Looking Beyond the Veil

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IMMANUEL V. CHIOCO

ABSTRACT

From establishments of state religions to bans on headscarves, religious minorities experience discrimination. In the post-September 11, 2001, world, Muslim women in particular have faced harsh forms of discrimination and stereotyping; this stigma has only been worsened with the recent influx of immigrants into Europe. With increasing numbers of immigrants, some countries have attempted to assimilate minority religious groups by banning the religious use of headscarves. EEOC v. Abercrombie & Fitch Stores, Inc., a case from the United States Supreme Court, was a break for Muslim women. This case, which involved a Muslim plaintiff, held that religious practices are to be given favored treatment by employers in the workplace. This Note reads the Abercrombie case against the background of the First Amendment’s Religion Clauses, Title VII of the Civil Rights Act of 1964, and globalization. Given the widespread discrimination that Muslim women currently face across the globe, this Note considers what steps the international community might take next to protect not only Muslim women but also other religious minorities in the workplace.

INTRODUCTION

Who cares about religion nowadays, anyway? By many measures, religion has occupied an unparalleled role in the development of society and in the human experience. For thousands of years, religious beliefs have shaped both laws and customs.1 So, too, has religion influenced
theories of morality and government;\(^2\) how people group together is often affected by their shared religious beliefs.\(^3\) In 2012, at least eighty percent of the world’s population held a religious faith.\(^4\) And, according to some research polls, the world will only become a more religious place in future years.\(^5\) Surely religion’s impact cannot be questioned.

Despite religion’s presence in history and in contemporary life, some people have begun to undermine its values and practices, especially when the tenets of any one religion conflicts with their own personal viewpoints. Challenges to differing religious beliefs are now seemingly all too common, no matter where one looks. For example, because of its strong stance on secularism and its state policy that minority “assimilation [should be] a condition of membership,”\(^6\) France bans Muslim women from wearing religious scarves and garments in public.\(^7\) In December 2016, Germany’s Chancellor, Angela Merkel, indicated that her country might follow suit when she stated that full veils should be prohibited “wherever it is legally possible.”\(^8\)

But religious conflicts take a more extreme form in other places. In Sudan, for example, instances have been reported of extremist groups

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2. See, e.g., BARBARA MACKINNON, ETHICS: THEORY AND CONTEMPORARY ISSUES 3 (7th ed. 2012) ("Many people get their ethical or moral views from their religion. . . . Some religions recognize and revere saints or holy people who provide models for us and exemplify virtues we should emulate."); John Locke, A Letter Concerning Toleration, in THE POLITICAL THEORY READER, supra note 1, at 259, 260 (Paul Schumaker ed., 2010) (writing that government cannot force anyone to adhere to a religion).

3. See RICHARD K. FENN, THE BLACKWELL COMPANION TO SOCIOLOGY OF RELIGION 233 (2003) ("There is undeniable evidence of . . . strength in the attachment to collective religious identities in some places.").


burning down Christian churches. And, as this Note is being written, approximately eleven million people have fled their homes because of the Syrian civil war, which is, in part, a religious struggle. Sometimes, conflicts between religion and social interests can operate in much grayer areas. Such is the case in the United States, where some people, such as bakers and small business owners, claim that the government cannot force them to serve homosexual customers, lest their religious beliefs be violated. All of these examples are occurring more frequently. Still, the "scale of religious persecution around the world is not widely appreciated." Why this is so, is somewhat of a mystery.

It is mysterious precisely because any tolerance of religious discrimination or lack of respect for another's religious beliefs, absent legitimate and compelling state interests, is antithetical to a liberal tradition that has long regarded freedom of religion as the oldest internationally recognized human right. Many of the most careful and insightful writers on religion have opined that all other rights are fundamentally linked with religious liberty. The importance of religious liberty is apparent in many constitutions. The French Constitution, for example, guarantees its citizens equality before the law, regardless of religion. The German Constitution likewise protects

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10. See A Snapshot of the Crisis—In the Middle East and Europe, SYRIAN REFUGEES (last updated Sept. 2016), http://syrianrefugees.eu.


15. See, e.g., Natan Lerner, Religious Human Rights Under the United Nations, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 79, 83 (Johan D. van der Vyver & John Witte, Jr. eds., 1996); ELLIS M. WEST, THE RELIGION CLAUSES OF THE FIRST AMENDMENT: GUARANTEES OF STATES' RIGHTS? 1 (2011); Irving Bryant, Madison: On the Separation of Church and State, 8 WM. & MARY Q. 3, 3 (1951) ("[F]reedom of religion was the fundamental item upon which all other forms of civil liberty depended. Its maintenance would not automatically preserve the entire liberty of the citizen. But without it the other rights were sure to be destroyed.").

16. 1958 CONST. 1 (Fr.).
the freedom of conscience and the "undisturbed practice of religion." And the United States Constitution adds another facet by barring government from establishing a state religion. What is a mystery is if the religious guarantees from these constitutions are hollow or whether they only apply fully to certain groups of people. As illustrated by the previous examples from France, Germany, and Sudan, tolerance is slowly disappearing. In the United States, although they may not experience legally sanctioned discrimination, bakers and other small business owners can still face social opprobrium if they follow beliefs contrary to the majority opinion; in the United States, then, respect is waning. Perhaps in this light, the important question is not whether anyone cares about religion in itself—because people and governments clearly do—but whether anyone still cares about the values of religious toleration.

Enter the Supreme Court of the United States in June 2015, when Justice Antonin Scalia summarized the Court's main points in his opinion for EEOC v. Abercrombie & Fitch Stores, Inc., an employment discrimination case that was overshadowed by the likes of King v. Burwell and Obergefell v. Hodges. Abercrombie involved a practicing Muslim, Samantha Elauf, who applied for a position at an Abercrombie outlet in Tulsa, Oklahoma. Because of her religion, Elauf wore a black scarf over her head, commonly known as an Islamic hijab. The district store manager declined to hire Elauf pursuant to Abercrombie's apparel policy, reasoning that all "headwear, religious or otherwise," would violate it, and Elauf subsequently brought suit against the store. In

18. U.S. CONST. amend. I.
23. Hijab is not to be confused with the Islamic burka, an article of clothing that typically covers the entire body. See, e.g., Peter Cumper & Tom Lewis, "Taking Religion Seriously"? Human Rights and Hijab in Europe—Some Problems of Adjudication, 24 J.L. & RELIGION 599, 602 (2009) (explaining how and why different types of Islamic clothing generate controversy).
Justice Scalia's words at the announcement hearing, this was a "really easy" case to determine.

The Court sided with Elauf on a vote of 8 to 1. The problem, as the Court identified it, was that Elauf's religious practice became a motivating factor in the manager's decision not to hire her. Even if an employer adopts a policy that is facially neutral, the Court wrote, the employer must still accommodate an applicant's religious exercise, so long as the accommodation is reasonable. Further still, the majority opinion stated outright that, at least in the context of employment discrimination cases, religious practices should be given "favored treatment" by employers. And it is certainly possible to read the *Abercrombie* decision to mean that, as a general matter, religious beliefs are a characteristic that judges should keep a keen eye out for in discrimination cases.

Now, the result of *Abercrombie* can perhaps be interpreted in two strands: a domestic strand and a global strand. In the domestic strand, the outcome in *Abercrombie* is, in some measures, unsurprising when understood in light of legal developments from the Supreme Court. Over the past six or seven decades, the Supreme Court has taken an extraordinarily solicitous stance on religious freedom—and this fact certainly helped Elauf win her argument. The case, however, can also be read in the context of modern globalization. Religion and globalization are intertwined. This, too, is unsurprising, as some religions, such as Christianity and Islam, are inherently global because adherents are called to establish a global network of believers to the faiths. Moreover, similar cases to Elauf's have been brought in European countries, but with opposite results. Because globalization offers a vehicle by which political, legal, social, and religious changes can occur across international borders, one can only speculate what role *Abercrombie* might play when the next religious dress case comes up in Europe or, indeed, anywhere in the world. Because of globalization, what occurs in one region will eventually impact the ongoing developments in another. Putting it another way, the spread and expansion of religious freedom is akin to a dialogue, a conversation.

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26. See *Abercrombie*, 135 S. Ct. at 2033 ("[T]he rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions.").

27. Id. at 2032–34; see also *Title VII of the Civil Rights Act of 1964, § 701(j)* (42 U.S.C. § 2000e(j)).


between vastly different societies striving to coexist. Therefore, one may very well also inquire whether Abercrombie can be a catalyst for greater religious freedom in workplaces across a world filled with diverse beliefs, cultures, and norms. This Note is structured around these two strands.

Part I of this Note focuses on the meaning and development of religious liberty in the domestic context. Part I, on the whole, gives only a minuscule account of this evolution, but it still gives enough background for one to adequately understand the Supreme Court's Abercrombie decision from a doctrinal standpoint. In so doing, it strives to illustrate how globalization affected the Framers' early, basic understanding of religious freedom; the Framers, in short, were borrowers and blenders of different European thought, especially when it came to philosophical theories that sought to delineate the contours between governmental power and individual belief. Consequently, some detail will be given as to how European Enlightenment thought influenced the American conception of religious liberty.

Part II gives Abercrombie its share of fair treatment, giving a deeper look at the religious role of headscarves in Islam as well as the case's journey through the courts. Part II also surveys aspects of Title VII of the Civil Rights Act of 1964, the legal framework through which employment discrimination plaintiffs like Elauf often bring their claims. It then examines the Abercrombie case in light of the legal history and developments described throughout Part I.

Part III examines what the Abercrombie case might potentially mean in the context of modern globalization. Part III explores whether the conception of religious accommodation in Title VII can be incorporated into a theory of international human rights law. In particular, Part III considers the theories of jus cogens and international customary law to determine whether either can allow for greater religious liberty and expression across the world.

I. RELIGIOUS VALUES: THE DEVELOPMENT OF RELIGIOUS FREEDOM IN THE UNITED STATES

One central feature of the United States' system of government is its commitment to religious liberty, or freedom of thought. Free exercise has sometimes been coined as the "first freedom," and its placement in

the First Amendment alone speaks volumes as to the importance that the Framers associated with religion; religious freedom was the spring by which other rights, most notably freedom of expression, could flourish. No wonder the Framers anchored the freedom of religion as a basis of American society.

Many of the Framers, such as Thomas Jefferson, Thomas Paine, and James Madison, were deeply influenced by their contemporary figures in the European Enlightenment, such as John Calvin, John Locke, and Montesquieu. Paine, for example, applauded the 1789 French revolutionaries for their establishment of the universal right of conscience. Similarly, Jefferson's political views were informed by the Scottish philosophers Francis Hutcheson and Lord Kames. And Madison, although reportedly the most irreligious of the three, espoused the Lockean view that the "purity of both government and institutional religion" will foster free exercise and religious practice. This borrowing of ideas has led at least one author to write that the "Americans of the eighteenth century were blenders . . . ." Therefore, at the very least, globalization, through the spread of ideas, influenced Americans' early ideas of what religious liberty should entail.

Domestically, religious liberty in the United States begins at the state level. Local movements toward a separation of church and state began well before the adoption of the federal constitution in 1789. Religion's importance in civil society, as well as its dangerous union with government, was already realized by the Framers, especially by Madison, the intellectual architect behind the Bill of Rights. In 1774, for instance, in a letter to a colleague, Madison wrote that slavery would surely have been institutionalized in the New England region had the Church of England been established there. At the time, six states

31. Similarly, the juxtaposition of the Free Speech and Religion Clauses in the First Amendment indicate their close relationship. Prayer, for example, is every much a form of expression as it is a religious practice.
33. See Adam & Emmerich, supra note 32, at 1584.
35. See Adam & Emmerich, supra note 32 at 1584.
36. Id. at 1586. But cf. George Mace, Locke, Hobbes, and the Federalist Papers: An Essay on the Genesis of the American Political Heritage 140 (1979) (arguing that, even if the Founding Fathers had been influenced by Locke and Montesquieu during the American Revolution, Thomas Hobbes's political philosophy became the most impactful by the time of the Constitution's drafting).
37. Zuckert, supra note 34, at 19.
38. See Bryant, supra note 15, at 3.
had established churches and imposed taxes on all citizens, including members of minority religious sects, to support, build, and maintain the state-sponsored church property and services. It was this establishment of state churches and state religion that caused religious dissenters' arousal.  

In particular, it was Madison and Jefferson who spearheaded the efforts to formulate a legal, constitutional provision for religious liberty. Circumstances in Virginia provided them the perfect opportunity to make their move. In 1784, Patrick Henry proposed an annual tax that would support Christianity as Virginia's official religion; this was in reaction to the Virginia Assembly depriving ministers of tax benefits just a few years earlier. Although Henry's Assessment Bill gained traction from Anglicans, it also drew sharp criticism from Baptists and Presbyterians. In response, Jefferson drafted a bill for religious freedom. He began this bill by writing that “God hath created the mind free” and “that all attempts to influence it by temporal punishment or burthens ... tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion . . . .” Textually, it is worth noting that Jefferson's bill incorporates Locke's view that religion thrives best when it is freed from either the constraints or the assistance of government. In sum, Jefferson focused primarily on protecting the independence of the human mind as well as the purity of religion. Henry's proposal was anathema to those ends.

For his part, Madison combatted Henry’s Assessment Bill by writing the Memorial and Remonstrance Against Religious Assessments. Madison's preamble branded the Assessment Bill as “a dangerous abuse of power.” The following paragraph set forth, as a first principle, every man's “unalienable right” to the liberty of conscience. Madison argued that any establishment of religion, no matter its degree, was an abridgment of the right to freedom of conscience. Because liberty of conscience was a duty “precedent, both in order of time and in degree of

39. See, e.g., DANIEL O. CONKLE, CONSTITUTIONAL LAW: THE RELIGION CLAUSES 19 (2d ed. 2009) (“The Virginia understanding was far from universal. Seven states, including Virginia, had adopted a policy of disestablishment. The remaining six states, however, continued to maintain or authorize established religions.”).
41. See Bryant, supra note 15, at 7–8.
42. SULLIVAN & FELDMAN, supra note 32, at 1480.
43. Id.
44. See Adam & Emmerich, supra note 32, at 1574.
45. Id. (quoting James Madison, Memorial and Remonstrance Against Religious Assessments, in 8 THE PAPERS OF JAMES MADISON 298, 299 (William T. Hutchinson & William M.E. Rachal eds. 1973)).
46. Id.
obligation," he further asserted that religious belief was an area wholly exempt from government regulation. In Madison's view, then, liberty of conscience was a foundational right, as all other rights would collapse without it. Eventually, in the summer of 1785, the Memorial and Remonstrance was widely distributed by Madison's contemporaries, before the Virginia Assembly could vote on Henry's proposed bill. In effect, the Memorial and Remonstrance generated so much political backing from Christian minority denominations that Henry's Assessment Bill was killed later that December, and, in 1786, the Virginia Assembly adopted Jefferson's Bill for Establishing Religious Freedom instead.

Between 1786 and 1791, after the United States Constitution had already been ratified, other states likewise passed their own laws safeguarding the liberty of conscience. Whereas Madison believed that no bill of rights was needed at the federal level, the same religious minorities that had opposed the taxes in Virginia now protested the absence of a similar guarantee for the freedom of conscience in the Constitution. Political pressure from opponents, as well as the prospect of yet another convention "for a reconsideration of the whole structure of the Constitution," forced Madison to shift from his initial position to become an advocate for a bill of rights, albeit a reluctant one. Perhaps this was so because Madison had to be so cautious in his craftsmanship, as religious policies across the states were still diverse.

After several drafts and reassurances to some statesmen that the clauses would apply only against the national government and would

47. Id. (quoting Madison, supra note 46, at 299).
48. Id.
49. Id.
50. SULLIVAN & FELDMAN, supra note 32, at 1480.
51. See THE FEDERALIST NO. 51, at 3 (James Madison) ("Society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects.") (emphasis added); Paul Finkelman, James Madison and the Bill of Rights: A Reluctant Paternity, 1990 SUP. CT. REV. 301, 310 (1990) ("Federalists argued that a bill of rights would be useless in stopping the government from trampling on the liberties of the people. Many members of the Convention, including Madison, believed that paper guarantees of basic rights meant very little.").
52. SULLIVAN & FELDMAN, supra note 33, at 1480.
53. Id.
54. Finkelman, supra note 51, at 337.
55. See id. at 336–44.
56. See, e.g., CONKLE, supra note 39, at 19.
leave current state policies intact.\textsuperscript{57} Congress ratified the Bill of Rights. The final text is familiar language: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . \textsuperscript{58} Similar to the French revolutionaries, Madison guaranteed constitutional protection for the freedom of conscience through the Free Exercise Clause. But he went further. By including the Establishment Clause in the Bill of Rights, Madison created "both a floor and a ceiling over the formulation of religion policy by the states."\textsuperscript{59}

Of course, the exact meanings of the Religion Clauses have been the subject of much debate and dispute, even though the Free Exercise Clause was the first guarantee of the First Amendment that the Supreme Court substantively analyzed.\textsuperscript{60} In 1878, in \textit{Reynolds v. United States},\textsuperscript{61} the Supreme Court originally interpreted the clause to actually allow for governmental interference with religious practices. But the meaning of free exercise would change by the time Congress enacted Title VII of the Civil Rights Act of 1964,\textsuperscript{62} which makes it illegal for an employer to make a hiring decision on account of an applicant's "race, color, religion, sex, or national origin . . . \textsuperscript{63}

By the 1960s, the Supreme Court had interpreted free exercise to require, at a minimum, that a person does not have "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."\textsuperscript{64} In other words, the Supreme Court in the latter half of the twentieth century had a much different understanding of free exercise than the 1878 Court, and it also had a

\textsuperscript{57} See, e.g., SULLIVAN \& FELDMAN, supra note 32, at 1480–81.
\textsuperscript{58} U.S. CONST. amend. I.
\textsuperscript{61} 98 U.S. 145, 166 (1878).
\textsuperscript{62} Although the Religion Clauses should oftentimes be read together, this Note will not focus on the Establishment Clause, as it is largely the Free Exercise Clause that comes into dispute in employment discrimination cases.
\textsuperscript{63} See Title VII of the Civil Rights Act of 1964, § 703(a) (42 U.S.C. § 2000e-2(a)). Title VII, however, did not always require accommodation of religious beliefs in the workplace. It was not until Congress amended Title VII in 1972 that the statute required employers to reasonably accommodate their employees' religious practices. See J. Gregory Grisham \& Robbin W. Hutton, \textit{Religious Accommodation in the Workplace: Current Trends Under Title VII}, 15 ENGAGE, July 2014, at 60, 60 (2014).
\textsuperscript{64} See, e.g., Sherbert v. Verner, 374 U.S. 398, 404 (1963) (ruling that South Carolina's withholding of state unemployment benefits to a Seventh-Day Adventist, who was fired and could not find any comparable employment because she would not take Saturday work, violated the Free Exercise Clause).
LOOKING BEYOND THE VEIL

much more solicitous view for religious practices. Beginning with Chief Justice William Rehnquist’s Court more specifically, Justices have begun reviewing laws under the Free Exercise and Establishment clauses in a more conservative fashion, in that the Court “tend[s] to support laws that accommodate religious belief in various ways.”\(^65\)

Conversely, whenever the Rehnquist Court happened to strike down ordinances affecting religion, it usually did so only when the regulation at issue required more separation between church and state.\(^66\)

One explanation for this significant doctrinal shift among different Supreme Courts is the increasing variety of minority religious practices that the United States harbors; arguably, globalization is also playing a role here. In employment discrimination claims, for which purpose Title VII was equipped to deal, more often than not, the plaintiff will come from a minority group.\(^67\) In the same vein, many First Amendment plaintiffs adhere to minority religious beliefs.\(^68\) The meanings of religion and religious liberty, central to both documents, were simply updated by the Supreme Court to accommodate more people and more differing beliefs. Some have suggested that a broad reading of the First Amendment’s Religion Clauses necessitates a broad reading of Title VII’s provisions combating religious discrimination in the workplace.\(^69\)

Although both the First Amendment’s Religion Clauses and Title VII protect essentially the same substantive values—the freedom of people to make religious decisions for themselves, independent of government coercion or influence—it is important to note that the two protect people from different entities. The First Amendment protects people from infringements by the federal\(^70\) and state\(^71\) governments. On the other hand, Title VII protects people from private sector employers. Consequently, there are important differences in how the two are

\(^65\) CHRISEP. BANKS & JOHN C. BLAKEMAN, THE U.S. SUPREME COURT AND NEW FEDERALISM: FROM THE REHNQUIST TO THE ROBERTS COURT 140, 141 (2012) (also observing that the “larger universe of data shows the Rehnquist Court was more solicitous of state and local religious policymaking than were the [other Courts]”).

\(^66\) See id. at 140–41.

\(^67\) See, e.g., Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) (suit brought by a member of the Worldwide Church of God); Crider v. Univ. of Tennessee at Knoxville, 492 F. App’x 609 (6th Cir. 2012) (unpublished) (suit brought by a Seventh-Day Adventist).


\(^69\) See generally JOSHUA D. DUNLAP, When Big Brother Plays God: The Religion Clauses, Title VII, and the Ministerial Exception, 82 NOTRE DAME L. REV. 2005 (arguing that the First Amendment’s ministerial exception should likewise be read into Title VII’s provisions).

\(^70\) U.S. CONST. amend. I (“Congress shall make no law . . . .”) (emphasis added).

\(^71\) U.S. CONST. amend. XIV, § 1.
applied to cases involving religious discrimination. In the First Amendment context, courts apply a strict scrutiny standard whenever they confront a law that outright regulates religious practice or conduct.\textsuperscript{72} If a law is neutral toward religion, then courts might apply\textsuperscript{73} the analysis set out in \textit{Employment Division v. Smith},\textsuperscript{74} which held that the First Amendment forbids neutral laws of general applicability if they affect not only free exercise but also other constitutional protections.

In Title VII cases, by contrast, employers need to show that they either tried reasonably accommodating an employee's religious practice or that they could not do so without incurring an undue burden;\textsuperscript{75} both standards are lower than the First Amendment's requirements. This, then, is the legal framework in which the \textit{Abercrombie} case would operate. Nevertheless, although First Amendment standards did not apply to Elauf's case and do not apply to employment discrimination cases generally, studying the meaning and development of religious liberty in the First Amendment context sheds light on the values that Title VII and other laws, such as religious freedom restoration acts, seek to protect.\textsuperscript{76}

\textbf{II. \textit{Abercrombie}: Through the Lens of Islam and Doctrine}

To have a deeper, more meaningful understanding of \textit{Abercrombie}'s impact and what it means for Muslim women, it is important to be familiar with the role that Islamic hijab plays in the religious and social spheres. Part II seeks to clarify the function of hijab in the Islamic faith and to comprehend the \textit{Abercrombie} decision in some detailed fashion—in light of both the hijab's significance as well as legal doctrine.

\textbf{A. The Religious and Social Significance of Islamic Hijab}

For some time now, Islamic hijab—and, indeed, Islam as a religion—has been misunderstood by people in the United States and

\begin{itemize}
  \item \textsuperscript{72} See \textsc{Conkle}, supra note 39, at 96.
  \item \textsuperscript{73} As \textit{Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal}, 546 U.S. 418 (2006), however, showed, courts will apply the standards set out in the federal Religious Freedom Restoration Act if a neutral federal law is being challenged.
  \item \textsuperscript{74} 494 U.S. 872 (1990).
  \item \textsuperscript{75} See \textsc{EEOC v. Abercrombie \& Fitch Stores, Inc.}, 135 S. Ct. 2028, 2032 (2015).
  \item \textsuperscript{76} Further, the First Amendment was created long before Title VII; it is entirely reasonable to think that at least some of the First Amendment's religious values were incorporated into Title VII's protections.
\end{itemize}
Europe, but perhaps more so in the post-September 11, 2001, world. Outside of the Middle East, Muslim women are often conveyed as oppressed and as being forced to practice Islam by wearing hijab. This conception, however, is mistaken, and has led to various restrictions on Islamic dress in the Netherlands, France, Belgium, Bulgaria, Italy, Switzerland, Egypt, Chad, Cameroon, Niger, and other countries. This misinterpretation has also carried social costs for Muslim women. Between 2001 and 2002, for instance, the Equal Employment Opportunity Commission (EEOC) reported a threefold increase in the number of complaints that involved Islamic garments like hijab. But as one author writes, “Contrary to the stereotype, the Qur’an itself prohibits forcing one to accept or practice Islam . . . .” Presumptively, practice includes the wearing of hijab; just as the Qur’an does not compel the practice of Islam, it also does not coerce anyone to wear hijab.

Hijab derives from the Arabic word ُهُجَابَةُ, which, in English, literally translates into “to prevent from seeing.” Far from being just a mere article of clothing, hijab has religious significance, in that it is “also hijab of the heart and intention. It is a choice to be modest, both in character and appearance, not just physical modesty, but also in one’s thoughts, speech, and actions.” Thus, wearing hijab also entails the modesty of one’s privacy and morality, which is encouraged by the Qur’an. In contrast to the popular viewpoint that the Qur’an requires only women to be modest in clothing, the Qur’an “prescribes for both Muslim men and women to be modest, in both character and dress.” For Muslim women, veiling oneself in hijab qualifies as a “sincere and meaningful [belief occupying] a place in the life of its possessor,”

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79. Id. at 447–48.


82. Abdo, supra note 78, at 448.

83. Benson, supra note 81, at 2 n.3.

84. Abdo, supra note 78, at 449 (citations omitted).

85. Id. at 448.

86. Grisham & Hutton, supra note 63, at 62.
equivalent to religion itself. Therefore, there are many religious justifications for veiling.

Islamic hijab is, moreover, a lifestyle. In practical terms, some women have described veiling as a liberation because it frees them “from societal expectations and judgments over a woman’s body and other physical characteristics.”\(^87\) Furthermore, wearing hijab allows women to avoid the influences of the fashion industry\(^88\) as well as the negative effects of sexuality.\(^89\) And, for Muslim immigrants, wearing hijab identifies oneself with the Islamic faith; it is a way to distinguish oneself from the majority. In other words, hijab is part of a collective identity that is unique to Muslims. Hijab “sends a message that [a woman:] a Muslim, has respect for herself, and expects to be treated respectfully, especially by the opposite sex.”\(^90\) As a lifestyle, Muslim women choose to wear hijab; in their view, no law can legitimately prohibit them from practicing their faith. Where and when one veils and unveils, stems from personal, independent choice, and this basic principle extends to places like the workplace. In this light, it is apparent why a decision like *Abercrombie* would have special significance to Muslim women—not just for those in the United States, but for Muslim women around the world.

**B. Understanding Abercrombie through the Title VII Framework**

Although the Supreme Court decided the case in 2015, the factual background to *Abercrombie* occurred in 2008, when Elauf, then seventeen years old, filled out an application for a sales associate position at Abercrombie Kids, a subsidiary of Abercrombie & Fitch.\(^91\) Like any designer store, Abercrombie is passionate about the presentation of both its sales items and its employees.\(^92\) Because of a store policy that “exemplifies a classic East Coast collegiate style of clothing,”\(^93\) Abercrombie employees are normally forbidden from wearing caps, necklaces, and bracelets.\(^94\)

Elauf, like many teenagers, was familiar with the type of clothes that the Abercrombie & Fitch brand promoted, and she realized that she

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88. *Id.* at 450.
90. Abdo, *supra* note 78, at 449.
91. Grisham & Hutton, *supra* note 63, at 64.
92. Olson, *supra* note 25, at 141.
93. EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1111 (10th Cir. 2013).
94. Olson, *supra* note 25, at 141.
would have to conform with the store's dress policy if she were to become a sales associate.\footnote{Grisham \& Hutton, \textit{supra} note 63, at 64–65.} Before Elauf's interview with the local hiring manager, an acquaintance at the store told Elauf that he thought her hijab would be fine, but suggested that she wear a color other than black.\footnote{Olson, \textit{supra} note 25, at 141.} Nevertheless, at the interview, Elauf wore jeans, a T-shirt, and a black hijab.\footnote{\textit{Id.}; Grisham \& Hutton, \textit{supra} note 64, at 65.} Although Elauf never revealed her faith during the interview,\footnote{Olson, \textit{supra} note 25, at 141–42. In fact, neither Elauf's headscarf nor her religion were brought up during the interview. \textit{Id.}} the interviewer assumed that she wore the scarf as a form of religious practice.\footnote{EEOC v. Abercrombie \& Fitch Stores, Inc., 135 S. Ct. 2028, 2031 (2015).} After she was declined the position, Elauf learned from another Abercrombie employee that she was not hired because of her hijab,\footnote{Olson, \textit{supra} note 25, at 142.} and, in 2009, the EEOC filed suit on her behalf.\footnote{\textit{Id.}}

Prior to Elauf's case in the Tenth Circuit, courts had interpreted Title VII to require an employment discrimination plaintiff to show that the plaintiff held a bona fide religious belief that conflicted with the employer's requirements or with the plaintiff's employment responsibilities, that the plaintiff gave actual notice to the employer of the conflict, and that the employer refused to hire the plaintiff for failing to conform with the employer's rules.\footnote{Grisham \& Hutton, \textit{supra} note 63, at 65.} Once a plaintiff made a prima facie case of discrimination, employers could defend themselves on the ground that they could not reasonably accommodate the plaintiff's religion without incurring an undue hardship on the business.\footnote{\textit{Abercrombie}, 135 S. Ct. at 2032.} With respect to the notice requirement for a plaintiff's prima facie case, practitioners have noted that:

The notice component appears to have become a focal point for courts, where the existence of a religious conflict with the employer's workplace policies or job duties arises and an adverse employment action is taken. Courts appear willing to infer notice if an employee makes reference to religion or religious belief in workplace discussions with the employer over job requirements or employer policies. Another trend arguably present in more recent religious accommodation cases is the subtle redefining of the \textit{de minimis} standard to place a more onerous burden on the
employer to justify undue hardship than that originally contemplated [earlier].

Intuitively, the requirement that the employer have notice makes good sense. If an employer did not really know about an applicant's religious belief, then one is left to ponder how the employer could have made an adverse decision on account of the applicant's religion. Therefore, a plaintiff has some burden to bear, but that burden is not a very high one. Following this framework, the 10th Circuit ruled for Abercrombie and held that Elauf did not even meet her light burden of proving notice, pointing out that Elauf never actually informed her interviewer of the conflict between the store's dress policy and her hijab.

In regard to doctrine, the Supreme Court's reversal of the Tenth Circuit's opinion is both surprising and unsurprising. It is surprising in that the Court, as a whole, paid little attention to the notice requirement in the Title VII framework. Throughout the three opinions in the case, the word "notice" appears only once—in Justice Samuel Alito's concurrence. In fact, Justice Scalia's majority opinion even went so far as to state that Title VII, unlike other antidiscrimination statutes, imposes no knowledge requirement on an employer. Instead, in disparate treatment cases such as Elauf's, Title VII prohibits employers from acting on bad motives. Applying that principle to the facts of the case, Abercrombie violated Title VII because the manager, although she did not actually know that Elauf was a practicing Muslim, still suspected that Elauf was Muslim.

On the other hand, Justice Scalia's opinion is unsurprising in light of the expansive and solicitous view of religious liberty that the Court has espoused over the past several decades. Moreover, this case involved a plaintiff from a religious minority group and, as was explained previously, the Court has changed its view of what religious liberty means to the benefit of religious minorities. Viewed from this vantage point, it is likely that the Court's evolving view of religion in the First Amendment affected how the Court applied Title VII's framework.

Justice Clarence Thomas dissented in part, but suggested that he might have sided with Elauf had she presented her case on a different theory of employment discrimination. Therefore, although he was in

104. Grisham & Hutton, supra note 63, at 67.
106. Id. at 2032.
107. Id. at 2033.
108. See id. at 2038 (Thomas, J., dissenting) ("To be sure, the effects of Abercrombie's neutral Look Policy, absent an accommodation, fall more harshly on those who wear headscarves as an aspect of their faith. But that is a classic case of an alleged disparate
partial dissent, Justice Thomas showed a willingness to have Abercrombie accommodate Elauf's hijab, given the right legal arguments. Still, Justice Thomas's opinion makes a political statement, as it implicitly acknowledges the role that religion plays in the workforce and in society—a trait increasingly common among Supreme Court Justices. At the very least, all nine of the Justices suggested throughout the Court's *Abercrombie* decision that Title VII doctrine is now in an age of solicitous religious accommodation.

III. DISCRIMINATION AGAINST ISLAMIC HIJAB ON A GLOBAL SCALE: DO INTERNATIONAL LAW THEORIES PROTECT RELIGIOUS EQUALITY IN THE WORKPLACE?

Although this Note has so far focused on the *Abercrombie* decision as mostly a domestic case, its factual background is more complete when viewed as part of a current, global conversation surrounding the stereotypes of Islam and its followers. Aggressions toward Muslim women are not unique to the United States. Discrimination toward religious minority groups such as Muslims occurs on a global scale, and one author writes that anti-Muslim sentiment ranges from "China to Congo-Brazzaville." As Europe's second largest religious group, Muslims, especially Muslim women, experience disparaging discrimination in many European countries. This Note has already mentioned the French headscarf ban and the proposed German ban as examples. In the United Kingdom, the rate of unemployment for Muslim women is three times higher than the national average. On the whole, most employment discrimination cases filed by Muslim women involve Islamic attire.

Arguably, globalization has had both positive and negative effects on religion. On the one hand, religious groups and organizations have been able to take advantage of transcultural "resources to mobilize
collective action, develop strategies, and press claims.” In addition, the growth of available financial resources has made it easier now for religious adherents to spread their beliefs across cultural lines; this process has involved “Christianity turning ‘southern’ and ‘black,’ Islam turning ‘Asian,’ and Buddhism turning ‘white’ and ‘western.’” Because of globalization, different religions are less isolated from each other. This has allowed some followers to fulfill the commands of their religion by establishing a worldwide network of believers. In so doing, people of different backgrounds and from different parts of the world have a sense of belonging in the religion with which they identify. Moreover, by bringing different people into constant contact with one another, globalization has perhaps fostered pluralism, in that “[e]verybody talks to everybody else” and so on, increasing the rate at which people can influence and understand each other. Finally, because of globalization, religions once thought to be very different from one another are now seen as sharing some desirable, worthwhile principles.

On the other hand, sometimes the exact opposite has been true. Modern changes have forced diverse groups of people to compete with each other in the global market, sometimes resulting in situations of the in-and-out-group mentality, which encompasses the view that anyone who does not belong to or is different from one’s group must be “bad, wrong, put down, converted, or killed.” Typically, this mentality tends to arise after a violent clash between cultures; hence the tendency in the United States and elsewhere to associate Islam with terrorism and Islamic hijab with radical fundamentalism after September 11. In Europe, some legal changes have been the direct result of waves of immigration. Globalization and the advent of modern transportation have made it easier for people to cross borders. It was only after Germany experienced an influx of hundreds of thousands of refugees that Angela Merkel called for a ban on face veils. These occurrences

115. See, e.g., Matthew 28:19 (“Therefore go and make disciples of all nations . . .”).
118. See Golebiewski, supra note 114.
in Europe have had their effects in the United States as well, as some states have attempted or are attempting to significantly limit the number of refugees who enter.\textsuperscript{120} These negative consequences have indubitably impacted religious freedom.

There are several reasons why \textit{Abercrombie} is an appropriate case for greater religious liberty around the world. First, Muslim women are perhaps one of the largest groups currently experiencing widespread religious discrimination. Second, \textit{Abercrombie} involved a case about veil-wearing, and veil-wearing is not peculiar to Islam. Roman Catholic nuns and many Catholic churchgoers, for instance, wear veils to church services.\textsuperscript{121} In that sense, \textit{Abercrombie} perhaps also allows for Christians to wear religious necklaces or veils, or for Jews to wear \textit{yarmulkes}, in the workplace. Third, \textit{Abercrombie}'s stance on religious freedom is modest, as it was an interpretation of Title VII, not of the Constitution.\textsuperscript{122} Thus, it acknowledged that there still may be instances where the government can lawfully ban the wearing of religious garbs because of compelling circumstances, such as in courtrooms and during police checks.

Reading the \textit{Abercrombie} decision against the background of globalization and the discrimination that Muslim women currently face, it is worthwhile to ask what steps the international community can take to protect not only Muslim women but also other religious minorities in the workplace. Although there are a variety of sources for legal norms in international law, this Note only seeks to briefly examine two of them: the \textit{jus cogens} theory of human rights and customary international law. Part III explores whether either of these theories is a suitable vehicle for regarding religious workplace accommodations as a fundamental human right.

\textbf{A. Jus Cogens as a Source of Human Rights Law}

In English, \textit{jus cogens} literally translates into “compelling law.”\textsuperscript{123} Although the theory of \textit{jus cogens} was known for a long time within many legal systems, it found its modern manifestation in international

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Maya Rhodan, \textit{Mike Pence Defends Refugee Plan Blocked by Judges}, \textit{TIME} (Oct. 5, 2016), http://time.com/4518963/vice-presidential-debate-mike-pence-syrian-refugees/ (commenting on Indiana’s attempt to block refugee immigration from countries where terrorism has been an issue).
\item Abdo, supra note 78, at 450.
\item Though, as has been argued, what “religion” means under the First Amendment probably affected what “religion” means under Title VII.
\end{enumerate}
\end{footnotesize}
law when the Vienna Convention on the Law of Treaties was opened for signature on May 23, 1969. Article 53 of the Vienna Convention defines _jus cogens_, also called peremptory norms, as a right that is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted . . ." Thus, as expressed in the Vienna Convention, a peremptory norm is a value—a right—so fundamental to humanity that it must be observed by all for the preservation of the international community. Because _jus cogens_ is effectively the supreme law in hierarchy, states that deviate from it are therefore acting as _hostes humani generis_, or as "enemies of the human race."

Generally, four criteria are considered in determining whether a right is _jus cogens_:

1. whether the right is a norm of general international law;

2. whether all states in the international community must accept the right, which is determined by whether a violation of the rule:
   (a) shocks the conscience of the international community, or
   (b) threatens the survival of states;

3. whether any derogation from the right is permissible;

4. and whether the right can only be modified by a new peremptory norm bearing the same character.

Currently, there are only a few practices that are prohibited because of _jus cogens_ theory. These include the practices of genocide, torture, apartheid, and slavery.

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Although the freedom to practice religion is not currently considered *jus cogens*, it is noteworthy that many of the most horrendous examples of human rights violations in history were linked with religious persecution and discrimination. The cases of genocide in Nazi Germany and the Soviet Union can be partially explained by religious intolerance.\textsuperscript{129} Likewise, an estimated 1.5 million Christians were killed in Armenia because of religious differences.\textsuperscript{130} Because these violations of *jus cogens* arose from religious disputes, there is arguably at least a nexus between *jus cogens* observation and religion. Some scholars have written extensively about this connection.\textsuperscript{131}

Several conceptual problems exist, however, with arguments advocating for religious liberty to be considered *jus cogens*. Precisely because *jus cogens* applies to all of humanity, peremptory norms are uncodified and are, therefore, unspecific. Consequently, even if religious liberty were to be considered supreme as a *jus cogens* right, it would still be unclear as to what part of that right all countries would be required to observe. Moreover, *jus cogens* is generally understood as detailing prohibitions on government actions. In contrast, religious liberty often entails accommodations for freedom of expression and for freedom of worship. Finally, because all states in the international community must agree as to what constitutes *jus cogens*, the basic premise for incorporating religious liberty as *jus cogens* is absent, because it is apparent that religious liberty carries different meanings in different countries. As conceived, *jus cogens* offers little protection for freedom of religious expression in the workplace.

But it is perhaps possible to rethink of *jus cogens* fundamentals from a different perspective. Presumably, countries observe the general prohibitions on genocide, torture, and slavery because those practices are simply morally wrong. In contrast, countries like France believe that it is morally permissible for the state to limit the freedom of religion by barring Islamic hijab in the workplace. This view is widely divergent from that prevailing in the United States, where many believe that the practice of religion enhances morality.\textsuperscript{132} This is so because the

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\textsuperscript{130} Id. at 7.

\textsuperscript{131} See, e.g., id.

\textsuperscript{132} See, e.g., Ara Norenzayan, *Does Religion Make People Moral?*, 151 BEHAV. 365, 369 (2014), \url{http://www2.psych.ubc.ca/~ara/Manuscripts/Norenzayan_Behaviour_DoesReligionMakePeopleMoral.pdf} ("American survey respondents who frequently pray and attend religious services (regardless of religious denomination) reliably report more prosocial behavior, such as more charitable donations and volunteering.").
freedom to practice one's religion peaceably is thought to lead to personal fulfillment. Furthermore, many have taken the view that it is immoral for the government to force someone to accept a particular faith or to prevent people from believing what they will. Therefore, from an ethical standpoint, there are arguments as to why the freedom of religious expression should be respected. If, at some point, enough countries adopted this interpretation of religious expression in the workplace, then perhaps it could become jus cogens; this occurrence would most likely result through social mobilization. Such a sudden change in the near future, however, is unlikely.

B. International Customary Law as a Source of Human Rights Law

Besides the treaty, customary international law is the other primary way in which international law comes about.133 Intuitively, as its name suggests, the substance of customary international law derives from countries' mere customs. In other words, countries obey customary international law from a sense of legal obligation. Customary international law has been described as a "unitary phenomenon that pervades international relations."134 Of course, state custom does not arise instantaneously to protect a specific right; instead, a right's meaning, understanding, and substance grows—or sometimes contracts—over time. Therefore, the length of time it takes for a right to become part of customary international law gives countries a chance to dissent.

This brings up the persistent objector doctrine, which has been a source of disagreement among human rights advocates. This doctrine implicitly reflects how international law theories have changed from focusing on natural law to focusing on the sovereignty and consent of states. For a long time, "international law . . . was conceived of as natural law, whereas today it is considered positive law developed through, and grounding its authority in, state action and consent."135 Therefore, there is a gloss to the persistent objector doctrine that relates back to the jus cogens theory: Countries may opt to invoke the persistent objector doctrine when the formation of a right is receiving traction throughout the international community, but the doctrine is simply inapplicable when the norm, in the rare instance, attains

134. Id.
peremptory norm status.\textsuperscript{136} On such occasions, even if a state never assented to such a norm and wanted to use the persistent objector doctrine to commit a heinous act, the persistent doctrine would not provide a valid defense. Moreover, if a state does not want to adhere to a particular norm, it must, under the persistent objector doctrine, make that known during the time of the right's formation; the state may not object once the customary international norm has solidified.

With respect to religious liberty generally, the Third Restatement of the Foreign Relations of the United States suggests that discrimination on the basis of religion is a violation of customary international law.\textsuperscript{137} With respect to religious accommodation in the workplace specifically, however, the issue is vaguer, because clearly there are countries that outlaw some types of religious garbs; the view that this violates customary international law has not widely been accepted.

In regard to custom, there are several instruments that tend to show a respect for religion and religious practices. At the international level, the Universal Declaration of Human Rights (UDHR) manifests the freedoms of religion and of expression in Articles 18\textsuperscript{138} and 19,\textsuperscript{139} respectively. Although the UDHR is not binding and does not create any obligations for states,\textsuperscript{140} it articulates many of the fundamental values that are shared in the international community. These rights are also contained in Articles 9\textsuperscript{141} and 10,\textsuperscript{142} respectively, of the European Convention on Human Rights (ECHR). Unlike the UDHR, however, the ECHR puts limitation clauses on these rights, making them subject to state regulation. At the domestic level, the Bill of Rights begins with the

\begin{itemize}
\item \textsuperscript{136} See Holning Lau, \textit{Rethinking the Persistent Objector Doctrine in International Human Rights Law}, 6 CHI. J. INT'L L. 495, 495 (2005).
\item \textsuperscript{137} See \textit{Restatement (Third) of the Foreign Relations of the United States} § 702 cmt. j (AM. LAW INST. 1987).
\item \textsuperscript{138} Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/Res/217(III), art. 18 (Dec. 10, 1948) [hereinafter UDHR] ("Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice and observance.").
\item \textsuperscript{139} Id. art. 19 ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.").
\item \textsuperscript{140} Mary Ann Glendon, \textit{The Rule of Law in the Universal Declaration of Human Rights}, 2 NW. J. INT'L HUM. RTS. 2, 4 (2004).
\item \textsuperscript{141} Eur. Conv. on H.R., art. 9 ("Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice and observance.").
\item \textsuperscript{142} Id. art. 10 ("Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.").
\end{itemize}
First Amendment’s Religion Clause and Free Speech Clauses, memorializing the importance that the Framers attached to religious liberty. Similarly, the constitutions of both France and Germany address free exercise and the freedom of conscience early in their articles.

The freedoms outlined in these documents, it would seem, extend to the manner in which people choose to dress because of religious reasons. Because of the limitation clauses in documents such as the ECHR, the issue then becomes whether a legitimate purpose exists to restrict peaceful religious expression in the workplace. This question became the core of Dahlab v. Switzerland, which has become one of the most prominent and criticized European employment cases about religious headscarves. The plaintiff, Lucia Dahlab, was a Swiss national who taught at primary schools. In 1991, Dahlab converted from Catholicism to Islam. Dahlab believed that her faith mandated the wearing of a headscarf and soon after her conversion she began wearing loose clothing that covered her entire body, except for her face. This posed no problem until the Director General of Primary Education heard about it and became involved. After refusing requests to stop wearing her hijab, Dahlab was brought to the Swiss courts, where she lost, even though the courts assumed that her Islamic hijab came within Article 9’s provisions of the ECHR.

In dismissing Dahlab’s claims, the courts reasoned that Dahlab, by wearing a headscarf, may have interfered with the freedom of conscience and religion of her pupils. But the problem with this rationale is that none of Dahlab’s pupils or their parents ever complained about her headscarf between the time of her religious conversion to Islam and the litigation—a span of about five years. The European Court of Human Rights (Court of Human Rights) went further to say that the hijab “is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a

143. See U.S. CONST. amend. I.
144. See 1958 CONS'T. I (Fr.).
147. See id. at 451.
148. Id.
149. See id.
150. See id.
151. Id. at 463.
152. Id. at 462–63.
LOOKING BEYOND THE VEIL

democratic society must convey to their pupils.” Therefore, besides the influence that religious garbs may have on impressionable children, the Court of Human Rights also considered factors about gender equality, intolerance, and democracy. This case is one of several that send the message that, although a person’s internal beliefs are protected, the manifestations of those beliefs may be regulated.

Contrary to the Court of Human Rights’s belief that Dahlab’s hijab endangered gender equality, the hijab must carry different meanings in different countries. Although there are countries in which wearing hijab in certain places is mandatory, such as Iran, Switzerland did not force Dahlab to veil her face. As to the former countries, arguments can be made that forcing women to dress a certain way by wearing hijab is repressive and adverse to gender equality; these arguments, however, do not seemingly apply in countries where women can wear hijab by choice. There are undoubtedly many Muslim immigrants across the globe that wear hijab not only to practice their faith but also to distinguish themselves from other groups. In this context, hijab can become an emblem for one’s identity, rather than a mark of oppression. Thus, the Court of Human Rights failed to take the context of country location into account.

In regard to the Court of Human Rights’s other justifications, the court assumed that Dahlab’s hijab symbolized her intolerance toward non-Muslims. On the contrary, it is arguable that the peaceful practice of religion fosters community. And, in point of fact, Dahlab “did not denigrate the beliefs of others or promote the superiority of her own views . . . ” In regard to the court’s point about democratic social order, accommodating diverse religious practices, especially minority ones, can help bolster social stability. One need only look at the United States, where hijab has not yet been outlawed, to see that accommodating it does not threaten the survival of a democracy. The

153. Id. at 463.
157. See Kalantry, supra note 155.
First Amendment recognizes that legal "tolerance [of religious practices] works better than suppression in maintaining the democratic order."\textsuperscript{159} Thus, the court's grounds for there being legitimate interests to circumscribe religious expression under Article 9 of the ECHR in the workplace seem suspect and, indeed, unsatisfactory.

The foregoing arguments apply with equal vigor to the workplace restrictions in France and the proposed restrictions in Germany. But there are still more arguments. Besides altruism, government power stands as a practical reason to let people religiously express themselves in the workplace. Letting government get too deep into religious affairs is, in effect, giving it that much more authority; in a society of free people, government power must be limited indeed. Much like Henry's proposed Assessment Bill in the early colonies, a modern government's attempt to prohibit some forms of religious expression is a dangerous abuse of power, and a prohibition on religious garbs like hijab in the workplace seems to violate Locke's vision of the purity of institutional religion. Lastly, it is a fact of life that people will pursue different paths. Just because paths may conflict, however, does not mean that they are not valuable. In fact, the value derived is that people get to choose their own paths by acting as independent, rationale agents.\textsuperscript{160} The Supreme Court's interpretation of Title VII in Abercrombie appreciates this truth, and it is time that other courts around the world do the same.

CONCLUSION

Part I illustrated how globalization played a small, but important, role in the Framers' early formulations of religious liberty; the Framers' understandings were shaped partially by the flow of ideas, which made the writings of European Enlightenment figures accessible. Part II delved deeper into the Supreme Court's Title VII interpretation in Abercrombie, and explored why hijab is a significant symbol in Islam. Part III sought to reassess international human rights law to consider whether the Supreme Court's understanding of religious liberty, as elucidated in Part I, can be applied so as to allow for the accommodation of Islamic hijab in foreign workplaces. \textit{Jus cogens} is one possible route, but it would take a complete reformulation of \textit{jus cogens} theory to incorporate religious accommodations as a fundamental human right. Customary international law is another possibility, but other courts claim that there are legitimate state interests that justify the preclusion

\textsuperscript{160} Cumper & Lewis, supra note 23, at 614.
of religious expression in the workplace. Part III sought to undermine those claims.

A lack of respect for different beliefs, especially minority religious beliefs, is becoming increasingly common in today's world. In the context of both the United States and abroad, this Note has strived to promote more respect for differing religious viewpoints. For a teacher, it is easy to view the hijab as a mere distraction in the classroom—and in some instances, it might really be a distraction. For a bystander on the street, it is similarly easy to think of a passerby's wearing of hijab as a strange practice—and to some degree, this is an inescapable consequence, as some people will always find something strange in others' behaviors. Toleration and understanding, however, are essential to a healthy, diverse society. Currently, hijab is seen as a taboo—as a symbol of gender inequality and of Islamic fundamentalism and radicalism. But this conception is only superficial and merely scratches the surface of a much larger issue. Someday, maybe people will look beyond the veil and realize that those who hold different religious beliefs are still worthy of legal protection.