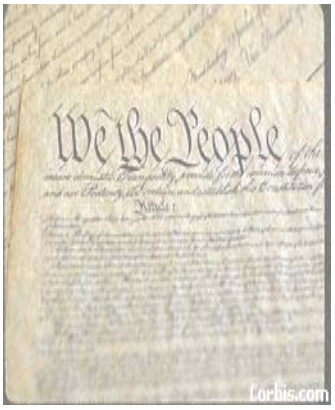
THE PEN BEFORE THE SWORD?



An undergraduate honors thesis submitted to the
Faculty of the Department of Political Science
at the University of California, Los Angeles.

By
Lalit Kundani

Political Science 195 Series
Professor David Wilkinson
Advisor: Professor Barbara Rosecrance
Spring 2001

To My Father, Ram Kundani

Contents

Acknowledgments

A FEW THANKS

"Gratitude is the heart's memory."

First and foremost, I would like to eternally thank my advisor and academic guru, Professor Barbara Rosecrance, an individual whose time and effort went into mentoring me, proof-reading my drafts, and making numerous suggestions for this thesis. Without her valuable guidance in steering this piece, I would not have enjoyed researching and writing the following pages.

I must also thank Dr. Vinay Lal, with the History Department, at the University of California, Los Angeles, for originally introducing the issue of the Sikh *kirpan* to me, and for inspiring me to take an active role in issues such as the ones focused in this piece.

Moreover, I extend many thanks to Professors David Wilkinson, Brian Walker, as well as Robert Hennig for the influence that their teachings and advice have had on this piece.

Additionally, this thesis would not have been possible without the selfless help of the individuals and experts at the Sikh Mediawatch and Resource Taskforce, headed in Washington, D.C., especially Mr. Manjit Singh, who was able to direct me in my research pathway as well as put me in touch with several notable players who were involved in the *kirpan* debate.

Many thanks as well are in order to Dr. Ranjit Singh Rajpal, who was able to provide me with a solid, detailed background to the *kirpan* as well as the religious elements involved in Chapter Two. I also am indebted to the patience of Mr. Johny Makhijani, Ms. Ashwinii Hari, and Mr. Jasminder Singh Riar, who all were very obliging in the homestretch of this piece.

Finally, I am indebted to the courage of the Cheema family and to those groups and individuals who toiled for years in defending their cause – for it is stories like theirs that remind the Skeptics of America that democratic processes still do exist, are functional, and are able to safeguard minority rights rather than overlook them entirely.

Chapter One

THE KIRPAN IN AMERICA

"Rellijon is a quare thing. Be itself it's all right. But sprinkle a little pollyticks into it an' dinnymit is bran flour compared with it. Alone it prepares a man f'r a better life. Combined with politicks it hurries him to it."[1]

On April 13, 1699, in the town of Anandpur, resting high up in the Shivalik hills of the northern Indian state of Punjab, a Sikh guru dressed in full battle gear and carrying a gleaming sword pronounced that a dagger, known as the *kirpan*, was to be one of the faith's most religious symbols. Approximately three hundred years later, in a small courtroom in Northern California, a District Court judge pronounced that a kirpan is a dagger, one of the American legal system's most banned weapons.

And evidently, the twentieth century was dubbed the "secular age."

Religion and politics undeniably make odd bed-fellows. The twentieth century was far from being a secular age, for it is rather effortless to recall terms such as *jihad* and *holocaust*, and names such as Palestine, Kashmir, and Bosnia. Rather, the twentieth century was a time of adjustment, where debates and confrontations were the mark of the latter. And as esoteric and passive as it may appear, the story of the kirpan and the American legal system is no less a story of adjustment, of debates, and of confrontations, for while the threat of world wars and mass killings is diminished, a battle is nevertheless still being fought which captures within it analogous issues relating to religious identity and state interference.

The story presented here of the kirpan and the American legal system began in January 1994, when three siblings, Rajinder, Sukhjinder, and Jaspreet Cheema, were observed to be wearing kirpans under their clothes while at school, and were at once suspended on the grounds

that a kirpan was to be considered as a weapon. What once began as an arcane issue between three Sikh students and their school principal quickly acquired the attention of the Livingston Union School District, the American Civil Liberties Union (ACLU), the California State Legislature, the Office of the California Governor, the District Court, as well as the Ninth Circuit Court of Appeals, the latter of which overturned the District Court's decision, consequently permitting the students to return to their school with the kirpans under certain stipulations. Nonetheless, *Cheema v. Thompson* is of extraordinary legal importance in that it became one of the first cases to be tried under the Religious Freedom Restoration Act (RFRA) of 1993, a once-constitutional congressional bill which challenged an earlier Supreme Court decision making it difficult for religious groups to win legal claims. Under the protection of the RFRA, the Sikhs won the case, a victory made even more unique given that the RFRA was overturned by the Supreme Court in 1996. In this paper, then, I will expound on the need to re-adopt the RFRA, for I will submit that *Cheema v. Thompson* is a case which fortifies the American legal system rather than weakens it. In order to establish this need, I will examine the court case itself and discuss the nuances pertaining to it, including the issues of social constructions and symbols, the role and responsibility of a school district, as well as the meaning of the words "compelling interest," a term which will have greater meaning in later chapters. While I will examine and interpret the intentions of the Founding Fathers in declaring the need for the First Amendment to the Constitution, similarly I will examine and interpret the intentions of the Sikh Guru in declaring the need for the kirpan, and I will attempt to demonstrate how the kirpan fits into the American legal system or question if such a possibility exists at all.

It is sufficient to note, then, that the kirpan in America does far more than educate America about Sikhs and their sword; rather, it *compels* America to question the strength of its

own legal system, for the mark of true strength is the response to obstacles, *not* the absence of them. Thus, how *does* an age-old legal system - that permits religious liberty but prohibits weapons - respond to an age-old religion whose religious symbol is a weapon? The converse is in order as well, for how does an age-old religion whose religious symbol is regarded as a weapon respond to an age-old legal system which claims to grant religious freedom but seeks to ban the religious symbol in question?

It is the dynamics of these two questions and these two parties that unfold in the course of this paper, presenting a multitude of confounding questions for us to conjure with. What was meant by the First Amendment and the Free Exercise Clause? What was meant by the need to wear the kirpan? Is accommodation possible when such conflicting views face one another? In tackling these questions, I will revisit the history of the kirpan in Chapter Two and the history of religious freedom in America in Chapter Three. After examining the conflict presented in *Cheema v. Thompson* in Chapter Four, I will then set out to offer conclusions and compromises to the conflict in Chapters Five and Six.

As I will demonstrate, *and* remonstrate, in this paper, the mark of a true democracy is measured by the treatment of its minorities and their claims. America will survive perpetually only if it is able to accommodate to uncomfortable beliefs, and similarly a religion will perpetuate eternally only when it can accommodate to uncomfortable conditions. This is the belief of theorists such as John Stuart Mill, who espoused such thoughts in works such as *On Liberty*, which I will also discuss in Chapter Five. Thus, the scope of this paper ranges in its aims, for while I will fully expose the issue of the kirpan and the First Amendment as well as the right for the Sikhs in question to wear it and the right for the government to prohibit them in doing so, I will also offer additional corollaries that can be concluded from the story of the

kirpan in America: that fairness does not necessarily always warrant equal treatment, and that in order for America to prevail as a democracy, there is great need in re-adopting the RFRA, a bill which compels Americans to accommodate to unfamiliar pluralities.

Chapter Two

THE KIRPAN: ITS INTENT, ROLE, AND SIGNIFICANCE

"To prevail under RFRA, the children had to prove that their insistence on wearing kirpans was animated by a sincere religious belief and that the school district's refusal to accommodate that belief put a substantial burden on their exercise of religion."[2]

"…Professor Mann clearly, although unintentionally, revealed that even through the eyes of a Sikh, a kirpan is indeed a weapon."[3]

Many of the most pressing questions the American legal system has had to conjure with involving the kirpan deal with the historical nature and dynamics of the kirpan itself. For instance, does the kirpan constitute "a sincere religious belief" on the part of Sikhs – as the RFRA would require? One fact to consider in posing this question is that the majority of people who consider themselves to be Sikh do not carry a kirpan. Thus, how much of a "substantial burden" is actually placed on those who maintain that the carrying of a kirpan is essential to their being Sikh?[4] A second query to concern ourselves with was raised by the Livingston County School District: could a symbolic replica of the kirpan, rather than an actual kirpan, still fulfill the mandate of the faith? The answer to this rests on a third, and even more challenging, question: what was the original intent of the kirpan? Was it to be used as a weapon, as Judge Wiggins asserted in his dissent in *Cheema v. Thompson,* or rather, was the kirpan intended to be a mere symbol of the Sikh faith? As is common and essential in the world of jurisprudence, the answers to such questions cannot divorce history from the dialogue. While the history of Sikhism in its totality is well beyond the scope of this paper, in this chapter I present an adequate examination of the three aforementioned questions in the hopes that such a pursuit will contribute to an understanding of the contours of the present debate.

I. A Brief History Leading to the Kirpan

As one understands the essentiality of a part by first examining its relation to the whole, similarly the significance of the kirpan is contingent upon the nature of Sikhism. While a comprehensive history of it need not detain us, certain fundamental, yet hardly indisputable, "facts" of Sikhism seem to be in order. Founded nearly five hundred years ago by Guru Nanak (1469-1539), Sikhism rebelled against the rigid social structures and rituals established by India's sacerdotal caste, the Brahmins. The faith established by Guru Nanak was simple: the caste system was replaced with a central principle of equality for all men; idolatry was replaced with monotheism, with God being *sat* ("truth"), the Supreme Reality. From all over the North Indian state of Punjab, Guru Nanak successfully assembled a number of disciples, *shishya*, from which the word *Sikh* was ultimately derived. Here, it should be emphasized that Guru Nanak preached a tradition shorn of violence; his interior practice of *nam simaran* (meditation on the divine Name) was anything but militant. As obvious as this may seem, it must be nevertheless be stressed, for, as we will see, Time would bring with it a sweeping and radical transformation to this pacifism in Sikhism.

The leadership of Guru Nanak passed successively to nine other gurus over the centuries. Among them was Guru Arjun (1563-1606), the fifth Sikh Guru, who helped give shape and form to the Sikh faith. Guru Arjun not only established the first Sikh temple, *gurdwara*, but also helped compose the Sikh holy book, the *Guru Granth Sahib*. Thus to Sikhs, the significance of Guru Arjun's leadership cannot be overstated enough, for his direction brought with it both a sacred space in which Sikhs could worship as well as a sacred text to guide them. Both helped mold the Sikh's consciousness of themselves as well as their faith.

As the *Panth*, or the Sikh community, began to take form and grow in number, India's Mughal rulers began to see the Sikhs as a potential threat to the dynasty. The solution was plain and obvious: convert the Sikhs or kill them. In 1606, after he refused to convert to Islam, Guru Arjun became the first Sikh martyr. This move on the part of the Mughal dynasty, rather than silencing the Sikhs into compliance, only incited them. On the day that he was to be invested and take over his father's role as guru, Hargobind, Guru Arjun's son, appeared dressed as a warrior. On his body, he displayed not one but two swords. The action was symbolic for

> whereas one sword represented the Guru's continuing spiritual authority (*piri)* the other proclaimed a newly-assumed temporal role (*miri*).[5]

Thus began an amalgamation of the heavenly and earthly aspects of Sikhism. With Hargobind's feat, a new era had begun. The meekness and gentleness that had once characterized the Sikh population under Guru Nanak was replaced with armed resistance.[6] In W.H. McLeod's words, "the Panth was thereafter to be armed."[7]

In the face of conversion and religious persecution, I will evade from referring to the new wave of Sikhism as "militant." But certainly the decision to defend the religion by fighting back violently affords a more activist description in terming the faith. In any case, the bellicose stance of the Sikhs intensified after the death of Guru Tegh Bahadur (1621-75), the ninth guru, who came to the defense of Hindus after they were being forced to convert to Islam. For his stand on religious freedom and refusing to convert his own faith, Guru Tegh Bahadur was imprisoned and in 1675, in the presence of his followers, he was beheaded by the order of the Emperor Aurangzeb. Dishearteningly, the Sikhs present at the execution refused to step forward from the crowd to collect the Guru's body, fearing the consequences of announcing themselves as the Guru's followers.[8]

The leadership of the Sikh people had been assumed by Guru Tegh Bahadur's nine-year old son, the tenth and final guru, Guru Gobind Singh (1666-1708). The execution of his father had revealed to Guru Gobind Singh two things. First, in the face of tyranny, justice had to be defended by the use of force. If all other methods of redress had failed, it was now legitimate to draw the sword in the defense of righteousness. Otherwise, the whole of Sikhism faced inevitable extinction. Just as "sparrows had to be turned into hawks," Guru Gobind Singh's Sikhs had to be made into men of steel willing to defend the faith.[9] The solution then was to implement a new baptism and discipline. Secondly, mortified that his fellow Sikhs had shrunk from recognition at his father's execution, it was Guru Gobind Singh's conviction that his Sikhs should never again be allowed to revert to craven concealment. His solution, thus, was the institution of the *panj kakke* (the Five Ks).

Thus, on April 13, 1699, Guru Gobind Singh asked for five men who were willing to sacrifice their lives for the sake of the religion. The five men who did come forward were to be forever known as the *Panj Pyaras*, or the Five Beloved. Together, they formed the new brotherhood known as the *Khalsa*, or the Pure. After being given the new name of "Singh" or lion (Sikh Khalsa women received the name "Kaur" or princess), the five Khalsa men were enjoined to wear, as a mark of their devotion to the faith and as an indication of their membership in the Khalsa, the Five Ks: *kes* (uncut hair), *kangha* (a comb), *kara* (a steel bangle), *kirpan* (a sword or knife), and *kachcha* (special breeches or undergarments). After directing the men from abstaining from tobacco, alcohol, and *halal* meat, Guru Gobind Singh baptized the five men and was, in turn, baptized by them. Guru Gobind Singh then poured water into a steel bowl and stirred it with his steel sword (it should be mentioned that the kirpan is still used today in the baptism ceremony in order to stir the water in the bowl). Guru Gobind Singh's wife then

dropped some sugar into the bowl, and its sweetness was mingled with the touch of steel (from the sword), creating *amrit,* the nectar used in the Sikh baptism ritual. Thus, this baptism ceremony, which has continued even until today, the same ceremony the Cheema children underwent as well, is referred to as "taking a*mrit.*"

II. The Observance of the Kirpan: A Sincere Religious Belief?

Having established some of the backbone to the history of the development of the kirpan, we can now begin to tackle a few pertinent issues raised in modern debate. It is clearly noted that the kirpan, along with the rest of the five symbols, is an essential aspect of being a Sikh or, more specifically, a Khalsa Sikh, one who has "taken a*mrit*" and the vow to which the ceremony is associated. The previous statement, then, suggests that there is a distinction in who is a Sikh and who is a Khalsa Sikh, and it is to this issue which I wish to turn my attention. Yet I will briefly preface this topic with a few perspectives on the relationship between a Khalsa Sikh and the kirpan.

In order to comprehend how much importance is afforded in the physical identity of being a Khalsa Sikh, I offer three points in consideration. First, as I mentioned in some detail in Part I, the Five Ks was a requirement on the part of Guru Gobind Singh as a way for the Sikhs to identify themselves, in order that they could never be ashamed of nor unwilling to express their uniqueness in the face of persecution, conversion, or hostility (I will return to this point later in the chapter). Secondly, a somewhat recent piece of Indian legislation, the Delhi Gurdwara Act 82 of 1971, defined a Sikh as a "person who professes the Sikh religion, believes and follows the teachings of Sri Guru Granth Sahib and the ten Gurus only *and keeps unshorn hair.*"[10] While it does not require a Sikh to keep a kirpan, nonetheless as both Vinay Lal and Jit Singh Uberoi have maintained

> despite the preeminence seemingly attached to *ke*s or unshorn hair the five symbols are of a piece, and together constitute 'the authenticating sign and seal of Sikhism.' They were almost certainly seen as belonging together on the person of the Sikh, and in one of the earliest colonial accounts we have of the Sikhs, the Khalsa Sikhs were described thus: 'The disciples of Govind were required to devote themselves to arms, always to have steel about them in some shape or other, to wear a blue dress, to allow their hair to grow…'[11]

That Khalsa Sikhs were "required to devote themselves to arms" clearly is an indication of the presence of the kirpan and tells of the weight of the Five Ks stipulation. Third and finally, the *Sikh Rahit Maryada*, the standard manual of Sikh doctrine and behavior written in 1950 by a group of noted scholars on Sikhism, includes as part of its definition of a Sikh "a person who believes…in the Khalsa initiation ceremony instituted by the tenth Guru."[12] From what I have sketched of the Khalsa initiation ceremony of the tenth Guru, the observance of the Five Ks is an integral part of the process of "taking *amrit*." Thus, as Lal points out, "to forgo the *kirpan*, at least on the orthodox view, is to relinquish one's identity as a Sikh observant of the faith."[13]

To recall, in order to prevail under RFRA, the Cheema children had to show that there was a "sincere religious belief." In light of the information presented, it is rather incontestable that the adherence to the Five Ks is an essential element of being a Khalsa Sikh, one who "takes *amrit*" and obliges to always wear the Five Ks. While one may engage in discussion as to the original intent of the kirpan, it would nevertheless be extremely difficult for one to deny the *importance* of a kirpan to a Khalsa Sikh. Thus, for the purposes of discussing Khalsa Sikhs, it seems as though the kirpan *does*, in fact, constitute a "sincere religious belief."

With regard to the definition of who is a Khalsa Sikh, there appears to be very little ambiguity. Notwithstanding, we return to the original distinction presented at the beginning of the section: Khalsa Sikhs do not appear to be synonymous with Sikhs. That is, while Khalsa Sikhs *must* and *do* observe the Five Ks, Sikhs on the whole vary in observance of the Five Ks,

namely the kirpan. Some who call themselves Sikhs carry the Five Ks, including the kirpan, but are not Khalsa; in other words, they have not "taken *amrit*" and have not undergone the actual baptism; McLeod would term them *Kes-dhari* Sikhs.[14] Other self-prophesized Sikhs maintain their unshorn hair and any of the three other Ks but do not observe the wearing of the kirpan. And still there are others who call themselves Sikhs who do not observe *any* of the Five Ks (commonly known as "Mona Sikhs"). In any case, all are *still* referred to as Sikhs – either because of their professed belief in various other tenets of Sikhism or by virtue of their observance of some of the Five Ks - which suggests that to qualify as being Sikh, one need not necessarily observe any or all of the Five Ks. To Khalsa Sikhs, this line of reasoning is a red-herring, a logical paradox in their own method of self-identification, for if an individual could still be a Sikh and not carry the kirpan, then a Khalsa Sikh's insistence on carrying the kirpan - because it constitutes a "sincere religious belief" - becomes diluted and distilled.

The simple, however incomplete, answer to this inconsistency is that the *Panth*, or the Sikh community, contains within it those who are Khalsa Sikhs as well as those who, for various reasons, do not accept the full Khalsa discipline. As McLeod notes

> the Khalsa may be regarded as an elite or as the 'orthodox' version of the Sikh identity, but the Rahit [code of conduct for the Khalsa Sikh] need not be regarded as a code which automatically excludes all who do not meet its strict requirements.[15]

Even if this be so, the problem still remains as to what the Khalsa Sikh should think of all this. If Guru Gobind Singh envisioned a purpose for the Five Ks, then it seems that its intention must apply to all who claim to be his disciples. Calling oneself a follower of Guru Nanak is certainly questionable if it implies a rejection of the latter teachings and instruction of Guru Gobind Singh. In McLeod's words, "The Guru is one, and instructions issued by the tenth Guru are as binding on Sikhs as guidance given by the first."[16]

The problem of who is a Sikh is indubitably unresolved, and it may always continue to be. As to the question of who is a Sikh, I will concede this dilemma to the innumerable historians and experts of Sikhism. But to advance the issues presented here, I wish to return to the question originally presented in this chapter: does the kirpan constitute a "sincere religious belief" on the part of the three Sikh children? It would appear to me that the answer is unquestionably "yes." First, the Sikh children in *Cheema* were Khalsa Sikhs; while there may be dispute as to whether or not their observance of the Five Ks is essential to their being *Sikh*, there is *no question* that their observance of the Five Ks is essential to their being *Khalsa Sikhs*. Secondly, the idea that one can be a Sikh and need not carry a kirpan is a compelling yet insufficient justification to underscore the importance of the kirpan to the Sikh religion. That is to say, even if it is true that in practice most Sikhs do not carry a kirpan, it still does not alter the fact that the kirpan is an integral part of being a Khalsa Sikh, and that by denying Khalsa Sikhs the right to carry the kirpan, the school district is placing a "substantial burden" on the exercise of their religion. The question of how "sincere" a religious belief is should not be verified by seeking an observance by the majority, for I would argue that such line of reasoning is a common ad populum fallacy which wrongfully appeals to the tendencies of the masses. Rather, it is important to look at the *history* of the belief, which is what I have attempted to examine.

Similar trends exist in other religions as well. For instance, is a *yarmulke* any less of a "sincere religious belief" on the part of Orthodox Jews simply because most Jews do not wear a *yarmulke*? I would assume that certainly most people would not think so. The next logical question to raise is why, then, is there *such* a controversy over the kirpan? As I have pointed out in this section, it is unquestionable, when we analyze it on its own merit, that *the kirpan indeed constitutes a "sincere religious belief" at least to Khalsa Sikhs*. I would submit, however, that

the controversy exists *not* because of the *religious sincerity* of the kirpan, but rather because of a separate issue, namely the *nature* of the kirpan. That is to say, if the kirpan had been a medallion or a necklace, the debate of whether or not it was a "sincere religious belief" would never have arisen to this degree; rather, it would be viewed with as little debate as the manner in which a *yarmulke* is viewed. I would argue that such a debate *has* surfaced only because the kirpan is feared as a dagger and, as a result, doubt is harbored as to its "sincerity" as a religious belief. Yet to any logician, this clearly is a fallacy of irrelevance, an *ignoratio elenchi*; it does not logically follow that because the kirpan is a dagger, it is disqualified from being a sincere religious belief, for the two are neither mutually exclusive nor contingent upon one another. Thus, one should not emasculate the kirpan's historical sincerity as a religious belief by examining its purported harm, a separate issue to which I will now turn.

III. The Intent of the Kirpan: Violent Weapon or Religious Symbol?

While the kirpan clearly manifests the qualities necessary to be constituted as a weapon pursuant to the California Penal Code (a weapon being any "dirk, dagger, ice pick, knife having a blade longer than 2 ½ inches"),[17] the Cheema family insisted that the kirpan should not be viewed as one, for the kirpan represents a religious symbol (as to erroneously suggest that the kirpan falls into the *either-or* category; *either* it is a weapon, *or* it is a religious symbol, but that it cannot constitute both). In the attempt to moderate the claims to both sides, I will invite history to adjudicate this impasse. While definitive conclusions to this issue may be premature and unpromising, it is my intention that the claims made by both the school district and the Cheema family can equally be misleading for, as I will show, the kirpan was neither intended to be exclusively a religious symbol nor was it intended to be used solely as a weapon.

While it is has already been recognized as to what the purpose of the Five Ks was as a whole, it will hold more bearing to identify what distinct purpose *each* of the Five Ks, namely the kirpan, represented. To call to mind, Sikhism as a faith was threatened by the Mughal dynasty. The response of Sikhism as a faith, especially after the executions of both Gurus Arjun and Tegh Bahadur, was to defend itself even at the cost of taking up arms. Thus, as one of the Five Ks, the carrying of the kirpan was to remedy injustice in order to establish righteousness; ergo the kirpan, to apply the context of the time period, was to be drawn in order to *defend* the faith and oneself from Mughal challenges. In the compilation of Guru Gobind Singh's teachings, the *Dasam Granth*, it reads, "Chun kar az hman heelte dar guzshat hlal ast ba shamsheer dast" ("When all means of redressing the wrong have been exhausted, raising the sword is pious and just").[18] As Lal adds

> A sword that is 'ritually constrained' is a sword that is bound to do only the work of justice, to be drawn on behalf of the oppressed and the weak, to be offered only in defense. The sword can be employed only when all other avenues have been explored and exhausted, and indeed failure to do so at that time would be tantamount to complicity in acts of evil and oppression.[19]

But let there be no mistake: a kirpan that is *only* used in defense and is drawn *only* to protect the "oppressed" and the "weak" is nevertheless *still* a weapon which, according to the faith, *can* be used in extreme cases. It is evident, as Amarjet S. Bhachu states in "A Shield for Swords," that the kirpan was "….an instrument of self-defense."[20] Thus, the Cheema family's claim that the kirpan is a religious symbol is a convenient half-truth, for although the kirpan may today be a religious symbol (this will be discussed later), it is quite evident that the *historical* intention of the kirpan, according to Guru Gobind Singh, included the idea of using the kirpan to defend oneself in a life and death situation whereby failing to draw the kirpan at the time would be as equal of a transgression as the person performing the criminal act in question.

At the same time, one must judiciously consider the rejoinder. The intent that the kirpan be used as a weapon only in self-defense was developed at a time period where the transgression to defend oneself from included the slaughtering, executions, beheadings, and mass conversions and persecution of the Sikh community. Certainly, these seem to be compelling justifications for the case of drawing the kirpan. While I wish to neither justify nor condemn the decision to draw the kirpan, I am simply presenting one feature of the kirpan and weighing it equally on the balancing scales of history.

Having dispelled the notion that the kirpan was simply a religious symbol that was never to be drawn, it is equally vital to examine the additional features and context of the kirpan. Up until now, I have discussed only half the parameters established by Guru Gobind Singh as to the reason for the kirpan – namely, its use in defending the faith from religious persecution. But if we recall, the kirpan served another, perhaps a more fundamental, purpose: in conjunction with the other Five Ks, the kirpan was an external means of instilling confidence and courage into the Panth. With his father being a martyr to the faith and the fear of persecution leading other Sikhs into a life of anonymity,

> Guru Gobind was unwilling to let his people be martyred by Muslim rulers…he did not think that they were to evade persecution by merging into the crowd. Thus the sword, becoming a characteristic mark of the Sikhs, was to render them intrepid, willing to forgo their lives of fear and anonymity for recognition by others, and place them on the path of self-recognition.[21]

In his piece, Lal quotes eighteenth-century writer, Ratan Singh Bhangu,

> the Guru reasoned and from thought he proceeded to action. His followers were to emerge as splendid warriors, their uncut hair bound in turbans; and as warriors all were to bear the name "Singh." This, the Guru knew, would be effective. He devised a form of baptism administered with the sword, one which would create a Khalsa staunch and unyielding. His followers would destroy the empire, each Sikh horseman believing himself to be a king. All weakness would be beaten out of them and each, having taken the baptism of the sword, would there-after be firmly attached to the sword.[22]

Bear in mind when Guru Tegh Bahadur was executed, his Sikh followers failed to come forward; they could fail to do so, because they were outwardly indistinguishable from the rest of the people. Thus, the kirpan (and the Five Ks) was a method of making certain that the Sikhs would forever be distinguished, that they would be proud to be Sikh, that their identity would forever remind *themselves* of who they were. While the kirpan's capacity included the possibility that it be used as a weapon, one must also accept its compelling symbolic presence as, in Ratan Singh's words, "an attachment." Its inalienable identity is a mark of a Khalsa Sikh, the character and signature of the faith. Conjoined by the words *kirpa* (meaning "grace" or "compassion") and *ann* (meaning "honor" and "dignity"), the regard for the kirpan is a regard for oneself and one's self-respect, dignity, and history.[23]

Having established that the kirpan clearly served a twofold purpose, it may benefit us to examine whether or not the meaning and significance of the kirpan has evolved over time. To recall, what once began in order to (1) defend the faith from religious persecution, and (2) serve as a symbol of Sikh self-identity now appears to be only partially applicable, for the first rationale has become somewhat antediluvian with the end of Mughal persecution (I will fully expound on this later). Nonetheless, the second rationale is by no means obsolete. A compelling case in point involves the meaning of the phrase *Akal Purakh*, "The Timeless Being." In Sikhism, *Akal Purakh* is a reference to the Creator and Sustainer of the Universe (for all relevant purposes, God). After Guru Gobind Singh's adoption of the Five Ks, however, *Akal Purakh* is characteristically denoted as *Sarab Loh*, "All-Steel," a clear reference to the kirpan.[24] As is written in the Guru Granth Sahib

> Thee I invoke, All-conquering Sword, Destroyer of Evil,
> Ornament of the brave.
> Powerful your arm and radiant your glory, your splendour as

Dazzling as the brightness of the sun.
Joy of the devout and scourge of the wicked, Vanquisher of sin,
I seek your protection.
Hail to the world's Creator and Sustainer,
my invincible Protector the Sword.[25]

Even until today, then, divinity is made manifest into the kirpan, a symbol which bears deep religious convictions. As noted previously, the kirpan is still used today in the baptism ceremony of "taking *amrit*." By all indication, it seems reasonable to accept the claim made by the Cheema family that the kirpan holds innate religious meaning to a Khalsa Sikh as a religious symbol; in fact, as I have attempted to show, it is obvious that the kirpan *has always* held innate religious meaning. But what I have also attempted to suggest is that it is not entirely foolproof to advance the argument that the kirpan has always held innate religious meaning *and nothing more*, for this assumption faultily rests on the belief that the kirpan never possessed within its faculty a claim to being a (defensive) weapon – a fact which is undisputable.

Thus, in regards to the kirpan being a symbol, I have shown in this section that the kirpan was an age-old symbol and continues to be a modern-day symbol. However, in regards to the kirpan being a weapon, while I have demonstrated that the kirpan was an age-old weapon, I have intentionally excluded until now the view of the kirpan as a modern-day weapon. Prior to advancing a few thoughts on this subject, I wish to first provide a caveat: one should not confuse the *intent* of the kirpan being used as a modern-day weapon with the *threat* of the kirpan being used as a modern-day weapon, the latter being an issue that is separate from my own intent here in this chapter but will be an issue in Chapter Four. As for the *intent* of the kirpan being used as a modern-day weapon, I offer a few statements of fact. First, some may entertain the belief that with the absence of Mughal persecution, the intent of the kirpan to be used to defend oneself becomes irrelevant. This is inaccurate for, according to Guru Gobind Singh, the kirpan was to be drawn against injustice, a category which includes Mughal persecution but is not limited to it. In

principle then, the modern-day kirpan could still be drawn to defend oneself from extreme situations, in so far that it is assumed that by "extreme" one refers to a life and death situation whereby no other avenues can be taken to put out the danger. Secondly, in contrast, it should be noted that in 17th century India, the sword was an archetypal weapon of combat, whereas in the wake of the 21st century, the sword is now somewhat antiquated as a weapon, a point which somewhat reduces the claim that the kirpan was still intended to be a modern-day weapon. Finally, one must also consider that while the kirpan has no stipulation in length, it nevertheless is commonly sheathed, riveted, restrained, reduced in size, and/or dulled. Thus, while the previous two points do not nullify the fact that the kirpan may still be used as a weapon of self-defense in extreme cases, they nevertheless point to a trend that suggests that the kirpan no longer *fully* constitutes its once-intended purpose as a weapon of self-defense but that its role today is *more* fundamentally that of a religious symbol.

To summarize the two points I have attempted to present in this section: first, there existed a somewhat dual intent of the kirpan under Guru Gobind Singh over 300 years ago. While it could be drawn to protect the identity and religion of the Sikhs under attack, namely from Mughal persecution, the kirpan was also a symbol of the faith as well as a manner in which a Sikh of the Khalsa "was to be visibly and unmistakably a Sikh, his identity proclaimed for all the world to see."[26] Having thus established a working history, let us re-consider the claims made by both parties. The Cheema family claimed that the kirpan was a religious symbol; the School District claimed that the kirpan was a weapon. From what I pointed out in this section, it should be rather evident that both sides have laid equal stakes to the issue. As would have it, Truth dwells at the nucleus, and perhaps it is on account of the acceptance of this hard principle – the

fact that both parties present an accurate perspective to the issue – that the matter involving the kirpan grows to be more compounded yet captivating.

Secondly, I have also attempted to provide a distinction in the claims made by both parties. While they are correct in maintaining that the intent of the kirpan was both as a weapon and as a symbol, I have faintly suggested that with the passage of time, the role of the kirpan has somewhat transformed. That is, with the demise of mass, coercive Mughal conversions, the kirpan is fundamentally less of a modern-day weapon used in self-defense of religious persecutors (although it can still be used in extreme cases of self-defense), but rather it is more of a living, breathing symbol to Orthodox Sikhs. In other words, while the kirpan's purpose as a defensive weapon is open to debate and has somewhat oscillated over the course of 300 years**,** the kirpan's purpose as a religious symbol is indisputable and has remained as constant as it did at the time of its naissance: that is, to Khalsa Sikhs, the kirpan *still* is an integral religious symbol.

IV. The Alternative to the Kirpan: Still a Mandate of the Faith?

It was posited at the beginning of the chapter whether or not the mandate of Sikhism could still be fulfilled if the kirpan existed in the form of a necklace or medallion. It was also mentioned that the answer to this question rested on the issue discussed just previously, namely what the intent of the kirpan exactly was. Now that it has been established that the role of the kirpan was twofold, to serve as a weapon in self-defense as well as to act as a vital religious symbol to Khalsa Sikhs, we can now address briefly the possibility of the kirpan existing in various other forms, as proposed by the Livingston County School District.

In light of the information presented in the previous section, it would appear that the kirpan could not be substituted with another symbol and still retain its intended significance.

That is, neither a necklace nor a medallion could fulfill all of the functions which an actual kirpan accomplishes. For instance, a necklace could not be used as a weapon to defend oneself in the face of religious persecution nor in extreme situations involving an individual's survival – a scenario which the kirpan was intended to resolve. Secondly, while a necklace of a kirpan may arguably still hold religious significance, it could not be used in the Khalsa initiation ceremony to mix the water in the bowl (recall from Section I that the kirpan is used to stir the water in the drinking bowl in the ceremony of "taking *amrit*"). Thus, any rendition of the kirpan in another form other than its actual structure would reduce the kirpan to a meaning other than that which it was intended to have. In many ways, a court affording Sikhs the right to wear a necklace of the kirpan rather than an actual kirpan would not be conceding much to Khalsa Sikhs but, rather, would be compromising the meaning of the kirpan and transcending its original intent.

Professor Mann, an Assistant Professor of Sikhism and South Asian Religions at Columbia University, stated in *Cheema v. Thompson*, "it is my belief that the obligation to wear a kirpan cannot be fulfilled by a medallion or similar replica."[27] Any transformation of the sort to the kirpan would "alter it and destroy its character as a kirpan," for as Professor Mann explicitly stated, "a kirpan is a knife."[28] Thus, while the need to accommodate to the beliefs of a religious group does exist and is extremely central to the preservation of a democracy, it does not necessarily follow that the price of accommodation includes with it complete alteration of the belief itself.

V. The Irony of the Kirpan: A Religious Paradox?

In this chapter, I have made an attempt to show how, through the lens of history, the kirpan is a sincere religious belief on the part of Khalsa Sikhs, that its intended role was both to be used as a weapon as well as an exterior symbol, and that the mandate of Sikhism cannot be fulfilled either

by the wearing of a symbolic necklace or medallion of the kirpan. In no way, however, do I profess that the issues have been fully resolved. For instance, it is still indeterminate as to whether or not the kirpan is a "sincere religious belief" for all Sikhs. Furthermore, whether the kirpan is still intended to be a modern-day weapon, as it obviously was at one point in the course of history, is left undetermined up until now. For the time being, then, these answers will remain irresolute. Yet despite this, it is undoubtedly clear that much of the debate surrounding the kirpan revolves around critical issues that have their origin in and are imbedded deeply into the faith of Sikhism. While all the questions can never be answered, the answers to some of the questions become clearer.

Nevertheless, many times the hand of Fate works ingeniously to concoct a situation as ironic of that as the kirpan. That is to say, given the history of the kirpan, it is extremely peculiar that a situation has developed whereby a modern government seeks to outlaw its possession. To recall, Guru Tegh Bahadur's challenge to the Emperor Aurangzeb was driven by the principle that it was wrong for the state to interfere with the religious practices of its subjects. In fact, Guru Tegh Bahadur became a martyr to this cause, and his

> martyrdom is seen not only as the act of a man dying resolutely for his own faith but on behalf of Hinduism and religious liberty as a principle. The kirpan then is a product of Guru Tegh Bahadur's defiance of religious tyranny, as well as a means to protect against such tyranny in the future. It is strange that a religious practice, which has its roots in resistance to centuries-old, state-led religious persecution, may itself be endangered by a modern-day government.[29]

Fortunately, the United States is not completely indifferent to individual religious rights; the First Amendment and RFRA are two shields standing in the way of measures that restrict religious freedom. Each will be discussed in the next chapter.

Chapter Three

THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[30]

These are the first sixteen words of the First Amendment to the United States Constitution. Yet words, as Socrates astutely observed, "are more plastic than wax is," and therefore are as likely to stimulate passionate conflict as to reconcile them. Thus, while on the one hand, the words of the First Amendment's Religion Clauses have been the source of America's great blessings, on the other, they have been the root of bitter disputes, as well as volumes of Supreme Court decisions. In this chapter, I focus on the second of the two clauses, the Free Exercise Clause, and discuss its gradual evolution in notable Supreme Court decisions over the years, culminating with the 1997 overturning of the congressional Religious Freedom and Restoration Act. While this chapter defers from embarking on a comprehensive historical journey into the story of religious freedom in America, it carefully will give shape to the most prominent developments in the Free Exercise Clause as they relate to the issue of the kirpan in particular. Just as a background to the kirpan was established in the previous chapter, the similar intent here is to provide the reader with an adequate legal framework of American jurisprudence in which, as we will see in Chapter Four, the kirpan will eventually find itself caught within.

I. The Three Eyes of the Free Exercise Clause: Intent, Interpretation, and Incorporation

It would behoove us to preface a detailed legal analysis of the Free Exercise Clause with some brief commentary on the original intent of the Clause itself. The Free Exercise Clause ("Congress shall make no law prohibiting the free exercise thereof"), as authored by James

Madison, was adopted in 1791 as a method to prevent the federal government from a number of things: the interference of religious belief, the restriction of religious expression without meeting the strict standards of free speech law (that government needs a "compelling" interest before restricting someone's freedom of speech), and the obstruction of religiously motivated conduct in a discriminatory fashion. Simply put, the Free Exercise Clause limited the government from imposing a law that intentionally curtailed a specific religious group from freely exercising its religious right or belief.

However, as Thomas Berg notes, "religious freedom is not a self-defining concept," and the vacillation in Court decisions is an indication of the disagreement about what religious freedom means to different justices.[31] How should government, then, interpret the Religion Clauses? What principles and values do the Clauses enshrine? Three underlying principles have competed for primacy in answering that question: separation of church and state, equal treatment, and religious liberty.[32] While the three principles overlap one another and in turn lead to inconsistency among Court decisions, understanding the principles enables us to rationalize the Court's mélange of decisions.

First is the notion of the separation of church and state. At the very least, this not only separates the church and state into two autonomous institutions, but also calls for the two to be sovereign institutions. Thus, neither the church nor the state should have any recognized role in directing the internal governance of the other. A comparative look at other nations will reveal how the United States is different in this regard of separation of church and state. For instance, Iran is a theocracy, in which the church and state are not two different institutions, but are conjoined. The United States has also rejected practices of nations such as Great Britain, in

which the government has an official part in choosing church leaders, and bishops have official seats in the upper houses of Parliament.[33]

Perhaps one of the most famous metaphors coined in regards to the separation of church and state was found in the 1947 case of *Everson v. Board of Education,* where the Court had quoted President Thomas Jefferson's reference to a "wall of separation" between church and state.

> The "wall" metaphor has implied not just that religion and government should stay out of each other's internal affairs, but that there should be little or no contact between the two at all. In practice, the Court has used the concept to forbid religious practice in government, such as state-sponsored school prayers, as well as tax-supported government funding of private religious schools.[34]

In practice, however, it is impractical to maintain a complete isolation between religion and government, primarily since both are concerned with matters involving public morality.

The second principle is equal treatment. This is generally the idea that government should be prohibited from favoring one position over others simply on matters of religion. That is to say, by granting one group more power than other groups, government consequentially demotes members of the disfavored groups to second-class citizens. In addition, the group that is preferred can gradually accumulate a precarious amount of authority, consequently resulting in social and political turmoil, which was just what Madison had feared in his Federalist Papers (No. 10).[35]

To authors like Thomas Berg, the principle of equal treatment covers two different spectrums: first, one religious denomination should not be preferred over any others; secondly, religion should not be favored over nonreligion.[36]

The third and final value that underlies the Religion Clauses is the idea of freedom of choice or religious liberty. The implication of such a principle lies in the idea that the primary

goal of the Religion Clauses is the reservation of religious liberty, even if it compromises the relationships between church and state or violates the principle of equal treatment. Proponents of religious liberty argue that the other two values should be superseded if they conflict with liberty in a particular case.

As one can readily imagine, the complexities of these three values are yawning. One reason is that government has adopted a greater responsibility for all facets of public life (e.g., governing social policy, managing domestic market activity, organizing the school system). As a result of such an increase in regulation tasks, government, in the hopes of maintaining church-state separation or religious liberty, may be able to do so at the price of treating religion quite differently from any other activity.[37] As government enhances its programs and responsibilities, the challenge to remain isolated from religion becomes relatively more difficult unless government does so at the price of regarding religion as a private matter – an action that can viewed as both discrimination against religion and restrictions on religious liberty.[38] Ultimately then, there exists a tradeoff between the three principles of the Religion Clauses, which, as we will soon see, results in conflicts such as the issue involving the kirpan.

Finally, while we have discussed intent and interpretation of the Religion Clauses, it is vital not to overlook the incorporation of the Religion Clauses into state law. In even a thumbnail history, one must recall that the First Amendment and the Free Exercise Clause, as they were adopted, limited only the *federal government*, not the states ("*Congress* shall make no law…"). So far as the Constitution was regarded, states were free to have established churches and to restrict religious freedom in ways not permitted to the national authorities. In practice, however, states themselves renounced such a right, as virtually all of them adopted close counterparts of the federal First Amendment. Thus, even though states like Massachusetts continued taxing

people to support church institutions until well into the nineteenth century, the basic confines of the First Amendment were put into practice to all levels of American government, almost from the beginning.

Nevertheless, the springboard for the modern church-state development was a Supreme Court ruling in 1940, in *Cantwell v. Connecticut,* in which the post-Civil War Fourteenth Amendment, requiring due process in the states, "incorporated" the First Amendment Religion Clauses and made them applicable to the states as well. Since 1940, then, the Establishment and Free Exercise Clause have both been applied to state governments rather than just the federal government. Thus, from this point forward, any general reference to either "government" or "state" will apply equally to the federal government as well as to state governments, unless otherwise specified.

II. The Modern Dilemma in the Free Exercise Clause

The cases that appear under the Free Exercise Clause have become fairly apparent in recent years. Various guiding principles have come to be relatively unquestioned in areas related to religious belief, expression, and conduct. To recall, government may not interfere with religious belief, it may not restrict religious expression without meeting the strict standards of free speech law, and it may not restrict religiously motivated conduct in a discriminatory fashion. While religious belief and expression have been safeguarded with relatively little debate, the Court has been clear that conduct motivated by religious faith offers more complexities and, thus, is more difficult to guarantee.

For instance, unrestrained religious conduct can harm others in ways that unrestrained religious belief and speech cannot. A case in point may be a religious denomination that is prevented from exercising its belief in human sacrifice. As the 1940 Court in *Cantwell* noted,

while "freedom to believe…is absolute," freedom to act, "in the nature of things…cannot be" but "remains subject to regulation for the protection of society."[39] Thomas Jefferson offered his own thoughts on the topic when he observed that religious belief and speech, unlike conduct, "neither breaks my leg nor picks my pocket."[40]

However, it is important to take note of a particular subtlety that the Court has been clear to mention. While government may restrict conduct, it may not single out conduct for restriction simply because such conduct is religious in scope. Such discriminatory action against religious exercise violates the principle of equal treatment as well as religious liberty as discussed previously in the chapter. An example of the Court's reassurance of this principle is *McDaniel v. Paty* (S.Ct.1978), in which the Court unanimously struck down a Tennessee constitutional provision that forbid members of the clergy from serving as state legislators. While the clergy disqualification was intended to separate religious disputes from politics, the Court found no reason to believe that members of the clergy would be any "less careful of antiestablishment interests or less faithful to their oaths of civil office than their unordained counterparts."[41] In his concurring opinion, Justice William Brennan wrote that the Religion Clauses do not permit government to treat religious believers "as subversive of American ideals and therefore subject to unique disabilities."[42] In other words, government was not entitled to favor nonreligion over religion, which inherently violates the Equal Treatment principle of the Religion Clauses.

Yet in today's day and age, very seldom does government directly interfere with pure religious belief or directly punish conduct only when it is religiously motivated. What is far more frequent, however, is a situation that arises in which a law applying to the general populace as a whole happens to come into conflict with the specific religious practices of certain citizens. A relevant case in point for our discussion is the issue of the Sikh kirpan and the California Penal

Code that bans knives on school grounds. Here is an instance in which no legislator was likely to have devised the law solely with a premeditated intent in suppressing an element of the Sikh faith; rather, it was likely that the legislators did not know about the effects that this general law would have on certain segments of the populace, such as the Sikhs. Potential conflicts such as these are characteristic and common in a society where wide ranges of religious practices exist and function within the pluralistic corners and crevices of America. One of the possible solutions to the problem, as espoused by groups like the Sikhs, is to entitle the religious group in question an "accommodation" or exemption from the law. Such an accommodation, as argued, is derived from the religious liberty principle of the Free Exercise Clause. What, then, has been the Court's response to such situations in which general, neutral laws come into direct conflict with certain religious practices, and the latter wish to be granted exemptions from the law in question? Given the gravity in resolving such a convoluted matter, perhaps it is predictable and unsurprising that the answer to the question seems to be marked by inconsistency.

For example, it is beneficial to recall our discussion of the three underlying values to the Free Exercise Clause: separation of church and state, equal treatment, and religious liberty. In a rather uncontroversial case such as *McDaniel v. Paty,* protecting religious conduct against discriminatory laws promotes both religious liberty and equal treatment for religion, and thus goes largely unquestioned. But accommodating or exempting religious conduct in the face of general laws presents a dilemma, for while an exemption from the law may promote a group's religious liberty, it nevertheless treats religious activity differently than nonreligious activity. If one follows the equal treatment principle, this could be seen as unjustified special treatment for religion or, more specifically, one specific religious group. Returning to the kirpan, if a law that bans knives on school grounds is exempted to Sikhs carrying a kirpan, the outcome is an

immediate breach in the principles of equal treatment as well as church-state separation. On the other hand, such a breach in principles may be viewed as necessary in order to preserve a more essential value, namely the value of religious liberty. Sliced in any dimension or direction, the issue inevitably leads to differences in opinion as well as outcries on all ends of the issue. Unsurprisingly then, it has generally been much more problematic and controversial for the Court to grant free exercise exemptions to certain religious groups, as we will now see.

III. The Compelled Accommodation Standard (1963-1990)

Before the 1960s, the Court for the most part denied religious freedom claims raised against general laws. The Court's response hinted at an anxiety in which religious exemptions would destabilize the laws in question as well as the authority of the states in general. In the 1879 Supreme Court case, *Reynolds v. United States*, the Court rejected George Reynold's claim that anti-polygamy laws could not apply to him because the practice of polygamy was his religious duty under the Mormon faith. The Court attacked such a defense, arguing that it would "permit every citizen to become a law unto himself."[43] In *Minersville School District v. Gobitis,* the High Court maintained that schools could require Jehovah's Witness students to salute the flag, for "[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."[44] For a while, it seemed as though the Court would not grant exemptions to religious groups who were burdened by generally applicable laws.

However, it was the 1963 case of *Sherbert v. Verner* that began the benchmark by which free exercise claims would now be judged. A Seventh-Day Adventist, Mrs. Sherbert, was fired from her job because she would not work on Saturday, her Sabbath day, which also precluded her from finding another job. When she filed for unemployment benefits with the state of South

Carolina, she was denied them on the ground that she had refused "without good cause" to accept "suitable work."[45]

The Court stated that South Carolina had placed a "substantial burden" on Mrs. Sherbert's religious exercise by denying benefits because of her unwillingness to work on Saturday. To the Court, Mrs. Sherbert was placed in an exacting impasse: lose her benefits or violate a "cardinal" principle of her faith. This quandary, to the Court, "effectively penalized" her religiously motivated behavior. The majority further stated that such an imposition as placed by South Carolina on Mrs. Sherbert could only be justified by a "compelling" or "paramount" interest, which the state had failed to demonstrate. Moreover, the state would have to show that there was no "alternative form of regulation" possible that would avoid infringing on free exercise.

The Court in *Sherbert* however was not altogether satisfied with the majority's ruling, for the latter had omitted many intriguing questions that were posed. In both concurring and dissenting opinions, it was expressed that the majority had granted an *exception* on religious grounds, but that such an exemption on religious grounds could be berated as a violation of the principle of Equal Treatment. Why, for example, wouldn't South Carolina have to make similar exceptions to mothers who could not work on Saturday because they could not find baby-sitters to take care of their children? What would give the state the right to favor religion over motherhood? This would be in direct violation of the Equal Treatment standard which does not permit a law to favor religion over nonreligion, or vice versa. Moreover

> in the course of his opinion for the Court, Justice Brennan mentioned almost as a throwaway that South Carolina imposed no requirement on Sunday worshippers similar to that on the Sabbatarian. That, the Justice wrote, 'compounded' the unconstitutionality of the Sabbatarian's treatment. One might have imagined that this, rather than simply 'compounding,' could serve as the heart of the decision, since government favoritism for the majority religion was a principal evil against which the First Amendment was directed.[46]

Despite such interruptions, *Sherbert* is significant primarily since it appeared to embrace the doctrine of protecting religious practice even from general laws that apply to other reasons for acting. In fact, in his concurring opinion, Justice William O. Douglas noted that the "[r]eligious scruples of a Sikh require him to carry a regular or a symbolic sword" and observed that

> many people hold beliefs alien to the majority of our society – beliefs that are protected by the first Amedment but which could easily be trod upon under the guise of 'police' or 'health' regulations reflecting the majority's views.[47]

Sherbert concluded that in order for the government to prevail against a free exercise claim, the government must show that (1) the law is supported by a compelling state interest, and (2) alternative forms of regulation that are less restrictive of First Amendment rights are unavailable.[48]

Nine years later, in the 1972 case of *Wisconsin v. Yoder,* the Court reaffirmed that a law "neutral on its face" nevertheless violated the Free Exercise Clause if it "unduly burden[ed]" religious exercise and was not supported by a "compelling" purpose.[49] The Court held that a religious exemption would be granted to parents of the Amish religious community who refused to abide by the state compulsory education laws and send their children to schools after age fourteen.

In regards to the first issue of schooling being a significant burden on religion, the Court acknowledged the Amish claim that schooling after age fourteen would "expos[e the] children to worldly influences" contrary to the group's long-established conviction, and would eventually undermine the children's allegiance to the Amish community. Moreover, the Court emphasized the "high place" that America affords to "the values of parental direction of the religious upbringing and education of their children."[50]

As for the second issue regarding a compelling or "overriding" governmental purpose, the Court stated that despite the important aim of mandating education, the state's assertion had to be "searchingly examined" in these particular circumstances. While the aim of mandating education was to generate successful and self-reliant citizens, the Amish had a 200-year-old tradition of training children for roles in their "separated agrarian" way of life, and they were "productive" citizens who generally rejected any form of public welfare support and therefore would not become "burdens on society."[51] In addition, the state largely achieved its interests by requiring that the children attend school through eighth grade.

While *Yoder* raised an important issue about the protection of children's interests (Justice Douglas' dissent), the majority partly circumvented the issue in its assertion of the more clearer and celebrated message which *Yoder* is known for: that the Court had adopted a compelled accommodation doctrine in the area of religious free exercise even in the face of neutral laws.

IV. Problems in *Sherbert* and *Yoder*?

To recall, *Sherbert* and *Yoder* had established the rule that a considerable restriction on religious practice must be justified by a strong state interest, even if the restriction stems from a general law applicable to nonreligious conduct as well. Furthermore, if such an interest existed, the state would also be compelled to demonstrate that no "alternate form of regulation" was possible other than one that would inhibit free exercise rights. As it has been mentioned, this level of rationale preserves the doctrine of religious liberty which, as viewed by some, ought to supersede any of the other two principles. Furthermore, it is important to note that religious practices can be infringed upon as equally by a discriminatory law than by a general law. As Professor Berg noted, "A general law applied to religion can be said to 'prohibit[ ]' free exercise just as much as a discriminatory one."[52] In practice, without an exemption, the free exercise guarantee is fairly

inconsequential today since very rarely does government single out a specific religion for exclusion. Rather, we see countless general laws posing problems on religious groups because the general laws are impervious to who they will affect and to what degree.

As promising as this may sound, *Sherbert* and *Yoder* presented at least two extremely difficult quandaries. First, the rationales offered by the Court majorities in *Sherbert* and in *Yoder* clearly were in violation of the principle of Equal Treatment since religious reasons for exemptions were being favored over nonreligious reasons for exemptions. Why should religious reasons be entitled to accommodations when other well-regarded motivations do not? Why should the Amish be exempted from sending their children to school when an equally sincere opponent of schools who follows Henry David Thoreau's teachings is not granted such an accommodation? Or why should a woman who refuses Saturday work in order to observe her Sabbath receive unemployment benefits when a mother who must stay home on Saturday to care for her children is denied benefits?

Furthermore, as Justice Potter Stewart noted in his concurring opinion in *Sherbert,* the compelled accommodation standard comes into direct conflict with language appearing in the Establishment Clause case law. For example, in *Abington School District v. Schempp*, government is forbidden to offer "any form of public aid or support for religion" and is required to maintain "neutrality" toward religion. In light of this, could a person be allowed to be exempted from a law simply because his or her religious principles demanded such? It would seem that by doing so, the government would be aiding or favoring religion within the broad language of the Court's decision. In his dissent in *Thomas v. Review Board*, then Justice William Rehnquist offered his observation of this "tension" between the Free Exercise and the Establishment Clauses.

Even still, the granting of religious exemptions may serve as an incentive for others who are originally not members of a faith to convert (or claim to convert) in order to secure the exemption granted to that specific faith. For example, if a certain tax exemption is granted solely to religious organizations, this may attract people to join religious pursuits in order to gain a financial advantage. If a kirpan is exempted from being viewed as a knife on school grounds, others may be attracted to join the Sikh faith simply for that benefit. While the possibility of this is slim and partial, nevertheless the line of reasoning is apparent: the sincerity of religious beliefs and practices can be watered down if attractive exemptions are granted to certain religious groups due to an influx of new adherents.

The second Achilles' heel that had paralyzed the decisions in both *Sherbert* and in *Yoder* was the inconsistent application of accommodations by the Court. Ultimately, this stems from an invalid definition of terms such as "compelling" and "overriding" purposes. As mentioned, under the *Sherbert* and Y*oder* standard, a government could interfere in a religious practice only if it had secured a compelling or "overriding" government purpose. For instance, a religion practicing human sacrifice would be restricted from doing so because of the compelling interest the state holds in protecting human life. Here, it is obvious that the preservation of human life is a compelling state interest. However, it is not always so easy to recognize what is regarded as compelling. To recall, in *Sherbert*, the Court stated that the state was compelled to provide benefits to a person who could not work on Saturday (her Sabbath) since there was no evidence of a draining unemployment fund caused by persons claiming an inability to work on Saturday, but the Court suggested that the state would not be compelled to provide benefits to a person whose religion forbade her to work at all. While the difference between the two cases is quite

obvious, it is natural to ask where the line is drawn between the two. In *Yoder*, the Court stated that the general importance of education was not decisive in the given context because

> the Amish had a record of successful vocational, educational, and community productivity. But to distinguish the Amish from other possible claimants, the Court had to engage in an intensive, very case-specific examination of Amish practices, without setting down a clear rule for other cases.[53]

Thus, some critics claim that the doctrine of compelled exemptions inevitably will be too case-specific, will not be sufficiently guided by general principles, and will discriminate in favor of more familiar faiths such as the Amish.

V. A New Wave in Thinking: The 1990 Court Standard

After having expounded on some of the most significant drawbacks in *Sherbert* and *Yoder*, it is important to realize that the Court began to gradually shift in its assessment of the compelled accommodation doctrine. After a string of Court cases following *Yoder*, free exercise rights against generally neutral laws diminished noticeably by the late 1980s.[54] The stage was now set for one Court case to overturn almost entirely the notion of compelled accommodations.

Employment Division, Department of Human Resources of Oregon v. Smith (S.Ct.1990) was the Court case to do just that. In a 6-3 decision, the Supreme Court came full circle by returning to the reasoning formulated in its first important free exercise case: the 1879 case of *Reynolds.* Justice Antonin Scalia, writing for the majority in *Smith*, argued that there was no reason for the government to demonstrate a compelling interest in order to apply a neutral law generally, irrespective of any indirect effect the neutral law may have upon individual religious practices. Twenty-five years of Court rulings had been virtually overturned by the Court in *Smith.*

Smith involved a state statute that prohibited the use of peyote, a hallucinogen used by certain Native Americans for sacramental purposes. The respondent, Alfred Smith, a member of the Native American Church, was fired from his job as a counselor at a private drug rehabilitation clinic in Oregon because of his ingestion of peyote while attending a religious ceremony. Under Oregon law, peyote was regarded as a controlled substance and, thus, after ruling that he had been discharged from his job for "misconduct," the state of Oregon denied Smith's application for unemployment compensation. Smith then challenged this action by the state as an infringement of his right to free exercise of religion.

Scalia stressed that the Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[55] In fact, the Court

> reached out and held that the Free Exercise Clause poses no barrier to "neutral laws of general applicability," no matter how severely they infringe on religiously motivated behavior. So long as the government prohibits a certain practice generally, it does not have to give a compelling reason (and probably not any reason) for applying the prohibition to religious practice.[56]

Scalia rejected the precedent enunciated in *Sherbert*, that a compelling state interest must exist to justify even an incidental encroachment on religious liberty. Rather Scalia returned to the philosophy behind the Court's ruling in *Reynolds* that a neutral, generally applicable law governs all conduct, without regard to indirect effects on religious practices. Scalia quoted the *Reynolds* decision when he wrote that to make an individual's compliance with a law contingent upon the demonstration of a compelling state interest is to allow the individual "to become a law unto himself."[57] Despite Justice Harry A. Blackmun's dissent citing the compelling interest standard as a "settled and inviolate principle," the Court in *Smith* chose the principle of equal treatment between religion and non-religion over that of religious liberty.

The Court, however, attempted to point out differences between *Smith* and previous accommodations cases such as *Yoder*. For instance, as the Court pointed out, *Yoder* involved not simply the Free Exercise Clause but, rather, was "in conjunction with other constitutional provisions." In *Yoder*, for instance, the Free Exercise Clause was conjoined with "the right of parents…to direct the educational upbringing of their children" which was established in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary* (1925). Thus, the Court maintained that in these cases, other "hybrid rights" were involved. Notwithstanding, as Justice Sandra Day O'Connor pointed out in her concurrence in *Smith*, the reference to "hybrid rights" is the Court's endeavor "to escape from our decisions in *Cantwell* and *Yoder*."[58] If it is true that certain "hybrid rights" are valid on their own merit (e.g., speech, parental rights, association), then we must ask: what need is there of a free exercise interest altogether?

VI. Congress Responds: The 1993 Religious Freedom and Restoration Act

It must be pointed out – for clarification sake – that *Smith* did not completely eradicate the notion of compelled accommodations. In order to understand the decision made by the Court in *Smith*, one must understand first the three alternatives available to the Court in regards to compelled accommodations.

The first alternative is to mimic the Court in *Sherbert* and *Yoder*. This was the idea that religious liberty must be protected, and religious accommodations, thus, are constitutionally required and are not a form of government aid or favoritism for religion. As we well know, this is the doctrine that the Court in *Smith* overturned. The *Smith* decision also rejected the second method of reasoning: the idea that any accommodation to general laws violates the Establishment Clause by favoring religion over nonreligion. This would require government to protect the standard of equal treatment between religion and other reasons for acting. *Smith*,

however, was not as absolute as this line of reasoning, for the Court in *Smith* never stated that all exemptions for religious practices are forbidden.

What the Court in *Smith* decided was a means between these two extremes, which Justice John Harlan stated in his dissent in *Sherbert*. Under this third alternative, government was not constitutionally *required* to either reject religious accommodations nor to protect them. Rather, government recognizes the conflict between equal treatment and religious liberty and, as a result, government is bequeathed the latitude in protecting or prohibiting either course. At times, government could apply the general law and, at other times, government could apply religious exemptions.

As coherent as this may seem, the danger lies in allowing government to be inconsistent. What is more, government would be more likely to exempt only those religious groups that have enough political clout and numbers and thus are more likely to secure an accommodation. Most importantly, what would become of religious groups in the meantime that could not secure an accommodation to their sincere religious belief because of the presence of a facially generally, neutral law? As Martin Kassman pointed out

> It isn't hard to imagine other mischief that could be, and will be, worked by [*Smith*]. A church serving sacramental wine to parishioners could run afoul of alcohol laws. A Court's local rule against wearing hats could be used to deny admittance to a Jewish attorney or litigant whose religious beliefs require him to wear a yarmulke.[59]

In an October 1996 piece of "The Recorder," a Texas judge had forced a Jewish expert witness from San Francisco to choose between removing his yarmulke and not testifying. Justice Sandra Day O'Connor's dissent in a case we will look at later, *City of Boerne v. Flores* (S.Ct.1997), discussed further problems in the *Smith* decision, such as performing an autopsy on a son over the religious objections of his parents.

The disenchantment with the Supreme Court's verdict in *Smith* led to a massive reform movement in Congress. Conservatives and liberals on both ends of the aisle lobbied Congress to pass a statute re-establishing the compelling interest and least restrictive means test of *Sherbert* and *Yoder*. Groups included the National Association of Evangelicals, the Southern Baptist Convention, the American Jewish Congress, the National Conference of Catholic Bishops, the Mormon Church, the Traditional Values Coalition, the American Civil Liberties Union, and Americans United for Separation of Church and State. On November 16, 1993, President Clinton signed into law the Religious Freedom and Restoration Act (RFRA), which had passed the House by a voice vote without objection and the Senate by a 97-3 margin. Clinton praised the law, stating that government would be held "to a very high level of proof before it interferes with someone's free exercise of religion."[60]

The key portion of the RFRA was Section 3, which was designed to prevent the government from placing a burden on religious liberty even if the burden resulted from a general applicable law unless the government could, first, demonstrate the furtherance of a compelling governmental interest and, second, show that the law or action was the least restrictive means of furthering that compelling interest. In part, Section 3 of RFRA reads:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –
>
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.[61]

In essence, RFRA made it more difficult for religious beliefs and practices to be hindered by general laws made by the government. RFRA, thus, granted religious groups their free exercise rights, shouldering any burden on the government to prove why a specific religious group's practice should still be restricted. In this regard, the legislation echoed and restored the twofold test introduced thirty years earlier by Justice Brennan in *Sherbert*.

VII. The Supreme Court Lashes Back: The Invalidation of RFRA

The law of constancy finds no place in the issue of the Free Exercise Clause, as the RFRA standard was in turn invalidated in the 1997 Supreme Court case of *City of Boerne v. Flores* in which the Catholic Archbishop of San Antonio had applied for a building permit to enlarge a church located in Boerne, twenty-eight miles northwest of San Antonio. Citing an ordinance passed by the Boerne City Council which had been intended to preserve historic districts in the city, local officials denied the Archbishop's request. The Archbishop challenged the denial of his application for a building permit in the U.S. District Court for the Western District of Texas. This complaint alleged that the denial was a violation of the RFRA, but the district court concluded that Congress had exceeded its authority when it enacted the legislation.

In order to appreciate the district court's ruling, we must first refer back to the constitutionality of Congress' authority in passing the RFRA in the first place. Section 1 of the Fourteenth Amendment of the U.S. Constitution guarantees that a state cannot deprive a person of life, liberty, or property without due process of law, or deny any person the equal protection of the laws. Section 5 of the amendment empowers Congress to enforce these guarantees with appropriate legislation. Thus, Congress had invoked its Section 5 of the Constitution. The Court of Appeals for the Fifth Circuit ruled that the RFRA was constitutional, thereby reversing the district court's decision.

In a 6-3 decision by the Supreme Court, Justice Anthony M. Kennedy, writing for the Court majority, concluded that the RFRA was a contradiction of two of the most basic principles of American government: separation of powers and federalism. The Court held that the RFRA exceeded the section 5 power because it did not appropriately "enforce" the constitutional free exercise rule – that is, the rule of *Smith* – but rather rejected *Smith* and "attempt[ed] a substantive change in constitutional protections."[62] To allow Congress to declare such changes under section 5, the justices said, would be to abuse the article 5 power as well as remove any restrictions on its legislative power, upsetting the federal-state balance.

Even before the *Boerne* decision, there had been debate whether section 5 empowered Congress simply to develop specific remedies for constitutional violations that the Court would recognize, or to go further and base legislation on its own substantive constitutional interpretation. *Boerne* squarely held that Congress' power was remedial only and not substantive, hearkening back to the *Marbury v. Madison* (1803) statement that it is the province of the courts to say what the law is. The court concluded that RFRA could not be read as a remedial statute enforcing the nondiscrimination rule of *Smith,* because it was far "out of proportion" to such a goal. The Act applied to any substantial burden imposed on religion, but the Court noted that many laws impose such burdens without aiming at or discriminating against religion. Once the Act's stringent compelling interest test applied, "laws valid under *Smith* would fall without regard to whether they had the object or purpose of stifling free exercise."[63]

It is imperative to assert that the decision in *Boerne* left open the question of whether the RFRA could still apply to the federal government. The Court in *Boerne* interpreted Congress' authority to implement section 5 of the Fourteenth Amendment. However, Congress is espoused with additional powers as well, including various enumerated powers in Article I together with

the power to make laws "necessary and proper" for executing the other powers (as dictated by Article 1, Section 8, Clause 18). While it may be far too early to predict RFRA's constitutionality as it applies to the federal government, as far as states and municipal levels of government are regarded, the *Boerne* decision has invalidated the scope of RFRA.

VIII. The Kirpan and the Free Exercise Clause

As it would so happen, the 1994 case of *Cheema v. Thompson*, which we will examine in the following chapter, fell in the interim period between the RFRA and the *Boerne* decision. Thus, RFRA was still constitutional and still applied to the Sikh plaintiffs, who used the RFRA as a defense when (1) a generally neutral law that restricted knives in public schools prohibited them from (2) a sincere religious belief: the carrying of a kirpan. As outlined, these were the two requisites and conditions needed to qualify for RFRA. Thus, the school district possessed a twofold burden: first, it had to show that it had a compelling state interest in prohibiting Sikhs from carrying a kirpan; secondly, it needed to demonstrate that preventing the Sikhs from wearing the kirpan was the least restrictive means available. In Chapter Four, we will next examine what the court in *Cheema* concluded.

Chapter Four

CHEEMA V. THOMPSON

"[Public schools] are a symbol of our secular unity…[and therefore] must be kept scrupulously free from entanglement in the strife of sects."[64]

In a case involving social constructions, the purported duty of school districts, and the controversy over weapon symbolism, *Cheema v. Thompson* was one of a few cases that applied the Religious Freedom and Restoration Act of 1993. *Cheema* highlighted the manner in which both a school district and a religious group like the Sikhs were able to compromise and reach agreeable solutions to a situation which involved vying legitimate interests, namely school safety and religious liberty. As difficult as it is imaginably to strike a balance between student safety in schools and the free exercise of three Sikh students, the Ninth Circuit in *Cheema*, by applying the 1993 Congressional act, was able to demonstrate the inherent strengths built into the RFRA. As a result of cases such as this one, in which the RFRA was able to serve as the solution to a complex problem, we begin to recognize the importance that the RFRA had brought into the legal picture, for it was successful in balancing the disproportion and disparity between equal treatment and religious liberty which had evolved after the *Smith* decision.

I. The *Cheema* Milieu: Elements Leading to the Case

I will first begin by recapitulating the events leading to the case. Jaspreet, Sukhjinder, and Rajinder Cheema, ages 7, 8, and 10 respectively, were three Sikh children attending the Livingston Union School District, near Merced, California. In December, 1993, all three students were baptized as Khalsa Sikhs during the winter school recess. In January, upon returning to

school, all three wore the five symbols of the faith, including the kirpan, which was worn under their clothes, as is common in the case of baptized Sikhs at work or school. However, after one of the three children was observed to be wearing a kirpan by his classmate, the school principal immediately suspended the three children on the grounds that the kirpan violated District regulations as well as the California Penal Code, Section 626.10, which makes it a public offense to bring to school – granted certain exemptions - any "dirk, dagger, ice pick, knife having a blade longer than 2 ½ inches," as well as numerous other specified objects.[65] According to existing legislation, it was explained to the Cheema family that the kirpan was to be considered a weapon and, consequently, the District refused to allow the children to return to school unless they were willing to leave their kirpans at home. The American Civil Liberties Union stepped into the picture by requesting the District to reconsider its decision, indicating that other school districts were able to work similar problems in ways that allowed Sikhs to still wear their kirpans to schools. A meeting between the school board soon followed whereby members of the Board were cautioned in a memorandum received by the Superintendent's office to uphold the policy of "no knives in school" taking into account the school's "compelling interest" in furnishing "an environment which is perceived to be safe." The Board, thus, refused to revert its decision. Furthermore, the Sikh adults who had attended the public Board meeting were threatened with arrest since they had arrived at the meeting wearing their own kirpans. It was requested again "to at least allow the Cheema children to return to school [with their kirpans] while the legality of defendants' actions was being litigated." This request was rejected. As a result, the counsel for the Cheema family, Stephen Bomse, and the ACLU turned to the District Court, requesting an injunction that would allow the Sikh students to attend school despite the School District's decision. Garland Burrell, Jr., the District Judge, denied the issuance of such an injunction,

however, on appeal, the Court of Appeals for the Ninth Circuit reversed the District Court's ruling and issued an injunction, thus permitting the students to return to their school with the kirpans under certain stipulations.

II. Do Sikhs Qualify for RFRA?

To analyze the issues presented in the case, it is best to do so in light of the legal framework which the case was structured around, namely the RFRA. Because the year was 1994 and the RFRA was not overturned yet, the Sikhs were able to use the RFRA defense. If we recall from the previous chapter, RFRA made it easier for religious groups to exercise their religious beliefs in the face of generally applicable laws which may unintentionally yet unduly restrict such beliefs. In appealing to the Ninth Circuit, the Cheema family made reference to the RFRA and argued that the RFRA should be applied in this situation since the California Penal Code, Section 626.10, was an example of a generally neutral law which was hindering the Sikh students' right to free exercise, namely their right to wear the kirpan. In order to qualify for RFRA, all the Sikh students had to demonstrate were two things: (1) that they possessed a sincere religious belief; and (2) some government action substantially burdened or threatened the free exercise of their religion. If these conditions could be satisfied, then RFRA would be applied and consequently the District would have the bold twofold task of proving that the substantial burden on the Sikhs' exercise of religion was: (1) in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest – an undertaking far more exigent than that placed on the Sikhs. In short, once it was proved that the Sikhs could qualify for RFRA, the burden was placed on the government.

To qualify for an RFRA claim then, the Sikh students needed to prove that wearing the kirpan was a sincere religious belief on the part of the Sikh faith and the District, by prohibiting

them from wearing the kirpan, had placed a substantial burden upon the Sikh students. As we have established at some considerable length in Chapter Two, the kirpan appears to be a sincere religious belief in Sikkhism, especially to Khalsa Sikhs, which the Cheema students indeed were. And as we have also witnessed in Chapter Two, there is indeed substantial debate in regards to this question as to how genuine the sincerity of the kirpan is in Sikkhism altogether, given that the majority of Sikhs do not carry the kirpan (although virtually all Khalsa Sikhs do). Nevertheless, despite any historical or religious debate discussed and dissected in Chapter Two, the dilemma is not as problematic here since, legally speaking, the Court has been quite lenient in accepting a claimant's description of his religious beliefs and his assertion that they are sincere. As one can readily imagine, it is quite difficult for any court to question how sincere a person's religious claim or belief really is.

> A series of unemployment decisions following *Sherbert* expanded the category of cognizable religious claims, deferring more and more to the individual's characterization of his beliefs. The Court held that a Jehovah's Witness could not be denied benefits because he refused to work in a factory that made components for army tanks, even though the man could not clearly articulate the doctrinal basis for his refusal and other Jehovah's Witnesses saw no problem in working there. *Thomas v. Review Board* (S.Ct.1981). The justices refused to question Thomas's understanding of his faith, noting that '[c]ourts are not arbiters of scriptural interpretation.'[66]

Thus, cases such as *Cheema* compare to *Thomas v. Review Board* in that the court was willing to adhere to religious sincerity claims.

As for the issue of whether the District had placed a substantial burden upon the Sikh students, the District Court conceded that "[a]s a result of the Districts' no-knives policy, Plaintiffs must choose either to follow a fundamental precept of their religion and forfeit the opportunity of attending school, or forsake one of the precepts of their faith in order to attend

school."[67] Such a choice violated the students' "free exercise of [their] constitutional liberties."[68] The Court of Appeals also noted that

> the Cheema children will suffer not just hardship, but possibly irreparable injury if they are not allowed to attend school during the pendency of this case. Home schooling is no substitute for in–class education for children like the Cheemas, whose primary language is not English and who thus require daily contact with native speakers in order to build their own language skills.[69]

With the Cheema family demonstrating that a substantial burden was being placed on them, it was relatively easy for an RFRA defense to be applied in this case, as the Cheemas were successful in showing that a sincere religious belief was both present and substantially burdened.

III. The District's Burden: Compelling Interest?

Since the first two conditions were met, it was incumbent upon the District to show that its action in preventing the children of the Cheema family from attending school was "in furtherance of a compelling governmental interest" and represented "the least restrictive means of furthering that compelling state interest." The District argued that its duty in providing a safe environment for students was in itself a compelling interest and that the kirpan, being a knife, was a weapon that thus threatened the safety of other students.

The plaintiffs, the Cheema family, countered this logic by relying on comparisons of school districts. For instance, the Superintendent of Schools in the Selma Unified School District stated: "I am unaware of any actual or threatened incidents of kirpan-related violence or other form of kirpan misuse, in this District or elsewhere."[70] Moreover, one official in the Surrey School District in British Columbia acknowledged the large number of Sikh students in the district who wear the kirpan without any difficulty. As she wrote in 1994

> since the beginning of this century, baptized Sikhs have been attending public schools wearing kirpans. In this long period of time, there is no

> record of an association between kirpans and violence, and there is no record of kirpans being used inappropriately.[71]

Finally, according to a study conducted in Ontario, "there is no evidence that kirpans have sparked a violent incident in any school, no evidence that any other School Board in Canada bars kirpans, and no evidence of a student anywhere in Canada using a kirpan as a weapon."[72] The lawyers on behalf of the Cheema family thus attempted to demonstrate that if other school districts had permitted Sikh students to wear kirpans and if no acts of kirpan-caused violence were cited, then perhaps there was not much to the District's claim that the kirpan was a threat to the safety of the school. In other words, it was the intention of the plaintiffs to dilute the District's compelling interest standard by referring to instances where the kirpan was permitted in schools and where no violence, harm, or danger was invoked.

Nevertheless the court in *Cheema* found that the District *did* indeed have a compelling interest in protecting the safety of its students. The Ninth Circuit recalled that even the U.S. Supreme Court had recognized the protection of public safety and order as a compelling governmental interest. For instance, in *Yoder,* the Court noted that "providing public schools ranks at the very apex of the function of the State," and under the California Constitution, districts are obligated to ensure that schools remain "safe, secure and peaceful."[73] Thus, the threat of kirpans in school seemed to validate the notion that the safety of the school was somewhat vulnerable and the court, then, was willing to acknowledge that this constituted a compelling interest on behalf of the school district.

The school district, then, had successfully fulfilled the first step of its twofold burden, for it had already proven its compelling interest in safety, which the Ninth Circuit recognized as legitimate. Although they submitted to the court's decision, a significant point had been expressed by the plaintiffs which would be noteworthy to discuss. The question, as the plaintiffs

implicated, was not over a compelling interest in safety, as this should obviously be a recognized concern for any school district. Rather the plaintiffs maintained that the school district was, in actuality, fearful of granting an exemption to the Sikh students because of the possibility and threat of fear of the kirpan, as well as the idea that by granting Sikhs an exemption, other students would be treated unfairly. However, the American courts have been vigilant in making certain that claims based on threats of fear cannot serve as the foundation for declining exemptions to regulations that are otherwise justifiable. It is important to realize that while fears are not always baseless, they are not always well-substantiated either, and thus it is questionable whether a threat of fear is sufficient enough to deny an individual of his or her fundamental rights as assured by the Constitution. For instance, in *Tinker v. Des Moines Independent Community School District* (S.Ct.1969), the Supreme Court held that a school district could not prohibit student protests against the Vietnam War simply because administrators felt that that the volatility of the issue might lead to disturbances. And the Ninth Circuit, in *Chalk v. District Court* (1992), ruled that an HIV-infected teacher should be allowed to return to his job, maintaining that theoretical danger and fear of infection was not enough to exclude the teacher from his job.

Likewise in *Cheema,* the Ninth Circuit noted that the school district did not have a compelling interest to control "the impact on other children resulting from the presence of kirpans at school," since such an impact did not directly relate to safety.[74] As a study commissioned in Calgary had concluded, a school district "is not expected to guarantee the absolute safety of students for of course this is impossible." The District Court noted this as well, when it observed that the school district "has a compelling interest not in protecting students

from all fears, but rather only those which are reasonably related to a real threat."[75] The threat of fear, thus, did not constitute a compelling state interest.

As the plaintiffs suggested, while the kirpan may have had the effect of invoking a substantial threat of fear, it was nevertheless one of *many* objects found in an educational setting that potentially could be used to inflict harm or damage. For example, if we consider a weapon to be merely any object that can inflict harm, then it is also possible to argue that various objects which are commonly allowed in schools – scissors, compasses, baseball bats – can also be used as weapons to inflict harm. Thus, while breadknives in the cafeteria and handguns can both be used potentially as weapons, what then distinguishes a gun as a weapon but a breadknife as a tool used to cut food? The answer lies in the fact that while breadknives, baseball bats, compasses, scissors, and acid in the laboratory all can be used as weapons and all can theoretically be used to inflict grave harm, they all constitute some other necessary and legitimate purpose or function. Similarly, while the kirpan could, in theory, be used to inflict injury, it nevertheless possessed a distinct purpose: as a devout religious symbol and an indispensable item to a Khalsa Sikh. As Lal mentions

> A baseball bat might well be construed as a piece of wood, or an object for hammering in a nail into a piece of wood, but preeminently it remains a special kind of sporting implement used to hit a round ball. It can no doubt be used, and indeed it has been so used, to smash a person's skull, or inflict some other grievous wound, but that does not alter its fundamental characteristics as a 'baseball bat.' Similarly, the essential characteristic of a kirpan is that it is a religious symbol of the faith: that is indeed its ontological status, and to construe it as a weapon is to do the kirpan injustice, to commit an act of epistemic violence, to plunge surreptitiously the sword into the backbone of the faith.[76]

Thus, plaintiffs for the Cheema family offered two extremely important arguments related to a school district's duty to protect. First, the plaintiffs sparked debate as to the duty shouldered by a school district. As court language has supported, a school district's obligation is

only to provide students with a safe environment – not to compel the school district to transform the school into a "hermetically sealed" environment. This was not justifiable, for as the attorney for the plaintiffs argued, even a child's home is only a "reasonably, not a perfectly, safe world."[77] Parents often keep loaded guns in their home, for instance, "although we know to a certainty that some children accidentally will be injured or killed as a result."[78] We do not, however, altogether ban guns. While this line of reasoning may be somewhat blurred as it mixes various constitutional protections, the point is still made in reference to school districts. For instance, in its decision in the Lopez case, the Supreme Court ruled that Congress was not within its jurisdiction in instituting federal legislation banning the possession of guns near school. Thus, the question the plaintiffs in *Cheema* wished to raise was how credible was the school district's claim that (1) the kirpans threatened school safety, given that studies conducted indicated no related incidents of violence linked to the kirpan; and (2) the school district has a duty to protect each student, given that the courts have ruled rather unanimously that threat of fear do not constitute a compelling interest.

Secondly, the plaintiffs asserted a bold statement involving social constructions and weapon symbolism. By labeling the kirpan as a "knife," the plaintiffs argued that the school district had committed a social misnomer on the inalienable nature and meaning of the kirpan. The kirpan was a religious symbol, they argued, although from our discussion in Chapter Two, we have seen that it was not always so clear and pronounced. Nevertheless, the plaintiffs maintained rather vehemently that the potentiality for an object to be used as a weapon did not necessarily cause that object to be a weapon. The kirpan, then, should be treated similarly, for although it *could* be used as a weapon, its function was otherwise: it was a sincere religious belief to Khalsa Sikhs and thus should be regarded *and defined* as such. Often times, as is the

scenario here, the manner by which we define, classify, and identify objects and situations will determine a large part of the way in which we view the object.

Therefore, in *Cheema v. Thompson*, the Ninth Circuit found that the School District was in fact furthering a compelling state interest when it sought to protect the safety of the school. However, it rejected the School District's claim that there was a compelling state interest in guaranteeing each student with absolute safety – including safety from fear, an idea which dilutes the compelling interest standard. In the 1993 case of *Church of the Lukumi Babalu Aye v. City of Hialeah,* the Court *Santeria* animal sacrifice case, the Supreme Court struck down several city ordinances that prohibited the ritual sacrifice of animals, because the ordinances discriminated against the worship ceremonies of Santeria, an Afro-Caribbean religion. Even though the state had compelling interests to prevent injury to animals, harm to children, infringement of zoning regulations, and unsanitary conditions, the Supreme Court made it known that the compelling interest standard was not to be "watered down." Similarly, despite the Ninth Circuit having found a compelling interest in safety, it still adhered to the stringent compelling interest standard outlined by the Court and was thus careful not to recognize any compelling interest standards that were ill-founded.

IV. Banning Kirpans Altogether: Least Restrictive Means?

Regardless of the fact that the Ninth Circuit became involved in the issue of threats of fear related to the kirpan, it nevertheless ruled that the school district had a compelling interest. Thus, according to the RFRA, the school district had to achieve the second step: prove that its decision to prohibit kirpans from school was the least restrictive means of furthering its compelling interest in school safety. This was the obvious hardball pitched to the school board members since, as we have seen, other school districts had been able to permit kirpans in school and not

jeopardize school safety. Thus, if it could be shown that there were alternative ways to solve the issue of school safety while permitting Sikhs to still wear their kirpans, then the school district would not succeed in entirely proscribing the Sikh students from wearing their kirpans.

The plaintiffs argued that the school district had failed to make any attempt to accommodate the religious practices of the three Sikh students, which is just what RFRA had sought to achieve in situations where generally neutral, non-specific laws conflict with the free exercise of religious groups. The Ninth Circuit was of the same mind, as it stated that "[the school district] has put in the record no evidence whatsoever of any attempt to accommodate the Cheemas' religious practices."[79] The district's only suggestion has been that the Cheema wear kirpan medallions, which we briefly read in Chapter Two. However, as witnesses testified, this "accommodation" did not meet the Sikh religion's requirements. Was this then enough of an attempt made by the school district?

The Ninth Circuit emphatically ruled that it was nowhere close to an accommodation. As the plaintiffs had pointed out earlier, numerous other school districts were able to accommodate the religious practice of the kirpans. And despite these methods of accommodation, the record was devoid of any incident where kirpans were involved in school-related violence. The Ninth Circuit cited school districts in Canada which permitted kirpans altogether. In the Yuba and Live Oak School Districts in California, the Ninth Circuit noted that kirpans were allowed but only if they were accompanied and riveted to sheaths. In the Selma School District, kirpans were permitted so long as they had rounded tips and blunted edges. Hence, accommodation was possible and safe, as a comparative study had demonstrated.

The Cheemas themselves had proposed to sew their kirpans into their sheaths in such a fashion that even an adult school board member could not remove them. Furthermore, the legally

permitted length of a knife was not to exceed 2 ½ inches; the kirpan was about 6-7 inches long, with a blade of roughly 3 ½ inches. Yet the Cheemas had conceded to wear a shorter kirpan. Still, in spite of these concessions, the district had failed to show why these less restrictive alternatives were insufficient. When the history of kirpan cases in the courts established that accommodation was possible and not dangerous, the Ninth Circuit was compelled and convinced to require the school district to make accommodations to the Sikh students, since denying them altogether the right to wear their kirpans to school was in no way the narrowest tailored method of achieving the school district's compelling interest in guaranteeing school safety.

To recall, the school district felt that if it permitted Sikh students to wear the kirpan, other students would be unfairly treated since an exemption would be made only to the Sikh students. The school district was concerned that all the children would not be treated the same. In perhaps the most important moral to the RFRA story, the majority for the Ninth Circuit responded by stating that

> accommodation sometimes requires exactly the opposite: accepting those who are different and recognizing that 'fairness' does not always mean everybody must be treated identically.[80]

To recall from Chapter Three, this is the idea that religious liberty supersedes other values, including that of equal treatment. Even though religion will be favored over nonreligion, each individual person will be guaranteed his or her respective religious liberty. And as the Ninth Circuit applied RFRA's conditions to the case of *Cheema,* then perhaps this is just what RFRA sought to achieve: the idea that equal treatment is an important value, however when general laws have the incidental effect of limiting and burdening another's religious exercise, equal treatment must be sacrificed and transformed so that religious liberties of various groups are secured.

Because the school district could not offer an adequate answer as to why the same solutions that worked in other school districts could not work in this specific situation, the Ninth Circuit was pressed to discount the total-ban-on-kirpans-solution to the problem. As a result, it ruled that a total ban on kirpans was not the least restrictive means to further the compelling interest in school safety and, as a result, the Cheemas were entitled to some sort of accommodation.

V. The Order of the Court

The result was that the Ninth Circuit mandated the District Court to direct an accommodation with both parties in a manner which would "protect the safety of the students and accommodate the religious requirements of the Cheema children."[81] Ultimately, the Cheemas returned to school with the following conditions:

> (1) the kirpan will be of the type demonstrated to the Board and to the District Court, that is: a dull blade, approximately 3-3 ½ inches in length with a total length of approximately 6 ½-7 inches including its sheath;
> (2) the kirpan will be sewn tightly to its sheath;
> (3) the kirpan will be worn on a cloth strap under the children's clothing so that it is not readily visible;
> (4) a designated official of the district may make reasonable inspections to confirm that the conditions specified about are being adhered to;
> (5) if any of the conditions specified above are violated, the student's privilege of wearing his or her kirpan may be suspended; and
> (6) the District will take all reasonable steps to prevent any harassment, intimidation or provocation of the Cheema children by any employee or student in the District and will take appropriate disciplinary action to prevent and redress such action, should it occur.[82]

VII. The Kirpan Today

If a similar issue in regards to the kirpan arose today in the courts, it would be interesting to see what became of it. It is important to realize that the Cheema family succeeded in its victory not based on a First Amendment defense, but rather on the defense of the RFRA. Since the *Cheema*

case, however, the RFRA was ruled unconstitutional. Thus, Sikhs making a similar claim like the one that the Cheema family had made would not be able to use RFRA to their defense.

Thus, it would appear that with the absence of RFRA as a legal defense, any claimant making a similar argument in regards to the kirpan would not succeed as the Cheemas had done. A Sikh's right to carry a kirpan would not be protected under the First Amendment as a consequence of the *Smith* decision. And while RFRA offered the only protection that could offer a shield, it no longer can ever since it was struck down by the Court in 1997 in the case of *Boerne*. As a result, Sikhs are presumably in a vulnerable position without a shield to protect their sword. Accordingly, this is why I will argue in the following chapter that the RFRA is needed in order for groups such as the Sikhs to regain legal protection in situations where generally applicable laws can still burden their sincere religious beliefs, for it appears that in cases like *Cheema v. Thompson*, both parties were able to maintain their respective positions - the school district furthered school safety, the Cheemas were able to wear the kirpan. Such successful rulings like *Cheema,* as I will argue in Chapter Five, are indicative of the political theories and sentiments espoused by John Stuart Mill in *On Liberty,* in which compromise, cooperation, and concessions are valuable to preserve various, distinct democratic ideals and principles.

Chapter Five

THE KIRPAN IN THE MILLIAN CONTEXT

"I disapprove of what you say, but will defend to the death your right to say it."[83]

Compromise was the exhortation of the ruling in *Cheema*, and the RFRA was the means of achieving that compromise. The lesson that the RFRA had taught was that accommodation was necessary in order to protect the religious freedoms of minorities whose rights had been swallowed by inadvertent laws and the decisions of uninformed lawmakers. However, with the RFRA having been ruled unconstitutional, accommodation was no longer obligatory and courts were able to use other yardsticks by which to measure such issues. This new benchmark in thinking, devoid of the need to accommodate, severely endangered liberty as a whole, for it ignored the fact that many religious groups were threatened by generally applicable, neutral laws, the kirpan a case in point. Thus, I argue in this chapter for the overwhelming need to re-adopt the RFRA, for I contend that the RFRA was the best answer to an extremely complicated dilemma. To support my claim, I will introduce the theories of the political theorist, John Stuart Mill, one of the most impassioned spokesmen of all time for the cause of freedom. Mill's political and social views, as I will demonstrate, are somewhat analogous to the overarching theme of the RFRA. Furthermore, I will apply Mill's *On Liberty* to another court case involving the kirpan, *New York v. Singh*, which occurred prior to the adoption of the RFRA and resulted in a Sikh man losing his right to wear his kirpan. Finally in this chapter, I will conclude that Mill's insistence on learning to accommodate and living with unfamiliarity must be our new focus if we are ever able to progress and establish the preconditions for a well-ordered society.

I. John Stuart Mill: A Few Facts

As we do not dream to comprehend the Universe without first delving into the basic laws of physics which bind together all actions and reactions, it would thus be logical to first understand the very nature of the underlying thread running through Mill's argument before we look at the kirpan in the Millian framework. To begin with, we must understand that to some Mill's *On Liberty* may seemingly appear to be a "book of contradictions." For instance, after categorizing himself as a utilitarian, thus advocating the maximization of total human happiness, Mill passionately argues for the overwhelming need for individuality and non-conformity. After placing a great emphasis on an unrestrained freedom of speech and thought, Mill discusses how consensus and stability are indispensable to a happy society. While it may seem that Mill equivocates on certain issues and despite how overt these discrepancies may appear to some, Mill has indeed concocted a viable system of liberty which has survived since it: 1) takes into consideration all inherent advantages of individual expression; and 2) possesses within it certain checks and balances which act as a social gauge on the abuses of individual autonomy. For these basic features, Mill's version of liberty is neither extreme nor contradictory; rather, it is a sufficient and sensible element for the progress of the state.

Secondly, Mill did not wish to defend liberty on a social contract or "natural rights" philosophy. Rather, he derived liberty on the principle of Utility – a word which in its simplest form can refer to anything which is useful towards achieving the ends of human life, the most important of which is happiness. Thus, to a utilitarian, by allowing another individual to express his individuality (granted he does not cause harm to others), happiness would be maximized for everyone. As we will see later in the chapter, by allowing them the right to wear their kirpans,

Sikhs would be expressing their individuality, an element which always maximizes total human happiness.

II. Mill's Argument for Liberty

On Liberty, thus, explores the boundaries between legitimate and illegitimate use of power and coercion. Mill sets forth a magnificent defense for the individual's freedom of action and for the guarantee of private rights. Every man, he insists, is entitled to the protection against the tyranny of public opinion as well as against governmental oppression. Individual independence is a right that must never be sacrificed to the collective opinion of the majority. As Mohandas Gandhi once wrote several decades later, "In matters of conscience, the law of majority has no place."[84]

In Chapter Two of *On Liberty,* Mill sets off on his eloquent justification of liberty of thought and discussion. There, Mill contended that freedom of expression is no less necessary when an honest government is backed by the people than when the government is corrupt or despotic; and small minorities – even a single dissenter – have as much right to express their views as do large or overwhelming majorities. As Mill wrote

> if all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.[85]

His case, argued at length, rests on the claim that to suppress an opinion is wrong, whether or not that opinion is true. For if it is true, we are robbed of the truth, and if it is false, we are denied that fuller understanding of the truth which comes from its conflict with error. Moreover, truth is rarely, if ever, absolute. Thus, when the prevailing view is part truth and part error, we shall know the truth only by allowing free circulation of contesting opinions.[86] In addition, Mill says that "all silencing of discussion is an assumption of infallibility."[87] Mill encourages us to contest even our most secured beliefs so that, by articulating and defending them, we may save them

from the "danger of being lost, or enfeebled."[88] When we allow this to happen, we further strengthen our own faculties, says Mill.

The conclusion of Mill's defense of freedom of thought and discussion paves the way for his defense of individuality. Mill feared that growth of a conformist society in which individuals maintained the Calvinist view of the self, whereby self-control and self-restraint are emphasized and where any natural tendencies or emotions were seen as disruptive and virtually sinful. Mill feared that if society became too conformist, individuality would be lost. As Mill said, "It does not occur to them to have any inclination, except for what is customary."[89] Since the "despotism of custom" loomed in the air, the forces which strengthened individuality and encouraged its growth were repudiated so much so in Victorian Britain that "so few [dared] to be eccentric."[90] This loss to claim a sense of individuality and promote diversity was a threat to the progress of the state.

To Mill, the free development of individuality was indeed socially advantageous; it makes for improvement, progress, and a variety of ways of living. But it means also that men may choose to live their own lives in their own distinctive ways, and Mill insisted that man's own mode of "laying out his existence" is best simply because it is *his* own mode. Moreover, it is only by cultivating individuality that we can become well-developed human beings. Mill therefore believed in liberty as a good in itself and as a means to happiness and progress; for him, the ideas of happiness and progress were thoroughly infused with his conception of a freely choosing human agent. Men are so diverse in their needs and capacities that ways of life must be diverse to match. To Mill, human beings are not like sheep. We each possess unique traits which will set us off on our own paths. We are all the gainers by the "experiments in living" which the few perform on our behalf. We do not yet know so much about our needs and abilities that we

can afford to dispense with experimentation; and if there are people among us who are willing to find out at their own risk what new ways of life there may be, we should be grateful, not resentful.

Finally, as much as Mill emphasizes a need to promote the good of others, this must never take the form of *forcing* them against their will simply under the assumption that we know what is best for them. Mill very clearly argues that

> His own good, either physical or moral, is not a sufficient warrant…over himself, over his own body and mind, the individual is sovereign.[91]

Recall that Mill states that if each individual knows what is in his best interest and has laid his own path down, it would then be a terrible paradox to infringe on this right and claim to know what is best for another. Thus, if an individual only is left in charge of his own body and mind and the consequences of his action are only harming him, coercion can never be used to alter the action of the individual. While we detest the nature of the action, we must respect the right of the individual to live his or her own life according to how he or she sees fit.

III. Countermeasures to Liberty

As we have seen, within this system of liberty there exists much attention and detail to the freedom of the individual and his right to exercise his liberty for a variety of reasons. Predictably, very few people would disagree with Mill's explanation of the need for individual liberty. In the case of the kirpan, however, there are differences that can be pointed to; that is to say, while Sikhs, like everyone, should bear the right to express their individuality, their right in doing so seemingly interferes in the safety of others. Where, then, according to Mill should an individual's liberty be curtailed? The beauty in Mill's system of liberty is that there exists a built-in mechanism which gauges the balance of individuality and conformity in a society. This mechanism, however, came about through no accident.

It was Mill's realization that popular government was no guarantee of freedom that gave much of the force to *On Liberty*. Even a government based on the will of the people can exercise tyranny, and what is more, the informal pressures of society can become oppressive. Mill believed that the restrictions imposed on individuals, whether by law or by opinion, ought to be based on some recognized principle rather than on the preferences and prejudices of powerful sections of the public, and he set himself the task of formulating such a principle and of illustrating how it should work.

Mill's Harm Principle, as termed commonly by political philosophers, presents us with the most basic check on an individual's liberty. Its main premise lies on the "one very simple principle,"

> That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.[92]

One's liberty, thus, stops when it inflicts "harm" on someone else. Here, the line of division is between conduct which "concerns others" (other-regarding activity), for which a person is accountable should it result in 'harm," and conduct "which merely concerns himself" (self-regarding activity), over which society has no jurisdiction at all.

Yet as we begin to peer closer into Mill's ideas, many complexities begin to cloud the picture. What about potential harm? Where does one draw the line between self-regarding and other-regarding activities? Is carrying the kirpan an example of the former of the latter? How do we claim that an individual's action has no effect on others? A barrage of "what-if" questions drown us in a sea of speculation. It is true that as time progresses, modern society will be able to furnish and fabricate more difficult cases than Mill could have ever envisioned that blur the distinction between such tedious terms. Perhaps the kirpan is an example of a modern conflict

that cannot resuscitate Mill's system of values. Given such hindsight, we are tempted to disclaim Mill's theory altogether because it seemingly fails to clearly answer many of these hypothetical situations.

Notwithstanding, we must prescribe great patience in understanding the implications of what Mill is arguing. It is important to realize that Mill is giving us the best answer to a very complex problem that is timeless: where do we draw the line between infringing on someone's right and our own obligation to protect what is in the interest of others? Mill sees a distinction that gets lost to many people. First, Mill does not say that we should be happy with what others do and should support their actions fully. He is arguing (wholeheartedly in fact) that it is necessary to contest others' opinions. We should remonstrate with him, reason with him, persuade him, entreat him, but not compel him, for imagine if we were compelled to reverse our own convictions. Secondly, Mill does not claim that there exists a separate private sphere whereby nothing around it is affected. Rather, Mill takes the side that *only* in cases where harm is done to others should people be coerced and limited in their freedom. When harm is not inflicted, people should not be coerced. Mill acknowledges that it is hard to justify situations in which people are merely offended, but not harmed. Thus he exclusively isolates coercion to those situations where *harm* is committed or is about to be committed. It is important to realize that offending is not always harming, but harming is always offending.

Still, many critics of Mill would not be satisfied with this clarification. Thus, I have yet to resolve the hardball counterargument: what exactly does Mill mean by "harm?" If he takes it in the strict sense, meaning exclusively the infliction, death, pain, slavery or loss of property on non-consenting others, then virtually everyone would support the use of both legal as well as moral sanctions without hesitation. But what if harm comes in other degrees and varieties in

addition to those just mentioned? There are some people (probably many) who view certain types of behavior, which may not be harmful in the strict sense, as being morally wrong or highly offensive and, therefore, fit subjects of moral reprobation. Where do we draw the line between what harms and what does not?

It is sagacious to realize that there is no perfect system which can always predict and prescribe when an action is harmful and when it is not. But there are actions that are *better* than others. Only when we see the nature of such nuances and subtleties do we begin to appreciate the implications of Mill's system of liberty, for Mill has created a system where rather than identifying exactly what is harm and who should be entitled to liberty, Mill's Harm Principle

> puts the burden of proof on those who propose to restrict the liberty of others. What constitutes 'harm' in any given sense may properly be matter for debate, but Mill's principle places the onus of producing evidence of 'harm' on the proposers of interference, and, even more important, it rules out intervention on any other basis.[93]

Thus, in the case of the kirpan, the court could debate as it pleased as to whether or not the kirpan was an object that inflicted harm (it eventually ruled that the kirpan did not), yet nevertheless, the burden of proving the harm is placed on those who wish to restrict the kirpan (the school district). According to theorists like Mill, until evidence of harm is proven or grounded, the school district cannot intervene and coerce the Cheema schoolchildren to give up their kirpan.

Mill is not saying what his critics have supposed, namely that we have a choice between coercing people and leaving them alone; rather he is saying that if we rule out coercion and compulsion as inappropriate, we shall see more clearly what sort of assistance and criticism is called for. In Mill's world, we must learn to put up with a great deal of criticism from others. To Mill, society can be both conscientious and still maintain a thick skin for back-talk. By doing

this, our own opinions profit, either by being replaced by the right views, being strengthened by the wrong views, or by combining with some truths of other views.

Furthermore, liberty can be checked not just by coercion and legal sanctions but by the powerful use of social and public opinion as well. If we choose to exercise an unfavorable opinion towards someone (which is an expression of our right) who has offended us (an expression of their own right), then we may use the powers of social pressures to change and warn and advise the other man to alter his ways. Coercion is intended to be used strictly when harm is (about to be) committed.

Thus, with regards to those critics who maintain that Mill's Harm Principle does not protect those who are offended or insulted, the fact that individuals may be highly offended or morally wronged (but not violated of their rights) is still not a warranted justification for a *carte blanche* to coerce. Rather, it is a situation which can be checked and stopped efficiently by Mill's idea of utilizing the power of public and social opinion, which he discusses in Chapter Four of *On Liberty*. Thus assuming that the person who has offended great numbers of people (but still has not violated their rights) is morally distasteful and offensive, he will

> suffer these penalties only in so far as they are the natural and…the spontaneous consequences of the faults themselves, not because they are purposely inflicted on him for the sake of punishment. A person who shows rashness, obstinacy, self-conceit…who cannot restrain himself from hurtful indulgences…must expect to be lowered in the opinion of the others, and to have a less share of their favourable (sic.) sentiments; but of this he has no right to complain…[94]

Assuming if the person who has offended the great numbers of people is *not* distasteful but an innocent victim to the abuses of public opinion, it is a misfortune no doubt but it is not fully unfortunate because he still possesses the *right* to do what he feels is right (so long as he does not hurt anyone in doing so).

Thus lies the beauty of and efficiency of Mill's *On Liberty*. Both sides are protected by the same principle. We may disagree heavily with what others think or say or do, but we do respect their right to have a wrong opinion. Through such an environment checked by the Harm Principle, a forum for public debate and moral progress can be institutionalized. Opinions will be re-examined, revamped, and re-institutionalized only to again be rejected, remedied, and refined once more. This constant activity in open mindedness and awareness will lead to the preservation of self-culture and cultivation but also to the progress of moral states as well.

III. Enter the Kirpan

After having presented the basic and most notable theories of Mill, I will use the kirpan as a test-case to the Millian framework just depicted. As one will readily see, the kirpan seems to be catered to fit with the issues that Mill presented and discussed hundreds of years before the debate over the kirpan even surfaced.

According to the theories espoused by Mill, the Sikhs ought to possess individual liberty to wear their kirpan and should not be barred from doing so on the basis of governmental oppression or because of public opinion. Individual independence, to recall, cannot be divorced from oneself simply because the collective opinions of the majority mandate it. Quantity holds no jurisdiction in authorizing or denying a certain action. To people like Mill, the Sikhs' wearing of a kirpan strengthens the notions of democracy, solidifies the insecurities of those who resent it, and promotes diversity and new waves in "experimentation."

Nevertheless, even Mill realized that there are times when individual liberty must be curtailed by force and coercion. Mill, however, did not leave this decision up to the discretion of an arbitrary government or capricious leader. Instead, he outlined the Harm Principle and maintained that if an action directly harms others, it should no longer be considered to be a part

of another's liberty right. Thus, does the wearing or carrying of a kirpan directly harm others? As Mill said, this is a question that could be debated on end.

And as Mill had advised, the question was debated. The court in *Cheema* found that the kirpan was not a direct threat but rather based on a threat of fear – a threat that was intangible and elusive. Fear and discomfort, according to Mill, would be elements that the majority should learn to adjust and accommodate to. The majority should not overcome their reservations and anxieties by simply calling for the prohibition of the kirpan; rather, they should come to realize that the kirpan is a part of reality and their views should be adjusted and modified towards the kirpan. What is more, the burden remained in the hands of the school district, just as Mill had recommended, for it was the school district that sought to restrict the liberties of the Sikhs. The school district, according to the RFRA, had to demonstrate what harm was evident. When the school district failed to prove direct harm, the court was able to rule in favor of the Cheema family.

In addition, the story of the kirpan continued to follow the pathway of Mill's political suggestions. For instance, Mill denounced coercion for the most part (except in cases of direct harm) and encouraged individuals to follow other avenues of reform. As Mill stated, we must all remonstrate, reason, persuade, and entreat one another, rather than just coerce each other. This is exactly what occurred in the case of the kirpan, for both sides turned to the California capitol in order to resolve the conflict, where a bill was pending before the California legislature to amend California Penal Code (Sec. 526.20), which bans weapons from school grounds, to exempt the carrying of a knife as part of any recognized religious practice. On August 24, 1994, the Assembly voted 44-22, over objections by Republicans to allow Sikh children to carry kirpans to school; and later in the month, the Senate passed the bill on a unanimous 30-0 vote.[95] This bill

did not, however, receive the assent of the Governor of California. In his veto message, Pete Wilson stated that he could not be a party to a piece of legislation which "authorize[s] the carrying of knives on school grounds."[96] In any case, Mill's point is well taken: there are other democratic methods available, other than force alone, which can be used to gauge public opinion and garner public support.

The RFRA was a perfect framework available to accommodate to differing views between religious groups and governmental laws. Simply put, the RFRA struck a reasonable balance between both claims, for the RFRA first placed the burden of proof on the religious group in question to prove how the religious belief is a sincere one and how it is being curtailed. Once that was established, the burden shifted to the school district. Thus, the RFRA was effective primarily because it ignored neither side of the issue; rather, it placed burdens on both sides to demonstrate their respective convictions. Ultimately, in the matter of the kirpan, the solution that was reached was a compromise of both parties; the kirpan was permitted, reduced in length, and sheathed. Thus, RFRA proved that compromises could be made to generally neutral laws and that solutions were viable, and it assured the parties involved as well as onlookers that answers did not have to be completely one-sided. The mechanisms built within the RFRA correspond to Mill's theories as established in this chapter. To recall, Mill believed that accommodation to individuality was necessary in order to attain a more diverse, balanced democracy.

The RFRA, as is made evident throughout in this piece, is a necessary piece of legislation for it checks the balance on both sides of a religious claim quandary. In the post-RFRA aftermath, it can be predicted that parties like the Sikhs will have a much more difficult time acquiring their religious rights since accommodation is not made necessary. For instance, in the

years prior to the adoption of the RFRA, Sikhs were not able to win claims as easily as they did in the case of *Cheema*. As we will now see in the case of *New York v. Singh*, there exists a great need for legislation such as the RFRA, for in the absence of the RFRA, the First Amendment is not enough of a shield to grant Sikhs their religious claims and, more importantly, accommodation is nonexistent. What remains is only coercion to an indirect threat, a scenario which Mill would have censured himself.

IV. *New York v. Singh*

In *New York v. Singh (*S.Ct.1987*),* a Sikh priest was issued a summons by a Transit Police Officer who had observed the defendant wearing his kirpan within the New York City subway system. The priest was prosecuted for possessing a knife in a public place in violation of the City of New York's Administrative Code. As noted, Section 10-133 provides in pertinent part:

> b. It shall be unlawful for any person to carry on his or her person or have in such person's possession, in any public place, street, or park any knife which has a blade length of four inches or more.
>
> c. It shall be unlawful for any person in a public place, street, or park, to wear outside his or her clothing or carry in open view any knife with an exposed or unexposed blade unless such a person is actually using such knife for a lawful purpose as set forth in subdivision d of this section.
>
> New York City, N.Y., Administrative Code & Charter [section] 10-133 (1995). The regulation has several exceptions. It does not apply to military personnel; to those transporting knives to or from a place where 'it is used for hunting, fishing, camping, hiking, picnicking or any employment…customarily requiring the use of such a knife'; when a knife is 'displayed or carried by a member of a theatrical group, drill team, military or para-military unit or veterans organization, to, from, or during a meeting, parade or other performance or practice for such event, which customarily requires the carrying of such knife'; or when the knife 'is displayed or carried by a duly enrolled member of the Boy or Girl Scouts of America or a imilar organization or society and such display or possession is necessary to participate in the activities of such organization or society.' Id. at [section] 10-133 (d).[97]

If convicted, the defendant faced punishment by a fine not to exceed three hundred dollars and/or imprisonment not to exceed fifteen days. The priest claimed that his right to carry a kirpan was protected by the Free Exercise Clause.

The New York Civil Court rejected the priest's free exercise claim. The court considered the prohibition to be a de minimis infringement upon the priest's free exercise rights that was justified by the state's compelling interest in protecting its citizens from the "risk of crimes of violence and other conditions detrimental to the public peace and welfare."[98] The court also concluded that granting an exception to Sikhs would place an "intolerable burden" upon law enforcement because it would necessitate "an official intrusion and searching inquiry" to determine whether a person dressed as a Sikh and carrying a blade was in fact a Sikh.[99] Nevertheless, while the court found a compelling state interest supported the prohibition, the court also decided that continued prosecution of the priest "would serve no useful purpose" and dismissed the case in the interest of justice.[100]

While this decision was favorable to the defendant, its reasoning was defective. First, the court asserted that "the intrusion on the defendant's First Amendment rights are de minimis." There is no basis for this observation.[101] The duty of a Sikh to wear a kirpan may be taken very seriously; therefore, preventing a Sikh who sincerely believes he must wear a kirpan cannot be arbitrarily classified as a "de minimis" infringement.

Second, the court correctly found that the state has a compelling interest in preserving public safety. The court, however, did not specifically address whether the measure was the least restrictive means available to carry out the state's objective. If the court's reference to the "intolerable burden" placed on law enforcement is meant to suggest that the prohibition was narrowly tailored, the court is incorrect. The Administrative Code's prohibition against

possessing knives is subject to many exceptions. For example, a knife carried by a "duly enrolled member of the Boy or Girl Scouts of America" or a similar organization is not covered by the prohibition where possession is "necessary to participate in the activities" of the organization. If law enforcement suffers an "intolerable burden" by being required to determine whether someone dressed as a Sikh is in fact a Sikh, why does it not face such a burden when determining whether someone dressed as a Boy Scout is in fact a Boy Scout? Common sense suggests that it would be impractical to think the criminal element will menace the streets dressed in Boy Scout uniforms. The same rationale applies to the situation at hand. How likely is it that the criminal element will adopt the garb of a Khalsa Sikh?

Clearly, cases such as the one presented here in *Singh* demonstrate that there exists a dilemma when the RFRA is not applied or is inapplicable. Without the protection of the RFRA, the First Amendment does not provide enough of a safeguard for violations of religious liberties against the threat of generally neutral laws. Thus, the need for RFRA cannot be overemphasized, for cases will continue to surface in which religious groups are denied accommodation to their respective religious practices – practices which do not necessarily harm others, but which may seem so foreign and remote, that they spawn discomfort among the masses, thus resulting in banning the practice altogether (Sikhs' carrying the kirpan a case in point).

I extend the argument, however, that if the Millian Harm Principle were applied and groups were forced to reason, accommodate, and compromise rather than coerce one another, then the decision reached in *Singh* may have been a different, more promising, one for all parties. I argue that we must search for theories such as the ones expressed by Mill's *On Liberty* as well as the RFRA, both which compel us to accommodate to diversity and its practices. Just as the court in *Cheema* was able to accommodate to the diverse practices of the Sikh children, the court

in *Singh* – if the RFRA had applied – could have mandated similar forms of accommodations rather than just restricting the kirpan altogether.

Admittedly, there may be situations where someone does not maintain the other four Khalsa symbols (thus making identification of a Sikh difficult), yet claims to be carrying a sword or dagger for religious reasons. In order to prevent frivolous claims of religious entitlement by those discovered carrying knives or daggers and in order to keep track of those with potentially dangerous weapons, a licensing requirement may be appropriate. Such a requirement would involve requiring a Sikh to fill out an application to carry a kirpan, in which the applicant indicates the blade is being carried for religious purposes. A background check, for any mental or criminal history, also would be appropriate; the application and subsequent license also could provide a description of both the individual and the kirpan as well. While some Sikhs probably would object to being required to possess a license to practice their religion, this would be a relatively small burden that would be simple to comply with. As such, it would be more narrowly tailored than a total ban on kirpans, as was dictated by the *Singh* court. At the same time, the state could be confident that its interest in preserving public safety is served because the state would be able to regulate and monitor closely those in possession of kirpans.

It is possible, very possible, to create and devise solutions to these seemingly perplexing situations. However, the fastest solution should not necessarily be categorized as the best solution. Banning the kirpan because it *may* threaten public safety may be the most immediate remedy to a probable safety issue; however, it is a flawed resolution (according to the Millian Harm Principle) since it overtly assumes that direct harm is plausible and likely. The solution, though, should be to accommodate in the least restrictive means; thus, a licensing requirement,

albeit a hassle to some Sikhs, is a relatively fair balance between permitting Sikhs to wear the kirpan and yielding to the concerns of public safety.

The licensing requirement in *Singh* and the sheathed kirpan in *Cheema* can only be possibilities when the courts begin to yield to solutions such as RFRA and Mill's theories on liberty. Only then can America live up to its potential as a true democracy, where minority rights are preserved and can remain intact without the threat of being overshadowed by legislative fiat. When we look at cases such as *Singh,* we begin to then appreciate the beauty that the RFRA had provided in cases such as *Cheema*. Thus, it is incumbent to understand the need to reinstate the RFRA.

V. Some Final Thoughts

The kirpan in the Millian framework ultimately shapes itself into being a symbol that exhorts the majority to adjust. This was just the characteristic that Mill had endorsed in his writings, since in order for a democracy to work soundly, the majority must learn to tolerate variation and endure distaste, granted that such distaste did not directly harm others. The kirpan may be somewhat of an insulting, distasteful symbol to many; that is, to legalize the carrying and wearing of a knife is in some extent affronting. However, to people such as Mill and courts like the one in *Cheema,* the kirpan must be recognized for what it is worth, not for simply what it may appear to be. After all, the kirpan has been a symbol in America for hundreds of years now. The time has eventually arrived for the kirpan to be accepted as not just part of the Sikh culture, but as a part of the Sikh American culture, since the Sikhs have formed long-standing ties in America for centuries now.

The courts had found that the kirpan did incite fear, only perhaps because it is a relatively new symbol to many who are not familiar with its meaning, intent, and purpose. Yet, the kirpan, as it was found, did not incite harm, a precondition that Mill set out in order to deny a given

practice or action. Thus, in the Millian interpretation, the kirpan should be permitted, and Sikhs should not be coerced to give up their practice of wearing the kirpan. Rather the solution, to individuals such as Mill, is for the majority to adjust themselves to the kirpan and its presence and familiarize themselves with its meaning. If, after this, the majority is still not satiated in their hopes to do away with the kirpan, they are left with several vehicles of social reform, namely the power of group pressure, dialogue, discourse, petitions, and anything short of coercion. In many ways, if we analyze the story of the kirpan, we will understand that this is exactly what occurred, for the court in *Cheema* saw all of what Mill had advised: groups from all sides lobbied their respective concerns over the kirpan. The ACLU, the California State Legislature, the Governor of the State, the Lieutenant Governor, the School Board Superintendent, and many other agents of social reform entered the picture and extended their muscle in order to sway the decision in one direction or the other. This, to Mill, was democracy at its best – a marketplace of ideas where the strong ideas would dominate the weak ones, all adjudicated by a neutral judicial body. This was the correct solution to the kirpan crisis – not a coercive, governmental diktat issued in response to a misguided, unsubstantiated threat of fear.

Chapter Six

ASSIMILATION VERSUS ACCOMMODATION: LESSONS LEARNED FROM THE KIRPAN

"The fear of kirpans, to raise the specter of translati-bility, is the fear generated in being unable to understand the language being spoken by one's neighbors, and the fear of being unable to render the unfamiliar familiar through an act of translation."[102]

The kirpan in America is a complex and multifaceted story that offers confounding questions yet few answers and takes us into a journey throughout the many aspects of political science – from the crevices of American public law, to the corners of American political theory, to the outskirts of comparative politics. Put simply, however, the complexity emerges since the story of the kirpan captures within it thousands of years of religious beliefs, hundreds of years of legal doctrine, and timeless amounts of debate, all of which go head to head. Nonetheless, what I have attempted to show is that the only way in which religion and public law can balance one another's differences is simply to accept the differences of each, thus conceding to the lessons of pluralism and diversity.

The rights of minorities must be protected in order for democracy and freedom to exist, and the kirpan is one of many issues that challenge America to the standards of this utmost test. For the United States to fulfill these obligations, it must yield to pluralism of the minority. In this piece, therefore, I have discussed some of the methods available in which American courts can defer to legal pluralism; among these legislative mechanisms that yield to such legal pluralism is the now-outdated RFRA, which prior to its overturning allowed pluralism to become absorbed within the fabric of American society.

In any case, as Dr. Vinay Lal has pointed out, it is imperative that a distinction be drawn between cultural pluralism and legal pluralism in America, for while the latter may exist (or may

have existed with the RFRA) in some forms, it exists only in the framework of judicial, executive, or legislative bodies. What is far more lacking, however, is the presence of a cultural pluralism among the majority of Americans. That is, while court verdicts and congressional bills may offer legal solace to minorities and their rights, these minorities are protected by virtue of just that: a "rights based" logic, a reminder to us that rights endowed to each individual must still be constantly and continuously granted by the state even in this day and age. It promotes the idea that states are not compelled to consider their duties and rather are placed in a position where they are endowed with supremacy over rights.

Legal pluralism provides for a redressal of grievances rather than a completely pluralistic society and, thus, legal pluralism cannot shape the boundaries of cultural pluralism. Cultural pluralism will unfold only when Americans begin to see the kirpan as a part of its own society, an object that is no longer foreign or alien or circumscribed to a certain singular community, but an object that marks the cultural and religious aspects of members belonging to its own society. With the presence of cultural pluralism, other concerns will begin to be disentangled. For instance, legal pluralism, while triumphant in the *Cheema* case, is only temporary, for legal mandates do little to fabricate fondness or eliminate fear of the kirpan. Cultural pluralism, however, may do a better job in offering these marked, necessary transformations.

Clearly, the presence of kirpan-carrying Sikh children in California schools has raised anxieties about cultural politics and identity altogether. While issues of safety and public order do exist, I argue that the drama caused by the kirpan was not in response to simply the issues of public safety but, rather, to a fear and discomfort that was induced by the very *presence* of a kirpan. For example, it was evident from studies conducted that the kirpan had never been used to inflict violence. However, a quick glimpse at current events will reveal that school safety has

been plagued in recent decades by many pressing issues other than the kirpan. One cannot help but to wonder why the kirpan has received so much heat then? For instance,

> the concern over kirpans appears to be most prevalent among those, such as conservative legislators and members of the National Rifle Association, who are otherwise keen supporters of the supposed constitutional provision allowing ownership of guns among private citizens, and who have resolutely opposed legislation that would place some restrictions upon the sale and purchase of guns in a country where murder takes the place of civil war and street crime takes the place of terrorism.[103]

What is more, in 1995, the Supreme Court ruled that Congress was beyond its scope when it passed legislation that banned the possession of guns near schools. To put things in perspective, then, if the mandate of the highest Court in the land feels this way towards school safety, one can obviously wonder why the carrying of a kirpan to school by Sikh children has provoked such debate and fear.

It is the job, then, of cultural politics to unmask this fear and pacify this debate. Pluralism then will develop, and diversity will then proliferate. Only then will we be able to understand nuances of other cultures, the kirpan belonging to this subset. But how does cultural politics reveal itself? Dr. Lal offers the next distinction: the difference between assimilation and accommodation. While legal pluralism is able to accommodate to diversity, kirpans, Sikhs, and their way of life, it still is unable to assimilate these into the mindsets of the American populace. Rather, cultural pluralism must adopt this responsibility and assimilate these differences – not accommodate them – for accommodation implies the view that there is Otherness present, and so long as there is Otherness, there will be no assimilation. To assimilate means to blend differences together so there exists no center and no margin; all begin to merge as one. To accommodate, however, one acknowledges the center and accepts a margin.

It is a very Millian thought to assimilate rather than accommodate. While Mill may admit that legal traditions must accommodate minorities, his views on the public and the society are

very assimilating. He argued for debate, discourse, dialogue, all whose respective ends were aimed at understanding one another, accepting one another, so that democracy would not perish and diversity would endure. *On Liberty,* thus, is a blueprint for the kirpan dilemma; it offers the solution to the problem. Unless direct harm is imposed, an individual (in this case a religious practice) cannot be and should not be curtailed; rather, it is the job and duty of society to recognize and learn to identify with this difference to the extent that it no longer appears to be a difference. As Dr. Lal mentions, "All communities will have to learn to live with a certain degree of *discomfort*."[104] The fear of the kirpan, then, is the fear of Otherness, and by accepting this discomfort which Lal speaks of, America will have established an important pre-condition for a well-ordered society: dispossessing rights and living with discomfort.

Finally, we must understand a very poignant legal lesson that has developed from cases such as the one in *Cheema.* To recall, the school district in *Cheema* was concerned that it treat all children the same, and it held that this was of compelling interest. The court, however, rejected this as a compelling interest and stated that accommodation sometimes requires exactly the opposite: accepting those who are different and recognizing that "fairness" does not always mean everybody must be treated identically and equally. To many, in *Cheema,* the Sikh children are treated unequally, for they are the only ones exempted from the law. To remind ourselves however, in Chapter Three, we discussed three important principles in relation to this issue: (1) separation of church and state; (2) equal treatment; and (3) religious liberty. By exempting the three Sikh children, the court in *Cheema* yielded to the third principle even when the first two may have been compromised, for it reasoned perhaps that individual religious liberty is more of a concern than equal treatment; in other words, if treating people a bit dissimilarly would guarantee a religious group's freedom of religion, then this was justified. After all, the court

reasoned that the Sikh children were still subject to certain safety stipulations which were the intent of the California Penal Code. Thus, it is not to say that the Sikhs were granted exemption from the goals the Penal Code had intended to uphold originally, since the stipulations placed on the Sikh children still related to these safety concerns.

Nonetheless, I wish to submit a caveat to the statement made above that by exempting Sikhs, the court is altogether overlooking the principle of equal treatment. It does not necessarily follow that by exempting only Sikhs from the California Penal Code one is necessarily being unequal. One must first consider the context of the situation. The Sikhs were victims to what has been constantly termed in this piece as well as the courts as a "generally, neutral law." However, in reality, how neutral was this law? Admittedly, the law may have been neutral in intent; nonetheless, in practice, the law was far from neutral, for it targeted, albeit unintentionally, the fifth largest religion in the world, many of whose practitioners now reside in California and attend California public schools, and who have been doing so for centuries almost. Thus, the original inequality was caused not by a California court but rather by a California Penal Code and the drafters of such a Code, and thus I would submit that whether or not the intent of the law or the lawmakers was to be biased towards Sikhs, the very fact that the effect of the law burdens the Sikh faith immediately ought to be given serious consideration as to who or what is the real recipient of "inequality." As I would suggest, all the *Cheema* court did was reverse the initial inequality that was propagated by the (unintentional) California Penal Code. The lesson we can take from this then is that it may be time to reconsider our somewhat antiquated laws. As Sikhs have now been an important part of the California economy, perhaps we should revisit similar laws in other common-law countries which have included within their legal jargon exemptions to items such as the kirpan – a legal inclusion which is not foreign to the United States; to recall, in

New York v. Singh, exemptions were made to members of Boy and Girl Scouts. Thus, similar exemptions ought to be made to Sikhs without the sentiment surfacing that Sikhs are being granted unequal treatment, for no one would argue the same about a Boy Scout who has been exempted from the same law.

At best, even if the conflict between the pen and the sword is not fully mollified nor completely resolved, we still have the pleasure of having gained valuable insight into the lessons which the kirpan in America have taught us. These lessons will not only bolster the American legal system but will remind all minorities, not just Sikhs, that assimilation into America is a slow moving process but a necessary one if ever we are to achieve a pluralistic framework. From the sword of Guru Gobindsingh, to the pen of James Madison, from the drafters of the RFRA, to the theories of John Stuart Mill, the kirpan in America is an amalgamation of thousands of years of history, theory, law, and politics all which emerged from various parts of the world and came together in a small courtroom in Northern California. While scholars will debate, dispute, and deliberate the sincerity of the kirpan as a religious symbol, the intent of the kirpan to be used as a weapon, the weaknesses in Mill's views, and the flaws in cases such as *Cheema,* the present still longs for the need of a remedy such as the RFRA, which invited diversity, rectified the misapplication of the Free Exercise Clause as generated in *Employment Division v. Smith*, and offered the initial steps towards the integration of minorities.

Glossary

Akal.
Eternal and immortal. A term used to describe God.

Akali.
Literally, a worshipper of the Eternal God. Presently the term denotes a member of the Shiromani Akali Dal, the major Sikh political party whose headquarters are in Amritsar.

Amrit.
Literally "nectar." It is composed of water and sugar and is stirred with a double-edged sword (or kirpan) while prayers are spoken. Initiation into Sikhism involves drinking Amrit. Can also refer, more generally, to the ambrosia of God's name.

Dasam Granth.
A sacred book of writings attributed by some Sikhs to *Guru Gobind Singh*, the tenth Guru of the Sikhs.

Five K's.
See Panj Kakke.

Gurbani.
The scriptures compiled by the Gurus.

Gurdwara.
Literally, "the door of the Guru", a building that houses the sacred Sikh scriptures; a Sikh temple.

Gurmukh.
One who follows the Guru's Teachings.

Guru.
Literally "teacher." One of the most important words in Sikhism, it has a number of related meanings. It can refer, depending on context of usage, to one of the ten Sikh prophets, the Sikh scripture, the Sikh community (*Guru Panth*), or God. The Sikhs had ten living Gurus, and the 10th Guru transferred the Guruship to the holy scripture, *Guru Granth Sahib*.

Guru Arjan Dev.
The fifth *Guru* of the Sikhs and their first martyr. He compiled the *Guru Granth Sahib*. It was on his martyrdom day in June 1984 that the Indian army attacked the *Golden Temple*.

Guru Gobind Singh (1666-1708).
The tenth and last living prophet of the Sikhs, he passed the guruship onto the Sikh scripture, the *Guru Granth Sahib*, and the Sikh community (*Guru Panth*). Guru Gobind Singh Ji founded the order of the *Khalsa* during Vaisakhi 1699.

Guru Granth Sahib.
The Sikh scripture, written in poetry organized in 31 sections, with each section corresponding to a particular melodic scale, or *raag*. It includes the poetry of six Sikh *Gurus*, and 36 other saints, including Muslims and Hindus. It is 1430 pages long and is the embodiment of the spiritual knowledge and authority of all of the *Gurus*. The words from the Guru Granth Sahib are the central focus at all Sikh *Gurdwaras*. It is used by Sikhs for meditation, guidance, comfort, and inspiration. It was originally compiled and edited by Guru Arjan Dev in 1604 AD.

Guru Hargobind.
The 6th *Guru* of the Sikhs. Following the martyrdom of his father, *Guru Arjan Dev Ji*, he was the first Guru to maintain a standing army and symbolically wear two swords, representing spiritual and temporal power. Responsible for the construction of the *Akal Takht*.

Guru Har Krishan.
The 8th *Guru* of the Sikhs, who was only 5 years old when he became Guru in 1661. He died three years later.

Guru Nanak.
The founder of the Sikh faith. Born in 1469, he began his mission by proclaiming that there is "neither Hindu nor Muslim," stressing common truths fundamental to diverse faiths. He preached against caste and advocated the equality of women.

Guru Teg Bahadur.
The 9th *Guru* of the Sikhs, who was killed by Mughal rulers in 1675 for defending Hindus facing forcible conversion to Islam.

Kacha.
Undershorts. One of the five Sikh articles of faith, given as gifts of love by *Guru Gobind Singh*, worn by a baptized Sikh.

Kanga.
Comb. One of the five Sikh articles of faith, given as gifts of love by *Guru Gobind Singh*, worn by a baptized Sikh.

Kara.
Steel bracelet. One of the five Sikh articles of faith, given as gifts of love by *Guru Gobind Singh*, worn by a baptized Sikh.

Kaur.
Literally "princess." The name given to all female Sikhs.

Kesh.
Uncut hair. One of the five Sikh articles of faith, given as gifts of love by *Guru Gobind Singh*, worn by a baptized Sikh.

Khalsa.
Literally "belonging only to the divine;" The collective body of all initiated Sikhs, who drink the *amrit* instituted by *Guru Gobind Singh*, and agree to live by the highest ideals of Sikh principles.

Khanda.
Double-edged sword. When surrounded by a *kirpan* on each side and a quoit, a symbol of the *Khalsa*.

Kirpan.
Miniature ceremonial sword. One of the five Sikh articles of faith, given as gifts of love by *Guru Gobind Singh*, worn by a baptized Sikh.

Panj Kakke.
The Five K's; the five external symbols worn by all members of the Khalsa, both male and female. The name of each symbol starts with the letter k (kakka) viz. kesh, kanga, kirpan, kara, and kaccha.

Panj Piare.
"Five beloved ones;" Five *Amritdhari* Sikhs. Often refers to the first five initiated Sikhs, during the Vaisakhi celebrations of 1699, who volunteered to give up their lives as a sign of their faith and love for their *Guru*. Currently, *panj piare* are necessary to perform baptisms, make important corporate decisions, and officiate over special occasions.

Panth.
Literally, "path"; today widely used to describe the Sikh community, but derived from the "path" taken by the followers of the faith.

Punjab.
Literally "five rivers." Fertile, agriculturally productive region in South Asia which today is divided between India and Pakistan. Birthplace of the Sikh religious tradition. Name of state in both India and Pakistan.

Sardar.
A chieftain or headman, presently used as a title for all Sikh men.

Sikh.
Literally "student, disciple." According to the Sikh *Rehat Maryada*, a Sikh is someone who believes in God, the ten Sikh *Gurus*, in the *Guru Granth Sahib*, in the importance of the *Khalsa* initiation, and in no other religion.

Singh.
Literally means lion. The name given to all male Sikhs.

Notes

Chapter One

[1] Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (New York: Macmillan Publishing Company, 1986), ix.

Chapter Two

[2] Judgment of the Court in *Rajinder Singh Cheema, et. al.* v. *Harold H. Thompson, et. al.* No. 94-16868, United States Court of Appeals for the Ninth Circuit.

[3] Ibid.

[4] Here, by Sikhs, I am referring to Khalsa Sikhs, those who have undergone the baptism of becoming a Sikh, and who maintain that the Five K's must be worn at all times.

[5] W.H. McLeod, *The Sikhs: History, Religion, and Society* (New York: Colombia University Press, 1989), 43.

[6] It is judicious to note, however, that the bearing of arms was already an established custom for some Sikhs, especially those belonging to the Jat community. "The Jats are a people accustomed to bearing arms and to using them as a means of resolving disputes" (McLeod, 43).

[7] McLeod, 43.

[8] Any Sikhs present probably had cause for concern. Guru Tegh Bahadur's close companions had already been put to death: one was tied between two posts and sawn in half; another was boiled alive; and another was cut to pieces limb by limb. (Amarjet S. Bhachu, "A Shield for Swords," *American Criminal Law Review v.34* (Fall 1996): 197-224.)

[9] McLeod, 44.

[10] Vinay Lal, "Sikh Kirpans in California Schools: The Social Construction of Symbols, Legal Pluralism, and the Politics of Diversity," *Amerasia Journal 22* (Spring 1996): 57-89.

[11] Ibid.

[12] McLeod, 60.

[13] Lal, 63.

[14] Actually, McLeod specifies what he means by the term, *Kes-dhari.* By it, he refers to any Sikh who observes the convention of unshorn hair, regardless of whether or not they accept Khalsa initiation or observe any of the other four K's. Those who do undergo the rite of initiation (and thereby "take *amrit"*) become *Amrit-dhari* Sikhs. What this means is that *all* who retain the *kes* (unshorn hair) are Kes-sharis, and that *some* Kes-dharis are also Amrit-dharis. (McLeod, 78).

[15] McLeod, 53.

[16] Ibid.

[17] California Penal Code, Sec. 626.10 (a).

[18] Dr. Ranjit Singh Rajpal, interview by author, phone interview, Los Angeles, Ca., 24 November 2000.

[19] Lal, 62.

[20] Amarjet S. Bhachu, "A Shield for Swords," *American Criminal Law Review v.34* (Fall 1996): 197-224.

[21] Lal, 62.

[22] Ratan Singh Bhangu, *Prachin Panth Prakas,* ed. Vir Singh, 4th ed. (Amritsar, 1962), 16:32-6, cited by Lal, "Sikh Kirpans," 62.

[23] Bhachu, 217.

[24] McLeod, 52.

[25] Ibid.

[26] Bhachu, 200.

[27] Judgment of the Court in *Rajinder Singh Cheema, et. al.* v. *Harold H. Thompson, et. al.* No. 94-16868, United States Court of Appeals for the Ninth Circuit.

[28] Ibid.

[29] Bhachu, 200.

Chapter Three

[30] U.S. Constitution, amendment 1.

[31] Thomas C. Berg, *The State and Religion* (St. Paul: Westgroup, 1998), 14.

[32] Berg, 15-21.

[33] Ibid, 15.

[34] Ibid., 16.

[35] Ibid., 18.

[36] Ibid.

[37] Ibid., 22.

[38] Ibid.

[39] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[40] Berg, 76.

[41] Ibid.

[42] Ibid.

[43] Ibid., 80.

[44] Ibid.

[45] Ibid., 81.

[46] Marvin E. Frankel, *Faith and Freedom: Religious Liberty in America* (New York: Hill and Wang, 1994), 75.

[47] Bhachu, 201.

[48] Berg, 81.

[49] Ibid., 82.

[50] Ibid.

[51] Ibid.

[52] Ibid., 84.

[53] Ibid., 94-5.

[54] Ibid., 108.

[55] John C. Patrick and Gerald P. Long, *Constitutional Debates on Freedom of Religion* (Westport, Connecticut: Greenwood Press, 1999), 130.

[56] Berg, 109.

[57] Patrick and Long, 132.

[58] Ibid., 134.

[59] Martin Kassman, "Unfree Exercise," *The Recorder,* 9 July 1997 [journal on-line]; available from http://web.lexis-nexis.com/universe/.html; Internet; accessed 13 November 2000.

[60] Patrick and Long, 275.

[61] Religious Freedom Restoration Act of 1993, 42 USC 2000bb. Public Law 103-41 [H.R. 1308], November 16, 1993. Further references to sections of this act will be found in the body of this paper.

[62] Berg, 125.

[63] City of Boerne v. Flores, 117 U.S. 2157 (1997).

Chapter Four

[64] Justice Frankfurter, in *McCollum v. Board of Education* (S.Ct.1948), quoted in Berg, 151.

[65] California Penal Code, Sec. 626.10 (a).

[66] Berg, 96.

[67] Lal, 74.

[68] Ibid.

[69] Judgment of the Court in *Rajinder Singh Cheema, et. al.* v. *Harold H. Thompson, et. al.* No. 94-16097, United States Court of Appeals for the Ninth Circuit.

[70] Lal, 69.

[71] Ibid.

[72] Ibid., 70.

[73] Judgment of the Court in *Rajinder Singh Cheema, et. al.* v. *Harold H. Thompson, et. al.* No. 94-16097, United States Court of Appeals for the Ninth Circuit.

[74] Ibid.

[75] Lal, 71.

[76] Ibid., 71-2.

[77] Lal, 71.

[78] Ibid.

[79] Judgment of the Court in *Rajinder Singh Cheema, et. al.* v. *Harold H. Thompson, et. al.* No. 94-16097, United States Court of Appeals for the Ninth Circuit.

[80] Ibid.

[81] Ibid.

[82] Judgment of the Court in *Rajinder Singh Cheema, et. al.* v. *Harold H. Thompson, et. al.* No. 94-16868, United States Court of Appeals for the Ninth Circuit.

Chapter Five

[83] Quoted by Voltaire, in *Instant Quotation Dictionary,* a series in *Instant Reference Library,* out of print.

[84] Quoted by Gandhi, in *Instant Quotation Dictionary,* a series in *Instant Reference Library,* out of print.

[85] J.S. Mill, *On Liberty* (London: Oxford University Press, 1966), 76.

[86] Ibid., Chapter Two.

[87] Ibid., 31.

[88] Ibid., 41-44.

[89] Ibid., 61.

[90] Ibid., 63.

[91] Ibid., 13.

[92] Ibid.

[93] Ibid., xvii.

[94] Ibid., 78.

[95] California Senate Bill 89, 1993-94 Reg. Sess. 626.10 (g) (1993).

[96] Text of Governor Pete Wilson's veto message, September 30, 1994 on Senate Bill No. 89. More comments are offered by Greg Lucas, "Wilson Veto for Knives at School," *San Francisco Chronicle* (October 1, 1994), A19.

[97] As noted in text, this was taken from New York City, N.Y., Administrative Code & Charter [section] 10-133 (1995).

[98] New York v. Singh, 516 N.Y.S. 2D at 415.

[99] Ibid.

[100] Ibid., 416.

[101] Bhachu, 203.

Chapter Six

[102] Lal, 82.

[103] Ibid., 80.

[104] Ibid., 82.

Works Cited

Alley, Robert S., ed. *The Supreme Court on Church and State*. New York: Oxford University Press, 1988.

Barzun, Jacques and Henry F. Graff. *The Modern Researcher*, 5th ed. Harcourt: 1992.

Berg, Thomas C. *The State and Religion*. St. Paul, Minnesota: West Group, 1998.

Bhachu, Amarjet S. "A Shield for Swords." *American Criminal Law Review*, v. 34 n.1 (Fall, 1996): 197-224.

California Senate Bill 89, 1993-94 Reg. Sess. 626.10 (g) (1993).

Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

Cheema v. Thompson, 36 F.3d 1102, 1994 WL 477725 (9th Cir. (Cal.)).

Cheema v. Thompson, 67 F.3d 883 (1994).

Church of the Lakumi Babulu Aye, Inc. v. City of Hialeah, 113 S.Ct. 2217 (1993).

Eastland, Terry, ed. *Religious Liberty in the Supreme Court: The Cases That Define the Debate Over Church and State*. Washington, D.C.: Ethics and Public Policy Center, 1993.

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

Frankel, Marvin E. *Faith and Freedom: Religious Liberty in America*. New York: Hill and Wang, 1994.

Hacker, Diana. *A Writer's Reference,* 3rd ed. Boston: Bedford Books, 1998.

"H.R. 1308 – Religious Freedom and Restoration Act of 1993." Public Law 103-141. November 16, 1993. Available from: Congressional Universe (Online service). Bethesda, MD: Congressional Information Service.

Instant Quotation Dictionary. [out of print] [no information given].

Jaasma, Keith. "Notes and Comments: The Religious Freedom Restoration Act: Responding to Smith, Reconsidering Reynolds." *Whittier Law Review*. 16 Whittier L. Rev. 211.

Johnson, Janet Buttolph and Richard A. Joslyn. *Political Science Research Methods*, 3rd ed. Washington, D.C.: CQ Press, c.1994.

Kassman, Martin. "Unfree Exercise." *The Recorder*. 9 July 1997.

Lal, Vinay. "Sikh Kirpans in California Schools: Legal Pluralism, The Social Construction of Symbols, and the Politics of Diversity." *AmerAsia Journal*. 22 no. 1 (Spring 1996), 57-89.

Levy, Leonard W. *The Establishment Clause: Religion and the First Amendment*. New York: Macmillan Publishing Company, 1986.

McLeod, W.H. *The Sikhs: History, Religion, and Society*. New York: Columbia University Press 1989.

Mill, John Stuart. *On Liberty*, trans. Sir David Ross. London: Oxford University Press, 1966.

New York City, N.Y., Administrative Code & Charter [section] 10-133 (1995).

New York v. Singh, 516 N.Y.S. 2d 412, 413 (Civ. Ct. 1987).

Nordhaus, Hannah. "Are They Missing The Point," *The Recorder*. 11 August 1994.

Patrick, John J., and Gerald P. Long, eds. *Constitutional Debates on Freedom of Religion*. Westport, Connecticut: Greenwood Press, 1999.

Rajpal, Dr. Ranjit Singh. Interview by author, 24 November 2000, Los Angeles. Phone interview.

Regina v. Appleby, 109 A.R. 40 (1990).

Regina v. Chaulk [1990] S.C.R. 1303, 1335-36.

Regina v. Edwards Books & Art Ltd. [1986] S.C.R. 713, 795.

Ryan, Alan. *J.S. Mill*. London: Routledge & Kegan Paul, 1974.

Sherbert v. Verner, 374 U.S. 398, 411 (1963).

Singh, Manjit. Interview by author, 19 October 2000.

Singh, Nikky-Guninder Kaur. *Sikhism: World Religions.* New York: Facts on File, 1993.

Singh v. Regina, 18 C.C.C. 3d 34.

Text of Governor Pete Wilson's veto message, September 30, 1994, on Senate Bill No. 89.

Toulmin, Stephen, Richard Ricke and Allen Janik. *An Introduction to Reasoning*. 2nd ed. New York: Macmillan, 1984.

Turabian, Kate L. *A Manual for Writers of Term Papers, Theses, and Dissertations*. 6th ed. Chicago: The University of Chicago Press, 1996.

Wisconsin v. Yoder, 406 U.S. 205 (1972).