

**THE MODERN CRUSADE: AN INVESTIGATION OF THE
INTERNATIONAL CONFLICT BETWEEN
CHURCH AND STATE**

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INTRODUCTION

“Give me your tired, your poor, your huddled masses yearning to breathe free.”¹

Engraved beneath the feet of Lady Liberty exists a quote that has epitomized the stance on personal religious freedom held by the United States throughout the greater part of its history.² A nation born from those escaping religious persecution, the United States has developed into one of the world’s most liberal grounds for the freedom of man to make his own decisions concerning his personal beliefs and values.

Yet as circumstance has permitted the United States to mature into a country of uninhibited religious freedom, other nations have developed specifically toward their own narrow cultural mores and societal ethics. Each country’s laws have grown like vines to shroud the solid stone of that nation’s values. As each country has taken a different path towards finding its own constitutional nirvana, a world has evolved in which no two nations share the same viewpoint on religious freedom.

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1. “The wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!” Emma Lazarus, *The New Colossus*, in LIBRARY OF CONGRESS, PRINTED EPHEMERA COLLECTION 1 (Philip and Fanny Duschnes 1949).

2. *See id.*

The following article invites the reader to explore the differences in religious freedom among some of the world's contemporary major powers, and to consider the factors that have driven each nation to create law adapted to a national perspective of religion.

I. THE UNITED STATES OF AMERICA

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”³ These words drafted into law set the cornerstone of American religious freedom over two hundred years ago. Many people of different nations escaped the old world in hopes of discovering a haven in America where they could practice their own religious beliefs without the fear of persecution. Among its first refugees, the United States found itself to be the home of Jews,⁴ Catholics, and Mennonites.⁵ The concept of raising a claim of religious freedom for the violation of an established law⁶ was nonexistent to these people, as many simply desired to practice their convictions in private.⁷

Not until the nineteenth century did the cultural melting pot of the United States become so diverse the government had to reconcile the clash between the rights of religion and the rule of law. With an influx of Chinese immigrants in the West⁸ and Catholics and Jews in the Northeast,⁹ the nation began to experience a new form of diversity

3. U.S. CONST. amend. I.

4. See IRVING BERDINE RICHMAN, *RHODE ISLAND: A STUDY IN SEPARATISM* 126 (1905).

5. See ROYDEN K. LOEWEN, *FAMILY, CHURCH, AND MARKET: A MENNONITE COMMUNITY IN THE OLD AND THE NEW WORLDS, 1850-1930* 1 (Board of Trustees of the Univ. of Ill. 1993) (1954).

6. See *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 528, 545, 579 (1993) (where the Santeria group was prohibited by a Florida animal cruelty statute from performing animal sacrifice required by their faith and the Court ruled that a law established specifically for the purpose of preventing a religious act was unconstitutional).

7. HASIA R. DINER, *THE JEWS OF THE UNITED STATES* 17 (Univ. of Cal. Press 2004).

8. ERIKA LEE, *AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882-1943* 25 (Univ. of N.C. Press 2003).

9. DAVID M. BROWNSTONE, IRENE M. FRANCK & DOUGLAS BROWNSTONE, *ISLAND OF HOPE, ISLAND OF TEARS* 5 (Barnes & Noble, Inc. 1979).

never before known by the old world. To some degree, this change brought a clash of religious intolerance,¹⁰ but simultaneously led to a more liberal understanding and acknowledgment of other faiths.

Recently, the United States government has been vitally concerned with the fear of religious favoritism and the commingling of church and state.¹¹ For example, in *Lemon v. Kurtzman*, Rhode Island taxpayers brought suit against the state for enacting a law that reimbursed costs incurred by teachers at nonpublic and church-related educational institutions.¹² There, the State directly paid teachers of these schools fifteen percent of their annual salary to cover the costs related to providing non-secular books and instructional material.¹³ Subsequently, the U.S. Supreme Court ruled this law to be unconstitutional,¹⁴ holding for a state to constitutionally aid religious education, the law must have (1) a secular purpose, (2) a primarily secular effect, and (3) not cause excessive government entanglement in religion.¹⁵ This extremely stringent test, referred to as the *Lemon Test*, has set a foundation making it difficult for states to assert any form of preferential treatment of religions.¹⁶

Additionally, the U.S. government has faced the issue of the separation of religious belief from religious action. Although the United States has traditionally been very lax in permitting people to hold their own beliefs, the United States often runs into conflict when that belief is coupled with an action that violates clearly established law. For example, in *Reynolds v. United States*, a Mormon man was charged and convicted for practicing polygamy, the act of having many spouses.¹⁷ There, the Court noted, although the act of polygamy

10. See RAY BILLINGTON, *THE PROTESTANT CRUSADE, 1800-1860*, 53 (New York: Macmillan Co. 1963) (1938) (discussing how American Nativism in the mid-1800's grew out of the increased immigration of Catholics to New York and those who feared their practices and ideologies of the immigrants formed a platform for the movement extending the length of naturalization and protecting the Protestant Republic).

11. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

12. *See id.* at 607.

13. *Id.*

14. *Id.* at 608.

15. *Id.* at 612-13.

16. *See id.*

17. *Reynolds v. United States*, 98 U.S. 145, 146 (1878).

was a violation of federal law,¹⁸ it was a permissive tenet of fundamentalist Mormon belief.¹⁹ There, the Court ruled that a religious duty was not a suitable defense to a criminal indictment.²⁰ Although this has been the prevailing theory for the greater part of the past century, recent activity by the Court has taken a new perspective on tolerance of religious activity. Additionally, the court in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* permitted a small religious organization to import and drink a tea made from the “ayahuasca” hallucinogen.²¹ Typically, this would violate Schedule I of the Substance Control Act.²² However, the Court focused its attention on the preservation of dogmatic principles within the religious group rather than dwelling upon the effects of such a decision upon the secular society in the group’s periphery.²³

Although an absolute freedom of religion is not written into law, the United States maintains one of the most lenient and permissive outlooks on religious tolerance among developed nations in the world. Importantly, this article purports foreign governments have approached this issue in a manner similar to the United States. However, each nation’s cultural differences that have evolved from the nation’s distinct social experiences have led the foreign governments to form different views and regulations regarding religious tolerance.

18. Morrill Anti-Bigamy Act, 12 Stat. 501 (1862) (repealed 1910), *available at* <http://memory.loc.gov/cgi-bin/ampage?cd/lId=llsl&fileName=012/lIs1012.db&recNum=532>.

19. MIRIAM KOKTVEDGAARD ZEITZEN, *POLYGAMY: A CROSS CULTURAL ANALYSIS* 90 (Oxford Int’l Publishers 2008).

20. *Reynolds*, 98 U.S. at 167.

21. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 425 (2006). “Dimethyltryptamine” is the scientific name of the plant, and “ayahuasca” is a hallucinogen in the plant to make the “hoasca” tea. *Id.*

22. 21 U.S.C. § 812 (1988) (listing that Schedule I refers to substances which (A) have a high potential for abuse; (B) have no currently accepted medical use in treatment in the United States; (C) have a lack of accepted safety for use of the substance under medical supervision).

23. *See Gonzales*, 546 U.S. 418, 439.

II. THE REPUBLIC OF FRANCE

In 1789, after the fall of its Monarchy and the development of new law, the French Republic declared, “[n]o one may be troubled on account of his opinions or religion, provided that their expression does not infringe public policy as established by [the law].”²⁴ The latter portion of this declaration has been a dynamic factor in the development of law and rule in France, as the nation has taken a much more stringent approach than the United States in permitting religious act outside of belief.

In March of 2004, the Republic of France enacted a ban that prohibited students in public schools from wearing conspicuous religious symbols.²⁵ Although the United States has enacted religious garb proscriptions,²⁶ in contrast, French courts have generally made judicial decisions showing that France predominantly regards the appearance of public school teachers.²⁷ However, there have been some instances in France where the legal system has proscribed religious garb.²⁸ In such instances, the French government justified this *sui generis* secularism by its attempts to confine religion entirely

24. JOHN BELL, *FRENCH CONSTITUTIONAL LAW* 263 (Oxford Univ. Press, Inc. 1992).

25. See M. Todd Parker, *The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clause of the ICCPR and the ECHR*, 17 *DUKE J. COMP. & INT’L L.* 91, 115 (2006); see also Dawn Lyon & Deborah Spini, *Unveiling the Headscarf Debate*, 12 *FEMINIST LEGAL STUD.* 333, 334 (2004), available at springerlink.com/content/r33w032003811364/fulltext.pdf; see also Olivier Beaud, *Reframing a Debate Among Americans: Contextualizing a Moral Philosophy of Law*, 7 *INT’L J. OF CONST. LAW* 53, 65-66 (2009).

26. See *Cooper v. Eugene Sch. Dist.*, 301 Or. 358, 360 (1986).

27. See Stephen G. Gey, *Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools*, 42 *HOUS. L. REV.* 1, 18 (2005). Professor Gey argues that the American Government has at times upheld such a ban on religious garb as to “limit the teacher’s coercive influence over the student’s religious views.” *Id.* Alternatively, he argues that the French Courts have gone so far as to permit the intervention between the students and their parents in order to ensure that these students are exposed to religions and cultures outside of their parent’s own “narrow religious community.” *Id.* Thus, the French law, he believes, is more uniform in its application and is intended as a means to procure the separation of religion with the public sector. *Id.*

28. See *id.*

to the private sphere.²⁹ Significantly, the *French Declaration of the Rights of Man and Citizen* ensures equal access to public mandates and positions to believers of all denominations and non-believers.³⁰ However, religious garb proscriptions for public workers and even students seem to force religion out of the public light, such that those who obtain public position do not even consider making known their religious dispositions or creeds. In contrast, during the 2000 United States Presidential election, Vice-Presidential nominee Joe Lieberman confessed that if he won the candidacy, he intended to practice the Sabbath on Saturdays in place of fulfilling his duties as vice president.³¹ Such an acknowledgement of religion intermingling with the state would not be permitted in France.

Essentially, the French concept of freedom of religion tends to revolve around non-interference with religious norms. French secularism, known as *laïcité*,³² separates church and state in two ways: First, it allows the France to remain non-denominational and non-sectarian in nature; second, France never has jurisdiction to regulate

29. See Dominique Custos, *Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004*, 54 AM. J. COMP. L. 337, 338 (2006).

30. DECLARATION OF THE RIGHTS OF MAN AND THE CITIZEN OF 1789, art. VI (Fr.), translation in The Avalon Project Documents in Law, History, and Diplomacy, available at http://avalon.law.yale.edu/18th_century/rightsof.asp.

31. *Lieberman's Sabbath has deep spiritual meaning*, available at <http://archives.cnn.com/2000/ALLPOLITICS/stories/08/12/campaign.sabbath.reut/index.html>; see Larry King Live (CNN television broadcast Aug. 8, 2000), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0008/08/lk1.00.html> (indicating during the 2000 Presidential election, Vice Presidential hopeful Joe Lieberman confessed to the media that he would not continue to campaign on the Jewish Sabbath day); see also JewishBreakingNews.com, *Lieberman Won't Join Obama at Dodd Fundraiser Senator has Plans to Observe Shabbos at Stamford Home*, <http://jewishbreakingnews.wordpress.com/2009/10/22/lieberman-wont-join-obama-at-dodd-fundraiser-senator-has-plans-to-observe-the-shabbos-at-stamford-home/> (indicating since the 2000 elections, Senator Lieberman has continued to observe the Sabbath day in his later political career) (last visited Dec. 11, 2009).

32. "The French word *laïcité* means the system that excludes churches from the exercise of political or administrative power, especially with regard to the organization of education. RENÉ RÉMOND, RELIGION AND SOCIETY IN MODERN EUROPE 11 n.1 (Antonia Nevill transl., Blackwell Publishers). "*Laïcisme*" refers to the doctrine of the supporters of total *laicization* of education, that is, the replacement of religious personnel with lay personnel. *Id.*

ecclesiastical matters.³³ However, the French government has attempted throughout history to take power away from France with regard to interference with religion.³⁴ During the course of the French Revolution, the government stripped the Catholic clergy of all their powers and nobility.³⁵ In contrast, the English system allows members of the Anglican Church to hold powerful positions within the House of Lords.³⁶

While secularism in France has historical foundation, secularism in public schools is a more recent phenomenon.³⁷ To the French “the public school system was conceived as the preferential place of the mandatory schooling where the canons of patriotism and . . . republicanism were to be instilled [in the students].”³⁸ On the other hand, decisions of U.S. courts reveal a strong policy against nationalistic indoctrination.³⁹ However, the U.S. Supreme Court has avoided the topic as to whether students should be forced to recite the Pledge of Allegiance when religiously opposed.⁴⁰

Importantly, the 2004 French enactment outlaws ostensible religious garb required by the student’s faith.⁴¹ This places the concept of act versus belief, the driving separation in much of U.S. religious freedom law, into a broader and grayer category of all religious issues.

33. See Thierry Rambaud, *Le Principe de Separation des Cultes et de l’Etat en Droit Public Compare*, LIBRAIRIE GÉNÉRALE DE DROIT ET DE JURISPRUDENCE 47 (2004) (Fr.).

34. FRANK TALLET & NICHOLAS ATKIN, *RELIGION, SOCIETY & POLITICS IN FRANCE SINCE 1789* 10 (The Hambleton Press 1991).

35. See *id.*

36. See S. E. FINER, *COMPARING CONSTITUTIONS* 48 (1995).

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

38. See *Custos*, *supra* note 29, at 355-56.

39. See generally *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (discussing that a non-custodial parent, Newdow, brought suit on his daughter’s behalf challenging the school district’s policy on recitation of the Pledge of Allegiance because he felt the words “under God” endorsed religion, thus violating the Establishment Clause).

40. See *id.* The Supreme Court dismissed the case finding Newdow did not have standing to bring the suit on his daughter’s behalf, never considering the Constitutional question. *Id.* at 2, 17.

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

From an American perspective, the consequence of this may blur the line separating illegal acts carried out in furtherance of religious doctrine with acts undertaken entirely in furtherance of personal and private beliefs.

A possible argument is that French laws treat all religions equally. France levels the playing field for all religions by prohibiting any religious exceptional freedoms not granted to other faiths.⁴² In France, the law prohibiting religious garb applies to *yarmulkes*,⁴³ oversized crosses, and *hijabs*⁴⁴ equally.⁴⁵ This may appear more justifiable than the American system, in which certain religious organizations are granted specifically carved out freedoms while other religious organizations making the same claims are denied such freedoms.⁴⁶ However, for obvious cultural reasons, such equality is not entirely enforceable. Consider the risk of ethnic profiling: a blond girl of native French descent who wears a bandana in a public setting would not receive the same scrutiny as an Arab girl of foreign ancestry wearing the same “bandana.”⁴⁷

France seems to be less tolerant of religious diversity than the United States. In France, there was strong public support for President Chirac’s ban on *hijabs* even prior to the passing of the 2004 law.⁴⁸ A

42. See Gey, *supra* note 27.

43. “Yarmulkes” are a skullcap worn by Jewish males, especially Orthodox and Conservative Jewish males, in the synagogue and the home. Merriam Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/yarmulke>.

44. “Hijab” is the traditional covering for the hair and neck that is worn by Muslim women. Merriam Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/hijab>.

45. Law No. 2004-228 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190. The law discusses religious garb generally.

46. See *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458, 1463-64 (D.C. 1989) (“[The] Court denied members of [the Ethiopian Zion Coptic Church] the use of marijuana as a sacramental intoxicant” The Court contrasted it with the use of peyote by the Native American Church stating there exists a “vast difference in demand for marijuana on the one hand and peyote on the other” based on the teachings of each of the churches).

47. See *Custos*, *supra* note 29, at 372.

48. See Elisa T. Beller, *The Headscarf Affair: The Conseil D’Etat on the Role of Religion and Culture in French Society*, 39 TEX. INT’L L.J. 581, 582 (2004) (relying on Keith B. Richburg, *French President Urges Ban on Head Scarves in*

poll taken in Paris held that sixty-nine percent of voters supported such a ban.⁴⁹ The French view the *hijab* as a “symbol of a foreign people—with a foreign religion—who have come to France, but who do not wish to integrate themselves fully into the French life or accept French values.”⁵⁰ Although French officials insist that wearing a *hijab* represents oppression and subordination of women,⁵¹ this explanation merely veils cultural xenophobia regarding what is not traditionally French. Many Muslim women prefer to wear the traditional dress of their religion, and do so as an indication of their own right to hold beliefs and conduct their personal lives as they wish.⁵² Although this wish to freely conduct one’s personal life is not acknowledged in France, it may nevertheless be accepted in the United States where students have traditionally been permitted to wear attire even if it violates prevailing cultural norms.⁵³

The 2004 French ban does not specifically target any religious group; it affects all religions in a seemingly fair and even manner.⁵⁴ For example, the law affects the practice of Sikh boys who, by virtue of their religion, do not cut their hair and contain their hair in turbans.⁵⁵ Likewise, the law affects orthodox Jewish boys who are

Schools: Chirac Confronts Spread of Islam, WASH. POST, Dec. 18, 2003 at A1, A44 (describing a survey conducted in December 2003 by Le Parisien that showed sixty-nine percent of the French public in favor of such a ban)).

49. Richburg, *supra* note 48 at A1.

50. T. Jeremy Gunn, *Religious Freedom and Laicite: A Comparison of the United State and France*, 2004 BYU L. REV. 419, 456 (2004).

51. U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Civil and Political Rights, Including the Question of Religious Intolerance, Addendum 2, Mission to France*, U.N. Doc. E/CN.4/2006/5/Add.4 (Mar. 8, 2006) (report submitted by Asma Jahangir), available at http://www.cesnur.org/2006/UNCHR_report_on_France.pdf.

52. See 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, 256 (2006).

53. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that students do not have to “shed their constitutional rights . . . at the schoolhouse gate” thus allowing students to wear black armbands in protest of the Vietnam war).

54. Walterick, *supra* note 52, at 260.

55. *Id.*

required to wear *yarmulkes*.⁵⁶ Yet within the first year of the enactment of this law, forty-seven Muslim girls had been expelled from French schools for wearing the *hijab*, rendering Muslims significantly more affected than any other cultural group.⁵⁷ This shows this law has been specifically tailored to meet the desires of a prevailing cultural intolerance.

The discrepancy between the Catholic, Protestant, and Jewish ways of life with that of the Islamic way of life is that the rules for Muslims concerning marriage, divorce, care of children, gender roles, and the like, may be contrary to French Law.⁵⁸ As a result the French may merely be using religious symbols as a scapegoat to strengthen the rule of law.⁵⁹ It may be argued, however, that forcing students to dress in a secular manner grants more freedom to the majority Christian sect, as the cultural dress that is worn in the secular sphere may have derived from Christian influence. Christian tradition considers not wearing a hat or hairpiece a showing of one's respect in a house of God, whereas Jewish and Muslim cultures traditionally wear hairpieces in their respective houses of worship.

Much of the secular assimilation in France goes beyond the separation of Church and State, and towards the formation of a stronger sense of French nationhood. In France, one is not merely a citizen by being born on French soil.⁶⁰ Similarly, in Germany,

56. *Id.* at 261.

57. *France's Ban on Veils Judged as a Success*, UNITED PRESS INT'L, June 2, 2005, available at http://www.upi.com/Top_News/2005/06/02/Frances-ban-on-veils-judged-a-success/UPI-29771117707842/.

58. JOHN R. BOWEN, *CAN ISLAM BE FRENCH: PLURALISM AND PRAGMATISM IN A SECULAR STATE* 174 (Princeton Univ. Press 2010) (1951).

59. Hadi Yahmed, *Paris School Bans Hijab-wearing Sisters, Jewish Father Irked*, Mombu the Religion Forum, <http://www.mombu.com/religion/arabic/t-paris-school-bans-hijab-wearing-sisters-religion-case-authority-rituals-quarters-3008431.html>.

60. In order for an individual to be granted rights as a French citizen, that person must either be born to at least one French parent, be married to a French citizen for over a year and still living with that person, be married to a French citizen for less than a year but be living together and have a child with that person, or live in France for five years. C. CIV arts. 17-26 (Fr.) (Georges Rouhette & Anne Rouhette-Berton trans. 2006), available at http://195.83.177.9/upl/pdf/code_22.pdf. Further, that individual must be eighteen years or older, have no significant criminal history, and must speak the French language sufficiently to function within the society. *Id.*

individuals must go through a series of hoops to obtain citizenship.⁶¹ France may seek to unite the nation by imposing the nationalism of French culture upon its peoples, perhaps to the detriment of outside cultures that may seemingly undermine that goal. Thus, it could be said that France uses its constitution to shield itself from altering its cherished cultural history where no man may be persecuted for his beliefs as long as such expression does not disturb public order.⁶² Although France is a nation which touts itself for maintaining a respect for all beliefs,⁶³ the laws of the nation have proven that it will not always permit actions stemming from those beliefs.

III. THE UNITED KINGDOM

Unlike the United States and France, the United Kingdom has no written constitution;⁶⁴ it relies on the rule making power of its two Houses to derive the letter of law.⁶⁵ From an American perspective, this may appear to be more of an *ad hoc* manner of developing legal precedent. However, even without a constitutional provision guaranteeing the freedom of religion, the United Kingdom has proven to be one of the most religiously tolerant and permissive nations.⁶⁶ Arguably, this lack of constraint results from not having a constitutional foundation in place. By not utilizing a *stare decisis* system to enforce laws by which all subsequent law must appropriately follow, the Parliament is capable of writing into law any decree that fits the cultural fashion of the day.

In contrast to the United States and the Republic of France, the United Kingdom has an established state religion, in which even members of the clergy may hold political office.⁶⁷ The Church of

61. See RONALD J. KROTOSZYNSKI JR., *THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH* 132 (N.Y. Univ. Press 2006).

62. See BELL, *supra* note 24.

63. 1958 CONST. art. I (Fr.).

64. See Mark Hill, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United Kingdom*, 19 EMORY INT'L L. REV. 1129, 1131 (2005).

65. See generally *id.*

66. See generally *id.*

67. See FINER, *supra* note 36.

England, or the Anglican Church, has been the dominant state religion since 1558.⁶⁸ Consistent with a lack of a constitution is a lack of guaranteed freedom of religion or rights specifically delineated for the Church. However, over the past two centuries, the United Kingdom has made efforts to improve its religious tolerance and grant further freedoms to those who are not members of the dominant state faith. In 1828, the Parliament passed the Act for the Relief of Catholics, which permitted the existence of Roman Catholic schools and places of worship. Additionally, the first Jew was admitted to Parliament in 1858 (Lionel de Rothschild),⁶⁹ and less than thirty years later, an Atheist followed (Charles Bradlaugh).⁷⁰

The United Kingdom's religious tolerance goes beyond that of admitting members of different faiths to government office. Its laws even mandate that Christian prisoners are exempt from work on Sunday, Christmas, and Good Friday.⁷¹ More recently, this law has been extended to the holidays of prisoners of all faiths.⁷² Additionally, prisoners are permitted a diet that conforms to their religious demands.⁷³ The fact that the state goes as far as to grant such freedoms to prisoners, who themselves may be considered a burden on the taxpayers, indicates an effort to promote religious tolerance that trumps the effect of resulting inconveniences upon the state.

Given that the Church may thrust its power upon the State, the laws of the United Kingdom are often tailored to the recognition of religious practice over the interests of a free market. In the United Kingdom, businesses are prohibited from allowing employees to work on Sunday unless that business can establish one of the following exceptions: (1) that the business qualifies under a specific exemption

68. The Archbishops' Council of the Church of England, 2004, <http://www.cofe.anglican.org/about/history> (last visited Jan. 14, 2010).

69. WERNER E. MOSS & JULIUS CARLBACH, *SECOND CHANCE: TWO CENTURIES OF GERMAN SPEAKING JEWS IN THE UNITED KINGDOM 177* (J.C.B. Mohr 1991).

70. C.J. LITZENBERGER & EILEEN G. LYON, *THE HUMAN TRADITION IN MODERN BRITAIN 127* (Caroline Litzenberger & Eileen G. Lyon eds., Rowman & Littlefield Publishers, Inc. 2006).

71. Prison Rules, 1999, S.I. 1999/728, pt. II, r. 18 (U.K.).

72. *Id.*

73. Prison Rules 2005, r. 25(2), available at <http://www.justice.ie/en/JELR/PrisonRules2005.pdf/Files/PrisonRules2005.pdf>.

by the state; (2) that the business is occupied and maintained by Jewish persons observing the Sabbath on Saturday instead of Sunday; or (3) for “large shops,” that a notice of proposed Sunday opening is in force by the state with limited and specific work hours.⁷⁴ To a capitalistic enterprise, this may appear to be a poor fiscal decision by the State. However, the Parliament perceives the respect for religious practice as a great necessity. Arguably, by prohibiting employee work on Sundays, the government by prohibiting Sabbath day labor places those with religious convictions on an even playing field with those who would otherwise work, thus promoting equality between those with and without religious constraints.

The United States has, in recent decades, developed similar laws to those of the United Kingdom. In *Sherbert v. Verner*, a Seventh Day Adventist was fired when she refused to work on Saturday.⁷⁵ There, the Court held if the government takes a course of action that substantially burdens the religious exercise of the practitioner, and is unable to show evidence of a compelling interest that prevails over the worker’s interest, the government has violated worker’s rights.⁷⁶ However, the difference lies in the fact that this law only applies to public workers, whereas in the United Kingdom, similar employment laws protect both public and private employees.⁷⁷

Much like the laws of the United States, the laws of the United Kingdom appear to distinguish between permissive beliefs and non-permissive acts. For example, the English courts have held that for Rastafarians, the use and supply of cannabis cannot be lawfully justified as motivated by religion.⁷⁸ This is very similar to the United States District Court’s reasoning in *Olsen v. Drug Enforcement Administration*, in which the court held that the First Amendment does not immunize religious marijuana users from prosecution.⁷⁹ This

74. See Hill, *supra* note 64, at 1135.

75. *Sherbert v. Verner*, 374 U.S. 398, 399 (1963); *but see* *Esson v. London Transp. Executive*, 1975 I.R.L.R. 48.

76. *Sherbert*, 374 U.S. at 409-10.

77. See generally Hill, *supra* note 64.

78. Peter Cumper, *The United Kingdom and the U.N. Declaration on the Elimination of Intolerance and Discrimination Based on Religion or Belief*, 21 EMORY INT’L L. REV. 13, 17 (2007); *cf.* *Crown Suppliers v. Dawkins*, [1993] I.C.R. 517 (discussing hair, not cannabis).

79. *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458, 1463 (D.C. 1989).

demonstrates the limit on how far state rule extends from religious tolerance.

The United Kingdom may be one of the more religiously tolerant nations in the world, yet even its tolerance only extends so far. For the United Kingdom, the Church is an entity specifically protected and incorporated by the state, rather than held separate as it is in the Republic of France and the United States. Where laws formulated in the United Kingdom take into account the effects of religious activity, the United States approaches religious freedom by carving such rights out of pre-existing law. These differences may stem from the early development of each country: one country grew from religious soil, while the other developed with the purpose of avoiding religious influence upon the State.⁸⁰

IV. THE FEDERAL REPUBLIC OF GERMANY

In Germany, German Basic Law contains the proclamation that there shall be no state-established church.⁸¹ Yet, unlike the United States, which has traditionally attempted to sever church issues from

80. The United States was developed by people from many religious backgrounds, and even the nation's forefathers attempted to pronounce a divide between the two conflicting interests. See Letter from Thomas Jefferson to Dr. Thomas Cooper (Feb. 10, 1814), available at <http://lachlan.bluehaze.com.au/lit/jeff10.htm>. In Thomas Jefferson's letter to Dr. Thomas Cooper in 1814, Jefferson stated "Christianity neither is, nor ever was a part of the common law." *Id.* Further, Jefferson was an ardent believer that the effect of religion upon government would be to permit tyranny. See Letter from Thomas Jefferson to Danbury Baptist Church (Jan. 1, 1802), available at <http://www.loc.gov/loc/cib/9806/danpre.html>. In his letter to the Danbury Baptist Church in 1802, he stated

Believing with you that religion is a matter which lies solely between Man and his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State.

Id.

81. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] art. 140 (F.R.G.) [Basic Law] (May 23, 1949), translated in *Inter Nationes*, <http://www.iuscomp.org/gla/statutes/GG.htm> (last visited Jan. 14, 2010).

State issues, the German State actively cooperates with religious organizations.⁸²

In comparison to the governments of the aforementioned nations, the German government tends to be much more lenient toward special privileges of religious groups. Generally, the courts are inclined to allow for religious exemptions from otherwise applicable civil laws. For example, in 1968, a clothing dealer sued to enjoin a group of Catholic students selling clothing for a church fund drive because the fund drive hurt his sales.⁸³ Three years later, an evangelical man was criminally charged for failing to resuscitate his dying wife.⁸⁴ In both cases, the Courts held in favor of the parties claiming religious freedom. Yet, the Courts neglected to clarify the discrepancy apparent in these cases; namely, that the man's failure to act in the latter case was based upon religious conviction, whereas the students in the prior case merely used their church as a foundation for a fund drive.

In Germany, freedom of religion is not entirely evident and is guaranteed only to the extent that it does not violate another individual's personal dignity.⁸⁵ Additionally, the German government is wary of any religion that promotes mythology or racial superiority.⁸⁶ Notably, the government approaches Scientology as an organization having an anti-democratic nature, and some believe it has

82. See Michael Browne, *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, 174 (1998) (discussing taxation of religious congregations).

83. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 445 (2d ed. 1997) (referencing Bundesverfassungsgericht [BVerfGE] [federal constitutional court] Oct. 16, 1968, 24, 236 (238) (F.R.G.)).

84. KOMMERS, *supra* note 83, at 449 (referencing Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Oct. 19, 1971, 32, 98 (99, n.74 & 130, n.90) (F.R.G.)).

85. See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] art. 1(1) (F.R.G.) [Basic Law] (May 23, 1949), *translated in* *Inter Nationes*, <http://www.iuscomp.org/gla/statutes/GG.htm> (last visited Jan. 14, 2010).

("Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.")

86. See NATAN LERNER, *THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* 179 (Sijthoff & Noordhoff Int'l Publishers 1980).

plans to infiltrate German industry, government and society.⁸⁷ This wariness of Scientology likely stems from a fear of falling into the same race-based political coup that developed during the Nazi era. The German government fears the charismatic leadership of L. Ron Hubbard, founder of the Church of Scientology, may create a fear of cultural takeover much like what occurred in the 1930's.

Germany's fear of societal takeover extends beyond religious subcultures to include religions seen as traditionally non-German. In September 2003, the Federal Constitutional Court in Germany ruled that the State had the right to prohibit a Muslim teacher born in Afghanistan from wearing a *hijab* at school.⁸⁸ The media considered this prohibition unconstitutional believing that the law protected the wearing of a *hijab*.⁸⁹ Nevertheless, the Court justified this decision by arguing that a teacher wearing a *hijab* in school inhibited the parents' rights to raise their children in the faith of their choice.⁹⁰ Notably, the Court decided this case around the same time the U.S. Supreme Court decided *Elk Grove v. Newdow*,⁹¹ Thus one could speculate that the German courts looked to the *Newdow* decision in reaching the conclusion in the above German Federal Constitutional Court case. Moreover, the German Court felt that allowing the teacher to wear a *hijab* would lead to conflict within the classrooms, since a religious symbol in the classroom is something that a passive observer cannot avoid.

87. See Browne, *supra* note 82, at 195.

88. Bundesverfassungsgericht [BVerfGE] [federal constitutional court] Sept. 24, 2003, 108, 282 (296) (F.R.G.) (In German: "1. Ein Verbot für Lehrkräfte, in Schule und Unterricht ein Kopftuch zu tragen, findet im geltenden Recht des Landes Baden-Württemberg keine hinreichend bestimmte gesetzliche Grundlage. 2. Der mit zunehmender religiöser Pluralität verbundene gesellschaftliche Wandel kann für den Gesetzgeber Anlass zu einer Neubestimmung des zulässigen Ausmaßes religiöser Bezüge in der Schule sein"); (translated into English by author: "1. A prohibition for teachers to worship in school and by wearing a headscarf was not found to be a sufficiently determined legal basis in the valid right of the country Baden-Wuerttemberg; 2. The social change connected with increasing religious Pluralität is for the legislators to determine for a new regulation on the permissible extent of religious garb at school.").

89. See Axel Frhr. Von Campenhausen, *The German Headscarf Debate*, 2004 BYU L. REV. 665, 666 (2004).

90. *Id.* at 674.

91. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 52 (2004).

This case may be viewed not necessarily as an attempt to protect rights related to religious conviction, but rather as a method for exposing the German people to a specific ethos that appears taboo in this cultural context: a social agenda looming in the background. The German citizenry has developed cultural reservations based upon the recent influx of Turkish immigrants and a fear arising from the conflict in the Middle East.⁹² Ironically, a nation modeled on religious freedom may have reverted to a system of law that specifically tailored freedoms to those people who fit the status quo, all the while denying the same freedoms to those falling on the cultural outskirts.

The German Basic Law holds that civil and political rights and duties shall neither be dependent on, nor restricted by, the exercise of religion.⁹³ Thus, it is feasible that the government could curtail religious freedom in defense of political or civil rights, if Muslim cultural influence was violating those civil rights.⁹⁴ This may justify the German government's position in serving the development of a Christian state. For example, similar to the United Kingdom, Germany has mandated that shops may not be open on Sundays.⁹⁵ However, unlike the United Kingdom, Jewish and Muslim shopkeepers in Germany may not opt out of this law.⁹⁶ Additionally, prayer is permitted in public schools and time is taken out of the day for students to pray. Students are not required to participate, and German courts have rejected the argument that having student prayer time forces students to be unduly subjected to other religions.⁹⁷

92. See KROTOSZYNSKI JR., *supra* note 61, at 135.

93. See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] art. 136(1) (F.R.G.) [Basic Law] (May 23, 1949), *translated in* Inter Nationes, <http://www.iuscomp.org/gla/statutes/GG.htm> (last visited Jan. 14, 2010).

94. See Gerhard Robbers, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Germany*, 19 EMORY INT'L L. REV. 841, 872-76 (2005).

95. See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] art. 139 (F.R.G.) [Basic Law] (May 23, 1949), *translated in* Inter Nationes, <http://www.iuscomp.org/gla/statutes/GG.htm> (last visited Jan. 14, 2010).

96. See Robbers, *supra* note 94, at 856.

97. Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Nov. 6, 1968, 24, 289 (300) (F.R.G.) (in German: "In mehrfacher Hinsicht verletze das Urteil Normen des Grundgesetzes, Die negative Bekenntnisfreiheit als Ausprägung des Grundrechts der Glaubens- und Gewissensfreiheit schütze nicht vor jeglicher Handlungsweise, durch die auf eine bestimmte Überzeugung geschlossen werden

Interestingly, Germany houses the largest Muslim minority in Western Europe.⁹⁸ Yet the fact that Germany has a large Muslim demographic⁹⁹ seems to have had little impact on the development of German law.

Under German law, when a perpetrator commits a criminal act in furtherance of a religious cause, such intent must be taken into account when determining the level of guilt and the punishment that person receives.¹⁰⁰ Thus, similar to the U.S. Supreme Court ruling in *Gonzales*,¹⁰¹ Germany may consider the use of narcotic substances for a religious purpose excusable if the narcotic use was justifiable by a religious reason. Also similar to the U.S. courts, the German courts do not believe that Rastafarians have a compelling enough reason to use marijuana as a sacramental intoxicant.¹⁰² The German courts may

könne; sichergestellt sei nur, daß jeder seine Überzeugung verschweigen könne—was z.B. durch Nichtteilnahme am Schulgebet geschehe—und daß daraus keine Nachteile für ihn entstünden. Die unbedingte Geltung des Grundrechts beziehe sich nur auf den Schutz der Persönlichkeitssphäre gegenüber dem Staat. Konflikte bei der Ausübung von Grundrechten mehrerer Bürger machten die Anerkennung zumutbarer Schranken erforderlich und seien nur im Geiste der Toleranz zu lösen. Das erfordere die Duldung des Gebets; das Recht zum Schweigen werde dadurch allenfalls zumutbar eingeschränkt, und zwar nicht in stärkerem Maße als etwa beim Fernbleiben vom Religionsunterricht.”); (translated into English by author: “In several respects the judgment injures the standards of the Basic Law. The negative effect of the freedom as a development of the fundamental right to faith and of the freedom to believe does not protect against any way of acting, by which a certain conviction can be determined; it is guaranteed only that everyone can conceal his conviction—which is done e.g. via nonparticipation on the school prayer—and that from it no disadvantages for him would develop. The absolute validity of the fundamental right refers only to the protection of the privacy in relation to the state. Conflicts with the practice of fundamental rights of several citizens made the acknowledgment of reasonable barriers necessary and are only in the spirit of the tolerance to be solved. That requires the tolerance of the prayer; the right to silence is necessary if reasonably limited thereby, not in stronger measure than, for instance, with the absence of religious education.”).

98. Robbers, *supra* note 94, at 868. Out of a population of 82.5 million people in Germany, 3.2 million are Muslims. *Id.*

99. *Id.*

100. KOMMERS, *supra* note 83, at 452 (referencing Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Oct. 19, 1971, 32, 98 (F.R.G.)).

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

102. RAYMOND YOUNGS, SOURCEBOOK ON GERMAN LAW 159 (2d ed. 2002)

justify this by arguing that the use of marijuana for religious purposes would restrict civil and political rights and duties under Article 136 of Basic German Law.¹⁰³

The German approach to freedom of religion differs vastly from many other Western nations in that the concept of religious freedom is approached as a right subsumed by the state rather than as a separate entity. Although the practice of religion is free, it must not interfere with the goals or intentions of the state.¹⁰⁴ While the government may be willing to defend personal dogmatic belief, overt faith-based actions not conforming to the dominant social norms are virtually proscribed, and therefore advocates of those acts are denied similar protections.¹⁰⁵

V. THE PEOPLE'S REPUBLIC OF CHINA

In the People's Republic of China ("China"), the concept of religious freedom vastly differs from that of Western nations. Traditionally, China has battled against the influence of outside cultures, both in the formation of law as well as in its cultural development. Further, "China [has] historically been suspicious that foreigners exploited religious teaching to usurp China's sovereignty [resulting in] religion [that] has been associated with 'military and political expansionism[,]'" similar to the cultural and religious imperialism imposed on China while under British rule.¹⁰⁶ Thus, China is selective about what foreign norms are applied, and often takes the position that Western religious norms are simply inappropriate for its nation.¹⁰⁷

(discussing denying a Rastafarian man a license to grow marijuana for religious purposes) (citing Bundesverwaltungsgericht [BVerwG] [Highest Administrative Court] Dec. 21, 2000, *Neue Juristische Wochenschrift* [NJW] 2001, 1365 (F.R.G.)).

103. See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] art. 136 (F.R.G.) [Basic Law] (May 23, 1949), *translated in* *Inter Nationes*, <http://www.iuscomp.org/gla/statutes/GG.htm> (last visited Jan. 14, 2010).

104. See Bundesverfassungsgericht [BVerfGE] [federal constitutional court] Sept. 24, 2003, 108, 282 (F.R.G.); see also BVERWG NJW 2001, 1365.

105. See 108 BVerfGE 282; see also BVERWG NJW 2001, 1365.

106. Lison Harris, *God and Caesar in China: Policy Implications of Church-State Tensions*, 35 H.K.L.J. 532, 533 (2005).

107. See Pitman Potter, *Legal Reform in China Institutions, Culture, and*

An example of the Chinese approach to non-traditional religion is seen in China's recent stance on its anti-cult crusades, particularly in regard to the Falun Gong group, a seemingly benign spiritual exercise group.¹⁰⁸ The Falun Gong was banned in October 1999, and by 2002, tens of thousands of its followers were detained, five hundred of whom died from torture while in custody.¹⁰⁹

Under international human rights law, freedom of religion is comprised of two components: freedom of religious belief and the manifestation of a religious belief.¹¹⁰ The Chinese government has contended that the right to freedom of religious belief is not absolute and does not outweigh other freedoms, particularly that of protecting its people from cults.¹¹¹ China, therefore, prohibits the organization of separate religious sects.¹¹² It is believed this came from a time when Chinese authorities were wary of political groups organized by Tibetans, and even suppressed folk religions in rural villages.¹¹³

It is likely that the anti-religious sentiment derived from Marxist teachings which disavow the existence of a transcendental realm. When the Nationalist Government gained control of China in 1927, it looked to wipe out popular religious or quasi-religious beliefs, such as astrology, magic, geomancy, and the sale of merchandise that related to these beliefs.¹¹⁴ Currently, China sanctions the existence of only

Selective Adaptation, 29 LAW & SOC. INQUIRY 465 (2004).

108. DANNY SCHECHTER, *FALUN GONG'S CHALLENGE TO CHINA: SPIRITUAL PRACTICE OR "EVIL CULT"?* 71 (Akashic Books 2000).

109. Amnesty International Report (2003), available at <http://web.archive.org/web/20030812025613/web.amnesty.org/report2003/chn-summary-eng>.

110. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966), available at <http://www1.umn.edu/humanrts/instreet/b3ccpr.htm>.

111. See <http://www.religiousfreedom.com/wrpt/Chinarpt.htm> (discussing the International Coalition for Religious Freedom argues that China regulates those religions it perceives threatens the nation's cultural heritage and labels these religious organizations as cults).

112. See Anne S.Y. Cheung, *In Search of a Theory of Cult and Freedom of Religion in China: The Case of Falun Gong*, 13 PAC. RIM L. & POL'Y J. 3 (2004).

113. Pittman B. Potter, *Belief in Control: Regulation of Religion in China*, in 3 THE CHINA QUARTERLY SPECIAL ISSUES, RELIGION IN CHINA TODAY 13 (Daniel L. Overmyer ed., Cambridge Univ. Press 2003).

114. Prasenjit Duara, *Knowledge and Power in the Discourse of Modernity: The Campaigns Against Popular Religion in Early Twentieth-Century China*, 74-80

five religious orders: Buddhism, Taoism, Catholicism, Protestantism, and Islam.¹¹⁵

China only permits religious freedom at all purportedly because the Chinese Constitution granted some protection to such freedoms in 1982. Essentially, the Chinese Constitution says, “citizens of the People’s Republic of China enjoy the freedom of religious belief,” but only “normal religious activity” is protected.¹¹⁶ Yet even with this freedom, the law forbids foreign domination of existing religious bodies.¹¹⁷ Thus Islamic or Christian spiritual leaders must be Chinese, and cannot be missionaries from other nations.

As political and cultural forces drive many parts of the world in one societal direction, history and tradition have caused others to head down a different path. Where many Western nations have struggled toward a complete and unfettered freedom of religion, China makes strides in the opposite direction, attempting to achieve national uniformity of religion for its government and people.

CONCLUSION

Freedom of religion is a concept that has evolved in each nation to reflect its particular cultural and societal ideals. Each nation’s ideologies have been tailored by the cultural model its citizens believe they can associate with. Such ideologies have also developed based on the country’s evolving cultures. Laws regarding the freedom of religion are merely an organic reflection of what the people of each country feel is most important to their national identity.

Many in the United States strongly feel there should be a social freedom and ideology that people should be able to hold and express their own beliefs. Such a concept is not commonly shared by the people of foreign nations. What must be noted is that there is no right or wrong; one cannot find answers for its nation within another culture, nor can one view another nation’s policies as flawed. Systems of government simply follow what is best for their people, forming laws that fit snugly into the nation’s social schema. Much like a

(1991), available at http://teaching.ust.hk/~huma552/week10/W10_Prasenjit.pdf.

115. See Cheung, *supra* note 112, at 19-20.

116. XIAN FA art. 36, § 1 (1993) (P.R.C.).

117. XIAN FA art. 36, § 4 (1993) (P.R.C.).

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religion, a government can function only if its people have faith in its laws.