of stamp)

http://www.sikhtimes.com/300_years_of_khalsa_stamp_canada_1999.jpg.

²²² See *Civil Rights Concerns in the Metropolitan Washington, D.C., Area in the Aftermath of the September 11, 2001, Tragedies*, U.S. Commission on Civil Rights 8 (June 2003) [hereinafter Civil Rights Commission Report].

²²³ Lea Terhune, *Sikhs Rule in California's Central Valley*, SPAN 2 (May/June 2005), available at <http://usembassy.state.gov/posts/in1/wwwfspmayjune4.pdf>.

²²⁴ See L. Scott Smith, *From Promised land to Tower of Babel: Religious Pluralism and the Future of the Liberal Experiment in America*, 45 BRANDEIS L.J. 527, 570 (2007); see also Stromer, *supra* note 11, at 739-40, 742-43.

²²⁵ Jensen, *supra* note 90, at 280.

²²⁶ *Id.*

²²⁷ SMART, *Who are the Sikhs*, Sikh Media Watch and Resource Task Force, available at <http://www.sikhmediawatch.org/pubs/smartpub1.htm>.

²²⁸ Civil Rights Commission Report, *supra* note 222 at 8 (quoting Patwant Singh, *The Sikhs* 242 (1992)). See e.g., Stephanie M. Weinstein, *A Needed Image Makeover: Interest Convergence and the United States' War on Terror*, 11 ROGER WILLIAMS U. L. REV. 403, 427 (2006) (“Religious minorities, such as Sikhs, are also experiencing economic gains. Akal Security, owned by the Sikh Dharma community, is one of America’s fastest growing security companies.”).

B. The Global Call for Assimilation after 9/11

The war on terror has not only increased racial violence, harassment, and adverse employment actions against Sikhs with turbans; it has also led to a more abstract questioning of the proper degree to which visible immigrant minority groups should be part of mainstream Western society.²²⁹ Western societies have generally permitted immigrant minority groups to maintain aspects of their identity and heritage.²³⁰ Canada, for example, is famous for advancing this more permissive approach to multiculturalism. Indeed, former Canadian Prime Minister Diefenbaker once said

Canada was not a “melting pot” in which the individuality of each element is destroyed in order to produce a new and totally different element. It is rather a garden into which have been transplanted the hardiest and brightest of flowers from many lands, each retaining in its new environment the best of the qualities for which it was loved and prized in its native land.²³¹

In a multicultural society, certain pockets of a city may have a large concentration of ethnic or religious immigrants.²³² The Little Italy’s or Chinatowns that are embedded

²²⁹ See Helen Elizabeth Hartnell, *Belonging: Citizenship and Migration in the European Union and in Germany*, 24 BERKELEY J. INT’L L. 330, 339 (2006) (“Questions surrounding tolerance, multiculturalism, and the existence of ‘parallel societies’ have returned to the forefront of contemporary debates in Germany, particularly since the eruption of ethnic violence in the neighboring Netherlands in the summer of 2004 and in France in October 2005.”).

²³⁰ See, e.g., Kenneth Lasson, *Religious Liberty in the Military: the First Amendment under “Friendly Fire”*, 9 J.L. & RELIGION 471, 471 (1992) (“most western cultures regard religious liberty as so fundamental that their military establishments routinely develop regulations to accommodate specific religious practices.”); Gidon Sapir, *Religion and State- A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579, 583 (Dec. 1999) (“The vast majority of Western nations accept the view that people should be granted freedom of religion.”).

²³¹ See, e.g., Singh, *supra* note 113, at 208.

²³² See Barry R. Chiswick & Paul W. Miller, *Immigrant Residential and Mobility Patterns*, (in Reed Ueda, *A COMPANION TO AMERICAN IMMIGRATION*, 309 (2006)) (“A common characteristic of immigrants in various destinations and in various time periods is that they tend to be geographically concentrated. Immigrants of a particular origin tend to live in areas where others from the same origin live, rather than disturbing themselves across the regions of the destination in the same proportion as the native-born population. The result of this tendency to settle among others from the country of origin is the formation of immigrant and ethnic concentrations or enclaves.”); *cf.* Dessa Marie Dal

in some countries' major metropolitan areas—with restaurants and grocery stores offering traditional food and dual language business signs—are examples of societies exhibiting permissive multiculturalism.²³³ While minorities and immigrants may live in these concentrated areas, they nonetheless participate in society, by, for example, taking part in political and civic activities or accepting jobs that some consider undesirable.²³⁴

On the other end of the spectrum, perhaps, is France. The French Republic was built on principles of separation of church and state and religious secularism, known in French as *laïcité*.²³⁵ *Laïcité* was at the base of the French Revolution, and has been a basic tenet of French government since the 18th Century.²³⁶ The separation of Church and State was formally declared in 1905, and the idea holds an almost militant sway over the French to this day.²³⁷ Secularism implies not just neutrality, but is itself a government mandated social norm,²³⁸ leaving little space for identities that might clash with one's role as a politically French citizen. France has a long tradition of secularism. As one commentator noted, “[t]he will of the state to avoid knowledge of citizens’ spirituality is . . . a guarantee of liberty for the diverse religious confessions.”²³⁹ As one writer

Porto, *La Piccola Italia Invisible: Washington D.C.’s Invisible Little Italy*, 11 GEO. PUB. POL’Y REV. 15, 16 (2006) (arguing that “an ethnic community can exist without having an ethnic enclave.”).

²³³ See KAREN CHRISTENSEN & DAVID LEVINSON, ENCYCLOPEDIA OF COMMUNITY: FROM THE VILLAGE TO THE VIRTUAL WORLD, 864 (2003) (“Contemporary Italian American neighborhoods are varied but share elements of appearance and traditions such as food preferences that result in the Italian groceries, bakeries, and delicatessens.”).

²³⁴ See MIN ZHOU, CHINATOWN: THE SOCIOECONOMIC POTENTIAL OF AN URBAN ENCLAVE (1992) (using New York's Chinatown as an example of an immigrant enclave that is distinct, though still inextricably linked to broader American society).

²³⁵ See Christine Langenfeld, *Germany: The Teacher Head Scarf Case*, 3 INT’L J. CONST. L. 86, 93 (Jan. 2005) (describing “the principle of laicism (*principe de laïcité*)” as a “core principle of the French Republic, that guarantees the peaceful and equal coexistence of different religions in French society” and which “demands a strict separation between the secular state and religion[.]”).

²³⁶ See *id.* (noting that *laïcité* was “[m]entioned in France’s 1789 Declaration of Human Rights[.]”).

²³⁷ See *id.* (“this principle was legally introduced in 1905 as the expression of a long tradition of separation of church and state and is now enshrined in Article 1 of the French Constitution.”).

²³⁸ Henri Astier, *The Deep Roots of French Secularism*, BBC NEWS ONLINE, December 18, 2003 available at <http://news.bbc.co.uk/1/hi/world/europe/3325285.stm>.

²³⁹ Jacques Robert, *Religious Liberty and French Secularism*, 2003 B. Y. U. L. REV. 637, 643 (2003).

describes it, “[t]he Republic has always recognized individuals, rather than groups: [a] French citizen owes allegiance to the nation, and has no officially sanctioned ethnic or religious identity”²⁴⁰—placing France squarely in the “melting pot” category of integrationists.

With terrorist activity occurring in the United States and throughout Europe, immigrant communities are increasingly coming under attack—there is, as will be described below, an increased call for Western societies to shift to the French side of the assimilation/integration continuum.²⁴¹ More specifically, the pockets that are home to immigrants are no longer charming corners of America or Europe; they are considered by some to be isolated societies that serve as breeding grounds for “homegrown terrorists.”²⁴² Integration, it is argued, prevents a non-Western identity from festering and developing into extremism.²⁴³

There are calls, therefore, for members of these self-segregating immigrant communities to sufficiently blend into mainstream society—to adopt more of a Western identity and to consequently shed some of their cultural ties to their homeland and native beliefs.²⁴⁴ There is a mounting emphasis on the outer, superficial characteristics of citizens as being symbols of loyalty to a particular political regime, as though appearance is almost a proxy for allegiance.²⁴⁵ In short, there is growing discomfort not only with concentrated areas of immigrants, but also with the clothing of immigrants.²⁴⁶

²⁴⁰ *Id.*

²⁴¹ See notes 248-83 and accompanying text, *infra*.

²⁴² See, e.g., Robert Polner, *A neighborhood in a fishbowl: Little Pakistan has lost plenty of residents since 9/11, and many who stayed behind are struggling to adapt*, *Newsday*, Aug. 2, 2005 (discussing the impact of post-9/11 scrutiny on Brooklyn’s Little Pakistan).

²⁴³ See, Muslim Integration A Bar To Extremism, *FORBES*, Oct. 9, 2006, available at http://www.forbes.com/home/business/2006/10/06/muslim-integration-stops-extremism-biz-cx_1009oxford.html.

²⁴⁴ See European Monitoring Centre on Racism and Xenophobia, *Muslims in the European Union: Discrimination and Islamophobia*, (Dec. 18, 2006); see also, Brian Murphy, *EU report: Muslims face ‘Islamophobia’*, *ASSOC. PRESS*, Dec. 18, 2006 (“Muslims feel that acceptance by society is increasingly premised on ‘assimilation’ and the assumption that they should lose their Muslim identity[.]”).

²⁴⁵ See Mark Rice-Oxley, *Taking on the veil: West looks to assimilation: From Britain to Australia, unease grows over the separateness of many of the West’s Muslim communities*, *CHRISTIAN SCI. MONITOR*, Oct. 20, 2006 (noting that, in Australia, “multiculturalism is seen in an increasingly negative light. Prime Minister John Howard, [for example,] has spoken of moving away from ‘zealous multiculturalism’ toward a reassertion of Australia’s *national identity*.”) (emphasis added).

²⁴⁶ See notes 248-83 and accompanying text, *infra*.

Conspicuous articles of faith are manifestations of a “separate” people and are therefore under additional scrutiny.²⁴⁷

Perhaps unsurprisingly, the debate regarding assimilation is most pronounced in France.²⁴⁸ In February 2004, French lawmakers passed a law prohibiting public school students from wearing articles of faith, such as signs or clothes, “that exhibit conspicuously a religious affiliation.”²⁴⁹ The French aimed the law against those religious minorities who are most “visible” amongst them, i.e. those whose appearance itself manifests an alternative “political” identity.²⁵⁰ The purpose of the ban was ostensibly to discourage the growth of Islamic fundamentalism and to promote secularism.²⁵¹ Although passed explicitly to prevent the wearing of headscarves by

²⁴⁷ See Rice-Oxley, *supra* note 245.

²⁴⁸ See U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *International Religious Freedom Report 2005: France*, Nov. 8, 2005 (“The [French] Constitution provides for freedom of religion, and the Government generally respects this right in practice; however, some religious groups remain concerned about legislation passed in 2001 and 2004, which provided for the dissolution of groups under certain circumstances and banned the wearing of conspicuous religious symbols by public school employees and students.”), available at <http://www.state.gov/g/drl/rls/irf/2005/51552.htm>.

²⁴⁹ Law No. 2004-228 of Mar. 15, 2004, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France] 5190, Mar. 17, 2004.

²⁵⁰ Many of the French arguments for the law have been on the grounds that the presence of headscarves and yarmulkes in schools politicizes the school atmosphere and leads to political incidents between students. See Statement by M. Jean-Pierre Raffarin, Prime Minister of France, Feb. 4, 2003, available at http://www.ambafrance-us.org/news/statmnts/2004/raffarin_secularism_030204.asp (noting in a speech entitled, “Bill on the application of the principle of secularity (laïcité) in state schools,” that, “[i]t has to be recognized that certain religious signs, among them the Islamic veil, are now becoming more frequently seen in our schools. They are in fact taking on a political meaning and can no longer be considered simply personal signs of religious affiliation.”); see also *Stasi Commission Report*, <http://www.Assemblee-nationale.fr/12/dossiers/laicite.asp>; The Sikh Coalition, *Chirac Endorsement- English Translation*, Dec. 17, 2003, http://www.sikhcoalition.org/frenchban_chiracspeech.asp; Caroline Wyatt, *French Headscarf Ban Opens Rift*, BBC, Feb. 11, 2004, <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/europe/3478895.stm>.

²⁵¹ See William J. Kole, *French Rue Religious Symbol Ban*, ASSOC. PRESS, Feb. 15, 2004 (describing the ban as “France’s response to what many perceive as a rise in Muslim fundamentalism[.]”); Christopher D. Bebelieu, *The Headscarf as a Symbolic Enemy of the European Court of Human Rights’ Democratic Jurisprudence: Viewing Islam Through a*

young Muslim women, the ban also prohibits Jewish skullcaps, “large” Christian crosses, and the Sikh turban in public schools.²⁵²

French Prime Minister Jean-Pierre Raffarin, commenting on the law, noted, “Today, all the great religions in the history of France have adapted themselves to [the principle of secularism] For the most recently arrived. . . secularism is a chance, the chance to be a religion of France.”²⁵³ Secularism under this view implies not just neutrality, but is itself the “state religion” of sorts.²⁵⁴

The ban on conspicuous articles of faith in public school upset minority groups whose religious identities were challenged.²⁵⁵ They are now required to choose between observing their faith and obtaining an education.²⁵⁶ For example, Sikh boys with turbans

European Legal Prism in light of the Sahin Judgment, 12 COLUM. J. EUR. L. 573 (2006) (commenting on the “simplification of the legal debate through a representation of the headscarf as a symbol of Islamic fundamentalism.”); Stefanie Walterick, *The Prohibition of Muslim Headscarves from French Public School and Controversies Surrounding the Hijab in the Western World*, 20 TEMP. INT’L & COMP. L.J. 251, 254 (2006) (“While the new law reflects France’s particular tradition of laïcité, the law can also be seen as a backlash against France’s growing Muslim minority population.”).

²⁵² See Walterick, *supra* note 251, n. 251 (“Although the new law contains neutral language that prohibits all religious garb, including large Christian crosses, Jewish yarmulkes, and Sikh turbans, the law was enacted with the specific intent to eliminate the Muslim hijab, or headscarf, from French public school classrooms.”).

²⁵³ *Debate Begins in France on Religion in the Schools*, N.Y. TIMES, Feb. 4, 2004, (French Prime Minister Jean-Pierre Raffarin, as quoted in Elaine Sciolino) available at <http://query.nytimes.com/gst/fullpage.html?res=9D0CE2DB153BF937A35751C0A9629C8B63&n=Top/Reference/Times%20Topics/Subjects/C/Church-State%20Relations>.

²⁵⁴ Henri Astier, *The Deep Roots of French Secularism*, BBC NEWS, Dec. 18, 2003, available at <http://news.bbc.co.uk/1/hi/world/europe/3325285.stm>.

²⁵⁵ For example, demonstrations were held in response to the ban. See, e.g., Delfin Vigil, *Worldwide Protests over Ban on Religious Symbols: French Proposal Would Apply to all its Public Schools*, Jan. 18, 2004.

²⁵⁶ In the words of one 17-year-old Sikh student, “I’m 100 percent French, I speak French, I was born here.” He continued, “[b]ut it’s impossible for me to take off my turban. If they force me, I’ll have to drop out, and never be able to do anything except a job that no one else wants.” Elaine Sciolino, *Bobigny Journal; French Sikhs Defend Their Turbans and Find Their Voice*, N.Y. TIMES, Jan. 12, 2004, available at [http://query.nytimes.com/gst/fullpage.html?res=9E05EFDE1530F931A25752C0A9629C8B63&n=Top/Reference/Times%20Topics/Subjects/S/Sikhs%20\(Sect\)](http://query.nytimes.com/gst/fullpage.html?res=9E05EFDE1530F931A25752C0A9629C8B63&n=Top/Reference/Times%20Topics/Subjects/S/Sikhs%20(Sect)).

are uniformly forbidden to enroll in public schools.²⁵⁷ Accordingly, a number of students from these minority communities have been forced to find alternative forms of basic education, such as private or religious schooling, or home-schooling.²⁵⁸ The accepted form of integration, for these individuals who rejected the ostensible call to shed religious attire, was one in which each culture adds to the identity of a nation by being able to express its own diverse characteristics, including, but not limited to, turbans.²⁵⁹ As prominent Sikh scholar I. J. Singh points out, “the only desirable integration for a small minority such as ours lies in a mosaic where our identity is sacrosanct.”²⁶⁰

The Sikh perspective was completely overlooked in the lead up to the French legislation.²⁶¹ When initially faced with Sikh objections after the bill’s passage, one Ministry of Education official replied, “What? There are Sikhs in France? I know nothing about the Sikh problem. Are there many Sikhs in France?”²⁶² This is despite the fact that approximately 5,000 to 7,000 Sikhs live in France,²⁶³ far more than the 1,200 veiled Muslim schoolgirls in the country.²⁶⁴

²⁵⁷ Although the ban officially affects only primary and secondary education (elementary through high school), there have been reports that universities too are refusing to accept Sikh men with turbans. Karamvir Singh, 19 year old French-Sikh and French citizen, was rejected from 5 French universities in October in anticipation of the ban. He was told that they were willing to accept him, if he took off his turban. Press Release, United Sikhs, *Right To Turban Petition*, Jan. 3, 2004 available at <http://www.sikhpride.com/france.htm>.

²⁵⁸ See, e.g., Emma Jane Kirby, *Sikh school sidesteps French ban*, BBC NEWS, Sept. 15, 2007.

²⁵⁹ See Robin Cook, *France need not fear schoolgirls in headscarves*, THE INDEPENDENT (U.K.), Dec. 19, 2003 (arguing that the British form of multiculturalism has “judged that we are more likely to reduce friction and to promote harmony if we respect religious and cultural diversity and tolerate rather than suppress its outward expressions. While France has acted to ban headscarves, we adapted our law to permit Sikhs to wear their turbans when others may be required to wear helmets. . . . Our lives are enriched by the consequent diversity of cultures, heritage and, most popularly, cuisine.”).

²⁶⁰ I. J. SINGH, *SIKHS AND SIKHISM: A VIEW WITH A BIAS* 112 (The Centennial Foundation 1998) (1993).

²⁶¹ *UK Sikhs join ‘headscarf’ protest*, BBC NEWS, Feb. 21, 2004, available at http://news.bbc.co.uk/2/hi/uk_news/3508677.stm.

²⁶² Sciolino, *supra* note 256.

²⁶³ *French Sikhs lambast school ban*, BBC NEWS, Sept. 7, 2004, available at <http://news.bbc.co.uk/2/hi/europe/3635768.stm>.

²⁶⁴ Elizabeth C. Jones, *Muslim girls unveil their fears*, BBC NEWS, Mar. 28, 2005, available at http://news.bbc.co.uk/2/hi/programmes/this_world/4352171.stm.

Despite protests from Sikhs, France's highest administrative body, the Council of State, upheld the ban as it applied to Sikhs.²⁶⁵ According to reports of the ruling, the Council of State concluded that the ban was "justified on the grounds of public security," an apparent allusion to the concern regarding the spread of religious fundamentalism, "and was not a restriction on freedom of faith."²⁶⁶ The Council of State also ruled that a Sikh can wear his turban in drivers' license and passport photos, reasoning on procedural grounds, rather than reasoning respecting the rights of Sikhs with turbans.²⁶⁷ Specifically, the Council stated that the transport minister, not the local interior officials, could establish regulations regarding such conditions or restrictions.²⁶⁸

France's actions have set an example for advancing a largely integrationist agenda in Europe. Belgium imposed a similar ban in 2005, specifically disallowing Sikh turbans in public educational institutions.²⁶⁹ The Netherlands is contemplating "a total ban on the wearing of burqas and other Muslim face veils in public, justifying the move on security grounds."²⁷⁰ Moreover, Germany

has increased its integration efforts regarding immigrants but grapples with sensitive issues such as headscarves. Amid heightened fears that wearing a veil is a symbol of fundamentalist Islam, the headscarf issue on another level also reflects sensitive topics such as the modern secular identities of European states, the compatibility of Islam with largely Christian Europe, the acceptance of immigrants, integration and religious rights.²⁷¹

²⁶⁵ *French Sikhs appeal on turban ban*, BBC NEWS, Mar. 7, 2006, available at <http://news.bbc.co.uk/2/hi/europe/4782420.stm>.

²⁶⁶ *Id.*

²⁶⁷ *See Rediff.com, France rules Sikh turbans legal*, REDIFF.COM, Dec. 5, 2005, available at <http://in.rediff.com/news/2005/dec/05paris.htm>.

²⁶⁸ *Id.*

²⁶⁹ *The Tribune, Belgium bans turban in schools*, THE TRIBUNE, Sept. 5, 2005, available at <http://www.tribuneindia.com/2005/20050905/punjab1.htm#10>.

²⁷⁰ *Alexandra Hudson, Dutch to ban wearing of Muslim burqa in public*, REUTERS, Nov. 17, 2006 available at <http://www.reuters.com/article/topNews/idUSL1720620620061117>.

²⁷¹ *German State Bans Hijab-clad Teachers*, JUDEOSCOPE, June 1, 2006 (noting that the *hijab* "has been the subject of growing debate in several parts of Europe for more than a decade. But it especially intensified following the Sept. 11 terrorist attacks in New York and Washington.").

Accordingly, now half of Germany's states prohibit Muslim schoolteachers from wearing headscarves.²⁷² In addition, a school in Berlin has not allowed "370 pupils. . . to speak in their native tongue" even though "[n]inety percent of the school's students have foreign-born parents . . . and each class features between eight and ten different languages."²⁷³ The school's headmaster explained, "We have introduced this ban to enable our students to take part in German society through speaking and understanding the language properly[.]"²⁷⁴

The row over integration and articles of faith is perhaps most fervent in England, where former Foreign Secretary Jack Straw claimed that Muslim attire that covers women from head-to-toe, exposing only the eyes, hinders communication: "Communication requires that both sides see each other's face You not only hear what people say, but you also see what they mean."²⁷⁵ Moreover, he stated that the Muslim veil "separates people," suggesting that its use contributes to the erosion of British society.²⁷⁶ He added:

Simply breathing the same air as other members of society isn't integration. Britishness is thus an identity available to Anglicans, Catholics, Jews, Muslims, Sikhs, Hindus and those of other religions and none, and a central element of that identity is the principle that everyone has the freedom to practice their faith not as a matter of tolerance but of right.²⁷⁷

To wear a headscarf, therefore, is to refuse to adopt British identity, a decision Straw does not find acceptable. Following Foreign Secretary Straw's foray into the subject, Prime Minister Tony Blair affirmed Straw's view that the veil is a "mark of separation" that makes "people from outside the community feel uncomfortable."²⁷⁸

²⁷² *Id.*

²⁷³ Stefan Nicola, *German school bans foreign languages*, UNITED PRESS INT'L., Jan. 26, 2006, available at <http://www.upi.com/archive/view.php?archive=1&StoryID=20060126-011259-7812r>.

²⁷⁴ *Id.*

²⁷⁵ Fareena Alam, *Beyond the Veil*, NEWSWEEK, Nov. 27, 2006, available at <http://www.msnbc.msn.com/id/15789437/site/newsweek/> (noting also that "British Muslims immediately wondered how Straw's former cabinet colleague, ex-Home Secretary David Blunkett- blind since birth- ever did his job.").

²⁷⁶ *Muslims must feel British—Straw*, BBC NEWS, Nov. 2, 2006, available at http://news.bbc.co.uk/2/hi/uk_news/politics/6110798.stm.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

Moreover, on March 22, 2006, the House of Lords ruled that a Muslim girl's "right to manifest her belief in practice or observance" was not infringed when her high school excluded her for wearing a *jilbab*, or a long shapeless black gown, instead of the school's uniform.²⁷⁹ The lords reasoned, in part, that "there were three schools in the area at which the wearing of the *jilbab* was permitted There is, however, no evidence to show that there was any real difficulty in her attending one or other of these schools[.]"²⁸⁰

To be sure, not all Western nations have responded to the terrorist activity and subsequent concern for the spread of fundamentalist Islam by clamping down on the wearing of articles of faith. For example, in 2005, the Australian government rejected a proposal "to ban Muslim girls from wearing traditional headscarves in state schools."²⁸¹ In discussing why he disliked the proposal, the Prime Minister stated, "If you ban a headscarf you might, for consistency's sake, have to ban a . . . turban,"²⁸² which the Prime Minister apparently was not willing to do. Moreover, an official in opposition to the proposal said, "We're at war with terror, not young girls wearing scarves or (people wearing) crucifixes or skull caps."²⁸³

Canada traditionally has been lenient towards minority groups. Former Prime Minister Pierre Trudeau, for example, instituted a policy of multiculturalism that sought to assist members of all cultural groups to overcome cultural barriers, promote encounters between different groups, and support all of Canada's cultures.²⁸⁴ Canada's commitment to multiculturalism has been hotly debated and opposed since the nation's inception. Opponents to the policy feel that it leads to the erosion of a unified Canadian identity.²⁸⁵

²⁷⁹ *R v. Headteacher and Governors of Denbigh High School*, (2006) UKHL 15, available at <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060322/begum-4.htm>.

²⁸⁰ *Id.*

²⁸¹ Brendan Nicholson, *PM rejects headscarves ban*, THE AGE, Aug. 30, 2005, available at <http://www.theage.com.au/news/national/pm-rejects-headscarves-ban/2005/08/29/1125302511538.html>.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ See A. Wayne MacKay & M. Chantal Richard, *Multiculturalism: Who Needs It?*, 8 EDUC. & L.J. 265, 282 (1998).

²⁸⁵ *Id.* at 270 (pointing out that multiculturalism cannot be blamed for everything, since these groups would be demanding certain rights whether or not an official governmental policy on the issue had been articulated).

Despite the opposition, the government supports visible minorities in their integration into Canadian society.²⁸⁶

After 9/11, the Canadian courts have ruled consistently with this approach. The Supreme Court of Canada concluded that Sikh students can carry *kirpans* to schools.²⁸⁷ The Court specifically held

an absolute prohibition against wearing a kirpan infringes the freedom of religion of the student in question under [section] 2(a) of the Canadian Charter of Rights and Freedoms [hereinafter Canadian Charter]. The infringement cannot be justified under [section] 1 of the Canadian Charter, since it has not been shown that such a prohibition minimally impairs the student's rights.²⁸⁸

Similarly, a postsecondary student in Quebec, Canada, “was told to remove her *hijab* at College Jean-Eudes[.]”²⁸⁹ In response, the Quebec Human Rights Commission ruled that “religious schools admitting students from more than one faith must make reasonable efforts to accommodate all their pupils’ beliefs”—irrespective of whether they are public or private institutions.²⁹⁰

A 2006 shooting spree in French-speaking Montreal, Canada by an immigrant Sikh challenged Canada’s multicultural ideal. On September 16, 2006, *Globe and Mail* columnist Jan Wong argued that the young man killed because of an alienation from Quebec’s francophone society, which explains not only this rampage, but also others that occurred in Quebec’s recent past.²⁹¹ The *Montreal Gazette* rejected Wong’s argument in clear terms:

The foolishness of her deduction was confirmed by the lack of evidence to support it. In none of the cases . . . was there even the slightest tangible

²⁸⁶ See M. Neil Browne & Michael D. Meuti, *Individualism and the Market Determination of Women’s Wages in the United States, Canada, and Hong Kong*, 21 LOY. L.A. INT’L & COMP. L.J. 355, 383-386 (July, 1999); Jason R. Wiener, Note, *Neighbors up North: Nunavut’s Incorporation in Canada as a Model for Multicultural Democracy*, 28 SUFFOLK TRANSNAT’L L. REV. 267, 297-98 (2005).

²⁸⁷ *Multani v. Comm’n Scolaire Marguerite-Bourgeoys*, *supra* note 21.

²⁸⁸ *Id.*

²⁸⁹ *Private schools can reject hijab*, MONTREAL GAZETTE, Oct. 5, 2005, at A5.

²⁹⁰ *Id.*

²⁹¹ Jan Wong, *Get under the desk*, GLOBE AND MAIL, Sept. 16, 2006, at A8.

hint that their actions were spurred by alienation from mainstream Quebec society. . . . In each case the ethnicity factor was purely incidental.²⁹²

C. The State of the Multicultural Union

In the United States, “as in other industrialized democracies, we are seeing the ‘return of assimilation.’”²⁹³ In Detroit, Michigan, home to a sizable Muslim population, a Muslim woman’s case was dismissed after she refused to remove her veil.²⁹⁴ The judge, Paul Parah, explained that he needed to see the woman’s face in order to assess her truthfulness²⁹⁵, an argument similar to the one made by Britain’s Jack Straw, who claimed that the Muslim veil hindered effective communication.

A court in Florida upheld a state law requiring an individual’s full face to be shown on his or her driver’s license photo.²⁹⁶ A Muslim woman who wanted to wear her veil for her license photo, sued, arguing in the main that the state law infringed upon her First Amendment right to free exercise of religion.²⁹⁷ In ruling against the Muslim woman, the court wrote:

We recognized the tension created as a result of choosing between following the dictates of one’s religion and the mandates of secular law However, as long as the laws are neutral and generally applicable to the citizenry, they must be obeyed.[Moreover, the law] did not compel [her] to engage in conduct that her religion forbids—her religion does not forbid all photographs.²⁹⁸

²⁹² Hubert Bauch, *Jan Wong was misguided, maybe. But why the fuss?* MONTREAL GAZETTE, Oct. 1, 2006, at A15.

²⁹³ See Yoshino, *supra* note 131.

²⁹⁴ Zachary Gorchow, *Veil costs her claim in court*, DETROIT FREE PRESS, Oct. 22, 2006, at 1B.

²⁹⁵ *Id.* (noting that the judge in question stated that, “[m]y job in the courtroom is to make a determination as to the veracity of somebody’s claim Part of that, you need to identify the witness and you need to look at the witness and watch how they testify.”).

²⁹⁶ *Florida appeals court won’t allow veil in driver’s license photo*, ASSOC. PRESS, Sept. 7, 2005, available at <http://www.firstamendmentcenter.org/%5Cnews.aspx?id=15748>.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

On October 24, 2006, in one of the leading newspapers in the world, *The Washington Post*, a columnist argued that Muslim women in America should not wear a full-faced veil in public because “it [is] considered rude, in a Western country, to hide one’s face.”²⁹⁹ While what is considered “rude” is inherently subjective (and thus may be based on bias, unfounded stereotypes, or class distinctions), the columnist nevertheless expressed the underlying notion that Western society is uncomfortable with certain articles of faith and that it is incumbent, therefore, on religious minorities to shed this attire rather than continue insulting the host majority—a line of thinking again consistent with recent statements made by British leadership.³⁰⁰

The editors of *The Washington Post*, one day later, struck a different tone. Responding to the European fixation and discomfort with the Muslim veil, the editors noted:

It’s hard to believe that veils are the biggest obstacle to communication between British politicians and the country’s Muslims; and it’s even harder to imagine Mr. Straw raising similar objections about Sikh turbans or Orthodox Jewish dress. True, the Labor Party MP was reflecting—or maybe pandering to—the concern of many in Britain about the self-segregation of some Muslims. But veils . . . are not the cause of that segregation, much less of terrorism. Attacks on Muslim custom by public officials are more likely to reinforce than to ease the community’s alienation.³⁰¹

As noted in the previous section, Sikh Americans have struggled with the legal system to uphold their religious rights.³⁰² What if Congress banned the wearing of conspicuous articles of faith, including Sikh turbans, in public schools? The Supreme Court has never ruled on such a question. While the legal remedies, particularly constitutional protections, available to Sikhs if legislation similar to that passed in France

²⁹⁹ Anne Applebaum, *Veiled Insult*, WASH. POST, Oct. 24, 2006, A19, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/10/23/AR2006102300976.html?nav=rss_opinion/columns.

³⁰⁰ See Amna Saadat, *Jack Straw and “Unveiling” Britain*, THE GLOBALIST, Oct. 13, 2006 (“Britain’s former foreign secretary Jack Straw . . . recently argued that the traditional veil worn by Muslim women is a visible statement of their separation from society. . . . [T]his implies that the multicultural experiment in Britain has failed—and the blame has been candidly laid at the feet of Muslims.”).

³⁰¹ Editorial, *Europe’s Muslims*, WASH. POST, Oct 25, 2006, at A16, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/24/AR2006102401148.html>.

³⁰² See Section II. G., *supra* (concluding that “the availability of legal remedies for Sikhs in various areas, including verbal harassment and most employment discrimination cases, appears limited.”).

was enacted in the United States are unclear, there is reason for optimism following recent Supreme Court pronouncements.

The First Amendment of the United States Constitution provides that “Congress shall make no law . . . prohibiting the free exercise [of religion].”³⁰³ The Free Exercise Clause has been interpreted to generally mean that, “the government is prohibited from interfering with or attempting to regulate any citizen’s religious beliefs, from coercing a citizen to affirm beliefs repugnant to his or her religion or conscience, and from directly penalizing or discriminating against a citizen for holding beliefs contrary to those held by anyone else.”³⁰⁴

In the 1963 case of *Sherbert v. Verner*³⁰⁵, the Court identified “strict scrutiny” as being the appropriate standard by which to examine a Free Exercise claim.³⁰⁶ Accordingly, for the government to prevail in a Free Exercise claim, it would have to prove that the law is supported by a “compelling state interest” and that alternative forms of regulation that are less restrictive of the Free Exercise right are unavailable.³⁰⁷ It would therefore seem that Sikhs, who wear their turban as an expression of their religious identity, generally enjoy the highest level of protection under the First Amendment for the manifestation of their faith.³⁰⁸

After *Sherbert*, however, “the Court has started to move toward a narrower conception” of the free exercise clause.³⁰⁹ In 1990, in *Employment Division, Department of Human Resources of Oregon v. Smith*,³¹⁰ the Court upheld a state statute that prohibited the use of peyote for religious purposes by Native Americans, ruling in part that the law was generally applicable, neutral on its face, and evidenced no intent to discriminate against particular religious groups.³¹¹ Although the Court did not expressly overturn *Sherbert*, it limited *Sherbert*’s ruling to cases regarding the denial of unemployment compensation: “even if *Sherbert* possessed any vitality beyond the

³⁰³ U.S. CONST. amend. I.

³⁰⁴ Donald Kramer, 16A AM. JUR. 2D, CONSTITUTIONAL LAW §424 (1998).

³⁰⁵ 374 U.S. 398 (1963).

³⁰⁶ *Id.* at 403.

³⁰⁷ *Id.*

³⁰⁸ See Kathleen Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397 (2003) (providing an in-depth discussion of interpretations of the Free Exercise and Establishment Clauses).

³⁰⁹ See Walterick, *supra* note 251, at 264.

³¹⁰ 494 U.S. 872 (1990).

³¹¹ *Id.* at 878-82.

unemployment compensation field . . . we would not apply it to require exemptions from a generally applicable law.”³¹²

As one legal commentator noted, the *Employment Division* decision leaves “religious conduct little protection from the effect of a law that is neutral and generally applicable.”³¹³ Since a ban on conspicuous articles of faith in public schools would not intentionally target Sikhs, and Sikhs would thus be seeking an exemption from generally applicable policy, one would suspect that any First Amendment right that they could claim to allow them to wear the turban may fail under the *Employment Division* standard.³¹⁴

A state court case in which the appeal was dismissed by the United States Supreme Court, *Cooper v. Eugene School District*,³¹⁵ highlights the limitations of religious dress statutes enacted for public employees when applied specifically to Sikhs. Janet Cooper was a public school teacher, who converted to Sikhism and began to wear a white turban and white clothes while teaching her sixth and eighth grade classes.³¹⁶ She was disciplined and her teaching license revoked as a result of a state statute that prohibited teachers in public schools from wearing any religious dress while engaged in the performance of duties as a teacher.³¹⁷ The Supreme Court of Oregon held that the religious dress statute did not violate, among other things, the First Amendment, stating “If such a law is to be valid, it must be justified by a determination that religious dress necessarily contravenes the wearer’s role or function at the time and place beyond any realistic means of accommodation.”³¹⁸ The court maintained that by excluding teachers whose dress is a constant visual reminder of their religious commitment, the law seeks to respect the right of free exercise of the *students*.³¹⁹ Although the court admitted that Cooper had not been trying to proselytize to her students, it felt that the repetitive and

³¹² Amarsect S. Bhachu, *A Shield for Swords*, 34 AM. CRIM. L. REV. 197, 204 (1996).

³¹³ Thomas Berg, *The New Attacks on Religious Freedom Legislation, And Why They Are Wrong*, 21 CARADOZO L. REV. 415, 415 (1999).

³¹⁴ As we will see in our discussion, *infra*, this standard has made it more difficult for Sikhs to successfully assert First Amendment claims.

³¹⁵ 723 P.2d 298 (Or. 1986), (*appeal dismissed*, 480 U.S. 942 (1987)).

³¹⁶ *Id.* at 312.

³¹⁷ *Id.* at 300.

³¹⁸ *Id.* at 307.

³¹⁹ *Id.* at 311.

constant nature of her appearance could have more of a proselytizing effect than she imagined, and therefore her Sikh regalia should not be permitted in schools.³²⁰

To those that doubt the weight of a State Supreme Court decision such as *Cooper*, it should be noted that the U.S. Court of Appeals for the Third Circuit relied on *Cooper* in 1990, following the Supreme Court's dismissal of the appeal, in reaching its analysis of a case brought by Muslim public school teacher under Title VII.³²¹ Accordingly, as one commentator noted, prevailing case law "suggest[s] that states can prohibit public school teachers from wearing religious garb in the interest of preserving religious neutrality without violating the free exercise rights of teachers as long as the prohibition applies equally to all religious dress and does not target or burden one religious group over others."³²² It may not be surprising, then, that some argue that a ban on conspicuous articles of faith in public schools is "not completely unthinkable in the United States," and that the religious rights of a turbaned Sikh public student after 9/11 are "tentative" at best.³²³

In 1993, however, Congress passed the Religious Freedom Restoration Act (RFRA), which was designed to reinstate the "compelling interest" *Sherbert* test for free exercise claims.³²⁴ The RFRA states that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability,"³²⁵ unless the government demonstrated that the burden is "in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."³²⁶ In 1997, the U.S. Supreme Court, in *City of*

³²⁰ *Id.* at 312-13. Interestingly, Cooper's decision to manifest her faith at school could have been recognized by the court as an educational benefit, namely of teaching her students about the diversity of the society they inhabited and, as such, teaching them to appreciate and respect those who may not appear to be the same as themselves. The court, however, assumed that visible religious minorities that are active in their communities are in essence imposing their faith on others by simply adopting the symbols of their own personal beliefs.

³²¹ U.S. v. Bd. of Educ. for Sch. Dist. of Philadelphia, 911 F.2d 882, 884 (3d Cir. 1990).

³²² Walterick, *supra* note 251, at 267.

³²³ *Id.* at 269. See also Elliot Taubman, *Headscarves, Skullcaps and Crosses: Does Banning Religious Symbols in Public Schools Deny Human Rights?* 53-Jun R.I. B.J. 9, 34 (2005) ("Even with a compelling interest test, when applied in a public school context, with at least equality of treatment of all religions, then Justice Scalia may say that taking the entire balance into account, there is a legitimate basis for a ban on obvious religious symbolism.").

³²⁴ *City of Boerne v. Flores*, 521 U.S. 507, 515 (1999).

³²⁵ 42 U.S.C.A. §2000bb-1(a).

³²⁶ 42 U.S.C.A. §2000bb-1(b).

Boerne v. Flores, declared that RFRA was unconstitutional as applied to individual states.³²⁷ However, it held that it is still applicable to First Amendment violations alleged against the federal government.³²⁸

In 2006, the Supreme Court may have marked an expansion of free exercise protection. In *Gonzales v. O Centro Espirita Beneficente Unido Do Vegetal*,³²⁹ a church that uses hallucinogenic tea in religious ceremonies claimed the enforcement of the Controlled Substances Act infringed on the church's free exercise rights. The Court unanimously sided with the church, noting that the government must "demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program," and rejecting the government's "slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law," namely, "If I make an exception for you, I'll have to make one for everybody, so no exceptions."³³⁰ The Court indicated that a case-by-case approach to evaluating exemptions to generally applicable religious laws was appropriate,³³¹ as was the case in the 2005 decision of *Cutter v. Wilkinson*.³³² Acknowledging that "there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA," the Court did not find that the Controlled Substances Act was immune from exemptions "given the longstanding exemption from the Controlled Substances Act for religious use of peyote, and the fact that the very reason Congress enacted RFRA was to respond to a decision denying a claimed right to sacramental use of a controlled substance."³³³

To the extent that the government may pass a ban on conspicuous articles of faith to promote secularity or a national identity, such an interest would likely not pass under *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*,³³⁴ which soundly

³²⁷ *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

³²⁸ See *Kikumura v. Hurley*, 242 F.3d 950, 959 (10th Cir. 2001) (noting that "the separation of powers concerns expressed in *Flores* do not render RFRA unconstitutional as applied to the federal government" and that "when a portion of a statute is declared unconstitutional the constitutional portions of the statute are presumed severable").

³²⁹ *Gonzales v. O Centro Espirita Beneficente Unido Do Vegetal*, 546 U.S. 418 (2006).

³³⁰ *Id.* at 421.

³³¹ *Id.* at 436.

³³² *Cutter v. Wilkinson*, 544 U.S. 709, 724-26 (2005).

³³³ *Gonzales*, 546 U.S. at 436.

³³⁴ *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

rejected a state interest in ensuring homogeneity of American children and achieving assimilation in public schools. The Court stated, “The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children[.]”³³⁵ To the extent that a government interest may be based on fear of fundamental Islam, that interest may be construed as discriminatory animus or perpetuating stereotypes, which would not please the Court either.³³⁶

Assuming that the federal government can proffer a compelling state interest, which is highly unlikely, Sikhs may be able to obtain an exemption from a ban on conspicuous articles of faith without having to run into the “slippery slope” concern of the government in part because of the fact that Sikhs have been permitted to wear turbans in the United States since their arrival. An interesting situation arises, however, if Sikhs are presented with the option of covering their hair, for example, with a school hat as opposed to the Sikh’s turban. In this instance, a Sikh’s case against the ban may not be as strong because he is still given an option to cover his *kes*.

D. Conclusion

In sum, the debate regarding whether conspicuous articles of faith are permissible in Western society due to security and/or more pragmatic concerns, such as enabling accurate identification and facilitating effective communication, is primarily a European phenomenon focused on Muslims and Muslim religious clothing. From this analysis it is evident that a number of sophisticated countries are engaged in this debate, and that serious infringements of the ability of Muslims, Sikhs, and others to wear insignias of their faith have occurred in the years following the 9/11 terrorist attacks.

The United States, as a host for hundreds of thousands of Muslims and Sikhs, is necessarily involved in the enterprise of determining where on the integration-passive multiculturalism spectrum its society lies—and consequently determining the extent to which the Sikh turban will be tolerated or challenged not only as a symbol of terrorism, but as an assault on American identity and solidarity. From the Sikh perspective, the legal framework available to Sikhs is still emerging, though recent developments support the contention that this framework may adequately protect Sikhs if Congress were to pass a ban on conspicuous articles of faith in public schools, as the French did in 2004.

³³⁵ *Id.* at 535.

³³⁶ *See Larson v. Valente*, 456 U.S. 228, 252-54 (1982).

IV. Conclusion

As noted at the outset, this Article aims to draw attention to the state of the Sikh turban through an analysis of how the turban has transformed from an article of religious devotion to a cue for violence and object of marginalization. Indeed, in various contexts and settings, Sikh-Americans have been subject to an unfortunate backlash in which their distinct appearance has been used as a proxy for the identity of a terrorist or terrorist-sympathizer. Broader efforts to achieve integration by eliminating conspicuous articles of faith from the public sphere have also challenged the Sikh identity on indirect grounds.

In this Article, we have observed that the American legal system is unlikely to protect Sikhs from the most common form of discrimination—verbal insults such as “bin Laden,” “raghead,” and “terrorist”—though the nation’s laws may protect Sikhs from a more drastic and wide-reaching policy of prohibiting Sikhs from wearing turbans in public schools. Sikhs, however, must continue to utilize non-legal methods to ensure that discriminatory activities do not occur in the first place, primarily by educating individuals who are unfamiliar with the Sikh turban or who are likely to associate it with terrorism. Because redress through the courts takes significant time and is not certain to produce desired results, a preventative approach—where Sikhs educate others of their identity and commitment to fundamental American principles—is likely to be the more effective means by which Sikhs are seen as a distinguishable, but still a welcomed, part of the American race.³³⁷

³³⁷ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment) (“In the eyes of government, we are just one race here. It is American.”).

Through non-legal avenues, such as awareness and outreach efforts,³³⁸ the discrimination experienced by this minority community, one that espouses basic American values of equality and civic involvement, will hopefully cease and will not reemerge with increased fervor if there is another act of terrorism on American soil. As Circuit Judge Frank Easterbrook noted in 2003, “[T]hose who keep heads covered as a sign of respect for (or obedience to) a power higher than the state should not be . . . threatened with penalties.”³³⁹ Nor should they be threatened with marginalization, physical injury, or even death because of a superficial resemblance with our real shared enemy.

³³⁸ In the aftermath of the 9/11 attacks, Sikhs were forced to organize to respond effectively to threats to the Sikh community and in particular to the Sikh appearance. Subsequent efforts led to significant achievements in the ability of Sikhs to maintain their religious identity and to defend their rights when and if that identity is challenged. For example, Sikh civil rights organizations have kept the Sikh community informed of its rights and published guidelines explaining how to respond to racial profiling or harassment in airports or other public space, *see, e.g.*, Sikh Media Watch and Resource Task Force, *SMART Advisory Memorandum on the issue of Illegal Turban Searches at Airports*, available at http://www.sikhmediawatch.org/pubs/SMART_Advisory_Memo_on_Turban_Searches_at_Airports.PDF; Press Release, *EEOC Provides Answers About Workplace Rights of Muslims, Arabs, South Asians, and Sikhs*, Equal Employment Opportunity Commission, May 15, 2002, available at <http://www.eeoc.gov/press/5-15-02.html> (the EEOC published guidelines for employers and employees specifically detailing the workplace rights of Muslims, Arabs, and Sikhs); and the federal government published posters informing security officials, particularly airport screeners, of how a Sikh turban and *kirpan* may be identified; *see also* DOJ Poster, *Sikh Americans and the Kirpan*, U.S. Department of Homeland Security (2006), available at http://www.saldef.org/anm/articlefiles/1604-SALDEF_DHS_Kirpan_Poster.jpg; *see also* USA Patriot Act §1002(a)(5) (These groups also lobbied for a congressional resolution recognizing that Sikhs have a “distinct religious and ethnic identity” that has become the target of attacks.). *See, e.g. id.* at §1002(b)(2), available at <http://www.sikhcoalition.org/Legislative.asp> (The resolution notes that Congress “condemns bigotry and any acts of violence or discrimination against any Americans, including Sikh-Americans.”).

³³⁹ *See James, supra* note 21, at 958.