

Veiled Threats?

By Martha Nussbaum, *The Times Online*, 11 July 2010.

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In Spain earlier this month, the Catalanian assembly narrowly rejected a proposed ban on the Muslim burqa in all public places — reversing a vote the week before in the country’s upper house of parliament supporting a ban. Similar proposals may soon become national law in France and Belgium. Even the headscarf often causes trouble. In France, girls may not wear it in school. In Germany (as in parts of Belgium and the Netherlands) some regions forbid public school teachers to wear it on the job, although nuns and priests are permitted to teach in full habit. What does political philosophy have to say about these developments? As it turns out, a long philosophical and legal tradition has reflected about similar matters.

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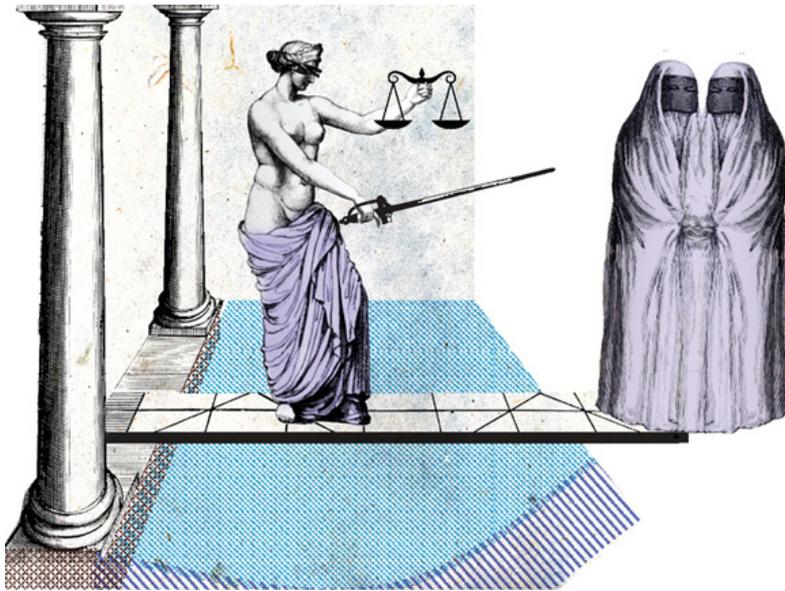
Let’s start with an assumption that is widely shared: that all human beings are equal bearers of human dignity. It is widely agreed that government must treat that dignity with equal respect. But what is it to treat people with equal respect in areas touching on religious belief and observance?

We now add a further premise: that the faculty with which people search for life’s ultimate meaning — frequently called “conscience” — is a very important part of people, closely related to their dignity. And we add one further premise, which we might call the vulnerability premise: this faculty can be seriously damaged by bad worldly conditions. It can be stopped from becoming active, and it can even be violated or damaged within. (The first sort of damage, which the 17th-century American philosopher Roger Williams compared to imprisonment, happens when people are prevented from outward observances required by their beliefs. The second sort, which Williams called “soul rape,” occurs when people are forced to affirm convictions that they may not hold, or to give assent to orthodoxies they don’t support.)

The vulnerability premise shows us that giving equal respect to conscience requires tailoring worldly conditions so as to protect both freedom of belief and freedom of expression and practice. Thus the framers of the United States Constitution concluded that protecting equal rights of conscience requires “free exercise” for all on a basis of equality. What does that really mean, and what limits might reasonably be placed upon religious activities in a pluralistic society? The philosophical architects of our legal tradition could easily see that when peace and safety are at stake, or the equal rights of others, some reasonable limits might be imposed on what people do in the name of religion. But they grasped after a deeper and more principled rationale for these limits and protections.

Here the philosophical tradition splits. One strand, associated with another 17-century English philosopher, John Locke, holds that protecting equal liberty of conscience requires only two things: laws that do not penalize religious belief, and laws that are non-discriminatory about practices, applying the same laws to all in matters touching on religious activities. An example of a discriminatory law, said Locke, would be one making it illegal to speak Latin in a Church, but not restricting the use of Latin in schools. Obviously, the point of such a law would be to persecute Roman Catholics. But if a law is not persecutory in this

way, it may stand, even though it may incidentally impose burdens on some religious activities more than on others. If people find that their conscience will not permit them to obey a certain law (regarding military service, say, or work days), they had better follow their conscience, says Locke, but they will have to pay the legal penalty. A modern Lockean case, decided by the U. S. Supreme Court in 1993, concerned an ordinance passed by the city of Hialeah, Fla., which made “ritual animal sacrifice” illegal, but permitted the usual ways of killing animals for food. The Court, invalidating the law, reasoned that it was a deliberate form of persecution directed at Santeria worshippers.



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Another tradition, associated with Roger Williams, the founder of the colony of Rhode Island and the author of copious writings on religious freedom, holds that protection for conscience must be stronger than this. This tradition reasons that laws in a democracy are always made by majorities and will naturally embody majority ideas of convenience. Even if such laws are not persecutory in intent, they may turn out to be very unfair to minorities. In cases in which such laws burden liberty of conscience — for example by requiring people to testify in court on their holy day, or to perform military service that their religion forbids, or to abstain from the use of a drug required in their sacred ceremony — this tradition held that a special exemption, called an “accommodation,” should be given to the minority believer.

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On the whole, the accommodationist position has been dominant in U. S. law and public culture — ever since George Washington wrote a famous letter to the Quakers explaining that he would not require them to serve in the military because the “conscientious scruples of all men” deserve the greatest “delicacy and tenderness.” For a time, modern constitutional law in the U. S. applied an accommodationist standard, holding that government may not impose a “substantial burden” on a person’s “free exercise of religion” without a “compelling state interest” (of which peace and safety are obvious examples, though not the only ones). The landmark case articulating this principle concerned a woman, Adell Sherbert, who was a Seventh-Day Adventist and whose workplace introduced a sixth workday, Saturday. Fired because she refused to work on that day, she sought unemployment compensation from the state of South Carolina and was denied on the grounds that she had refused “suitable

work.” The U. S. Supreme Court ruled in her favor, arguing that the denial of benefits was like fining Mrs. Sherbert for her nonstandard practices: it was thus a denial of her equal freedom to worship in her own way. There was nothing wrong in principle with choosing Sunday as the day of rest, but there was something wrong with not accommodating Mrs. Sherbert’s special religious needs.

I believe that the accommodationist principle is more adequate than Locke’s principle, because it reaches subtle forms of discrimination that are ubiquitous in majoritarian democratic life. It has its problems, however. One (emphasized by Justice Scalia, when he turned our constitutional jurisprudence toward the Lockean standard in 1990) is that it is difficult for judges to administer. Creating exemptions to general laws on a case by case basis struck Scalia as too chaotic, and beyond the competence of the judiciary. The other problem is that the accommodationist position has typically favored religion and disfavored other reasons people may have for seeking an exemption to general laws. This is a thorny issue that requires lengthy discussion, for which there is no room here. But we don’t need it, because the recent European cases all involve discriminatory laws that fail to pass even the weaker Lockean test. Let’s focus on the burqa; arguments made there can be adapted to other cases.

Five arguments are commonly made in favor of proposed bans. Let’s see whether they treat all citizens with equal respect. **First, it is argued that security requires people to show their faces when appearing in public places. A second, closely related, argument says that the kind of transparency and reciprocity proper to relations between citizens is impeded by covering part of the face.**

What is wrong with both of these arguments is that they are applied inconsistently. It gets very cold in Chicago – as, indeed, in many parts of Europe. Along the streets we walk, hats pulled down over ears and brows, scarves wound tightly around noses and mouths. No problem of either transparency or security is thought to exist, nor are we forbidden to enter public buildings so insulated. Moreover, many beloved and trusted professionals cover their faces all year round: surgeons, dentists, (American) football players, skiers and skaters. What inspires fear and mistrust in Europe, clearly, is not covering per se, but Muslim covering.

A reasonable demand might be that a Muslim woman have a full face photo on her driver’s license or passport. With suitable protections for modesty during the photographic session, such a photo might possibly be required. However, we know by now that the face is a very bad identifier. At immigration checkpoints, eye-recognition and fingerprinting technologies have already replaced the photo. When these superior technologies spread to police on patrol and airport security lines, we can do away with the photo, hence with what remains of the first and second arguments.

A third argument, very prominent today, is that the burqa is a symbol of male domination that symbolizes the objectification of women (that they are being seen as mere objects). A Catalan legislator recently called the burqa a “degrading prison.” The first thing we should say about this argument is that the people who make it typically don’t know much about Islam and would have a hard time saying what symbolizes what in that religion. But the more glaring flaw in the argument is that society is suffused with symbols of male supremacy that treat women as objects. Sex magazines, nude photos, tight jeans — all of these products, arguably, treat women as objects, as do so many aspects of our media culture. And what about the “degrading prison” of plastic surgery? Every time I undress in

the locker room of my gym, I see women bearing the scars of liposuction, tummy tucks, breast implants. Isn't much of this done in order to conform to a male norm of female beauty that casts women as sex objects? Proponents of the burqa ban do not propose to ban all these objectifying practices. Indeed, they often participate in them. And banning all such practices on a basis of equality would be an intolerable invasion of liberty. Once again, then, the opponents of the burqa are utterly inconsistent, betraying a fear of the different that is discriminatory and unworthy of a liberal democracy. The way to deal with sexism, in this case as in all, is by persuasion and example, not by removing liberty.

Once again, there is a reasonable point to be made in this connection. When Turkey banned the veil long ago, there was a good reason in that specific context: because women who went unveiled were being subjected to harassment and violence. The ban protected a space for the choice to be unveiled, and was legitimate so long as women did not have that choice. We might think of this as a "substantial burden" justified (temporarily) by a "compelling state interest." But in today's Europe women can dress more or less as they please; there is no reason for the burden to religious liberty that the ban involves.

A fourth argument holds that women wear the burqa only because they are coerced. This is a rather implausible argument to make across the board, and it is typically made by people who have no idea what the circumstances of this or that individual woman are. We should reply that of course all forms of violence and physical coercion in the home are illegal already, and laws against domestic violence and abuse should be enforced much more zealously than they are. Do the arguers really believe that domestic violence is a peculiarly Muslim problem? If they do, they are dead wrong. According to the U. S. Bureau of Justice Statistics, intimate partner violence made up 20 percent of all nonfatal violent crime experienced by women in 2001. The National Violence Against Women Survey, cited on the B.J.S. Web site, reports that 52 percent of surveyed women said they were physically assaulted as a child by an adult caretaker and/or as an adult by any type of perpetrator. There is no evidence that Muslim families have a disproportionate amount of such violence. Indeed, given the strong association between domestic violence and the abuse of alcohol, it seems at least plausible that observant Muslim families will turn out to have less of it.

Suppose there were evidence that the burqa was strongly associated, statistically, with violence against women. Could government could legitimately ban it on those grounds? The U. S. Supreme Court has held that nude dancing may be banned on account of its contingent association with crime, including crimes against women, but it is not clear that this holding was correct. College fraternities are very strongly associated with violence against women, and some universities have banned all or some fraternities as a result. But private institutions are entitled to make such regulations; a total governmental ban on the male drinking club (or on other places where men get drunk, such as soccer matches) would certainly be a bizarre restriction of associational liberty. What is most important, however, is that anyone proposing to ban the burqa must consider it together with these other cases, weigh the evidence, and take the consequences for their own cherished hobbies.

Societies are certainly entitled to insist that all women have a decent education and employment opportunities that give them exit options from any home situation they may dislike. If people think that women only wear the burqa because of coercive pressure, let them create ample opportunities for them, at the same time enforce laws making primary and secondary education compulsory, and then see what women actually do.

Finally, I've heard the argument that the burqa is per se unhealthy, because it is hot and uncomfortable. (Not surprisingly, this argument is made in Spain.) This is perhaps the silliest of the arguments. Clothing that covers the body can be comfortable or uncomfortable, depending on the fabric. In India I typically wear a full salwaar kameez of cotton, because it is superbly comfortable, and full covering keeps dust off one's limbs and at least diminishes the risk of skin cancer. It is surely far from clear that the amount of skin displayed in typical Spanish female dress would meet with a dermatologist's approval. But more pointedly, would the arguer really seek to ban all uncomfortable and possibly unhealthy female clothing? Wouldn't we have to begin with high heels, delicious as they are? But no, high heels are associated with majority norms (and are a major Spanish export), so they draw no ire.

All five arguments are discriminatory. We don't even need to reach the delicate issue of religiously grounded accommodation to see that they are utterly unacceptable in a society committed to equal liberty. Equal respect for conscience requires us to reject them.