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The Headscarf as Threat: A Comparison of German and U.S. Legal Discourses

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The Headscarf as Threat: A Comparison of German and U.S. Legal Discourses

Robert A. Kahn*

ABSTRACT

This Article compares how U.S. and German judges conceptualize the harm the headscarf poses to society. The examples are the 2003 Ludin case, in which the German Federal Constitutional Court held that the civil service, in the absence of state regulation, could not reject a woman from a civil service teaching position solely because she would not remove her headscarf while teaching, and State v. Freeman, in which a Florida court held that a woman could not pose for a driver's license photograph wearing a garment (the niqab) that covered all of her face except her eyes. While judges and legal critics in both countries tended to see the headscarf as threatening, German society was more likely to see it as a symbol of political Islam, while U.S. society viewed it as a tool used by potential terrorists.

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I. SYMBOLIC THREATS

Societies ask courts to repudiate symbols they find threatening. For example, German courts repudiate Holocaust denial; courts in the U.S. South repudiate cross burnings and Ku Klux Klan masks.¹ The symbols, however, do not have meaning by themselves. Instead, it is up to the court to attribute meaning to them. In this process, the courts often privilege the concerns of the specific society within which they operate. Consequently, courts in different settings—or different societies—will treat the same symbol differently. To explore this point, this Article will look at two cases involving the Muslim headscarf—one from Germany, the other from the United States. The Article has two goals. First, it will show that although legal discourses surrounding both cases treated the headscarf as a threat, the threats themselves were presented differently. Second, somewhat more speculatively, the Article will trace the reasons for the different perceptions of the threat to differences in how Germans and those in the United States view religion in general and Islam in particular.

The German case began in 1998, when a series of German courts debated whether school authorities in Stuttgart could deny a civil service position as an elementary school teacher to Fereshta Ludin, an Afghani woman, solely because she refused to take off her headscarf while teaching.² Ultimately, in 2003 the Federal Constitutional Court ruled in Ludin's favor but only because the state of Baden-Württemberg did not specifically ban headscarves,³ a failing the state legislature speedily remedied the following year.⁴ Central to the legal debate was whether wearing a headscarf was consistent with the civil service official's duty of neutrality and moderation.⁵ In this context, the headscarf raised two fears: (i) religious conversion (the court repeatedly expressed the concern that the sight of an

1. Robert A. Kahn, *Cross-Burning, Holocaust Denial and the Development of Hate Speech Law in the United States and Germany*, 83 U. DET. MERCY L. REV. 163.

2. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sep. 24, 2003, 108 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 282, (283–84) (F.R.G.) [hereinafter *Ludin*] (describing background of the case).

3. *Id.* at 282–83, 313. Three dissenting judges would have upheld the school authority's right to refuse to hire Ms. Ludin. *Id.* at 314, 325 (dissenting). Dissents are relatively rare for the Federal Constitutional Court. According to Donald Kommers, the court decides over 90% of its cases by a unanimous vote. See DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 26 (1997).

4. Tony Czuczka, *German State Bans Headscarves in Schools*, ASSOCIATED PRESS, Apr. 2, 2004, available at <http://pewforum.org/news/display.php?NewsID=3224>.

5. *Ludin*, *supra* note 2, at 292–93 (tracing the duty of neutrality to the Constitution); *id.* at 314, 316, 320–23 (dissenting).

authority figure wearing a headscarf would lead the pupils to adopt Ms. Ludin's views, even though she repeatedly claimed no interest in this and was even willing to tell her students that the headscarf was a "fashion accessory";⁶ and (ii) political Islam (the courts repeatedly drew a connection between Ms. Ludin's headscarf and Islamist movements, especially those that sought to repress women).⁷

The case of Sultaana Freeman raised different threats.⁸ In early 2001, Ms. Freeman, a U.S.-born convert to Islam, posed for a Florida state driver's license photograph wearing a *niqab*, a garment that covered her entire face, save for her eyes.⁹ In late 2001, however, she was ordered to surrender her license and submit to a photo without her *niqab*.¹⁰ In response, she sued under Florida's Religious Freedom Restoration Act (RFRA). In June 2003—after a three-day trial that aired on Court TV—Judge Janet Thorpe rejected her request.¹¹ To get around precedent extending similar rights to isolationist Christian sects in the 1970s and 1980s,¹² Judge Thorpe observed that times had changed since then, noting both the increase in technology and the new threat of "foreign and domestic" terrorism.¹³ Although she assured her readers that Ms. Freeman "most likely" was not a terrorist, Judge Thorpe did not allow the headscarf to get off as easily.¹⁴ Repeatedly in her ruling, she identified the headscarf as the means for accomplishing terrorist acts and discussed the idea that an "insincere" terrorist could threaten national security by falsely posing as a religious Muslim at the Department of Motor Vehicles (DMV).¹⁵ Some of the media commentators observing the trial harped on this point, relying on reports that Ms. Freeman's husband had been caught with phony identification cards.¹⁶

Part II of this Article will examine the Ludin case in detail. First, it will show how Germans view the threat posed by Political Islam through the lens of their totalitarian past. It will then discuss the view that Germany is a Christian country, one with a widely shared opposition to a rigid separation of church and state. Then it

6. *Id.* at 325–26 (dissenting).

7. *See id.* at 330–34 (dissenting) (asserting that the headscarf, at least in part, carries a heavy symbolic meaning as a symbol of political Islamism).

8. *Freeman v. Florida*, No. 2002-CA-2828, 2003 WL 21338619 (Fla. Cir. Ct. Jun. 6, 2003).

9. *Id.* at *1.

10. *Id.*

11. *Id.* at *3, *8.

12. The key cases were *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984); *Dennis v. Charnes*, 646 F. Supp. 158 (D. Colo. 1986); *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*, 380 N.E.2d 1225 (Ind. 1978).

13. *Freeman*, 2003 WL 21338619, at *7.

14. *Id.*

15. *Id.*

16. *Woman Fighting Over Photo Was Previously Arrested*, WFTV.com, May 27, 2003, <http://www.wftv.com/news/2230721/detail.html>.

will show how these ideas manifested themselves both in the decision of the majority and in the opinions of the dissenters of the Federal Constitutional Court as well as in the reaction to the case by political leaders, activists, and other commentators.

Part III turns to the Freeman case. It will show how the trial judge, Janet Thorpe, made rulings on Ms. Freeman's sincerity and burden that go against earlier precedents involving Christian religious groups. It will also show how Judge Thorpe's decision to craft her opinion in this way reflected a societal fear of terrorism in the wake of September 11th and, to a lesser extent, a suspicion of U.S. citizens who convert to Islam. Finally, Part III will show how Judge Thorpe's rulings on sincerity and burden were not necessary, because she could have reached the same conclusion by holding that states had a compelling interest in banning women from posing for driver's license photos while wearing the *niqab*.

The Conclusion notes the strong differences between the two cases. While the Germans viewed Fereshta Ludin's headscarf as a symbol of totalitarianism, those in the United States saw Sultaana Freeman as a potential terrorist. These differences suggest that Western constitutional democracies, when confronting the challenge posed by Islamic migrants, will fall back on their own fears and traditions.

II. GERMANY: THE HEADSCARF AS POLITICAL THREAT

A. *Migration, Feminism, and Political Islam*

Fereshta Ludin's headscarf touched off a number of fears for Germans about Muslims and their impact on German society. There are about 3.2 million Muslims in Germany, which is just under 4% of the population.¹⁷ Although many of the Muslims are from Turkey, there are also large numbers of Muslims from other countries, especially Iran, as a result of employment as guest workers during the *Wirtschaftswunder*.¹⁸ Moreover, while it is customary to think of Turkey as a secular Muslim country, not all Turks in Germany are secular. Instead, many are religious.¹⁹ In fact, the Milli Görüs, a

17. MSNBC.com, Islam in Europe Interactive, <http://www.msnbc.msn.com/id/12757599> (click on Germany) (last visited Feb. 18, 2007).

18. *Id.*

19. Cf. JØRGEN NIELSEN, MUSLIMS IN WESTERN EUROPE 26 (1992) (indicating that some Turks are Christian and describing the existence of only a minority who would call themselves secular).

Muslim fundamentalist group that attracts primarily Turks, has a large presence in Germany.²⁰

Before the mid-1990s, the German image of Turks was one of victims. Extreme right-wing circles added new slurs against the Turks to new ones about the Jews.²¹ Song lyrics also featured the Turk as target.²² This animosity resonated deeply at a time when Europeans were expressing doubt about the political stability of a reunified Germany.²³ The 1992 firebombing at Mölln, which led to the deaths of four Turkish guest workers, helped spark a nationwide response to the problem of anti-foreigner violence²⁴ (a problem that unfortunately still persists as followers of the World Cup will notice).²⁵ As the 1990s persisted, the image of the Turk—and by extension, the Muslim—began to improve. With the election of Gerhard Schröder as Chancellor in 1998 and the opening of German citizenship to Turks, the image of immigrants began to change,²⁶ even though many Turks still cluster around menial jobs.²⁷

Meanwhile, Germans began to pay more attention to Islam. Within a decade, the Turkish immigrants went from being the next

20. *Id.* at 28, 30–32. The Milli Görüs are active in Germany, Austria, and the Netherlands. *Id.* at 28, 63, 92. They were originally connected with the Turkish Welfare Party, which challenged Turkey's secular government during the late 1990s, before being banned. Jytte Klausen, *From Left to Right: Religion and the Political Integration of German Muslims*, in UNDERSTANDING THE "GOD GAP": RELIGION, POLITICS, AND POLICY IN THE UNITED STATES AND GERMANY 26, 28 (Johns Hopkins Univ., Am. Inst. for Contemporary German Studies ed., 2005) [hereinafter UNDERSTANDING THE "GOD GAP"]. The German Office for the Protection of the Constitution describes the group as "anti-democratic and anti-Western," with the result that ordinary German citizens are afraid to associate with members of the Milli Görüs. *Id.* at 30.

21. See David A. Jacobs, Note, *The Ban of Neo-Nazi Music: Germany Takes on the Neo-Nazis*, 34 HARV. INT'L L.J. 563, 572–73 (1993).

22. *Id.* at 572–73.

23. See STEVEN OZMENT, *A MIGHTY FORTRESS: A NEW HISTORY OF THE GERMAN PEOPLE* 312–13 (2004) (describing the variety of political divisions in Germany). The title of Ozment's introduction—"Looking for the Good Germans"—gives further currency to these fears. *Id.* at 1.

24. Jacobs, *supra* note 21, at 573, 576. Likewise, the cover of Watson's book, which displays a skinhead standing next to an imperial German flag, conveys the fear Germans inspired at the time. ALAN WATSON, *THE GERMANS: WHO ARE THEY NOW?* (1994).

25. Jere Longman, *Surge in Racist Mood Raises Concerns on Eve of World Cup*, N.Y. TIMES, June 4, 2006, at 1.1. This continued threat of anti-foreigner violence undercuts Germany's effort to present itself as a tolerant nation. For example, an immigrant group called the Africa Council warned non-white visitors to the World Cup to stay away from the small towns in Brandenburg, the eastern German state that surrounds Berlin. *Id.*

26. See Pascale Fournier & Gökçe Yurdakul, *Unveiling Distribution: Muslim Women with Headscarves in France and Germany*, in MIGRATION, CITIZENSHIP, ETHNOS, 167, 175–76 (Y. Michal Bodemann & Gökçe Yurdakul eds., 2006) (describing the adoption of a new citizenship law intended to accelerate immigrant incorporation).

27. *Id.* at 174–75.

victims of the Nazis to becoming potential Nazis themselves, especially in the context of the civil service.²⁸ Despite the failure of German public officials to stop Hitler's rise to power in the 1920s and 1930s, the public officials portrayed civil service as a bulwark against the political parties that would corrupt the state;²⁹ in 1972, the Radicals Decree sought to purge political extremists from the civil service.³⁰ Some of the participants in the headscarf debate saw Fereshta Ludin as a potential extremist.

The fears about political Islam were not limited to totalitarian civil servants. Political Islam and the headscarf were also seen as oppressing women.³¹ The outrages committed against women in Afghanistan and Algeria in the name of political Islam are well known.³² In Germany, many see political Islam as a symbol of gender oppression.³³ Like their French counterparts, German feminists suspected that most women who wore the headscarf did not do so by

28. See GERARD BRAUNTHAL, *POLITICAL LOYALTY & PUBLIC SERVICE IN WEST GERMANY: THE 1972 DECREE AGAINST RADICALS AND ITS CONSEQUENCES* 9–10 (1990).

29. See *id.* at 3–10. The German model of the politically neutral civil servant goes back at least to the nineteenth century. The lack of political will to fight the Nazis only increased the importance of a politically neutral civil service. It also led to a determination to purge extremists and totalitarians of all kinds. *Id.* Sometimes this had odd results, such as when the Germans targeted Scientologists for governmental observation on the theory that they are a totalitarian cult, or when they targeted the Jehovah's Witnesses as totalitarian solely because their members do not vote in elections. See Michael Browne, Note, *Should Germany Stop Worrying and Love the Octopus? Freedom of Religion and the Church of Scientology in Germany and the United States*, 9 *IND. INT'L & COMP. L. REV.* 155, 194–95, 196, 199 (1998) (describing the government's wariness of Scientologists as a cult exercising psychological control over its members, and the government's nationwide surveillance of them in response); Edward J. Eberle, *Free Exercise of Religion in Germany and the United States*, 78 *TUL. L. REV.* 1023, 1031 (2004) (describing the denial of official privileges to Jehovah's Witnesses because its members are "not allowed to vote or participate in democratic processes").

30. See BRAUNTHAL, *supra* note 28, at 22–40 (describing the content and effects of the 1972 Decree).

31. Stefanie Walterick, *The Prohibition of Muslim Headscarves from the French Public Schools and Controversies Surrounding the Hijab in the Western World*, 20 *TEMP. INT'L & COMP. L.J.* 251, 274 (2006) (describing the headscarf as a symbol of Islam's oppression of Muslim women).

32. For an overview of how Muslim fundamentalists view women, see generally JOHANNES J.G. JANSEN, *THE DUAL NATURE OF ISLAMIC FUNDAMENTALISM* 138–57 (1997).

33. See Walterick, *supra* note 31, at 274 (describing Germans' view of the headscarf as symbolic of women's oppression). In the debate over the passage of a headscarf ban in the Baden-Württemberg legislature, education minister Annette Schavan (Christian Democratic Union (CDU) party) explicitly linked fundamentalist Islam with inferior treatment of women. See Goethe-Institut Lille, *Das Kreuz mit dem Kopftuch*, Mar. 10, 2004, http://www.qantara.de/webcom/show_article.php/_c-548/_nr-14/_p-1/i.html?PHPSESSID=5. Likewise, she called the headscarf "part of the history of women's suppression." Czuczka, *supra* note 4.

their own free will.³⁴ Consequently, they tended to downplay the possibility that women wear the headscarf as a form of self-expression and that some forms of Islamist activism provide women opportunities to express themselves in a politically modern way.³⁵

While German feminists' disapproval of political Islam and the headscarf was genuine, other groups latched onto the gender oppression argument to add muster to their criticism of political Islam as totalitarian.³⁶ This was true especially of those who wanted to ban the headscarf. At the same time, these groups allowed the crucifix (both on school walls and as a piece of clothing), despite the history of the Catholic Church denying equal opportunity to women—a history that in Germany extended not just to the priesthood, but also to positions in theology schools.³⁷

B. Germany's Christian Heritage

If the debate of Fereshta Ludin's headscarf turned into an exercise of comparative guilt by association in which accusations of totalitarianism and patriarchy competed with accusations of anti-foreigner racism,³⁸ one factor muddied the waters: religion.³⁹ As

34. See *infra* notes 102–04 and accompanying text. For an overview of the recent controversy in France over a law banning the wearing of headscarves by public school students, see Steven G. Gey, *Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools*, Address at the Ninth Annual Frankel Lecture (2005), in 42 HOUS. L. REV. 1, 6–18 (2005).

35. See generally MODERNIZING ISLAM: RELIGION IN THE PUBLIC SPHERE IN EUROPE AND THE MIDDLE EAST (John L. Esposito & François Burgat eds., 2003) [hereinafter MODERNIZING ISLAM]. The gist of this edited volume is that while the content of political Islam may be reactionary, the processes it entails—for example, increasing social organization and political participation for women—are quite similar to those associated with modernism in the West. This point comes across especially strongly in Connie Carøe Christiansen's essay, which shows how Moroccan women viewed Islamism as an opportunity for personal and political development. See Connie Carøe Christiansen, *Women's Islamic Activism: Between Self-Practices and Social Reform Efforts*, in MODERNIZING ISLAM, *supra*, at 145, 145–66.

36. See Ludin, *supra* note 2, at 331–34 (dissenting) (describing the public's negative reaction due to the headscarf's heavy symbolic meaning of women's subordination to men). The French experience shows that headscarves can make for strange bedfellows. For example, in 1990 Jean-Marie Le Pen and secularists (usually seen as left-wing) joined forces to oppose students wearing headscarves in school. See JONATHAN MARCUS, *THE NATIONAL FRONT AND FRENCH POLITICS: THE RESISTIBLE RISE OF JEAN-MARIE LE PEN* 87–90 (1995).

37. FREIHEITSRECHT FÜR CHRISTEN? WARUM DIE KIRCHE EIN GRUNDGESETZ BRAUCHT 89–95 (Norbert Greinacher & Inge Jens eds., 1980) (detailing the experience of a female Catholic theologian who was unable to gain work in her field of study).

38. For an example of the latter, see Justus Leicht, *Bundesverfassungsgericht ermöglicht Kopftuch-Verbot für islamische Lehrerinnen*, Oct. 3, 2003, available at http://www.wsws.org/de/2003/okt2003/ludi-o03_prn.html. Leicht notes that five years earlier, members of the right-wing Republikaner Party had proposed a headscarf ban. *Id.*

convenient as it might have been for German opponents of the headscarf to look across the Rhine to the French ban on headscarves, they rarely did so. This was because the French model of strict separation between church and state was an even greater threat than the headscarves.⁴⁰

Although the Basic Law forbids the establishment of a state religion,⁴¹ German courts and lawmakers have had little difficulty referring explicitly to Germany's Christian heritage. This can be seen in decisions of the Federal Constitutional Court⁴² and in the constitutions of the federal states (*Länder*).⁴³ It also reflects a set of institutional structures. German visas require the holder to identify himself as belonging to either the Catholic or Evangelical (Protestant) Church.⁴⁴ These churches are supported through a system of church taxation.⁴⁵ The state also provides for religious instruction in schools.⁴⁶

The roots of these practices go back to the Protestant Reformation. On the eve of the Reformation, Germany was divided into small principalities.⁴⁷ The Reformation unleashed a century of political and religious ferment and great suffering as Protestants and Catholics took turns persecuting each other.⁴⁸ Out of this conflict emerged the idea that each principality should determine the

39. Germany is roughly 30% Catholic, 30% Protestant, and 30% non-religious. Rolf Schieder, *Church, State, and Nation in Germany*, in UNDERSTANDING THE "GOD GAP," *supra* note 20, at 11.

40. See Alena Kuhelj, *Religious Freedom in European Democracies*, 20 TUL. EUR. & CIV. L.F. 1, 16–17 (2005) (describing France as the most secular state, with strict adherence to its constitutional principle of *laïcité*, the separation of church and state). The majority in the *Ludin* case explicitly rejected the "strict separation of church and state." *Ludin*, *supra* note 2, at 299–300. In a law review article on the *Ludin* case, Axel Frhr. Von Campenhausen, who specializes on church and state relations at Göttingen, rejected the French approach of "radical laicism." He noted, "Germany . . . in comparison to other European countries has long been a model country in the field of religious freedom." Axel Frhr. Von Campenhausen, *The German Headscarf Debate*, 2004 BYU L. REV. 665, 697–98 (2004).

41. Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, art. 137 (F.R.G.), *translation available at* <http://www.iuscomp.org/gla/statutes/GG.htm>.

42. For example, the court in the *School Prayer Case*, 52 BVerfGE 223 (1979), summarized in KOMMERS, *supra* note 3, at 461–67, which upheld voluntary prayer in state schools, noted the "recognition of Christianity as a formative cultural and educational factor which has developed in Western history." *Id.* at 463.

43. Both the constitutions of Baden-Württemberg and Bavaria refer explicitly to "reverence for God" as something worthy of instilling in its citizens. BADEN-WÜRTTEMBERG CONST. art. 12(1) (F.R.G.); BAVARIAN CONST. art. 131 (F.R.G.).

44. Eberle, *supra* note 29, at 1031–32.

45. *Id.*

46. KOMMERS, *supra* note 3, at 471.

47. IAN ROBERTS, *TEACH YOURSELF: WORLD CULTURES: GERMANY* 9 (2000).

48. OZMENT, *supra* note 23, at 104–05, 121. More generally, the Reformation made "the organization of religion . . . the responsibility of political leaders." Schieder, *supra* note 39, at 14.

religious practice for its own subjects.⁴⁹ This principle, further enshrined in the 1648 Peace of Westphalia (which ended the Thirty Years War), sought to dampen the religious conflict between Catholics and Protestants by linking religious boundaries with state boundaries.⁵⁰ (This use of the state to dampen religious conflict stands in contrast to the United States, where the state's involvement in religion is seen to enhance religious conflict.)

This Westphalian practice continued after 1871 when the German states, including Baden and Württemberg, were incorporated into the German Reich.⁵¹ The entry of the Catholic south into unified Germany did, however, lead to religious conflict as the Protestant majority enacted a series of laws aimed at restricting the role of Catholicism in public life.⁵² These laws—supported by a coalition of Bismarckian conservatives and Protestant liberals—became known as the *Kulturkampf* (clash of cultures).⁵³ The conflict petered out in the late 1870s, as Bismarck turned his attention to other foes, including the Socialists.⁵⁴ However, the Catholic Center Party, which served as a counterweight to Bismarck, remained a part of the German political scene during the Second Reich and Weimar periods (1871-1933).⁵⁵

While the Nazis dissolved the principalities and created a unitary Germany, the post-war creators of the Federal Republic opted for a federal system.⁵⁶ As a result, each *Länder* had control over its own education system.⁵⁷ Moreover, in light of the Nazi experience, which was seen as the result of Godless materialism, Germany adopted an explicitly religious identity.⁵⁸ This identity stood for

49. This was established at the Peace of Augsburg (1555). See HAGEN SCHULZE, *GERMANY: A NEW HISTORY* 55–56 (1998).

50. See *id.* at 64–67. This perspective influences how ordinary people understand “church.” While people in the United States typically think of their neighborhood church, Germans think of the Vatican. See Scheider, *supra* note 39, at 13.

51. Significantly, the principalities entered the German Reich as sovereign states because they kept their local control over education. This lessened the need for either French-style separation or U.S.-style limitation on the power of the federal government to establish religion. This did not, however, prevent the central state from trying to assert a Protestant identity immediately after unification.

52. See MICHAEL STÜRMER, *THE GERMAN EMPIRE: A SHORT HISTORY* 29–30 (2002).

53. *Id.* at 31.

54. *Id.* at 32.

55. See Rudolf Morsey, *The Center Party Between the Fronts*, in *THE PATH TO DICTATORSHIP, 1918–1933*, at 68, 86–88 (1966) (describing the dissolution of the Center Party in 1933).

56. ARNOLD J. HEIDENHEIMER, *THE GOVERNMENTS OF GERMANY* 215 (4th ed. 1975).

57. *Id.* at 216.

58. JOHANNES RUX, *Kleiderordnung, Gesetzesvorbehalt und Gemeinschaftschule*, *ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK* 8 (2004).

religion in general, even though it was framed in terms of Christianity,⁵⁹ and also reflected the Federal Republic's status as a frontline state in the Cold War.⁶⁰ This ecumenical trend was likewise evident in the rise of the Christian Democratic Union, a grouping that included Protestants and Catholics.⁶¹

These trends have had some important implications for understanding the Ludin case. For instance, in describing the duties of schools, the constitution of Baden-Württemberg makes reference to "reverence for God" and "the spirit of Christian afterlife."⁶² Likewise, the Baden-Württemberg constitution authorizes establishment of Christian community schools.⁶³ The strength of the connection between Christianity and the public schools was shown by the public outcry in 1997, when the German Constitutional Court held that the state of Bavaria could not require individual schools to hang crucifixes on the walls of classrooms.⁶⁴

Support for the crucifix united both sides of the headscarf debate. Supporters of Fereshta Ludin saw it as a reason not to ban the headscarf,⁶⁵ opponents sought to distinguish the two symbols by arguing that the headscarf, unlike the crucifix, was not a religious symbol but a political symbol.⁶⁶ Very few participants in the debate supported a sharp secularist position that would ban both headscarves and crucifixes.

C. Protecting Germany's Children from Islam

How, then, did the Federal Constitutional Court address these concerns? A majority of five judges ruled that the Stuttgart school

59. *Id.*

60. See generally PATRICK MAJOR, *THE DEATH OF THE KPD: COMMUNISM AND ANTI-COMMUNISM IN WEST GERMANY, 1945-1956* (1997).

61. See Reference.com, Christian Democratic Union (Germany), [http://www.reference.com/browse/wiki/Christian_Democratic_Union_\(Germany\)](http://www.reference.com/browse/wiki/Christian_Democratic_Union_(Germany)) (last visited Feb. 18, 2007) (discussing the party's inclusion of both Roman Catholics and Protestants).

62. BADEN-WÜRTTEMBERG CONST. art. 12(1) (F.R.G.).

63. *Id.* at art. 15(1). For a history of schooling in Baden-Württemberg, see RUX, *supra* note 58, at 5-9. Rux describes how before 1933 small towns in Württemberg would often have three one-room school houses—a Catholic one, a Protestant one, and a non-denominational Christian one. *Id.* at 7 n.33.

64. 93 BVerfGE 1 (1995), summarized in KOMMERS, *supra* note 3, at 472-86. The decision led to calls for political officials to refuse to enforce the ruling. See KOMMERS, *supra* note 3, at 482-83. For an overview, see generally Howard Caygill & Alan Scott, *The Basic Law Versus the Basic Norm?: The Case of the Bavarian Crucifix Order*, in CONSTITUTIONALISM IN TRANSFORMATION: EUROPEAN AND THEORETICAL PERSPECTIVES 93 (Richard Bellamy & Dario Castiglione eds., 1996). In actual fact, very few crosses were removed. Leicht, *supra* note 38.

65. The former Federal President, Johannes Rau, made this point but was heavily criticized for it. See *infra* notes 106-09 and accompanying text.

66. This was especially true of the dissenters. See *Ludin*, *supra* note 2, at 332-33 (dissenting).

authority was wrong to reject Ms. Ludin's job application.⁶⁷ The court ruled that the legislature, not the civil service, was best suited to balance Ms. Ludin's rights to freedom of expression against the rights of parents and students to a neutral classroom environment.⁶⁸ This ruling was limited, and it left an easy fix for the legislature.⁶⁹ Many supporters of headscarves attacked the decision as cowardly.⁷⁰ However, it did offer greater freedom than the dissent, which would have held that Ms. Ludin, as a public servant on duty, had no right to express her religious beliefs in public.⁷¹ The dissenters also faulted the majority for not giving Baden-Württemberg warning of its ruling so that it could pass a law before Ms. Ludin entered the civil service.⁷²

For its frame of reference, the majority relied on the administrative courts, which had twice rejected Ms. Ludin's claims,⁷³ largely on the basis that a headscarf worn by an authority figure would influence students.⁷⁴ The majority took this concern very seriously—so seriously that the court invited a series of scholars to testify as to how a teacher wearing a headscarf would impact students.⁷⁵ In ruling that Baden-Württemberg required a law to ban headscarves, the court noted that none of the experts had found that exposing children to a headscarf would lead to religious conversion or conflicts with other teachers.⁷⁶ Moreover, Ms. Ludin said that, if necessary, she would be willing to wear the scarf as a shawl and only put it on when an adult entered the room.⁷⁷

67. *Ludin*, *supra* note 2, at 283.

68. *Id.* at 302–03.

69. *Id.* at 311–13.

70. Martin Klingst, *Feige Richter*, DIE ZEIT (F.R.G.), Sept. 25, 2003, <http://www.zeit.de/2003/40/Kopftuch>.

71. *Ludin*, *supra* note 2, at 315, 319, 325 (dissenting).

72. *Id.* at 338 (dissenting). Moreover, as a civil servant, Ms. Ludin would have lifetime tenure. In the end, Ms. Ludin decided to teach in an Islamic school instead. *Muslim Teacher Wins Headscarf Fight*, BBC NEWS, Sept. 24, 2003, <http://news.bbc.co.uk/2/hi/europe/3134824.stm>.

73. After the Stuttgart school district rejected her claim, Ms. Ludin sued in the administrative courts of Stuttgart (2000), and later Baden Württemberg (2001), and ultimately the Federal Administrative Court in Berlin (2002). She lost all three times. *See Ludin*, *supra* note 2, at 283, 285–86, 288.

74. *Id.* at 285–89. The court rejected Ms. Ludin's argument that schools should not be a refuge from religious pluralism. *See id.* at 290.

75. *Id.* at 303–04. These experts included Dr. E. Kirchof, who represented the Stuttgart school district; Director of Psychology, Ms. Leinenbrach (also of the Stuttgart school district), who testified about the influence of religious symbols on children; and Dr. Karakasgolu of Essen, who testified about the reasons Muslim women choose to wear the headscarf. *Id.*

76. *Id.* at 306. The *Ludin* dissent raised another concern: that Ms. Ludin's headscarf would make her Muslim students who do not veil feel uncomfortable. *Id.* at 329 (dissenting).

77. *Wieviel fremde religion verträgt unsere Gesellschaft—Erste Stellungnahmen aus der Verhandlung*, AGENCE FRANCE-PRESSE, June 2, 2003, available at

Despite this, the concern about influence and conversion played a major rhetorical role in the majority's ruling. Like the dissent, the majority asserted that missionary activity in the classroom violated the teacher's duty as a civil servant to act with neutrality and moderation.⁷⁸ It also violated the "negative rights" of the school children and their parents to be free from religious influences they do not share, especially in the classroom from where there is no escape.⁷⁹ The dissent went a step further and asserted that students would be too intimidated by the teacher to raise any complaints.⁸⁰ Moreover, the dissent also disagreed with how the majority treated the threat of "influence."⁸¹ The dissent felt that if the authority has to wait for proof of unwanted influence on the students, it will be too late.⁸² On the broader issue of the power of the headscarf to mold children's minds (in a way the crucifix does not), the dissent and majority were in near total agreement.⁸³

The two sides did, however, take sharply different views of the headscarf itself. The court described the many different motives a Muslim woman could have for wearing a headscarf, such as preserving her identity in the Diaspora, indicating her unavailability for sex, and expressing her religious orientation.⁸⁴ Then the court concluded that the headscarf could not be reduced to a symbol of the oppression of women.⁸⁵ The court conceded that Ms. Ludin could plausibly wear the headscarf out of religious grounds and that the wearing of the headscarf could foster the integration of Muslim women.⁸⁶ However, after this extended discussion, the court announced that the subjective intent of the wearer is irrelevant; what matters is the headscarf's objective impact on the observer.⁸⁷ This led the court back to a discussion of the danger the headscarf posed for students and parents.⁸⁸

The dissenters took a much darker view of the headscarf, which they view as a symbol both of political Islam and of the subordination of women.⁸⁹ Because many people in the Muslim world share this

<http://www.123recht.de/article.asp?a=5612&p=2>. Wearing a shawl in front of the children would still accord with her Islamic beliefs; however, adult visitors would have to knock before entering the classroom. *Id.*

78. *Ludin*, *supra* note 2, at 303.

79. *Id.* at 301. However, the court would leave it to the state legislature to work out the specific details.

80. *See id.* at 329 (dissenting).

81. *Id.* at 328–29 (dissenting).

82. *Id.* at 329 (dissenting).

83. *Id.* at 330 (dissenting).

84. *Id.* at 304.

85. *Id.* at 305.

86. *Id.*

87. *Id.*

88. *Id.* at 306–07.

89. *Id.* at 333 (dissenting).

view, it did not matter that some women wear the headscarf as a sign of liberation.⁹⁰ Furthermore, the covering of the head is not compatible with the “German constitutional understanding” of human worth, which the dissent summarized with the pithy phrase: “The free person shows their face.”⁹¹

In addition, the dissent put great emphasis on the fact that the German schoolteacher was a civil servant.⁹² She was not seeking protection from the state; rather, she was seeking to become part of it.⁹³ In that role, she had no standing to demand religious rights.⁹⁴ Every right she took would be at the expense of the clients she served.⁹⁵ Not only that, every conflict that resulted from Ms. Ludin’s wearing of her headscarf would make the civil service less efficient.⁹⁶ In addition, it would hinder the role of the civil service, which is to provide a counterweight to the political branches.⁹⁷ The crucifix on classroom walls, on the other hand, was a general symbol of a tolerant culture drawn from Jewish and Christian sources.⁹⁸

The majority, by contrast, struggled with the crucifix analogy. On the one hand, it tried a few times to distinguish the headscarf from the crucifix.⁹⁹ On the other hand, in its instructions to the Baden-Württemberg legislature, it did not say whether anti-headscarf laws also had to ban crucifixes.¹⁰⁰ Instead, it held that the *Länder* must fall back on its traditions when making new laws.¹⁰¹ The discussion makes it unclear whether the dissent was referring to the types of symbols allowed or the general habit of allowing religious symbols.¹⁰² Moreover, the court’s warning that the new laws should not discriminate on the basis of religion has not stopped several *Länder* from passing laws that explicitly outlaw the headscarf.¹⁰³

90. *Id.*

91. *Id.* at 334 (dissenting). The reference to a “German” constitutional understanding comes immediately after the dissent’s expression of sympathy for Muslims opposed to the headscarf. *Id.* at 333 (dissenting).

92. *Id.* at 315 (dissenting).

93. *Id.* at 315, 316 (dissenting).

94. *Id.* at 315, 325 (dissenting).

95. *Id.* at 316 (dissenting).

96. *Id.* at 316, 325 (dissenting).

97. *Id.* at 315–16, 319, 322–24 (dissenting).

98. *Id.* at 330 (dissenting). Later, during its discussion of potential anti-headscarf legislation, the dissent asked whether the ban must include a small personal cross worn as jewelry that carried no significant message and therefore was unlikely to lead to a conflict of worldviews. *Id.* at 337 (dissenting).

99. *Id.* at 304–05. The majority asserted that the headscarf, unlike the crucifix, does not have a meaning independent of its wearer. *Id.* at 304. The court then related how the headscarf can be seen as a symbol of political Islam. *Id.*

100. *Id.* at 302–03, 309–12. The dissent attacked the majority on this point. *Id.* at 338 (dissenting).

101. *Id.* at 302–03, 309–12.

102. RUX, *supra* note 58, at 11.

103. *See infra* notes 110–11 and accompanying text.

D. *The Utility of Political Islam as a Threat*

The political, legal, and scholarly reaction to the Ludin case largely followed the themes laid out above. Most participants stressed Germany's religious heritage.¹⁰⁴ Former Federal President Johannes Rau¹⁰⁵ and Bavarian President Edmund Stoiber supported this position,¹⁰⁶ while former Chancellor Gerhard Schröder opposed it.¹⁰⁷ Schröder stated that Germany was a secular country while stressing Germany's Judeo-Christian roots.¹⁰⁸ Despite these differing opinions, most political parties joined together in supporting headscarf bans.¹⁰⁹ Moreover, the bans occurred not only in the Catholic south (Bavaria and Baden-Württemberg), but also in less religiously conservative parts of Germany such as Berlin, Bremen, Lower Saxony, Hesse and, most recently, Nordrhein-Westfalen.¹¹⁰

Nor has the headscarf ruling placed the crucifix in doubt. In fact, when Johannes Rau in his 2004 New Year's address argued rhetorically that if the state wanted to ban the headscarf it would also have to ban the crucifix, he unleashed an outcry of criticism accusing him of secularism.¹¹¹ In response, Stoiber accused Rau of "cast[ing] doubt on our national identity distinguished by the

104. See Johannes Rau, Federal President, Germany, Address at the Rede zum 275 Geburtstag von Gottfried Ephraim Lessing [275th Birthday of Gotthold Ephraim Lessing] (Jan. 22, 2004) (F.R.G.), transcript available at http://www.zeit.de/reden/gesellschaft/200405_rau_religion?page=all; Regierungserklärung des Bayerischen Ministerpräsidenten Dr. Edmund Stoiber [Government Statement of the Bavarian Prime Minister Dr. Edmund Stoiber] (Nov. 6, 2003) (F.R.G.), available at http://www.bayern.de/Presse-Info/Regierungserklaerungen/RegErklaerung_031106.html [hereinafter Government Statement].

105. Rau referred to Germany as a Christian-believing land for several centuries. Rau, *supra* note 104.

106. Government Statement, *supra* note 104.

107. Interview by BILD AM SONNTAG with Gerhard Schröder, Chancellor of Germany (Dec. 21, 2003) (F.R.G.), transcript available at <http://archiv.bundesregierung.de/bpaexport/interview/16/580116/multi.htm>.

108. *Id.* Schröder also traced Germany's roots in "Greco-Roman philosophy" and the Enlightenment. *Id.*

109. See *Berlin City Bans Headscarves*, DEUTSCHE PRESS-AGENTUR, Mar. 31, 2004, available at http://www.expatica.com/actual/article.asp?channel_id=2&story_id=6177.

110. Interestingly, the Berlin law banned crucifixes, yarmulkes, and turbans as well as headscarves. This may be because of the role of the Party of Democratic Socialism (PDS) in the Berlin government. See *Berlin City Bans Headscarves*, *supra* note 109.

111. In opposing the headscarf bans, Rau said, "if the headscarf is an expression of religious faith, a dress with missionary character, then that could apply equally to a monk's habit or a crucifix." *Hijab Causes a Major Row in Germany*, ALJAZEERA.NET, Jan. 2, 2004, <http://english.aljazeera.net/News/archive/archive?ArchiveId=399>. Later, in response to criticism, Rau explained that a headscarf ban would be a first step toward a lay state, in which all symbols were banned, and that the future of Christianity in Germany depended on the strength of beliefs of the Christians themselves. Rau, *supra* note 104.

Christian religion.”¹¹² However, Pope Benedict XVI, then Cardinal Ratzinger, responded by supporting both the crucifix and the headscarf.¹¹³ This shows that Rau’s strategy may have borne some fruit.

The main debate focused on the role of the headscarf with regard to political Islam and the repression of women.¹¹⁴ Women’s groups came down on both sides of the issue. The Women’s Initiative Against the Headscarf Ban gathered the signatures of a number of prominent women from the political and artistic world, including former Bundestag President Rita Süsmuth and Kohl-era Justice Minister Sabine Leutheusser-Schnarrenberger, to sign a petition opposing the bans.¹¹⁵ Meanwhile, a group of Turkish-speaking women opposed to the headscarf, led by Lale Akgün, a Turkish member representing the Social Democrats in the federal parliament, wrote an open letter to the Minister of Immigrant Affairs, Marie Luise Beck. The letter stressed that religion should be a private affair and that those who, “under the influence of the Islamists,” choose to wear the headscarf in public life should not be eligible for the civil service.¹¹⁶

Supporters of the headscarf argued, as did the majority of the court, that many women wore the headscarf as a sign of self-empowerment.¹¹⁷ Some also played the anti-racism card by accusing those opposed to the headscarf of being unwilling to accept that a veiled woman could be anything other than a cleaning woman or fruit vendor.¹¹⁸ On the other side stood those, such as Margot Käßmann, the Bishop of the Evangelical Church in Hannover, who argued that

112. *Hijab Causes a Major Row in Germany*, *supra* note 111.

113. *Id.* The Pope, while finding Rau’s religious beliefs “strange,” said, “I will not forbid any Muslim to wear a headscarf, but still less do we accept a ban on wearing the crucifix.” *Id.*

114. See Lale Akgün, *Against the Relativism of the Headscarf Debate!*, QANTARA.DE, May 3, 2004, http://www.qantara.de/webcom/show_article.php/_c-549/_nr-3/i.html; Goethe-Institut Lille, *supra* note 33.; *Headscarf Issue Rears its Head Again*, DEUTSCHE WELLE, Dec. 2, 2003, <http://www.dw-world.de/dw/article/0,2144,1047227,00.html>.

115. Goethe-Institut Lille, *supra* note 33. They emphasized their position with the slogan: “The decisive thing is not what’s on the head, but what’s in it.” *Headscarf Issue Rears its Head Again*, *supra* note 114.

116. Akgün, *supra* note 114.

117. The Woman’s Initiative made this point. *Headscarf Issue Rears its Head Again*, *supra* note 114. Fereshtha Ludin herself made the same point when she argued that even a headscarf-wearing woman can have secular thoughts. *Wieviele fremde Religionen trägt unsere Gesellschaft—Erste Stellungnahmen aus der Verhandlung*, *supra* note 77.

118. Jochen Bauer, KONFLIKTSTUFF KOPFTUCH [CAUSE FOR CONFLICT HEAD CLOTH] (F.R.G.), available at <http://www.verlagruhr.de/archiv/kopftuch.html> (last visited Feb. 18, 2007). Martin Klingst, writing in DIE ZEIT, made a similar point. See Klingst, *supra* note 70. He claimed that headscarf-wearing women are not shuttered, repressed creatures but are, instead, modern women who work in a wide variety of fields, including as computer experts, insurance agents, and, when they are qualified, teachers. *Id.*

the headscarf represented a step back from gender equality, which is something for which women had long fought.¹¹⁹ She also accused Ms. Ludin of letting herself be used by the Islamists, who sought to establish an Islamic legal order, and criticized her efforts at compromise by wearing her veil as a shawl, because those efforts would only create “a climate of fear.”¹²⁰ Finally, Käßmann criticized the headscarf itself as incompatible with a “liberal Islam” that accepted the separation of church and state and equality for women.¹²¹ Likewise, Lela Akgün viewed the *hijab* in political terms: “The Islamic headscarf symbolizes Islam no more than Mao’s uniform represents Chinese civilization.”¹²²

The concern about the headscarf is quite similar to the rationale behind German laws that ban the Nazi salute and swastika. These symbols are criminalized not because they risk offending anyone, but because they express support for right-wing extremists who commit violent acts against foreigners.¹²³ This is why German authorities chose not to prosecute an African soccer star that responded to racist taunts by a crowd in a soccer game in Eastern Germany with the Hitler salute; the prosecutors recognized that he was using the salute to criticize racism, not to support it.¹²⁴ For this very reason, German feminists who opposed the headscarf rejected the label of racist.¹²⁵ According to Alice Schwarzer: “The true racists are those who, in the name of a falsely understood tolerance, [promote] the ghettoization of Muslims in Germany.”¹²⁶

Mainstream politicians also expressed concern about political Islam. At one extreme stood those, such as Helmut Schmidt, Chancellor of Germany from 1974 to 1983, who called political Islam Germany’s number one problem and expressed regret that Germany permitted the guest workers to arrive.¹²⁷ Likewise, Stoiber suggested that those migrants who came to Germany had to accept that it was a

119. Interview by Tagesschau.de with Margot Kahmann, Bishop of the Evangelical-Lutheran Church in Hannover (Sept. 24, 2003) (F.R.G.), *transcript available at* <http://www.tagesschau.de/aktuell/meldungen/0,1185,OID2356748,00.html>.

120. *Id.*

121. *Id.*

122. Akgün, *supra* note 114.

123. The same logic applies to laws against Holocaust denial. See ROBERT A. KAHN, *HOLOCAUST DENIAL AND THE LAW: A COMPARATIVE STUDY* 15, 149–51 (2004).

124. Jere Longman, *Surge in Racist Mood*, N.Y. TIMES, June 4, 2006, at 1.1.

125. *Kopftuch-Streit beschäftigt das Verfassungsgericht*, AGENCE FRANCE-PRESSE, June 2, 2003, *available at* <http://www.123recht.net/article.asp?a=5612&p=1>.

126. *Id.*

127. Klausen, *supra* note 20, at 26. Sometimes concerns about migration, however, trumped the headscarf. For example, Bavaria required four Iranian asylum-seekers to pose for identity cards wearing the headscarf. The authorities reasoned that, if the four women lost their asylum claim, it would be easier to deport them to Iran. Bauer, *supra* note 118.

Christian, Western country and follow its rules.¹²⁸ Even some supporters of the headscarf took this position, but they made two “tactical” arguments: (i) excluding people like Fereshta Ludin from the civil service risked aiding Islamists by further isolating religious-minded Muslims from the larger community;¹²⁹ and (ii) there were better issues for fighting the battle for women’s rights, such as forced marriages¹³⁰ and honor killings.

Overall, however, political Islam—whatever the actual danger it poses—is very well suited as a symbolic threat. As a “totalitarian ideology,” it fits in nicely with a state that was born out of the ashes of one such ideology (Nazism) and spent most of its formative years fighting another (Communism).¹³¹ It also allows Germans to express uneasiness about the rising political salience of German Muslims and the fact that Germany is now a “country of immigration,” without being labeled as racist. Interestingly, the term “political Islam” expresses the idea that Muslims have politics.

The fears of a multicultural Germany also express themselves in other aspects of the debate. The dissenters’ reference to an explicitly German constitutional understanding breaks with a taboo Germans had in the post-Holocaust era of identifying themselves as German.¹³² Furthermore, both the dissent and majority expressed concern that the school children would be exposed to a foreign (*Fremde*) religion.¹³³ This view, however, excludes Muslims from the classroom (and the political community), which is a somewhat contradictory position for

128. Government Statement, *supra* note 104. Stoiber argued that the headscarf both “documents” and “propagates” foreign values. *Id.*

129. According to supporters of the Women’s Initiative, a ban on headscarves would play into the hands of the fundamentalists by isolating Muslim women from the rest of the society. Goethe-Institut Lille, *supra* note 33.

130. See, e.g., Klingst, *supra* note 70. Former President Rau made the same point but cautioned that people who come to Germany must learn the language. See Rau, *supra* note 104.

131. The role of anti-Communism in German identity was particularly strong in the 1940s and 1950s as German exiles from the east settled in West Germany. The 1990s saw a revival of anti-Communist ideology as Germans worked to come to terms with the East German past. See DAVID F. PATTON, COLDWAR POLITICS IN POSTWAR GERMANY 20–21, 51–57, 69–70, 149–51 (1999).

132. Ms. Ludin touched directly on these taboos when, in a speech in Frankfurt am Main two months after the ruling, she told an audience that she felt excluded and discriminated against. She then compared herself to Jews “just before the Holocaust.” The audience responded negatively, and she immediately apologized. Oliver Havlat, *Ludin fühlt sich “wie kurz vor dem Holocaust,”* DIE TAGESZEITUNG, Nov. 24, 2003, available at <http://www.taz.de/pt/2003/11/24/a0062.1/text>. Her apology did not, however, satisfy the local CDU politicians, who wanted to explore the possibility of prosecuting her for denying the Holocaust. *Wachsweiche Entschuldigung,* DIE TAGESZEITUNG, Nov. 27, 2003, available at <http://www.taz.de/pt/2003/11/27/a0038.1/text>.

133. See *Ludin*, *supra* note 2, at 306; *id.* at 325–26 (dissenting).

the dissent, given its reliance on non-headscarf wearing Muslim students as likely victims of Ms. Ludin's headscarf.

To sum up, the German headscarf debate has focused on fears rooted in German history, which include concerns about totalitarianism, secularism, women's rights, and migration. These fears are encapsulated in political Islam, an ideological "other" against which the state can define itself. A similar process took place in the United States, but there, the Muslim "other" took a different form.

III. UNITED STATES: HEADSCARF AS A TOOL FOR TERRORISTS

A. *The Limits of Religious Sincerity*

Sultaana Freeman's request to be photographed for a driver's license wearing a headscarf showing only her eyes touched off concerns about security in a post-9/11 age. Whether one watched the trial on Court TV or heard the talking heads on the Chris Matthews or Geraldo Rivera shows, the message was clear that *Freeman* was about the limits a society must place on religious freedom during times of crisis.¹³⁴ Justice Jackson, dissenting in *Terminello v. Chicago* at the start of the Cold War, warned that overly doctrinaire court rulings would "convert the constitutional bill of rights into a suicide pact."¹³⁵ But a funny thing happened on the way to the suicide pact: Judge Thorpe ruled against Freeman, mentioning 9/11 but explicitly basing her decision on another ground¹³⁶—the same ground that the Circuit Court of Appeals used to affirm Judge Thorpe's denial—namely, that Freeman had not shown how the license requirement burdened her.¹³⁷ This, in turn, rested on a series of doubts—doubts about Freeman's religious sincerity and doubts

134. See, e.g., Matt Bean, *Freedom of Religion Meets the DMV*, COURT TV NEWS, May 28, 2003, http://www.court tv.com/trials/freeman/backgrounder_ctv.html.

135. *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). The petitioner in *Terminello* was charged with breach of the peace for making an incendiary speech that riled up the crowd against him. *Id.* at 2. Writing for the majority, Justice Douglas found the absence of a clear and present danger and reversed the conviction. *Id.* at 5.

136. See *Freeman v. Florida*, No. 2002-CA-2828, 2003 WL 21338619, at *6-*7 (Fla. Cir. Ct. Jun. 6, 2003).

137. Judge Thorpe ruled against Ms. Freeman in June 2003. *Id.* at *8. In September 2005, a Florida circuit court affirmed Judge Thorpe's ruling. *Freeman v. Dep't of Highway Safety & Motor Vehicles*, No. 5D03-2296, slip op. (Fla. Dist. Ct. App. 2005), http://www.aclufl.org/issues/religious_liberty/FreemanOrder.pdf, *withdrawn and superseded on reh'g by*, 924 So.2d 48 (Fla. Dist. Ct. App. 2006). Ms. Freeman then applied for rehearing, which the circuit court granted before again affirming Judge Thorpe's ruling in March 2006. *Freeman*, 924 So.2d at 50, 56-57 (Fla. Dist. Ct. App. 2006).

about how a DMV (or court) could assess the sincerity of other religious applicants.¹³⁸

On one level, the concern about sincerity flows directly from the events of 9/11. Several of the terrorists who flew into the World Trade Center and damaged the Pentagon obtained Florida driver's licenses—albeit ones with photos.¹³⁹ On this view, one can hardly blame Florida for being a little gun-shy as to whom it grants licenses. However, the Author would suggest that the suspicion of Ms. Freeman was not simply pragmatic. Rather, it reflected a renewed questioning of religious beliefs at a time when Islam was becoming increasingly visible in the United States. As such, *Freeman* (and the debate surrounding it) marks a contraction of the principle first stated in *United States v. Ballard* (1944) that a court cannot inquire into the truth or falsity of a religious belief.¹⁴⁰ Courts can only inquire whether the belief in question is held sincerely.¹⁴¹ At the time, *Ballard* was seen both as revolutionary (since it amounted in effect to a ban on prosecutions for religious fraud)¹⁴² and incoherent in practice (since truth is often a powerful way to demonstrate sincerity).¹⁴³

Ballard was one of a number of decisions, such as *West Virginia State Board of Education v. Barnette*,¹⁴⁴ that greatly expanded the scope of religious freedom in the 1930s, 1940s, and 1950s. These cases almost always involved Protestant groups (typically Jehovah's Witnesses, although *Ballard* involved the "I Am" movement).¹⁴⁵ In basing religious freedom on the subjective belief of the claimant, U.S. courts charted a potentially much broader course for religious freedom than did their German counterparts, who always looked to the objective impact of the claimant's religious belief on others.¹⁴⁶

138. *See id.*

139. *See* Steve Bousquet & Alisa Ulferts, *Hijackers Got State IDs Legally*, ST. PETERSBURG TIMES, Sept. 16, 2001, available at http://www.sptimes.com/News/091601/State/Hijackers_got_state_I.shtml.

140. *See* *United States v. Ballard*, 322 U.S. 78, 85–88 (1944).

141. *See id.*

142. Chief Justice Stone, writing in dissent, made this point. *See id.* at 88–89 (Stone, C.J., dissenting).

143. Justice Jackson made this point in his dissent, where he argued that the majority in *Ballard* did not go far enough in protecting religious liberty. *See id.* at 92–93 (Jackson, J., dissenting).

144. 319 U.S. 624 (1943) (invalidating compulsory flag salute in a case involving the Jehovah's Witnesses); *see also* *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (upholding right of Jehovah's Witness to play an anti-Catholic phonograph record as part of his effort to proselytize on the street).

145. For examples of cases against Jehovah's Witnesses, *see* *Barnette*, 319 U.S. at 627–29 and *Cantwell*, 310 U.S. at 300–01. For a description of the beliefs of the "I Am" movement, *see* *Ballard*, 322 U.S. at 79–80.

146. One reason for this may be the privileged place of Protestant groups—both mainstream and breakaway sects—in U.S. religious life. *See* HAROLD BLOOM, *THE AMERICAN RELIGION: THE EMERGENCE OF THE POST-CHRISTIAN NATION* 16 (1992)

And for a long time the *Ballard* principle was applied quite broadly, at least in cases involving religious exemptions for driver's licenses. In *Bureau of Motor Vehicles v. Pentecostal House of Prayer* (1978),¹⁴⁷ *Quaring v. Peterson* (1984),¹⁴⁸ and *Dennis v. Charnes* (1986),¹⁴⁹ the courts took the sincerity of the religiously motivated plaintiffs for granted. Of course, it did not hurt that the plaintiffs in all these cases came from the same type of Protestant sects that had been successful in the earlier religious freedom cases.¹⁵⁰ Moreover, in each of the cases, the court found that the conditioning of a driver's license on taking a photo burdened the plaintiffs' religious beliefs.¹⁵¹ This required, however, an evidentiary showing that the plaintiffs needed cars for their daily lives.¹⁵² For example, the plaintiff in *Charnes* worked as a painter and needed a truck to get around.¹⁵³ Likewise, one of the plaintiffs in *Pentecostal House of Prayer* needed a car to visit the sick and perform religious services.¹⁵⁴ In general, in the cases involving Christian sects the courts took the plaintiffs at their word, both as to their religious beliefs and as to evidence that the photo license requirement burdened them.¹⁵⁵

This was not Sultaana Freeman's experience. To be sure, the court found that she sincerely believed that Islam commanded her to use the veil.¹⁵⁶ But this is where the court's trust in her ended. On the one hand, the court took issue with another of her beliefs, namely her view that Islam commanded her to avoid all contact with images

(arguing that the "American Religion" is "biblical, though its Bible may be confined largely to Saint Paul (the Southern Baptists) or be an American set of replacement Scriptures (the Mormons, Seventh-day Adventists, Christian Scientists, among others)").

147. See *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*, 380 N.E.2d 1225, 1226–27 (Ind. 1978).

148. See *Quaring v. Peterson*, 728 F.2d 1121, 1123, 1125 (8th Cir. 1984).

149. See *Dennis v. Charnes*, 646 F. Supp. 158, 160, 162 (D. Colo. 1986).

150. *Pentecostal House of Prayer* involved a Pentecostal Church and a group of Amish who drove. 380 N.E.2d at 1226. Likewise, the plaintiff in *Quaring* attended a Pentecostal church. 728 F.2d at 1123. The plaintiff in *Charnes* belonged to the cult of YHWHHOSHUA, a small Protestant sect. 646 F. Supp. at 159–60.

151. *Quaring*, 728 F.2d at 1125; *Charnes*, 646 F. Supp. at 162; *Pentecostal House of Prayer*, 380 N.E. 2d at 1228.

152. See *Charnes*, 646 F. Supp. at 160; *Pentecostal House of Prayer*, 380 N.E.2d at 1228; *Quaring*, 728 F.2d at 1125 (recognizing that *Quaring* needed her car for "managing a herd of dairy and beef cattle, helping her husband manage a thousand-acre farming and livestock operation, and working as a bookkeeper in a community ten miles from home").

153. 646 F. Supp. at 160.

154. 380 N.E.2d at 1228.

155. This has been the recent trend as regards *Ballard*. See Jared Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 514–18 (2005).

156. See *Freeman v. Florida*, No. 2002-CA-2828, 2003 WL 21338619, at *2 (Fla. Cir. Ct. Jun. 6, 2003).

of human faces and animals.¹⁵⁷ To support this view—which is extremely similar to the beliefs of the plaintiff in *Quaring*, who said that the Second Commandment forbade the use of graven images¹⁵⁸—Freeman testified that she did not let her children play with toys with human faces and that she excised such images from all goods she brought into the house from the supermarket.¹⁵⁹ Again, this is quite similar to *Quaring*.¹⁶⁰ But the court did not extend the same respect to Ms. Freeman. Rather, it said that because her husband, who claimed to share his wife’s beliefs as part of a family unit, allowed himself to be photographed, Ms. Freeman’s beliefs about avoiding images were insincere.¹⁶¹

But this was not the reason Judge Thorpe ruled against Ms. Freeman; rather, the decisive issue was Ms. Freeman’s failure to show precisely how the license regulation burdened her.¹⁶² Judge Thorpe thought this point was sufficiently important to put it in italics.¹⁶³ And on one level Judge Thorpe’s concern is valid because Ms. Freeman’s complaint, filed by the South Florida American Civil Liberties Union, says that the license regulation burdens Ms. Freeman but does not say why.¹⁶⁴ The complaint may have been poorly drafted, but Judge Thorpe also disregarded the Christian license cases, which held that the lack of access to a car constituted the burden.¹⁶⁵ These cases were mentioned by Ms. Freeman’s

157. *Id.* at *3.

158. See *Quaring v. Peterson*, 728 F.2d 1121, 1123 (8th Cir. 1984). The plaintiffs in *Charnes* and *Pentecostal House of Prayer* had similar beliefs. See 646 F.Supp at 159–60; 380 N.E.2d at 1226–27.

159. *Freeman*, 2003 WL 21338619, at *3.

160. According to the court, the plaintiff in *Quaring* “refuses to allow decorations in her home that depict flowers, animals or other creations in nature” and “[w]hen she purchases foodstuffs displaying pictures on their labels, she either removes the label or obliterates the picture with a black marking pen.” 728 F.2d at 1123.

161. *Freeman*, 2003 WL 21338619, at *3. The focus on her husband’s beliefs shows the extent to which the court would go to put Ms. Freeman’s credibility into doubt.

162. *Id.*

163. The italicized sentence reads as follows: “Plaintiff never clearly articulated just what the substantial burden is that she claims is being imposed.” *Id.*

164. In her complaint filed by the American Civil Liberties Union, Ms. Freeman alleged, “hav[ing] a photograph without her veil would substantially burden . . . [her] exercise of her religious beliefs.” Complaint of Sulthaana Freeman at Count II ¶ 5, *Freeman*, 2003 WL 21338619, available at http://www.aclufl.org/legislature_courts/legal_department/briefs_complaints/freemancomplaint.cfm.

165. *Freeman*, 2003 WL 21338619, at *5–*6. For a discussion of how Florida courts interpret burden in a concrete situation, see generally WINNIFRED FALLERS SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* (2005) (describing *Warner v. City of Boca Raton*, 267 F.3d 1223 (11th Cir. 2001), which concerned a city ordinance restricting the display of religious symbols on gravestones).

attorney, Howard Marks, in his opening statement.¹⁶⁶ Furthermore, Judge Thorpe made extensive use of them in the part of her opinion where, in dicta, she stated that even if Ms. Freeman had shown a burden, there was a compelling state interest in requiring a full-face photo.¹⁶⁷

Without access to the complete records of the trial, it is hard to determine whether Judge Thorpe's conclusion on burden was the result of poor lawyering on Mr. Marks' part or whether the court was applying a double standard for Muslims. The two appellate decisions, however, supply more evidence of a double standard. The first ruling came down in September 2005.¹⁶⁸ The court reviewed the testimony of experts brought in by Ms. Freeman and the State of Florida to discuss the role of veiling in Islam.¹⁶⁹ The state's expert, Dr. El Fadl, testified that although some Muslims believe the Qur'an compels them to veil, this duty is subject to the doctrine of "necessity," which allows the woman to take off the veil to take a photo.¹⁷⁰ He added that women in Saudi Arabia take full-face photos for identity cards.¹⁷¹ In response, Ms. Freeman solicited testimony from Professor Saif Ul-Islam, who claimed that the doctrine of necessity applied only to life or death circumstances.¹⁷²

Here one might pause and ask why, under *Ballard*, such testimony was necessary. Assuming Ms. Freeman's beliefs about veiling are sincere, it should not matter whether her beliefs are shared with others. The court in *Ballard* refused to inquire into the beliefs of the "I Am" movement, a group that even Justice Jackson, its staunchest defender in the *Ballard* case, described as more "humbug than truth."¹⁷³ (Justice Jackson would have prevented the court from

166. Transcript of Opening Statement of Howard Marks at 5–6, *Freeman*, 2003 WL 21338619, available at <http://www.geocities.com/freemanvsdmv/marksopening.pdf>. While Marks did not elaborate on the question of burden, he did mention *Charnes* and *Quaring* explicitly. *Id.* at 6.

167. *Freeman*, 2003 WL 21338619, at *4–7. Judge Thorpe did not refer to the 1986 *Charnes* case, but she did mention *Quaring* and *Pentecostal House of Prayer* repeatedly. *Id.*

168. *Freeman v. Dep't of Highway Safety & Motor Vehicles*, No. 5D03–2296, slip op. (Fla. Dist. Ct. App. 2005), http://www.aclufi.org/issues/religious_liberty/FreemanOrder.pdf, withdrawn and superseded on reh'g by, 924 So.2d 48 (Fla. Dist. Ct. App. 2006).

169. *Id.* at 5–6.

170. *Id.* at 5.

171. *Id.*

172. *Id.* at 5–6.

173. *United States v. Ballard*, 322 U.S. 78, 92 (1943) (Jackson, J., dissenting). Ninth Circuit Court of Appeals Judge John T. Noonan, Jr., argues that the court was too harsh in its assessment of the "I Am" movement. See generally John T. Noonan, Jr., *How Sincere Do You Have to Be to Be Religious?*, 1988 U. ILL. L. REV. 713 (1988). Writing forty years after the fact, Noonan describes the movement as mixing "the moral exhortations of St. Paul in his letters to the Corinthians with some of the self-

looking at truth or necessity.)¹⁷⁴ Moreover, why did Judge Thorpe or the appellate court not reject Ms. Freeman's belief on the basis of the state's compelling interest in promoting secure identification for law enforcement?

After mentioning this evidence and discussing the doctrine of burden at great length, the court concluded that Ms. Freeman did not establish a burden because she said in deposition testimony that she agreed she could be photographed without the veil.¹⁷⁵ Since this contradicted what Ms. Freeman had said throughout her trial, one might have expected the court to have lodged this as an attack on her sincerity. At least if the court had attacked her sincerity in her religious beliefs, it would have resolved the case within the past precedent.

Ms. Freeman applied for a rehearing.¹⁷⁶ In March 2006, the circuit court removed the ruling (including removing it from LexisNexis and Westlaw—the Author obtained a copy of the 2005 ruling on the internet) and replaced it with a new ruling.¹⁷⁷ The new ruling was identical to the earlier one in almost every respect except the reference to Ms. Freeman's deposition testimony.¹⁷⁸ In place of the deposition testimony is a rehash of Dr. Fadl's testimony about the necessity doctrine, combined with a footnote describing his academic credentials.¹⁷⁹ It reads like a summary of a contributor to an edited volume. The reader learns that Dr. Fadl "is a widely published author of texts and commentaries on Islamic law, including the rules related to veiling."¹⁸⁰

The new ruling made no mention of Ms. Freeman's personal beliefs on the subject of veiling or of the testimony of her expert, Professor Ul-Islam. Nor did the court say anything about the earlier understanding of sincerity and burden expressed in *Quaring* and *Charnes*. This omission partly reflects a change in First Amendment law heralded by *Employment Division, Department of Human Resources of Oregon v. Smith*.¹⁸¹ Before *Smith*, once the plaintiff showed that a state practice placed a substantial burden on a sincere

help optimism of a Dale Carnegie and . . . traces of Buddhist belief in reincarnation." *Id.* at 719.

174. *Ballard*, 322 U.S. at 92–93 (Jackson, J., dissenting).

175. *Freeman*, No. 5D03-2296, at 13.

176. *Freeman v. Dep't of Highway Safety and Motor Vehicles*, 924 So.2d 48, 49 (Fla. Dist. Ct. App. 2006).

177. *Id.*

178. The new version adds a sentence explaining the change and corrects a single citation. Otherwise, the two rulings are identical. *Compare Freeman*, 924 So.2d 48 with *Freeman*, No. 5D03-2296.

179. *Freeman*, 924 So.2d at 56.

180. *Id.* at 56 n.9.

181. 494 U.S. 872, 882 (1990). The *Smith* case involved the ingestion of peyote. *Id.* at 874.

religious belief, the state had to show a compelling state interest for the practice.¹⁸² *Smith*, however, held that once the state showed that the law was of general applicability, the plaintiff had to show that the state acted because of the believer's religious status.¹⁸³ In response to *Smith*, many states—including Florida—passed Religious Freedom Restoration Acts (RFRA) that restored the old compelling state interest requirement.¹⁸⁴ Ms. Freeman brought her case under Florida's RFRA, so the court followed the old test.¹⁸⁵ But to the extent *Smith* reflected a more general skepticism with the religious beliefs of minority groups, one could see it as partially responsible for the shift from *Quaring* and *Charnes* to *Freeman*.

But this is only part of the story. The court's treatment of Ms. Freeman also reflects a general societal skepticism about her beliefs as a Muslim. Here, two concerns were paramount. On the one hand, those in the United States wanted to know why one of "their own" would convert, especially someone who described herself as "your average, wholesome midwestern girl."¹⁸⁶ This led Geraldo Rivera to ask Ms. Freeman how she arrived at her Muslim faith, to which she countered by asking Mr. Rivera about his faith.¹⁸⁷ Conservative newspaper columnists, such as Diana West, harped on the theme of betrayal.¹⁸⁸ Writing in the *Washington Times*, Ms. West said that, "On the highway she's a driver first, not a Muslim," adding that denying Ms. Freeman her driver's license may have stopped a potential terrorist.¹⁸⁹

On the other hand, there were questions about how to assess Islamic beliefs. The debate, as framed by the appellate court, featured a clash of expert opinion about when the necessity doctrine applied to the practice of veiling.¹⁹⁰ Facing this issue in its March

182. For an example of the earlier rule, see *Sherbert v. Verner*, 374 U.S. 398, 398, 406 (1963) (extending unemployment benefits to a worker who refused to work on the Sabbath).

183. *Smith*, 494 U.S. at 877, 882; *see also* *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534–35 (1993) (finding restrictions on the slaughter of animals were not neutral).

184. Florida's RFRA, passed in 1998, prevents the government from substantially burdening a religious belief in the absence of a compelling state interest. FLA. STAT. § 761.03 (2006).

185. *Freeman v. Florida*, No. 2002-CA-2828, 2003 WL 21338619, at *4–*7 (Fla. Cir. Ct. Jun. 6, 2003).

186. *Sharon King Live!*, transcript available at <http://sociology.ucsd.edu/~soc169/topic3/groupe/Script.htm> (last visited Feb. 18, 2007).

187. *Id.* Geraldo Rivera served as a correspondent for the show. *Id.*

188. *See* Adam Rothstein, *Jihad for Journalists*, RELIGION IN THE NEWS, Summer 2003, available at <http://www.trincoll.edu/depts/csrlp/RINVol6No2/Jihad%20for%20Journalists.htm>.

189. *Id.*

190. *Freeman v. Dep't of Highway Safety & Motor Vehicles*, No. 5D03-2296, slip op. at 5–6 (Fla. Dist. Ct. App. 2005), http://www.aclufl.org/issues/religious_

2006 ruling, the court picked the prosecution's expert without explaining why.¹⁹¹ This is problematic because, as Richard Bulliet suggests in his recent book *The Case for Islamo-Christian Civilization*, the current crisis in Islam is one of institutions; in the absence of them, the definition of Islam is open to anyone capable of releasing a videotape or pamphlet.¹⁹² The dangers of this can be seen in the cable-TV universe, where, for example, Bill O'Reilly based his rejection of Ms. Freeman's claims on the basis of a statement of a University of California, Los Angeles law professor that Islam does not require veiling.¹⁹³

Added to this were direct attacks on Ms. Freeman's sincerity. As noted above, there were accusations that Mr. Freeman trafficked in phony identification cards.¹⁹⁴ In addition, the press pointed out Ms. Freeman's 1998 arrest for abusing her foster children, which resulted in a mug shot that appears on Wikipedia for the world to see.¹⁹⁵ While the court did not consider these issues worthy of consideration, they appeared on the website of WFTV, a local television station in Orlando.¹⁹⁶

The sincerity issue also arose in the context of the veil itself. Judge Thorpe worried that wearers of full face cloaks would "pretend[] to ascribe to religious beliefs in order to carry out activities that would threaten lives."¹⁹⁷ Here, Thorpe links the religiously insincere with terrorists. This formulation ignores the possibility that people could commit acts of terror without religious motives.

B. *The Headscarf and National Security*

Once the focus of the court and the larger debate turned to national security, the veil itself, not the person, became the focus of concern. For this very reason, Judge Thorpe's discussion of the compelling state interest test was something of an anti-climax. For one thing, some of the Christian driver's license cases found a compelling reason to require the photographs. In *Johnson v. Motor Vehicle Division*, the state of Colorado, in an early case involving the

liberty/FreemanOrder.pdf, *withdrawn and superseded on reh'g by*, 924 So.2d 48 (Fla. Dist. Ct. App. 2006).

191. *Id.* at 13–14.

192. RICHARD W. BULLIET, *THE CASE FOR ISLAMO-CHRISTIAN CIVILIZATION* 135, 147 (2004). His book is an excellent overview of the challenges Western societies face in responding to Islam.

193. Rothstein, *supra* note 188.

194. *Woman Fighting Over Photo Was Previously Arrested*, *supra* note 16.

195. See Wikipedia.com, Sultaana Freeman, http://en.wikipedia.org/wiki/Sultaana_Freeman (last visited Feb. 18, 2007) (the photo has since been removed).

196. *Woman Fighting Over Photo Was Previously Arrested*, *supra* note 16.

197. *Freeman v. Florida*, No. 2002-CA-2828, 2003 WL 21338619, at *7 (Fla. Cir. Ct. Jun. 6, 2003).

cult of YHWHHOSHUA, found that a license photo served a compelling state interest by assisting the police in making a rapid identification at a traffic stop.¹⁹⁸ Likewise, in cases involving pistol permits and photos for suspects, courts had little difficulty finding a compelling state interest.¹⁹⁹

To be sure, *Quaring* and *Charnes* proved harder to escape. On the one hand, these cases held that claims of a compelling state interest are suspect when the state allows other types of drivers to get by with photo-free licenses, as does Florida.²⁰⁰ Nor does it necessarily matter that the licenses are temporary, unless there is some evidence that (i) the state requires a permanent photo on file and (ii) the police in the field will have access to it.²⁰¹ Otherwise, the rapid law enforcement reaction time, which was so vital for the *Johnson* court, is unlikely to occur.

Ultimately, Florida met these hurdles fairly easily. Florida required a permanent file photo for every recipient of a temporary license.²⁰² The state also had a driver and vehicle identification database (DAVID), which according to a prosecution witness, was in the process of being put into place.²⁰³ For that reason, the judge had a fairly easy time distinguishing the Christian sect cases as relying on “archaic technology.”²⁰⁴ The court went so far as to point out that DAVID was under development before September 11, 2001.²⁰⁵

The court’s explicit discussion of national security concerns was relatively brief. The court noted that the past twenty-five years have seen “new threats to public safety, including both foreign and domestic terrorism.”²⁰⁶ Consequently, the plaintiff’s religious freedom must be subordinated to the “safety and security of others.”²⁰⁷ However, Judge Thorpe stopped well short of labeling Islam as a security threat. Judge Thorpe, in direct response to Ms. Freeman’s claim that she was singled out because of 9/11, wrote that

198. 593 P.2d 1363, 1365 (Colo. 1979). Colorado kept negatives of the driver’s license photos, which it used to assist the police in lineups. *Id.*

199. *See* United States v. Slabaugh, 655 F. Supp. 462, 466 n.2 (D. Minn. 1987) (relying on police expert who viewed photo as necessary to identify suspect, even though he only had one arm); *People v. Miller*, 684 N.Y.S.2d 368, 371 (N.Y. App. Div. 1998) (finding that photo requirement for pistol permit helped law enforcement make immediate identifications).

200. *Quaring v. Peterson*, 728 F.2d 1121, 1126 (8th Cir. 1984); *Dennis v. Charnes*, 646 F. Supp. 158, 161–63 (D. Colo. 1986). The court in *Charnes* allowed exemptions for drunk drivers, who the court noted, with irony, were typically seen as high risk. 646 F. Supp. at 162; *see, e.g.*, FLA. ADMIN. CODE ANN. r. 15A-1.0051 (2006) (allowing some Florida driver’s licenses to be renewed without a photograph).

201. *Charnes*, 646 F. Supp. at 163.

202. *Freeman*, 2003 WL 21338619, at *6.

203. *Id.* at *4.

204. *Id.* at *7.

205. *Id.*

206. *Id.*

207. *Id.*

the court “would rule the same way for anyone—Christian, Jew, Buddhist, Atheist.”²⁰⁸ The reader can decide whether she treated Ms. Freeman’s Islamic religious beliefs with the same respect.

IV. CONCLUSION

The German debate in the Ludin case focused on how a veil worn by a schoolteacher impacted her students. This led to a debate over the symbolic content of the headscarf in German society, a debate that focused on political Islam, the repression of women, and fears of totalitarianism. By contrast, the U.S. debate focused less on the headscarf itself than on its wearer—Sultaana Freeman. As a U.S.-born convert to Islam, she raised issues of motive (why did she do it?) and betrayal (was she the next hijacker?).

These concerns reflected U.S. fears in 2002 and 2003 about the renewal of terrorist attacks, fears encapsulated by the Bush administration’s manipulation of its multi-colored warning system. Similarly, the reaction in Germany to religious indoctrination and political Islam reflected fears of a reunited Germany coming to terms with itself in a post-Holocaust era. Interestingly, the fears do not overlap. No one in the German debate for a moment suspected Ms. Ludin, or political Islamists of terrorism. Their goal was seen almost exclusively as the domination of society—i.e., totalitarianism. Likewise, Ms. Freeman was not seen as an oppressed woman or the representative of a political movement that oppresses women. In fact, a board member of the National Organization for Women attended a rally in support of Ms. Freeman’s right to veil if she wishes.²⁰⁹ Nor do those in the United States share the German tendency to equate Muslim political activism with totalitarianism. In fact, the movement to allow driver’s licenses for *hijab*²¹⁰ wearers in Alabama was spearheaded by an African-American convert to Islam who is viewed as an up-and-coming politician.²¹¹

208. *Id.*

209. *Sharon King Live!*, *supra* note 186.

210. Unlike the *niqab*, the *hijab* exposes the wearer’s face. See Liz Maziarz, *Welcome to L.A.—Lower Alabama!*, COVERING RELIGION, Mar. 18, 2004, <http://www.jrn.columbia.edu/studentwork/religion/2004/archives/000315.asp> (discussing the hijab). Many U.S. states permit driver’s license photos by *hijab* wearers. See COUNCIL ON AM-ISLAMIC RELATIONS, RELIGIOUS ACCOMMODATION IN DRIVER’S LICENSE PHOTOGRAPHS: A REVIEW OF CODES, POLICIES AND PRACTICES IN THE 50 STATES 2–3 (2004), available at <http://www.cair.com/downloads/driversphoto.pdf> (“Forty-six states passed laws or enacted administrative policies addressing the religious needs of applicants with headgear.”). In 2004, nine states allowed driver’s license photos of veiled women, twenty-two states opposed the practice, and the rest remained silent. *Id.* at 3.

211. See Maziarz, *supra* note 210 (describing Yusuf Salaam’s background). The author describes Yusuf Salaam, an African-American who converted to Islam in 1975.

In an age of increasing Muslim migration and self-assertion, the liberal democracies of the West will fall back on their own private fears, shaped by national historical experience and traditions. This, in turn, suggests that there will be no common Western response to issues such as the headscarf, the publication of cartoons depicting the prophet Mohammed, or the issue of how best to incorporate Muslims into the folkways of U.S. and German societies. Each country will have its areas of fear and suspicion. In the United States, the fears are of terrorism and profiling of Muslims, whereas in Germany the fear is of Muslim political assertiveness and activism. Hopefully, each country will also have areas of greater toleration. Only time will tell.

According to Salaam, the political leadership of U.S. Muslims will come from "indigenous Americans who understand the culture." *Id.*