

The Headscarf as Threat: A Comparison of German and American Legal Discourses

Robert A. Kahn¹

Abstract

[In this article I compare how American and German judges conceptualize the harm the headscarf poses to society. My 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 drivers license 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, Germans were more likely to see it as a symbol of political Islam, while Americans saw it 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 American South repudiate cross burnings and Ku Klux Klan masks.² The symbols, however, do not have meaning by themselves. Instead, it is up to

¹ Assistant Professor of Legal Writing, Brooklyn Law School. The author wishes to thank Jacqueline Baronian, David Patton, Sheldon Goldman, Jennifer Fredette, and Douglas Dow. An early version of this paper was presented at the 2006 Law and Society Annual meeting in Baltimore, Maryland.

² Robert A. Kahn, *Cross-Burning, Holocaust Denial and the Development of Hate Speech Law in the United States and Germany*, __ U. DET. MERCY L. REV. __ (forthcoming 2006).

the court to attribute meaning to them. In this process, the courts often privilege the concerns of the specific society they operate in. Consequently, courts in different settings—or different societies—will treat the same symbol differently. To explore this point, this essay will look at two cases involving the Muslim headscarf—one from Germany, the other from the United States. The essay has two goals. First, it will show that, although legal discourses surrounding both cases treat the headscarf as a threat, the threats themselves were presented differently. Second, somewhat more speculatively, the essay will trace the reasons for the different perceptions of threat to differences in how Germans and Americans view religion in general and Muslims in particular.

The German case began in 1998, when a series of German courts debated whether the 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. Ultimately in 2003 the Federal Constitutional Court ruled in Ludin’s favor,³ but only because the state of Baden-Württemberg did not specifically ban headscarves⁴ (a failing the state legislature speedily remedied the following year).⁵ Central to the legal debate was whether wearing a headscarf was consistent with the civil service official’s duty to neutrality and moderation.⁶ In this context, the headscarf raised two fears: (i) religious conversion—the court repeatedly expressed the concern that the sight of an 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;”⁷ and (ii) political Islam—here the courts repeatedly drew a connection between Ms. Ludin’s headscarf and Islamist movements, especially those that sought to repress women.⁸

The case of Sultaana Freeman raised different threats. In early 2001 Ms. Freeman, an American born convert to Islam, posed for a Florida state driver’s license wearing a niqab—a garment that covered her entire face, save for her eyes. She was allowed to do so. In December 2001 she was ordered to surrender her license and submit to a photo

³ BVerfG, 2 BvR 1436/02, decided Sep. 24, 2003. Citations that follow are to specific paragraphs of the ruling.

⁴ Ludin Majority at ¶¶ 29, 63 and 72. Three dissenting judges would have upheld the school authority’s right to refuse to hire Ms. Ludin. Ludin Dissent ¶¶ 75-138. 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 Kommers, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* (2d ed.)(Durham: Duke University Press, 1997) at 26.

⁵ Tony Czucka, *German State Bans Headscarves in Schools*, ASSOCIATED PRESS, Apr. 2, 2004.

⁶ Ludin Majority, at ¶¶ 48, 90 (tracing the duty of neutrality to the constitution); Ludin Dissent, at ¶¶ 79, 101.

⁷ Ludin Dissent, at ¶ 115.

⁸ This was especially true of the dissenters. See *Id.* at ¶¶ 116-25.

without her niqab. 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.⁹ To get around precedent extending similar rights to isolationist Christian sects in the 1970s and 1980s,¹⁰ Judge Thorpe observed that times had changed since then—noting both the increase in technology and the new threat of “foreign and domestic” terrorism.¹¹ Although she assured her readers that “most likely” Ms. Freeman was not a terrorist, the headscarf did not get off as easily.¹² Repeatedly in her ruling she stressed the headscarf as the means for accomplishing terrorist acts, especially the idea that an “insincere” terrorist could threaten the national security by falsely posing as a religious Muslim at the DMV.¹³ Some of the media commentators who observed the trial harped on this point, relying on reports that Ms. Freeman’s husband had been caught with phony identification cards.¹⁴

Part II of this essay 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 and the widely shared opposition to a rigid separation of church and state. Then it will show how these ideas manifested themselves both in the decision of the majority and 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 the question of Ms. Freeman’s sincerity and experience of a 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 Americans who convert to Islam. Finally, Part III will show how Judge Thorpe’s rulings on sincerity and burden were not necessary—she could have reached the same conclusion by holding that states had a compelling interest in banning women from posing for driver’s licenses 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, Americans saw Sultanna Freeman as a potential

⁹ *Freeman v. State*, 2003 WL 21338619 (Fla. Cir. Ct. Jun. 6, 2003).

¹⁰ 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*, 380 N.E.2d 1225 (Ind. 1978).

¹¹ *Freeman*, 2003 WL 21338619, at *7.

¹² *Id.*

¹³ *Id.*

¹⁴ “Woman Fighting Over Photo Was Previously Arrested,” appearing on WFTV.com, May 27, 2003 (available at <http://www.wftv.com/news/2330721/detail.html>).

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, or just under 4% of the population.¹⁵ Although many are from Turkey—the result of employment as guest workers during the *Wirtschaftswunder*, there are also a large number of Muslims from other countries, especially Iran.¹⁶ 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. In fact the Milli Görüs, a Muslim fundamentalist group that attracts primarily Turks, has a large presence in Germany.¹⁷

Before the mid-1990s the image of Turks was one of victim. Extreme right wing circles added old slurs against the Jews with new ones about Turks.¹⁸ Song lyrics also featured the Turk as target.¹⁹ These fears drew deep resonance at a time when Europeans were expressing doubt about the political stability of a reunified Germany.²⁰ 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 violence²¹ (a problem that unfortunately still persists as followers

¹⁵ “Islam in Europe” (available at <http://www.msnbc.msn.com/id/12757599>).

¹⁶ *Id.*

¹⁷ The Milli Görüs are active in Germany, Austria and the Netherlands. Jørgen Nielsen, *MUSLIMS IN WESTERN EUROPE* (2d ed.), (Edinburgh: Edinburgh University Press, 1995). They were originally connected with the Turkish Welfare Party, which during the late 1990s challenged Turkey's secular government 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*, (Report by American Institute for Contemporary German Studies, Johns Hopkins University, 2005) at 28. 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.

¹⁸ David Jacobs, *Note, The Ban of Neo-Nazi Music: Germany Takes on the Neo-Nazis*, 34 *HARVARD INTERNATIONAL LAW JOURNAL* 563 (Spring, 1993).

¹⁹ *Id.* at 572-73.

²⁰ See Steven Ozment, *A MIGHTY FORTRESS: A NEW HISTORY OF THE GERMAN PEOPLE*, (New York: HarperCollins, 2004) at 312-13. The title of the Ozment's introduction—“Looking for the Good Germans”—gives further currency to these fears.

²¹ Alan Watson, *THE GERMANS: WHO ARE THEY NOW?* (London: Meuthen, 1992), at xxi, 368-69. 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.

of the World Cup will notice).²² As the 1990s persisted, the image of the Turk—and by extension the Muslim—began to improve. With the election of Schröder in 1998 and the opening of German citizenship to Turks, the image of immigrants began to change.²³ However, despite gaining the option of citizenship, many Turks still cluster around menial jobs.²⁴

Meanwhile, Germans began to pay more attention to Islam. Within a decade the Turks went from being the next victims of the Nazis to becoming potential Nazis themselves. Despite the failure of the German public officials to stop Hitler's rise to power in the 1920s and 30s, the civil service was and is portrayed as a bulwark against the political parties who would corrupt the state.²⁵ The concern about the civil service came to a head in 1972 with the Radicals Decree which sought to purge political extremists from the civil service.²⁶ Likewise, some of the participants in the headscarf debate saw Fereshta Ludin as a potential extremist.

However, the fears about political Islam were not limited to totalitarian civil servants. Political Islam—and the headscarf—were also seen as oppressing women. The outrages committed against women in Afghanistan and Algeria in the name of political Islam are well known.²⁷ In Germany, political Islam is seen by many as a symbol of gender oppression.²⁸ Like their French counterparts, German feminists suspected

²² Jere Longman, *Surge in Racist Mood Raises Concerns on Ease of World Cup*, NEW YORK TIMES, June, 4, 2006. This continued threat of anti-foreigner violence undercuts Germany's effort to present itself as tolerant nation, as for example when non-white visitors to the World Cup were warned to stay away from the small towns in Brandenburg—the eastern German state that surrounds Berlin. *Id.*

²³ See Pascale Fournier and Görçe Yurdakul, *Unveiling Distribution: Muslim Women with Headscarves in France and Germany* in Michal Bodemann ed. MIGRATION, CITIZENSHIP, ETHNOS (New York: Palgrave, 2006), 175-76.

²⁴ *Id.* at 174-75.

²⁵ See Gerard Braunthal, POLITICAL LOYALTY & PUBLIC SERVICE: THE 1972 DECREE AGAINST RADICALS AND ITS CONSEQUENCES, (Amherst: University of Massachusetts Press, 1990). 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.* at 3-9. Sometimes this had odd results, as when the Germans target the Scientologists for governmental observation on the theory that they are a totalitarian cult, or when they target the Jehovah's Witnesses as totalitarian solely because their members do not vote in elections. Michael Browne, *Should Germany Stop Worrying and Love the Octopus? Freedom of Religion and the Church of Scientology*, 9 IND. INT'L & COMP. L. REV. 155 (1998); Edward J. Eberle, *Free Exercise of Religion in Germany and the United States*, 78 TUL. L. REV. 1023, 1035 (2004)(describing the Jehovah's Witnesses).

²⁶ Braunthal, POLITICAL LOYALTY AND PUBLIC SERVICE, at 22-40.

²⁷ For an overview of how Muslim fundamentalists view women, see Johannes J.G. Jansen, THE DUAL NATURE OF FUNDAMENTALISM, (Ithaca, Cornell University Press, 1997) at 138-57.

²⁸ In the debate over the passage of a headscarf ban in the Baden-Württemberg legislature, education minister Annette Schavan (CDU) explicitly linked fundamentalist Islam with inferior treatment for women. See *Das Kreuz mit dem Kopftuch*, GOETHE-INSTITUT, Mar.

that most women who wore the headscarf did not do so of their own free will, rather they did so because their fathers and brothers forced them to. Consequently, they tended to downplay the possibility of women wearing the headscarf as a form of self-expression and, more generally, that some forms of Islamist activism provided women opportunities to express themselves in a politically modern way.²⁹

While disapproval of German feminists of political Islam and the headscarf was genuine, others not known for their feminism latched on to gender oppression to give the critique of political Islam as totalitarian more weight.³⁰ This was true especially of those who wanted to ban the headscarf, while allowing the crucifix (both on school walls and as a piece of clothing) despite the history of the Catholic Church in denying equal opportunity to women—a history that in Germany extended not just to the priesthood, but also to positions in theology schools.³¹

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,³² one factor muddied the waters—religion.³³ As convenient as it might be for

10, 2004. Likewise, she called the headscarf “part of the history of women’s suppression.” Czucka, *supra* note 5.

²⁹ See John L. Esposito & François Burgat eds., *MODERNIZING ISLAM: RELIGION AND THE PUBLIC SPHERE IN EUROPE AND THE MIDDLE EAST* (New Brunswick: Rutgers University Press, 2003). 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 *Women’s Islamic Activism: Between Self-Practices and Social Reform Effort* in Esposito and Burgat eds. *MODERNIZING ISLAM*, at 145-66.

³⁰ Most notably the dissent in *Ludin* makes this point. *Ludin Dissent*, at ¶¶ 117, 122. The French experience shows how headscarves can make for strange bedfellows as 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*, (New York: New York University Press, 1995) at 87-90.

³¹ Norbert Greinacher and Inge Jens eds. *FREIHEITSRECHT FÜR CHRISTEN? WARUM DIE KIRCHE EIN GRUNDGESETZ BRAUCHT*, (München, Piper 1980) at 89-95 (detailing the experience of a female Catholic theologian who was unable to gain work in her field of study).

³² For an example of the latter, see Justus Leicht, *Bundesverfassungsgericht ermöglicht Kopftuch-Verbot für islamische Lehrerinnen*, Oct. 3, 2003 (available on World Socialist Website). Leicht notes that 5 years earlier members of the right-wing Republikaner Party had proposed a headscarf ban. *Id.*

³³ According to Rolf Schieder, Germany is roughly 30% Catholic, 30% Protestant and 30% non-religious. See Schieder, *Church, State, and Nation in Germany*, in *UNDERSTANDING THE “GOD GAP”: RELIGION, POLITICS, AND POLICY IN THE UNITED*

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 even a greater threat than the headscarves.³⁴

Although the Basic Law forbids the establishment of a state religion,³⁵ 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 Court³⁶ and in the constitutions of the federal states (Länder) that trumpet this fact.³⁷ It also reflects a set of institutional structures. German visas ask the holder to identify as belonging to either the Catholic or Evangelical (Protestant) Church. These churches are supported through a system of church taxation.³⁸ The state also provides for religious instruction in schools.³⁹

The roots of these practices go back to the Protestant Reformation. At the time of the Reformation, Germany was divided into small principalities. The Reformation unleashed a century of political and religious ferment and great suffering as Protestants and Catholics took turns persecuting each other.⁴⁰ Out of this conflict emerged the idea that each principality should determine the religious practice for its own subjects. This principle, enshrined in the 1648 Peace of Westphalia, which ended the Thirty Years War, sought to dampen religious conflict between Catholic and Protestants by linking religious boundaries with state boundaries.⁴¹ (This use of the state to dampen religious conflict stands in

STATES AND GERMANY, (Report by American Institute for Contemporary German Studies, Johns Hopkins University, 2005) at 11.

³⁴ The Ludin Majority, at ¶¶ at 43, 44 explicitly rejects the “strict separation of church and state.” In a review article on the *Ludin* case Axel Frhr. Von Campenhausen, who specializes on church state relations at Gottingen, rejected the French approach of “radical laicism” noting that “Germany...in comparison to other European countries has long been a model in the field of religious freedom.” See *The German Headscarf Debate*, 2004 B.Y.U.L. REV. 665, 697. 698.

³⁵ Basic Law, Art 140 (incorporating Art. 137 of the Weimar Constitution).

³⁶ For example, in the School Prayer Case, 52 BVerfGE 223 (1979)(cited in Kommers supra note 4, at 461-66), which upheld voluntary prayer in state schools, the court noted the “recognition of Christianity as a formative cultural and educational factor which has developed in Western history.” *Id.* at 463.

³⁷ Both the Constitutions of Baden-Württemberg and Bavaria refer explicitly to “reverence for God” as something worthy of instilling in its citizens. Baden-Württemberg Constitution, Art. 12(1); Bavarian Constitution, Art. 131.

³⁸ Eberle, supra note 25, at 1031-32.

³⁹ Kommers, supra note 4, at 471.

⁴⁰ Ozment, supra note 20, at 104-05, 121. More generally, the Reformation made “the organization of religion...the responsibility of political leaders.” Rolf Schieder, supra note 33, at 14.

⁴¹ This perspective influences how ordinary people understand “church”—while Americans think of their neighborhood church, Germans think of the Vatican or, in the case of Protestants, the end of World War I, when Protestantism lost its status as the state religion. See Scheider, supra note 33 at 13.

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.⁴² 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. These laws—supported by a coalition of Bismarckian conservatives and Protestant liberals—became known as the *Kulturkampf* (clash of cultures). The conflict petered out in the late 1870s as Bismarck turned his attention to other foes, including the Socialists. 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).

While the Nazis dissolved the principalities and created a unitary Germany, the post-war creators of the Federal Republic opted for a federal system. As a result each state (Länder) had control over the education system. Moreover, in light of the Nazi experience, which was seen as the result of Godless materialism, Germany adopted an explicitly religious identity which—even though it was framed in terms of Christianity—stood for religion in general.⁴³ (This religious identity also reflected the Federal Republic's status as a frontline state in the Cold War.)⁴⁴ This ecumenical trend is likewise evident in the rise of the Christian Democratic Union—a grouping that included Protestants and Catholics.

These trends have had some important implications for understanding the Ludin case. For one thing, in describing the duties of schools, the constitution of Baden-Württemberg makes reference to “reverence for God” and “the spirit of Christian afterlife.”⁴⁵ Likewise, the Baden-Württemberg constitution authorizes the establishment of Christian community schools.⁴⁶ The strength of the connection between Christianity and the public schools was shown by the public outcry in 1997 when the

⁴² Significantly, the principalities entered the German Reich as sovereign states—i.e. they kept their local control over education; this lessened the need for either French style separation or American 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.

⁴³ Dr. Johannes Rux, *Kleiderordnung, Gesetzvorbehalt und Gemeinschaftsschule*, ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK (2004), at 8.

⁴⁴ Patrick Major, *THE DEATH OF THE KPD: COMMUNISM AND ANTI-COMMUNISM IN WEST GERMANY, 1945-1956* (1998).

⁴⁵ Baden-Württemberg Constitution, Art. 12(1).

⁴⁶ *Id.*, Art. 15(1). For a history of schooling in Baden-Württemberg, see Rux, *supra* note 43, 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.

German Constitutional Court held that the state of Bavaria could not require individual schools to hang crucifixes on the walls of classrooms.⁴⁷

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;⁴⁸ opponents sought to distinguish the two symbols by arguing that the headscarf, unlike the crucifix, was not a religious symbol but a political symbol.⁴⁹ 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 narrowly ruled that the Stuttgart school authority was wrong to reject Ms. Ludin's job application.⁵⁰ 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.⁵¹ As noted above, this ruling was narrow—and it left an easy fix for the legislature, a development which led supporters of headscarves to attack the decision as cowardly.⁵² However, it did differ from 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.⁵³ 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.⁵⁴

For its frame of reference, the majority relied on the administrative courts, which had twice rejected Ms. Ludin's claims,⁵⁵ largely on the basis that, as an authority figure, her use of the headscarf would influence the

⁴⁷ 93 BVerfGE 1 (1995)(cited in Kommers, *supra* note 6, at 472-82. The decision led to calls for political officials to refuse to enforce the ruling. *Id.* at 482-83. For an overview, see Howard Caygill and Alan Scott, *The Basic Law Versus the Basic Norm: The Case of the Bavarian Crucifix Order*, in Richard Bellamy and Dario Castiglione eds., *CONSTITUTIONALISM IN TRANSFORMATION: EUROPEAN AND THEORETICAL PERSPECTIVES* (Oxford: Blackwell, 1996). In actual fact, very few crosses were removed. Leicht, *supra* note 32.

⁴⁸ The former Federal President Johannes Rau made this point but was heavily criticized for it. See notes 83-85 *infra*, and accompanying text.

⁴⁹ This was especially true of the dissenters. See Ludin Dissent, at ¶¶ 113, 117.

⁵⁰ Ludin Majority, at ¶ 29.

⁵¹ *Id.* at ¶¶ at 62-64.

⁵² Martin Klingst, *Feige Richter*, DIE ZEIT, Sep. 25, 2004.

⁵³ Ludin Dissent, at ¶ 135.

⁵⁴ *Id.* at ¶ 138. Moreover, as a civil servant, Ms. Ludin would have lifetime tenure. In actual fact, Ms. Ludin decided to teach in an Islamic school instead.

⁵⁵ After the Stuttgart school district rejected her claim, Ms. Ludin sued in the Administrative courts of first Stuttgart (2000), then Baden Württemberg (2001) and ultimately the Federal Administrative Court in Berlin (2002). She lost all three times. For an overview, see the Ludin Majority, at ¶¶ 5-15.

students.⁵⁶ 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.⁵⁷ 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.⁵⁸ Moreover, Ms. Ludin said that, if necessary she would be willing to wear the scarf as a shawl—only putting it on when an adult entered the room.⁵⁹

Despite this, the concern about influence and conversion plays a major rhetorical role in the majority ruling. Like the dissent, the majority asserts that missionary activity in the classroom violates the teacher’s duty as a civil servant to act with neutrality and moderation.⁶⁰ It also violates the “negative rights” of the school children and their parents to be free from religious influences they do not share—especially those in the classroom, from which there is no escape.⁶¹ The dissent goes a step further and asserts students will be too intimidated by the teacher to raise any complaints.⁶² Moreover, the dissent also disagrees with how the majority treats the threat of “influence”—if the authority has to wait for proof of unwanted influence on the students, it will be too late.⁶³ On the broader issue—the power of the headscarf to mold children’s minds (in a way the crucifix does not)—the dissent and majority are in near total agreement.

The two sides do, however, take sharply different views of the headscarf itself. After describing the many different motives a Muslim woman could have for wearing a headscarf—preserving her identity in the Diaspora, indicating her unavailability for sex, expressing her religious orientation—the court concludes that the headscarf cannot be reduced to a symbol of the oppression of women.⁶⁴ The court concedes that Ms. Ludin could plausibly be wearing the headscarf out of religious grounds and that the wearing of the headscarf could foster the integration of Muslim

⁵⁶ Ludin Majority at ¶ 25. The court rejected Ms. Ludin’s argument that schools should not be a refuge from religious pluralism. *See id.* at ¶ 19.

⁵⁷ *Id.* at ¶ 28. 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 as 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.

⁵⁸ *Id.* at ¶¶ 56, 57. The Ludin Dissent, at ¶ 121 raises another concern—that Ms. Ludin’s headscarf would make her Muslim students who do not veil feel uncomfortable.

⁵⁹ *Wieviel fremde religion verträgt unsere Gesellschaft—Erste Stellungnahmen aus der Verhandlung*, AFP (Agence France-Presse), Jun. 3, 2003. 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.

⁶⁰ Ludin at ¶ 49.

⁶¹ *Id.* at ¶ 46. However, the court would leave it to the state legislature to work out the specific details.

⁶² Ludin Dissent, at ¶ 112.

⁶³ *Id.* at ¶¶ 104, 111.

⁶⁴ Ludin Majority, at ¶ 52.

women.⁶⁵ However, after this extended discussion, the court announces that the subjective intent of the wearer is irrelevant; what matters is its objective impact on the observer—which leads the court back to a discussion of the danger it poses for students and parents.⁶⁶

The dissenters take a much darker view of the headscarf, which they view as a symbol both of political Islam and of the subordination of women.⁶⁷ Because this view is shared by many people in the Muslim world, it does not matter that some women wear the headscarf as a sign of liberation.⁶⁸ Furthermore, the covering of the head is not compatible with the “German constitutional understanding” of human worth, which the court summarizes with the pithy phrase: “The free person shows their face.”⁶⁹

In addition, the dissent puts great emphasis on the fact that the German school teacher is a civil servant. She is not seeking protection from the state, rather she is seeking to become part of it.⁷⁰ In that role she has no standing to demand religious rights. Every right she takes will be at the expense of the clients she serves.⁷¹ Not only that, every conflict that results from Ms. Ludin wearing her headscarf will make the civil service less efficient.⁷² In addition, it will hinder the role of the civil service which is to provide a counterweight to the political branches.⁷³ On the other hand, the crucifix that stands on classroom walls is a general symbol of a tolerant culture drawn from Jewish and Christian sources.⁷⁴

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.⁷⁵ 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.⁷⁶ Instead it held that the *Länder* must fall back on their

⁶⁵ *Id.* at ¶ 53

⁶⁶ *Id.* at ¶¶ 53, 56.

⁶⁷ Ludin Dissent, at ¶ at 117.

⁶⁸ *Id.* at ¶ at 122.

⁶⁹ *Id.* at ¶ 123. The reference to a “German” constitutional understanding comes immediately after the dissent’s expression of sympathy for Muslims opposed to the headscarf.

⁷⁰ *Id.* at ¶ 81.

⁷¹ *Id.* at ¶ 86.

⁷² *Id.* at ¶ 100.

⁷³ *Id.* at ¶ 96.

⁷⁴ *Id.* at ¶ 113. Later the dissent—in its discussion of potential anti-headscarf legislation—asks whether the ban must include a small personal cross worn as jewelry that carries no significant message and therefore is unlikely to lead to a conflict of worldviews. *Id.* at ¶ 133.

⁷⁵ *Id.* at ¶¶ 50-51. The majority asserted that the headscarf, unlike the crucifix, does not have a meaning independently of its wearer. The court then related how the headscarf can be seen as a symbol of political Islam.

⁷⁶ The dissent attacked the majority on this point. Ludin Dissent, at ¶¶ 132-33.

traditions when making new laws⁷⁷—making it unclear whether it is referring to the types of symbols allowed or the general habit of allowing religious symbols.⁷⁸ 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.

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. Among politicians, this position was shared by former Federal President Johannes Rau⁷⁹ as well as Bavarian president Edmund Stoiber⁸⁰ and former then chancellor Gerhard Schröder, who opposed them. (While Schröder stated that Germany was a “secular” county, he also stressed Germany’s Judeo-Christian roots.)⁸¹ Moreover, most political parties joined together in supporting headscarf bans. Moreover, the bans occurred not only in the Catholic South (Bavaria and Baden-Württemberg) but also in other parts of Germany that are less religiously conservative such as Berlin, Bremen, Lower Saxony, Hesse and, most recently, Nordrhein-Westfalen.⁸²

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 he would also have to ban the crucifix, he unleashed an outcry of criticism accusing him of secularism.⁸³ In response, Edmund Stoiber accused Rau of “cast[ing] doubt on our national identity distinguished by the Christian religion.”⁸⁴ (However, Pope Benedict XVI, then Cardinal Ratzinger, responded by supporting

⁷⁷ Ludin Majority, at ¶ 71.

⁷⁸ Rux, *supra* note 43, at 11.

⁷⁹ Rau referred to Germany as a Christian believing land for several centuries. Rede zum 275. Geburtstag von Gottfried Ephraim Lessing, Jan. 22, 2004.

⁸⁰ Regierungserklärung des Bayerischen Ministerpräsidenten Dr. Edmund Stoiber, Nov. 6, 2003.

⁸¹ Gerhard Schröder, Interview, WELT AM SONNTAG, Dec. 21, 2003. Schröder also traced Germany’s roots in “Greco-Roman philosophy” and the Enlightenment. *Id.*

⁸² Interestingly the Berlin law banned crucifixes, yarmulkes, and turbans as well as headscarves. This may be because of the role of the PDS in the Berlin government. *See Berlin City Bans Headscarves*, DPA, Mar. 31, 2004.

⁸³ In opposing the headscarf bans Rau said that “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*, Jan. 2, 2004 (available on aljazeera.net). 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. Rede zum 275. Geburtstag von Gottfried Ephraim Lessing, Jan. 22, 2004.

⁸⁴ *Hijab Causes a Major Row in Germany*, Jan. 2, 2004 (available on aljazeera.net).

both the crucifix and the headscarf—so Rau’s strategy may have borne some fruit.).⁸⁵

The main debate focused on the role of the headscarf as regards political Islam and the repression of women. 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 Sussmuth, and Kohl-era Justice Minister, Sabine Leutheusser-Schnarrenberger, to sign a petition opposing the bans.⁸⁶ 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, which stressed that religion should be a private affair and that those who “under the influence of the Islamists” chose to wear the headscarf in public life should not be eligible for the civil service.⁸⁷

Supporters of the headscarf argued, as did the majority, that many women wore the headscarf as a sign of self-emancipation.⁸⁸ 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.⁸⁹

On the other side stood those, such as Margot Käßmann, the Bishop of the Evangelical Church in Hannover, who argued that the headscarf represented a step back from gender equality, something women had long fought for.⁹⁰ 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 fostering a compromise by wearing her veil as a

⁸⁵ *Id.* The Pope, while finding Rau’s religious beliefs “strange,” said that “I will not forbid any Muslim to wear a headscarf, but still less do we accept a ban on wearing the crucifix.”

⁸⁶ *Das Kreuz mit dem Kopftuch*, GOETHE INSTITUT, Mar. 10, 2004. 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*, Deutsche Welle, Dec. 2, 2003

⁸⁷ Lale Akgün, *Wider die Kulturalisierung des Kopftuch-Diskurses*. May 3, 2004 (available at Qantara. de).

⁸⁸ The Woman’s Initiative made this point. *Headscarf Issue Rears its Head Again*, Deutsche Welle, Dec. 2, 2003. Fereshta Ludin herself made the same point when she argued that even a headscarf wearing woman can have secular thoughts. *Wieviel fremde religion verträgt unsere Gesellschaft—Erste Stellungnahmen aus der Verhandlung*, AFP (Agence France-Presse), Jun. 3, 2003.

⁸⁹ Jochen Bauer, KONFLIKTSTUFF KOPFTUCH (available at <http://www.verlagruhr.de/archiv/kopftuch.html>). Martin Klingst, writing in *DIE ZEIT* made a similar point—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, as teachers. Martin Klingst, *Feige Richter*, *DIE ZEIT* Sep. 25, 2004.

⁹⁰ *Schule sollte Freiheit vermitteln*, interview on Tagesschau.de., Sep. 24, 2003.

shawl—these efforts would only create “a climate of fear.”⁹¹ Finally, Käßmann criticized the headscarf itself as incompatible with a “liberal Islam” that accepted the separation of church and state and equality for women.⁹² Likewise, Lela Akgün views the hijab in political terms: “The Islamic headscarf symbolizes Islam no more than Mao’s uniform represents Chinese civilization.”⁹³

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.⁹⁴ (This is why German authorities chose not to prosecute an African soccer star who 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.)⁹⁵ For this very reason, German feminists who opposed the headscarf rejected the label of racist. 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.”⁹⁶

Mainstream politicians also expressed concern about political Islam. At one extreme stand those, such as Helmut Schmidt, former chancellor of Germany from 1974-83, who called political Islam Germany’s number one problem and expressed regret that Germany permitted the guest workers to arrive.⁹⁷ Likewise, Edward Stoiber suggested that those migrants who came to Germany had to accept that it was a Christian Western country and follow its rules.⁹⁸ 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

⁹¹ *Id.*

⁹² *Id.*

⁹³ Lela Akgün, *Wider die Kulturalisierung des Kopftuch-Diskurses*. May 3, 2004 (available at Qantara. de).

⁹⁴ The same logic applies to laws against Holocaust Denial. See Robert A. Kahn, *HOLOCAUST DENIAL AND THE LAW: A COMPARATIVE STUDY*, (New York: Palgrave-Macmillan, 2004).

⁹⁵ Longman, “Surge in Racist Mood,” *NEW YORK TIMES*, Jun. 4. 2006.

⁹⁶ “Kopftuch-Streit beschäftigt das Verfassungsgericht, (AFP), Jun. 2, 2003.

⁹⁷ Klausen, *supra* note 17, 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. Jochen Bauer, *KONFLIKTSTOFF KOPFTUCH*, *supra* note 89.

⁹⁸ Regierungserklärung des Bayerischen Ministerpräsidenten Dr. Edmund Stoiber, Nov. 6, 2003. Stoiber argued that the headscarf both “documents” and “propagates” foreign values. *Id.*

Muslims from the larger community;⁹⁹ and ii) there were better places to fight the battle for women’s rights, such as forced marriages and honor killings.¹⁰⁰

Overall, however, the German society is united in its opposition to political Islam, which—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).¹⁰¹ It also allows Germans to express unease 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.¹⁰² Furthermore, both the dissent and majority express concern that the school children will be exposed to a foreign (*Fremde*) religion¹⁰³—words that exclude Muslims from the classroom (and the political community), a somewhat contradictory position for 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—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 in America the Muslim Other took a different form.

⁹⁹ 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. *Das Kreuz mit dem Kopftuch*, GOETHE INSTITUT, Mar. 10, 2004.

¹⁰⁰ See, e.g., Martin Klingst, *Feige Richter*, DIE ZEIT, Sep. 25, 2004. Former President Rau made the same point, but cautioned that people who come to Germany must learn the language. Rede zum 275. Geburtstag von Gottfried Ephraim Lessing, Jan. 22, 2004.

¹⁰¹ The role of anti-Communism in German identity was particularly strong in the 1940s and 50s 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.

¹⁰² 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. *Ludin fühlt sich “wie kurz vor dem Holocaust”*, TAZ, Nov. 24, 2003. Her apology did not, however, satisfy the local CDU politicians, who wanted to explore the possibility of prosecuting her for denying the Holocaust. *Wachsweiße Entschuldigung*, TAZ, Nov. 27, 2003.

¹⁰³ See Ludin Majority, at ¶¶ 22, 46.

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—*Freeman* was about the limits a society must place on religious freedom during times of crisis. 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.”¹⁰⁴ But a funny thing happened on the way to the suicide pact, Judge Thorpe, in ruling against Freeman, while mentioning 9/11, explicitly based her decision on another ground, the same ground that the Circuit Court of Appeals used to affirm Judge Thorpe’s denial—that Freeman had not shown how the license requirement burdened her.¹⁰⁵ This, in turn, rested on a series of doubts—doubts about Freeman’s religious sincerity and doubts about how a DMV (or court) could assess the sincerity of other religious applicants.

On one level, the concern about sincerity flows directly from the events of September 11, 2001. Several of the terrorists who blew up the World Trade Center and damaged the Pentagon obtained Florida driver’s licenses—albeit ones with photos. On this view, one can hardly blame Florida for being a little gunshy as to whom it grants licenses

However, I would suggest that the suspicion of Ms. Freeman was not simply pragmatic. Rather it reflected a renewed questioning of religious beliefs as such 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 *Ballard v. United States* (1944)¹⁰⁶ that a court cannot inquire into the truth or falsity of a religious belief—only whether the belief in question is sincerely held. At the time *Ballard* was seen both as revolutionary (since it amounted in

¹⁰⁴ 337 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.

¹⁰⁵ Judge Thorpe ruled against Ms. Freeman in June 2003. *Freeman*, 2003 WL 21338619. In September 2005, a Florida Circuit Court affirmed Judge Thorpe’s ruling. *Freeman v. Dept. of Highway Safety and Motor Vehicles*, (Case No. 5D03-2296, decided Sep. 2, 2005, available on findlaw.com). Ms. Freeman then applied for rehearing, which the Circuit Court granted before, in March 2006, again affirming Judge Thorpe’s ruling. *Freeman v. Dept. of Highway Safety and Motor Vehicles*, 924 So.2d 48 (Fla. Cir. Ct. 2006).

¹⁰⁶ 322 U.S. 882 (1944)

effect to a ban on prosecutions for religious fraud)¹⁰⁷ and incoherent in practice (since truth is often a powerful way to demonstrate sincerity).¹⁰⁸

Ballard was one of a number of decisions, such as *Barnette v. West Virginia State Board of Education*,¹⁰⁹ which greatly expanded the scope of religious freedom in the 1930s, 40s, and 50s. These cases almost always involved Protestant groups (typically Jehovah's Witnesses, although *Ballard* involved the "I Am" movement). In basing religious freedom on the subjective belief of the claimant, American 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.¹¹⁰

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),¹¹¹ *Quaring v. Peterson* (1984),¹¹² and *Dennis v. Charnes* (1986),¹¹³ 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 such success in the earlier religious freedom cases.¹¹⁴ Moreover, in each of the cases, the courts involved found that the conditioning of a driver's license on taking a photo burdened the plaintiff's religious beliefs.¹¹⁵ This required, however, an evidentiary showing that the plaintiff needed the car for their daily life. For example, the plaintiff in *Charnes* worked as a painter and needed a truck to get around.¹¹⁶ Likewise, one of the plaintiffs in *Pentecostal House*

¹⁰⁷ Chief Justice Stone, writing in dissent, made this point. *Id.* at 887 (Stone, C.J., dissenting).

¹⁰⁸ Justice Jackson made this point in his dissent—which argued that the majority in *Ballard* did not go far enough in protecting religious liberty. *Id.* at 889 (Jackson, J., dissenting).

¹⁰⁹ 319 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).

¹¹⁰ One reason for this may be the privileged place of Protestant groups—both mainstream and breakaway sects—in American religious life. For more see, Harold Bloom, *THE AMERICAN RELIGION: THE EMERGENCE OF THE POST-CHRISTIAN NATION*, (New York: Touchstone, 1992) at 16 (arguing that American faith is scriptural and best represented by "African-American religionists, the Mormons, the Pentecostals, and other peculiarly American varieties of spiritual experience.")

¹¹¹ 380 N.E. 2d at 1228.

¹¹² 728 F.2d at 1123, 1125.

¹¹³ 646 F.Supp. at 162.

¹¹⁴ *Pentecostal House of Prayer* involved a Pentecostal Church and a group of Amish who drive. 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.

¹¹⁵ *Quaring*, 728 F.2d at 1125; *Charnes*, 646 F.Supp. at 162; *Pentecostal House of Prayer*, 380 N.E. 2d at 1228.

¹¹⁶ 646 F.Supp. at 160.

of *Prayer* needed a car to visit the sick and perform religious services.¹¹⁷ In general, in these cases involving Christian sects, the courts took the plaintiffs at their word—both as to their religious beliefs as well as to evidence that the photo license requirement burdened them.¹¹⁸

This was not Sulthaana Freeman’s experience. To be sure, the court did find that she sincerely believed that Islam commanded her to use the veil.¹¹⁹ 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 of human faces and animals.¹²⁰ 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 images¹²¹—Freeman testified that she did not let her children play with dolls with human faces and that she scratched off such images with a magic marker on all goods she brought into the house from the supermarket.¹²² Again, this is quite similar to *Quaring*.¹²³ But the court did not accuse Ms. Freeman of plagiarism. Rather they said that because her husband—who claimed he shared his wife’s beliefs as part of a family unit—allowed himself to be photographed, Ms. Freeman’s beliefs about avoiding images was insincere.¹²⁴

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. Judge Thorpe thought this point was sufficiently important to put it in italics.¹²⁵ And, on one level, Judge Thorpe has an argument. Ms. Freeman’s complaint filed by the South Florida ACLU says that the license regulation burdens Ms. Freeman but does not say why.¹²⁶ So, the complaint may be poorly drafted. But Judge Thorpe also disregarded the Christian license cases, which held

¹¹⁷ 380 N.E.2d at 1228.

¹¹⁸ 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 (Winter 2005).

¹¹⁹ *Freeman*, 2003 WL 21138619 at * 2.

¹²⁰ *Id.* at * 3.

¹²¹ 728 F.2d at 1123. The plaintiffs in *Charnes* and *Pentecostal House of Prayer* had similar beliefs. 646 F.Supp at 159-60; 380 N.E.2d at 1226-27.

¹²² *Freeman*, 2003 WL 21338619 at * 3.

¹²³ 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.

¹²⁴ *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.

¹²⁵ *Id.* The italicized sentence reads as follows: “Plaintiff never clearly articulated just what the substantial burden is that she claims is being imposed.”

¹²⁶ In her complaint filed by the ACLU Ms. Freeman alleges that “hav[ing] a photograph without her veil would substantially burden...[her] exercise of her religious beliefs.” Complaint of Sulthaana Freeman, Count II, ¶ 5.

that the lack of access to a car constituted the burden.¹²⁷ These cases were mentioned by Ms. Freeman's attorney, Howard Marks, in his opening statement¹²⁸ and Judge Thorpe made extensive use of them in the part of her opinion where, in dicta, she held that even if Ms. Freeman had shown a burden, there was a compelling state interest in requiring a full-face photo.¹²⁹

Without access to the complete records of the trial, it is hard to determine whether Judge Thorpe's conclusion on burden is the result of poor lawyering on Mr. Marks' part or whether the court is applying a double standard when it comes to Muslims. The two appellate decisions, however, supply more evidence of a double standard. The first ruling came down in September 2005.¹³⁰ 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. 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 in order to take a photo; he added that women in Saudi Arabia take full-face photos for identity cards.¹³¹ 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.¹³²

Here one might pause and ask why, under *Ballard*, such testimony was necessary. Assuming Ms. Freeman's beliefs about veiling are sincere, why does it matter whether others follow them, especially since 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 (he would have prevented the court from looking at truth or necessity),¹³³ described as more humbug than truth? Moreover, why didn't Judge Thorpe or the Court of Appeals reject Ms. Freeman's belief on the basis of

¹²⁷ For a discussion of how Florida courts interpret burden in a concrete situation, see Winnifred Fallers Sullivan, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM*, (Princeton: Princeton University Press, 2005)(describing *Warner v. City of Boca Raton*, which concerned a city ordinance restricting the display of religious symbols on gravestones).

¹²⁸ See Opening Statement of Howard Marks, May 27, 2003 (available from Sultaana Freeman's website). While Marks did not elaborate on the question of burden, he did mention *Charnes* and *Quaring* by name. *Id.* at 3-4.

¹⁴¹ Judge Thorpe does not refer to the 1986 *Charnes* case, but she does mention *Quaring* and *Pentecostal House of Prayer* repeatedly. See *Freeman*, 2003 WL 21338619 at * 4-7.

¹³⁰ *Freeman*, (Case No. 5D03-2296, decided Sep. 2, 2005).

¹³¹ *Id.* at 5.

¹³² *Id.* at 5-6.

¹³³ 322 U.S. at 889 (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. Writing 40 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-help optimism of a Dale Carnegie and...traces of Buddhist belief in reincarnation." Noonan, *How Sincere Do You Have to Be to Be Religious?*, 1988 U. ILL. L. REV. 713, 719 (1988).

the state’s compelling interest in promoting secure identification for law enforcement?

Be that as it may. 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.¹³⁴ Since this contradicts what Ms. Freeman said throughout her trial, one might have expected the court to have lodged this as an attack on her sincerity. But the ruling, if true, at least would have resolved the case.

Ms. Freeman applied for a rehearing. In March 2006 the Circuit Court removed the ruling (which included removing it from Lexis and Westlaw; I obtained my copy of the 2005 ruling on the internet) and replaced it with a new ruling, identical with the earlier one in almost every respect, except the reference to Ms. Freeman’s deposition testimony.¹³⁵ In its place is a rehash of Dr. Fadl’s testimony about the necessity doctrine combined with a footnote describing his academic credentials.¹³⁶ (This reads like a summary of a contributor to an edited volume. We learn that Dr. Fadl “is a widely published author of texts and commentaries on Islamic law, including the rules related to veiling.”)¹³⁷

There was 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*. Part of this reflects a change in First Amendment law heralded by *Employment Division, Department of Human Resources of Oregon v. Smith*.¹³⁸ Before *Smith* once the plaintiff showed that a state practice placed a substantial burden on a sincere religious belief, the state had to show a compelling state interest.¹³⁹ *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.¹⁴⁰ In response to *Smith*, many states—including Florida—passed Religious Freedom Restoration Acts—which

¹³⁴ *Freeman*, (Case No. 5D03-2296, decided Sep. 2, 2005) at 13.

¹³⁵ The new version adds a sentence explaining the change and corrects a single citation. Otherwise, the two rulings are identical.

¹³⁶ *Freeman*, 924 So.2d at 56.

¹³⁷ *Id.* at 56, n.9.

¹³⁸ 494 U.S. 872, 882 (1990). The *Smith* case involved the ingestion of peyote.

¹³⁹ For an example of the earlier rule, see *Sherbert v. Verner*, 374 U.S. 398 (1963)(extending unemployment benefits to a worker who refused to work on the sabbath).

¹⁴⁰ *Smith*, 494 U.S. at 877; see also *Church of the Lukimi Babalu Aye v. City of Hialeah*, 505 U.S. 520, 534-35 (1993)(restrictions on slaughter of animals were found to be not neutral).

restored the old compelling state interest.¹⁴¹ Ms. Freeman brought her case under Florida's RFRA, so the court followed the old test.¹⁴² 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, Americans wanted to know why one of their "own" would convert, especially someone who described herself as "your average, wholesome midwestern girl."¹⁴³ 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.¹⁴⁴ Conservative newspaper columnists, such as Diana West, harped on the theme of betrayal. 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.¹⁴⁵

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. Facing this issue in its March 2006 ruling, the court picked the prosecution's expert without explaining why. This is problematic because, as Richard Bulliet suggests in his recent book, *The Case for Islamo-Christian Civilization* (2004), 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.¹⁴⁶ 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 UCLA law professor that Islam does not require veiling.¹⁴⁷

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, in addition the press pointed out Ms. Freeman's 1998

¹⁴¹ Florida's RFRA, passed in 1998, prevents the government from substantially burdening a religious belief in the absence of a compelling state interest. Florida Statutes § 761.03.

¹⁴² Freeman, 2003 WL 21338169 at * 4-7.

¹⁴³ Transcript of Sharon King Live! (need date), at 1 (available at <http://sociology.ucsd/~soc169/topic3/groupc/script.html>).

¹⁴⁴ *Id.* Geraldo Rivera served as a correspondent for the show.

¹⁴⁵ Adam Rothstein, *Jihad for Journalists*, Jul. 1, 2003(available at <http://www.geocities.com/freemanvsdmv/jihadforjournalists.html?20063>)(quoting Diane West, in the WASHINGTON TIMES May 30, 2003).

¹⁴⁶ Richard W. Bulliet, *THE CASE FOR ISLAMO-CHRISTIAN CIVILIZATION*, (New York: Columbia University Press, 2004) at 135-35, 147. His book is an excellent overview of the challenges Western societies face in responding to Islam.

¹⁴⁷ Rothstein, *Jihad for Journalists*, Jul. 1, 2003.

arrest for abusing her foster children, which resulted in a mug shot that appears on Wikipedia for the world to see.¹⁴⁸ While the court did not consider these issues worthy of consideration, they appeared on the website of WFTV a local television station in Orlando.¹⁴⁹

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.”¹⁵⁰ Here Thorpe links the religiously insincere with terrorists—a formulation that ignores the possibility that people could commit acts of terror out of 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 cult of YHWHHOSHUA, found a license photo served a compelling state interest by assisting the police in making a rapid identification at a traffic stop.¹⁵¹ Likewise, in cases involving pistol permits, and photos for suspects, courts had little difficulty finding a compelling state interest.¹⁵²

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 Florida does.¹⁵³ 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.¹⁵⁴ Otherwise, the rapid law enforcement reaction time—so vital for the *Johnson* court—is unlikely to occur.

¹⁴⁸ See http://en.wikipedia.org/wiki/Sultaana_Freeman.

¹⁴⁹ “Woman Fighting Over Photo Was Previously Arrested,” appearing on WFTV.com, May 27, 2003.

¹⁵⁰ *Freeman*, 2003 WL 21338619 * 7.

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

¹⁵² *United States v. Slabaugh*, 655 F.Supp. 462, 466 n.2 (D.Minn 1987)(court relies on police expert who views photo as necessary to identify suspect, even though he only had one arm); *People v. Miller*, 684 N.Y.S.2d 368, 371 (photo requirement for pistol permit helps law enforcement make immediate identifications).

¹⁵³ *Quaring*, 728 F.2d at 1126; *Charnes*, 646 F.Supp. at 161-63. The court in *Charnes* allowed exemptions for drunk drivers, who the court noted with irony, were typically seen as high risk. *Id.* at 162.

¹⁵⁴ *Charnes*, 646 F.Supp. at 163.

Ultimately, Florida met these hurdles fairly easily. Florida required a permanent file photo for every recipient of a temporary license. 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. For that reason, the judge had a fairly easy time distinguishing the Christian sect cases as relying on “archaic technology.”¹⁵⁵ The court went so far as to point out that DAVID was under development before September 11, 2001.¹⁵⁶

The court’s explicit discussion of national security concerns was relatively brief. The court notes that the past 25 years have seen “new threats to public safety, including both foreign and domestic terrorism.” Consequently, the plaintiff’s religious freedom must be subordinated to the “safety and security of others.”¹⁵⁷ However, Judge Thorpe stopped well short of labeling Islam a security threat. Judge Thorpe, in direct response to Ms. Freeman’s claim that she was singled out because of 9/11, wrote that the court “would rule the same way for anyone—Christian, Jew, Buddhist, Atheist.”¹⁵⁸ 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 school teacher 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 American debate focused less on the headscarf itself, than on its wearer—Sultaana Freeman. As an American born convert to Islam, she raised issues of motive (why did she do it?) and betrayal (was she the next hijacker?).

These concerns reflected American fears in 2002 and 2003 about the renewal of terrorist attacks, fears encapsulated by the Bush Administrations manipulation of its multi-colored warning system, just as the fears of religious indoctrination, and political Islam expressed 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 Fereshta 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

¹⁵⁵ *Freeman*, 2003 WL 21338619 at *7.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

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.¹⁵⁹ Nor do Americans share the German's tendency to equate Muslim political activism with totalitarianism. In fact, the movement to allow driver's licenses for hijab¹⁶⁰ wearers in Alabama was spearheaded by an African-American convert to Islam who is viewed as an up and coming politician.¹⁶¹

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 one 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 American and German societies. Each country will have its areas of fear and suspicion—fears of terrorism and profiling of Muslims in the United States; fear of Muslim political assertiveness and activism for Germans. But, hopefully, each country will also have areas of greater toleration. Only time will tell.

¹⁵⁹ Transcript of Sharon King Live!, at 9.

¹⁶⁰ Unlike the niqab, the hijab exposes the wearer's face. Many American states permit driver's license photos by hijab wearers. See Council on American Islamic Relations report, *Religious Accommodation in Driver's License Photographs: A Review of Codes, Policies and Practices in the 50 States (2004)*. In 2004 nine states allowed driver's license photos of veiled women, nineteen states opposed the practice, and the rest remained silent. *Id.* at 3.

¹⁶¹ See Liz Maziarz, Welcome to L.A.—Lower Alabama, Mar. 18, 2004 (available at <http://www.jrn.columbia.edu/studentwork/religion/2004/archives/000315.asp>). The author describes Yusuf Salaam, an African American who converted to Islam in 1975. According to Salaam, the political leadership of American Muslims will come from "indigenous Americans who understand the culture." *Id.* (quoting Yusuf Salaam).