

LIVING BY THE SWORD: THE FREE EXERCISE OF RELIGION AND THE SIKH STRUGGLE FOR THE RIGHT TO CARRY A KIRPAN

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I. INTRODUCTION

During the celebrated dialogue which ensued in the newspapers and speeches following the constitutional convention, the American intellectuals of the late 1700s debated theories which supported and opposed the proposed constitution. One of the primary complaints regarding this newly-authored constitution was its lack of protection for the free exercise of religion. In one of the articles published in October of 1787 against the constitution as proposed, the anonymous author decried the lack of such a provision:

“[T]here is no declaration, that all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences and understanding; and that no man ought, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against his own free will and consent; and that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul [sic], the right of conscience in the free exercise of religious worship...”¹

These very concerns led to the eventual adoption of the Bill of Rights, which included amongst its provisions the free exercise of religion.² However, even the highfalutin idealism of the founders could scarcely have predicted the rapid influx of immigrants into the United States. These immigrants would bring in a multi-culture,

¹ THE ANTIFEDERALIST, Centinel II (Samuel Bryan).

² U.S. CONST. Amend. I.

multi-religion kaleidoscope of ethnicities that would far exceed the imagination of the founders' experience with only the patchwork of Christian denominations in the former colonies. The First Amendment was not written with Muslims, Jews, Hindus, Sikhs, Jains, and Buddhists in mind; if anything, the possibility of non-Christians and those from the East coming to the United States may have been one of the arguments against the inclusion of the free exercise protection. One of these arguments was presented in one of the many debates that occurred after the proposed constitution:

“[I]t might be objected to in a political as well as in a religious view. In the first place, he said there was an invitation for Jews, and Pagans of every kind, to come among us. At some future period, said he, this might endanger the character of the United States. Moreover, even those who do not regard religion, acknowledge that the Christian religion is best calculated of all religions to make good members of society, on account of its morality. I think then, added he, that in a political view, those gentlemen who formed this Constitution, should not have given this invitation to Jews and Heathens. All those who have any religion are against the emigration of those people from the eastern hemisphere.”³

Regardless of the speaker's views, the constitution and the American democracy have accommodated the many people who have come within its borders, changing the practices of those immigrants, and the immigrants often changing the American social landscape in the process. One of these growing immigrant populations are Sikh-Americans; immigrants hailing from Punjab, a northwestern province of India, who follow a growing religion that is a little over 500 years old – relatively recent compared to the many ancient religions born or thriving in the South Asian peninsula. But unlike these other South Asian religions, Sikhs stand out. Their religion requires that they stand

³ See Rev. David Caldwell and Samuel Spencer Continue the Debate on Religious Toleration (July 30, 1788), in THE DEBATE ON THE CONSTITUTION: PART TWO, at 908 (Bernard Bailyn ed.)(1993)

out. And it is the outward symbols of Sikhism – the turban, the uncut hair, the ceremonial sword, the steel bracelet – which both remind Sikhs daily of their faith, and also remind the American public that these individuals are different.

Of the many challenges that face the Sikh community, including discrimination for wearing these symbols of faith, one of the greatest challenges is the very right to wear them. Uniform regulations conflict with the duty of a Sikh to wear a turban.⁴ Grooming specifications conflict with a Sikh's duty to maintain unshorn hair.⁵ This piece, however, concentrates specifically on the conflict between anti-weapons regulations and the kirpan, a ceremonial sword symbolizing a Sikh's duty to fight against oppression.

This conflict is real. At the Sikh American Legal Defense and Education Fund (SALDEF⁶) and other Sikh advocacy groups, kirpan cases arise again and again in different circumstances. Many of the stories discussed in this piece are based on my personal work as a law clerk at SALDEF. These cases are real and ongoing; though SALDEF and other Sikh advocacy organizations try to release stories such as these to the press, the parties often choose not to disclose their identity for fear of backlash or difficulty finding employment. Many are recent immigrants to the United States, and fear that complaining against the system will cause their deportation. As such, this piece is not intended to be a mere recitation of the current law as it applies to the kirpan, but a

⁴ See e.g., Subway driver transferred over turban, UPI, June 7, 2004, LEXIS NEXIS Library, UPI File; Hats off to transit unit: Lets Sikh motorman wear his turban, Editorial, June 10, 2004, at A42 (discussing New York Metropolitan Transit Authority (MTA) reassignment of subway operator for wearing turban in violation of MTA uniform policy).

⁵ See e.g., Khalsa v. Weinburger, 779 F.2d 1393, 1394-95 (9th Cir. 1985) (holding that a Sikh could not challenge the U.S. Army uniform requirements when the Army rejected his application for enlistment for refusing to shave his beard and cut his hair).

⁶ I am grateful to the Sikh American Legal Defense and Education Fund for allowing me to write this piece, as well as providing me with the opportunity to work with Sikhs who experience legal difficulties in their day-to-day life due to their faith. Their website is located at www.saldef.org.

critique of the current inadequacies of the law which hinder the Sikh's free exercise of this important aspect of their religion, as well as a "field guide" for the next steps that Sikhs must take for legal acceptance of the kirpan.

Sikhism is little understood outside of its homeland, and thus a brief discussion of its origins and beliefs sheds light on its practices and their importance. Next, I discuss some of the day-to-day problems and recent issues facing kirpan-carrying Sikhs in North America. Upon reviewing the current state of free exercise jurisprudence as applied to the kirpan, I outline several suggestions for the acceptance and accommodation of kirpans.

II. A PRIMER ON SIKHISM AND THE KIRPAN

Punjab and the founding of Sikhism

Sikhism originated in the Punjab region of India over 500 years ago.⁷ The word Punjab stems from two Persian words, "punj" meaning five, and "ab" meaning "river."⁸ And, this land of five rivers was fertile for more than crops; it was a fertile region for the exchange of ideas and beliefs.⁹ The Khyber Pass between the Hindu Kush mountains and the Himalayas open up to the plains of this region, and it was here that the Aryans invaded ancient India, that the Persians influenced India, that Alexander the Great brought the first European conquest of the South Asian peninsula, and that waves of

⁷ See PATWANT SINGH, THE SIKHS 16-17 (Doubleday 1999).

⁸ The five rivers which run through the Punjab are the Sutlej, Beas, Ravi, Jhelum, and Chenab. KUSHWANT SINGH, A HISTORY OF THE SIKHS, VOLUME I: 1469-1839 3-5 (Oxford Univ. Press 1999)(1963). The Indus River also runs through the region, but is not traditionally one of the rivers comprising the Punjab. Id.

⁹ SINGH, supra note 7.

Islamic intruders first entered India.¹⁰ The history of Punjab during the last millennia was one of clash between India's Hindu civilization and Islam.¹¹ This era had also seen the rise of various inhumane practices in Indian society such as *sati* (the strongly encouraged suicide of a widow over her husband's funeral pyre), increased inequality between the genders, further stratification of society through the Hindu caste system, and other social ills.¹²

Through this exchange of culture and clash of religion, a new movement emerged with the birth of Guru Nanak in 1469 in the small village of Talwandi in what is now Pakistan.¹³ When only a child, Nanak began preaching what was to become the foundations of his movement – “there is no Hindu, there is no Muslim.”¹⁴

Through his 70-year life span, Nanak made four great journeys through the entire Indian subcontinent and as far west as the Arabian peninsula, visiting Mecca and Baghdad, writing poetry and preaching the core of his message; there is but one God, he is the Supreme Truth.¹⁵ His followers were known as “Sikhs,” deriving from the Sanskrit word meaning “disciple.” Nanak was the first in a succession of ten living Gurus who continued the movement and added to Nanak's poems, which, with the addition of poems authored by distinguished poets of other religions, eventually became the Granth Sahib,

¹⁰ SINGH, supra note 8, at 10-12.

¹¹ Id. at 13-16, 28-29.

¹² Id. at 13-29.

¹³ SINGH, supra note 7, at 17.

¹⁴ Id. at 18.

¹⁵ SINGH, supra note 8, at 31-33 (quoting GURU GRANTH SAHIB, Japji Sahib 1)

the holy book of Sikhism.¹⁶ Sikhism, however, was not generally recognized as a separate order until the tenth Guru, Guru Gobind Singh, ceremoniously established a Sikh brotherhood known as the Khalsa (literally meaning “pure ones”), in 1699.¹⁷ When the time came for Guru Gobind Singh to name his successor, rather than naming an eleventh Guru to ascend the Guru’s position as the spiritual leader of the Sikhs, he took a novel approach: he named the Granth Sahib, as the compilation of the living Gurus’ works, the eleventh Guru and the source of all Sikh knowledge¹⁸. To this day, Sikhs refer to their holy text as the Guru Granth Sahib¹⁹.

Sikhism was more than a distinct religious faith; it was an earth-shattering social movement in Punjab. Sikhs rejected the Hindu caste system, asceticism, and mysticism. Sikhs declared that Hindus, Muslims, and members of all religions were equal, and that there was no difference between the genders.²⁰ But, to stand out from the rest of the Punjabi social mosaic, the Sikhs adopted five spiritual symbols, known as the five “Ks.”²¹ These symbols are: “kes,” uncut hair to preserve the natural state of the body, usually tied neatly in a turban; “kanga,” a small wooden comb to keep this uncut hair tidy and symbolize cleanliness; “kachcha,” a military-style undergarment to emphasize chastity and self-control; “kara,” a steel bangle on the right hand as armor to protect the sword-

¹⁶ SINGH, supra note 7, at 36.

¹⁷ Guru Gobind Singh established the Khalsa brotherhood in Anandpur, India through the Sikh baptism ceremony, baptizing five volunteers who were willing to give their lives for their faith, and then himself being baptized by the five. The tradition of the “punj pyare” (five beloved ones) carries to this day, as a group of five baptized Sikhs officiate all major Sikh events. See SINGH, supra note 7, at 54-57.

¹⁸ SINGH, supra note 7, at 36.

¹⁹ Id. at 36-37.

²⁰ See SINGH, supra note 8, at 39-48 (describing the various central teachings of Guru Nanak).

²¹ See SINGH, supra note 7, at 53-54.

wielding hand, as well as remind one of his faith; and “kirpan,” a ceremonial sword or dagger symbolizing a Sikh’s duty to fight for good over evil, to always support freedom above oppression.²² Finally, Sikhs adopted the surname “Singh” – meaning “Lion” – to show the strength of the Sikhs and their ideals.²³

Sikhs in the United States

Although many Sikhs and other South Asians are relatively recent immigrants to the United States, Sikhs have resided in California in since the late 1800s when they were the first South Asians to come to the United States in sizeable numbers.²⁴ These Sikhs came to the United States to work the farmlands of California and in the timber industry of the northwest.²⁵ They also remained influential and involved in the Sikh homeland. In fact, the San Francisco-based Ghadr (“mutiny”) Party was founded by American Sikhs in the early 1910s.²⁶ The group spread information throughout the world protesting the treatment of Indians by the British, and eventually supported an armed insurrection by Indians against the British Empire.²⁷ The first South Asian American Congressperson, Dilip Singh Saund, was of Sikh origin.²⁸ Estimates of the number of Sikhs in the United

²² See Id.

²³ See Id.

²⁴ See VIJAY PRASHAD, THE KARMA OF BROWN FOLK 72 (Univ. of Minn. Press 2000).

²⁵ Id.

²⁶ Id.; See SINGH, supra note 7, at 180-81.

²⁷ See SINGH, supra note 7, at 180-81.

²⁸ See PRASHAD, supra note 24.

States vary significantly, there may be as many as 500,000 Sikhs currently living in the United States.²⁹

The Kirpan

There are a number of reasons for the adoption of a sword as a symbol of Sikhism. Undeniably, the experience of Sikhs during the founding days of the faith contributed to its glorification of military symbols such as the kirpan³⁰, kara, and kachcha. Two of the ten Gurus of the faith, Guru Arjun Dev and Guru Tegh Bahadur, the fifth and ninth Gurus respectively, were brutally tortured and killed by the Muslim Mughal rulers of the day, events which served to militarize the members of the faith.³¹ Guru Hargobind, the sixth Guru who ascended his father Arjun Dev's seat after his martyrdom, carried two swords around his waist, symbolizing both spiritual and temporal power, and was determined to build a Sikh army to prevent further intimidation from the Mughals.³² But the kirpan's significance was not fully established until the tenth Guru, Guru Gobind Singh, and his reign over the Sikh movement. The sword had protected the followers of the young faith when it was under attack from outside, and it had begun to

²⁹ There are approximately 23 million Sikhs in the world. Various sources list different population estimates for the Sikh population in the United States. The United States Census Bureau is prohibited from asking religious affiliation on the census. Numbers provided by various Sikh groups estimate up to 500,000 Sikhs in the country, a number Congress cites in the USA PATRIOT Act of 2001. See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, H.R. 3162, 107th Cong. § 1002 (2001).

³⁰ The word "kirpan" is Punjabi and translates loosely to "grace of God."

³¹ Guru Arjun Dev was tortured and executed by order of Mughal Emperor Jahangir in 1606 by placement on a hot iron plate, pouring of burning hot sand and boiling water over him, and drowning in the Ravi River. Mughal Emperor Aurangzeb ordered Guru Tegh Bahadur's execution for his refusal to convert to Islam; he first witnessed his three companions sawn in half, boiled to death in a cauldron, and burnt alive, then was himself publicly beheaded. See SINGH, supra note 7, at 37-50.

³² See SINGH, supra note 8, at 63.

adopt a tremendous religious significance. Guru Gobind Singh once gave the following prayer before battle:

Eternal God, Thou art our shield,
The dagger, knife, the sword we wield,
To us protector there is given.
The timeless, deathless, Lord of Heaven,
To us all-steel's unvanquished might,
To us all-time's resistless flight,
But chiefly Thou, protector brave,
All steel, wilt Thine own servant save.³³

Gobind Singh directed the Khalsa to carry a kirpan at all times as a requirement of the faith, and even wrote that “when all avenues have been explored, all means tried, it is rightful to draw the sword....”³⁴

The Sikh Rehat Maryada, or Code of Sikh Conduct, prescribes that Sikhs wear a “strapped kirpan,” but notably does not specify the length of the blade.³⁵ Perhaps as a result, kirpans come in many varied sizes. Kirpans range in size from several foot long swords kept in a Gurudwara (Sikh Temple) used for ceremonial purposes, to two or three inch unsharpened blades kept sown or strapped on the inside of one's clothing. Generally, these kirpans are kept encased in a wooden sheath. Other Sikhs, rather than carry a sword or dagger with them, choose to wear a small kirpan pendant or medallion as a necklace. As further discussed in § IV, *infra*, many Sikhs do not believe that a

³³ *Id.* at 78-79 n.6.

³⁴ *Id.* at n.5

³⁵ See *Rehat Maryada* § 6, at http://www.sgpc.net/rehat_maryada/section_six.html. The Sikh Rehat Maryada or Sikh Code of Conduct is the codification of Sikh practices and procedures adopted by the Shiromani Gurdwara Prabandhak Committee (S.G.P.C.), a democratically elected leadership of Sikhs managing the day-to-day affairs of the Sikhs and their Gurudwaras (Sikh Temples) located in Amritsar, India. The Rehat Maryada was initially proposed in 1936, underwent amendments, and was adopted in its current form in 1945. The entirety can be found on the SGPC website at <http://www.sgpc.net/sikhism/sikh-dharma-manual.html>.

symbolic kirpan is sufficient to satisfy the “strapped kirpan” requirement in the Rehat Maryada; these Sikhs believe that a strapped kirpan implies that the kirpan be a wieldable weapon. This distinction between the kirpan as a symbol and the kirpan as a weapon becomes a crucial debate both within the Sikh community and in American jurisprudence surrounding the kirpan.

III. THE KIRPAN TODAY

The kirpan is not only a symbol of profound significance for Sikhs, it is also the cause of much controversy as the Sikh population grows and shifts from its Punjabi homeland to the outside world. In the United States, a Sikh’s duty to carry a kirpan as a religious symbol can stir fascination regarding its meaning to those outside the faith.³⁶ However, carrying a dagger or sword also clashes directly with the norms of American life. Sikhs in the United States check in their kirpans at the airport and do not wear them when going to court or into secured buildings. But wearing the kirpan in day-to-day life can cause trouble for Sikhs. Frequently, this leads to situations where Sikhs must decide if they want to keep their faith or keep their job.³⁷ In at least one such case, the Equal Employment Opportunity Commission (EEOC) has filed a case against a major corporation for firing an employee because she carried her kirpan.³⁸ No-weapons

³⁶ See Ron Orozco, Wearing the faith: The coming Light Festival highlights religious items that distinguish Sikhs, The Fresno Bee, Oct. 15, 2005, at F1 (interviewing Sikhs in the Fresno area and discussing the need for the five Ks and their religious significance to Sikhs).

³⁷ I have personally helped SALDEF file several U.S. Equal Employment Opportunity Commission complaints relating to the kirpan in the workplace. Some of these are in early stages of their filing, and in others, the complainants have chosen not to reveal their identities for fear of backlash from their employers.

³⁸ See Howard Fischer, 2 firms face lawsuits over wearing of religious items, Ariz. Daily Star, Sept. 28, 2004, at D (discussing EEOC suit filed in federal district court in Phoenix where Sikh woman was fired by Sanmina-SCI Corp. and ineligible for rehire for violating company’s no-weapons policy).

policies in companies are occasionally applied against a Sikh employee when the employee had been working at the company without complaint before the employer discovered that the individual wore a kirpan.³⁹

Perhaps the greater controversy surrounding the kirpan, however, arises when Sikh children wear a kirpan to school. In Canada, most provinces have allowed Sikh children to wear a kirpan of “reasonable size” to school without hassle.⁴⁰ However, when 14-year-old Gurbaj Singh Multani mistakenly dropped his kirpan at school in Quebec, hundreds of parents pressured the school board to apply its zero-tolerance policy towards weapons and prevent Multani from bringing his kirpan to school.⁴¹ Although a lower court overturned the school board’s decision, the Quebec Court of Appeals reversed, holding that kirpan was in fact a security concern.⁴² The Multani family appealed the decision to the Canadian Supreme Court, which has currently reserved judgment on the issue.⁴³ The case has ignited a vigorous debate in Canada about the freedom of Sikhs to practice their religion against the need for school security.⁴⁴

³⁹ See id. (the Sikh individual working at Sanmina worked at the company for years before they discovered she carried the kirpan when she reported it lost). Furthermore, SALDEF has a pending kirpan case where a major job placement company trained and assigned a Sikh individual to a warehouse. The individual notified the company of his kirpan and the company had no objections. However, when the placement company found out that the individual carried a kirpan, his placement was immediately revoked, and the individual was eventually fired.

⁴⁰ See e.g., Pandori v. Peel Board of Education, 47 O.A.C. 234 (Ontario Bd. of Inquiry 1990) (an Ontario holding that Sikhs could wear kirpans "of a reasonable size" to school, without giving a specific finding as to what constituted a reasonable size).

⁴¹ Kirk Makin, Top court to weigh school ban on kirpan: Quebec case could set precedent on whether to allow wearing of dagger, *Globe and Mail* (Toronto Can.), Apr. 12, 2005, at A10.

⁴² Id.

⁴³ Supreme Court of Canada reserves judgment on kirpan, *Times* (UK), Apr. 19, 2005, at 8.

⁴⁴ See, e.g., Where’s the danger in a student’s kirpan?, Editorial, *Globe and Mail* (Toronto Can.), Mar. 9, 2004, at A16 (arguing that Quebec, like other Canadian provinces, should allow kirpans in school on the basis of religious freedom); but see, e.g., Olivier Jalbert, Editorial, No kirpans in school, *Globe and Mail*,

A similar debate continues here in the United States. The only major kirpan case to go to the federal courts, Cheema v. Thompson, discussed in detail infra, arose in the early 1990s when three Sikh children in California were excluded from their public school for carrying a kirpan on school grounds.⁴⁵ The issue, however, remains far from resolved. Earlier this year, 15-year-old Amandeep Singh was suspended from his Hartsdale, NY high school for wearing his kirpan to school in violation of anti-weapons regulations. After intervention by attorneys for the family and public interest groups, the school district eventually came to a compromise with the kirpan, allowing Singh to bring a smaller, more secured version of the kirpan to school.⁴⁶

The security concerns surrounding the kirpan are not completely unfounded. Although there have been no reported cases of school violence caused by kirpans in North America⁴⁷, there have been reported cases of violence where the kirpan was used outside the school setting.⁴⁸ Some of the most recent kirpan-related violence in the United States occurred during a fight inside a in a Sikh temple in New Jersey which

Mar. 11, 2004, at A20 (a letter to the editor responding to the previous article arguing that school safety concerns outweigh religious freedom).

⁴⁵ Cheema v. Thompson, 67 F.3d 883 (9th Cir. 1995) appeal after remand from Cheema v. Thompson, 36 F.3d 1102, 1994 WL 477725 (9th Cir. 1994).

⁴⁶ See Alison Bert, Student may wear symbol of Sikh faith, Journal News, Mar. 16, 2005, at 1B; Student allowed to carry kirpan to school, India Abroad (N.Y. ed.), Apr. 1, 2005, at A4; see also The weapon that wasn't, Editorial, Journal News, Mar. 17, 2005, at 8B (local newspaper supporting the decision of the school board to accommodate the kirpan in school).

⁴⁷ Kirk Makin, Top court to weigh school ban on kirpan: Quebec case could set precedent on whether to allow wearing of dagger, Globe and Mail (Toronto Can.), Apr. 12, 2005, at A10.

⁴⁸ See, e.g., Joanna Lavoie, Swords and baseball bats used in parking lot attack, Etobicoke Guardian, Aug. 19, 2005, at A (describing a parking lot beating where the assailants used baseball bats and kirpans in the greater Toronto region in Canada).

erupted over an election dispute and resulted in not only injuries to five Sikhs in the temple, but also caused the closing of the temple itself for many months.⁴⁹

IV. THE KIRPAN AND THE FREE EXERCISE CLAUSE

The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”⁵⁰ Through the doctrine of incorporation, the Supreme Court expanded this text by applying it to the states.⁵¹ The Court’s interpretation has also indicated that the free exercise of religion protects not only the right to believe whatever religious doctrine one desires, it also protects the right to engage in physical acts involved in one’s beliefs.⁵² For nearly three decades, the Court held that the government may only burden a person’s free exercise of religion if the government demonstrates that the burden to the person is in furtherance of a compelling government interest, and that the government acted in the least restrictive means of furthering that interest.⁵³

The Court’s ruling in Employment Division, Department of Human Resources of Oregon v. Smith drastically limited this right by holding that the free exercise of religion

⁴⁹ See Tom Lounsberry, 5 Sikhs injured in temple melee, Courier Post, Apr. 24, 2005, at B1; John Reitmeyer, Judge expresses concern about new clashes, says Sikh temple in Springfield to stay closed, Burlington County Times (N.J.), Aug. 27, 2005, at 9A.

⁵⁰ U.S. CONST. Amend. I.

⁵¹ See Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

⁵² See Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

⁵³ Id.

does not relieve an individual of his obligation to “observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires).⁵⁴ Congress reacted sharply against the Court’s ruling in Smith, and passed the Religious Freedoms Restoration Act (RFRA), restoring the Court’s pre-Smith jurisprudence.⁵⁵ Although the Court eventually ruled the RFRA unconstitutional, one of the most instructive cases dealing with the kirpan, Cheema v. Thompson, was decided under its provisions.⁵⁶

In Cheema, Rajinder, Sukhjinder, and Jaspreet Cheema, siblings who were baptized Sikhs, wore their kirpans to their elementary school located in the Livingston Union School District in California.⁵⁷ One day while Rajinder was playing basketball, one of his classmates realized that he was wearing a kirpan under his clothing.⁵⁸ As soon as school officials discovered the Cheema’s kirpans, they suspended them from school.⁵⁹ The parents immediately filed suit, requesting a preliminary injunction barring the district from applying its no-weapons policy against the Cheemas.⁶⁰

⁵⁴ 494 U.S. 872, 878 (1990).

⁵⁵ See 42 U.S.C.A. § 2000bb-1 (1993).

⁵⁶ See City of Boerne v. Flores, 521 U.S. 507 (1997).

⁵⁷ Cheema, 36 F.3d 1102, 1994 WL 477725, at *1.

⁵⁸ Dipanwita Deb, Note, Of Kirpans, Schools, and the Free Exercise Clause: Cheema v. Thompson Cuts Through RFRA’s Inadequacies, 23 Hastings Const. L.Q. 877, 877-78 (1996) (citing Brief for Appellant at 7, Cheema v. Thompson, 1994 U.S. App. LEXIS 24260 (9th Cir. Sept. 2, 1994) (No. 94-16097)).

⁵⁹ Id.

⁶⁰ Cheema, 36 F.3d 1102, 1994 WL 477725, at *1.

The district court denied the Cheema’s argument, siding with the school district that the kirpan indeed constituted a threat to the school’s security.⁶¹ The Cheemas appealed to the Ninth Circuit Court of Appeals, who reversed the district court’s decision. The Ninth Circuit held that the Cheemas were entitled to the injunction because they had a likelihood of success on the merits of the case – the Cheemas produced sufficient evidence to indicate that there were lesser restrictive means to further the governmental interest – and also because the Cheemas would suffer irreparable injury by missing school.⁶² Upon remand from the Ninth Circuit, the district court imposed a compromise plan for terms of the injunction when the two parties could not agree.⁶³ The plan included several provisions, including a size limitation on the length of the kirpan, a requirement that the blade be dulled, tightly sown to its sheath, and worn underneath the clothing, and granting the school district the right to inspect the kirpan for compliance.⁶⁴ The school district appealed this plan to the Ninth Circuit, which affirmed the district court’s decision.

The heart of the kirpan conflict is evident when reading the opinions in Cheema I and Cheema II. The majority criticized the school board for failing to prove why the Livingston Union School District refused to make the same accommodations other school districts did, as well as the school district’s “failure to build a meaningful record” against

⁶¹ Id.

⁶² Id. at *2 (noting that other school districts allowed kirpans of shorter lengths when sown into their sheaths).

⁶³ Cheema, 67 F.3d at 886.

⁶⁴ Id.

school children following a central tenet of the Sikh faith.⁶⁵ And, Judge Wiggins, the lone dissenting voice on the Ninth Circuit in Cheema, represented the other side of the argument. In both opinions, Judge Wiggins emphasized a school district's compelling interest in children's safety at school.⁶⁶ He also examined closely the testimony of the Cheema's expert in Sikhism, Professor Gurinder Singh Mann, who testified about the role of the kirpan in Sikhism.⁶⁷ Judge Wiggins pointed out that Professor Mann's testimony indicated that not only is the kirpan a necessary and integral part of Sikhism, a kirpan must be a "functional knife" in order for it to fulfill the faith's requirement, regardless of the Cheema's argument that a kirpan is more a symbol than a knife.⁶⁸ Wiggins concluded that "while a knife can indeed be a kirpan, and thus have deep spiritual meaning to a Sikh, this does not change the fact that the underlying object is, still, a knife."⁶⁹

Another case decided under the RFRA recognized the religious significance of the kirpan. In State v. Singh, the First District of the Ohio Court of Appeals considered an appeal from a district court where a Sikh man, Dr. Harjinder Singh, was prosecuted under an Ohio concealed weapons law for carrying a kirpan.⁷⁰ He was charged under the law when, as a party to a civil case, he failed to answer questions in a judgment-debtor

⁶⁵ Id. at 885 n.2; Id. at 885 n.3

⁶⁶ See Cheema, 36 F.3d 1102, 1994 WL 477725, at *4; Cheema, 67 F.3d at 889-90.

⁶⁷ See Cheema, 67 F.3d at 890.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ See State v. Singh, 690 N.E.2d 917, 917-18 (Ohio Ct. App. 1996).

examination and was held in contempt of court.⁷¹ When Dr. Singh was searched in the intake area of the Hamilton County Justice Center, deputies discovered the kirpan sown into his kachcha (undergarment), and Singh was subsequently charged with carrying a concealed weapon.⁷²

Singh's lawyers also used an expert witness, Dr. John W. Spellman, to inform the court about the necessity of the kirpan.⁷³ Dr. Spellman testified that the kirpan was designed and worn only as a religious symbol, a particularly important distinction for this particular case because the concealed weapons statute in question criminalizes the carrying of a deadly weapon only if it is "designed or specially adapted for use as a weapon or possessed, carried, or used as a weapon."⁷⁴ The Court analyzed the nature and history of a kirpan, and alongside the expert testimony of Dr. Spellman, concluded that the kirpan was essentially "a religious symbol to remind Sikhs of their obligations to do justice," despite some evidence to indicate that it could be used as a weapon as a last resort.⁷⁵ Because the kirpan was only a symbol, it did not satisfy the requirement that the object be a deadly weapon under the statute.⁷⁶

Judge Painter concurred in the result, writing separately:

I concur wholeheartedly with this opinion.

⁷¹ Id. at 384.

⁷² Id.

⁷³ Id.

⁷⁴ See OHIO REV. CODE. ANN § 2923.12(A) (criminalizing the knowing possession of a "deadly weapon"); see also OHIO REV. CODE. ANN § 2923.11(A) (defining "deadly weapon" as an instrument capable of inflicting death *and* either designed or specifically adapted for use as a weapon, or possessed, carried, or used as a weapon).

⁷⁵ Singh, 690 N.E.2d at 920.

⁷⁶ Id. at 920-21.

I write separately to confess that I am amazed that a case like this would ever be prosecuted... Free expression of religion has been a cornerstone of the inalienable rights of Americans [describing various historic legal provisions providing free exercise]. The Sikh religion has been part of world history since the fourteenth century. An integral part of that religion is the symbolism embodied in the five k's worn by its members. To be a Sikh is to wear a kirpan--it is that simple. It is a religious symbol, and in no way a weapon. As long as the kirpan remains a symbol and is neither designed nor adapted for use as a weapon, laws such as R.C. 2923.12 are wholly inapplicable.

I cannot understand the purpose for this prosecution, which, if successful, would have had the effect of banishing the members of one religious sect from the state of Ohio for its mandatory wear. And to what end? That a veterinarian would be punished for having a dulled blade of two and one-half inches sewn inside his clothing as required by his religion.⁷⁷

The decisions in Cheema and Singh, both decided under the RFRA, provided some indication that the free exercise principle provided a Sikh with a right to carry a kirpan, even if that right was subject to some limitations for government concerns such as school safety. Both cases also highlighted an active debate within the Sikh community itself; does the kirpan's history and religious meaning require it to be a useable weapon, or merely a symbol? The difference between the two was unimportant in Cheema; the decision there rested upon the existence of reasonable accommodations in other school districts which could have been provided to the Cheemas as they attended school.⁷⁸ In Singh, however, the distinction was pivotal; if the kirpan was intended as a weapon, it is

⁷⁷ Id.

⁷⁸ See Cheema, 36 F.3d 1102, 1994 WL 477725, at *2

unlikely that the kirpan would have been quickly dismissed as exempt from concealed weapons laws.⁷⁹

With the holding in City of Boerne v. Flores, the Supreme Court struck down the portion of the RFRA compelling state enforcement, rendering the RFRA essentially unconstitutional. Several circuits have subsequently interpreted Boerne's holding regarding RFRA narrowly, and have held that Boerne only ruled the portion of the RFRA that enforced its provisions against the states through § 5 of the Fourteenth Amendment unconstitutional and beyond Congress' power.⁸⁰ These courts continue to apply the remaining portion of the RFRA and its standards to the federal government.⁸¹ Regardless, the inapplicability of the RFRA to the states has further placed the kirpan in an uncertain legal state. Even though Singh was decided before Boerne, the case is still valuable for an analysis of the kirpan relative to concealed weapons laws because the court in Singh decided the case independently of the RFRA.⁸²

It is unlikely that a kirpan case would succeed under the reigning logic of Smith. Smith does not extend the rights of the free exercise clause to exempt the observance of physical acts that a generally applicable law either prohibits or requires, unless another constitutional right is implicated.⁸³ Laws prohibiting the carrying of weapons are

⁷⁹ Singh, 690 N.E.2d at 920.

⁸⁰ See e.g., Kikumura v. Hurley, 242 F.3d 950, 959 (10th Cir.2001); In re Young, 141 F.3d 854, 858- 59 (8th Cir.1998).

⁸¹ See Kikumura, 242 F.3d at 959; In re Young, 141 F.3d at 858- 59.

⁸² See Singh, 690 N.E.2d at 920 (recognizing that though the trial court's failure to conduct an inquiry into RFRA defenses was sufficient error to remand the case to the trial court to conduct an inquiry, error as to the prosecution's failure to prove that the kirpan was a "deadly weapon" under the Ohio concealed weapons statute was sufficient to resolve the case without remand).

⁸³ Smith, 494 U.S. at 877-81.

generally applicable laws; these laws do not specify Sikhs or the kirpan as specifically prohibited.⁸⁴ And, one would be hard pressed to argue that carrying a kirpan implicates any another constitutional provision.⁸⁵ Thus, the First Amendment's free exercise clause currently provides little in the way of constitutional aid to Sikhs who carry a kirpan; if prosecuted, it seems a Sikh's only recourse is to prove that a kirpan is not intended as a deadly weapon as defined under weapons statutes.

V. BEYOND THE FEDERAL COURTS: FINDING A SOLUTION

A great number of Sikhs and other South Asians have come to America and found tremendous financial success, and the number and influence of South Asians is doubtlessly growing. As the population of Sikhs in the United States grows, the free exercise problems of Sikhs, especially for symbols such as the kirpan, are likely to increase.

The current state of First Amendment and free exercise jurisprudence has not provided the Sikh population with a protected right to carry a kirpan. Yet, the growing number and influence of Sikhs will necessarily bring these problems to the forefront, just as they have in other countries with large Sikh populations, such as Canada and the United Kingdom. There are, however, other legal avenues available for Sikhs hoping to carry a kirpan legally beyond the First Amendment.

Statutory Exceptions

⁸⁴ See e.g., Mich. Comp. Laws, Ann. § 259.80f (a Michigan weapons statute criminalizing the carrying of knives into the sterile area of an airport, without mention of type of knife or blade length).

⁸⁵ Though a kirpan is a weapon perhaps in the definition of "arms," the very limited scope of Second Amendment jurisprudence would certainly not create a right to carry a kirpan. See e.g., Daniel E. Feld, Annotation, Federal Constitutional Right to Bear Arms, 37 A.L.R. FED. 626 (2005).

No American jurisdiction currently exempts the kirpan from weapons laws. The laws of the United Kingdom and Canada, two nations with large Sikh populations, are instructive in this regard. The weapons laws in the United Kingdom specifically include an exemption. A general statute criminalizing the possession of a blade or knife longer than three inches in a public place, contains an exemption for a blade kept for religious reasons or as part of a national costume.⁸⁶ A kirpan, as a religiously mandated article of faith, would fall under this exception. As a result, Britain's over 500,000 Sikhs are completely protected against prosecution for carrying a kirpan. Although there is no statutory exception in Canada, Sikhs are protected from prosecution for wearing a kirpan

⁸⁶ The English statute provides, in relevant part:

(1) Subject to subsection [] . . . (5) below, any person who has an article to which this section applies with him in a public place shall be guilty of an offence.

(2) Subject to subsection (3) below, this section applies to any article which has a blade or is sharply pointed except a folding pocketknife . . . [unless] the cutting edge of its blade exceeds 3 inches. . . .

(5) Without prejudice to the generality of subsection (4) above, it shall be a defence for a person charged with an offence under this section to prove that he had the article with him-- . . .

(b) for religious reasons; or
(c) as part of any national costume.

(6) A person guilty of an offence under subsection (1) above shall be liable . . . imprisonment . . . or a fine, . . . or both;

(7) In this section "public place" includes any place to which at the material time the public have or are permitted access, whether on payment or otherwise . . .

Criminal Justice Act, 1988, c. 33 Pt. XI s. 139

in most provinces through case law.⁸⁷ Several cases have given Sikhs the right to carry a kirpan, so long as it is of a reasonable size.⁸⁸

There has been one American attempt to introduce a statutory exception for the kirpan. In January of 1993, before the Ninth Circuit heard arguments in Cheema, California Senator Lockyer introduced Senate Bill 89 in the California Senate.⁸⁹ California penal code criminalizes the possession or carrying of certain weapons, including knives, onto the grounds of a public or private school.⁹⁰ This legislation sought to incorporate an exception for those carrying a knife or dagger that “is an integral part of a recognized religious practice.”⁹¹ The legislative history of the bill specifically cites the

⁸⁷ The major exception to this is the province of Quebec where courts have specifically ruled that a kirpan was not allowed in a school in the Gurbaj Singh Multani case as discussed supra. This case is awaiting judgment in the Canadian Supreme Court. See Balvir Singh Multani, et al. v. Commission scolaire Marguerite-Bourgeoys, et al., No. 30322, pending (Can. Sup. Ct 2005).

⁸⁸ See e.g., Pandori v. Peel Board of Education, 47 O.A.C. 234, (Ontario Bd. of Inquiry 1990) (holding that Sikhs could wear kirpans "of a reasonable size" to school, without giving a specific finding as to what constituted a reasonable size)

⁸⁹ See S.B. 89, 1993-1994 (Cal. 1993).

⁹⁰ See CAL. PENAL CODE § 626.10 (generally criminalizing the possession or carrying of weapons or knives on the grounds of a public or private school in California, with exceptions for those used by police or armed services or for food preparation)

⁹¹ The complete text of the proposed exception was as follows:

Subdivisions (a) and (b) [criminalizing the carrying or possession of a weapon] shall not apply to the carrying of any knife or dagger that is an integral part of a recognized religious practice. In order for this subdivision to apply to a minor at a school referred to under subdivision (a), a parent or guardian of a minor shall give notice to the appropriate school authority that the minor meets the criteria under this subdivision. However, an emancipated minor may give his or her own notice.

Nothing in this subdivision shall be construed to allow an exemption from prosecution for an offense relating to assault or brandishing.

The exemption provided by this subdivision shall not be construed to prevent a school district from imposing additional reasonable conditions or standards pertaining to the lawful possession of a dirk or dagger when that possession is an integral part of a recognized religious practice.

occurrence of the dispute leading to Cheema, and states the desire to accommodate the Sikh kirpan without compromising school safety.⁹² The bill passed the senate unanimously, and the California assembly by a majority vote.⁹³

California Governor Pete Wilson vetoed the legislation.⁹⁴ In his veto message, he recognized the “venerable religious practice of the Sikhs,” though discussed several reasons for rejecting the legislation.⁹⁵ One of these reasons was the Ninth Circuit’s decision in Cheema I, which the court had issued before the passage of the legislation, as a result of which “the immediate need for SB 89 ha[d] been obviate[d].⁹⁶” Secondly, the lack of any statutory limits on the size of the blade or limiting the exception to Sikhs or to the kirpan was a concern that the governor believed needed to be addressed in the legislation.⁹⁷ Lastly, Governor Wilson wanted to assure that any exceptions for a kirpan include alteration of the kirpan so that it could not be used as a weapon, referring to the compromises made by several California school districts requiring that the kirpan be riveted to its sheath.⁹⁸ If the legislature made these changes to the bill, the governor

Thus, the statute’s language recognized some of the inherent dangers of carrying such a knife, and provided the school authority some flexibility in maintaining an orderly school environment. See S.B. 89, 1993-1994 (Cal. 1993)

⁹² See S.B. 89 BILL ANALYSIS, SENATE FLOOR, 1993-1994 (Cal. 1994) available at <http://www.leginfo.ca.gov/>.

⁹³ See S.B. 89 VOTE, SENATE FLOOR, Aug. 29, 1994, available at <http://www.leginfo.ca.gov/>; S.B. 89 Vote, Assembly Floor, Aug. 24, 1994, available at <http://www.leginfo.ca.gov/>.

⁹⁴ S.B. 89 VETO MESSAGE, Aug. 30, 1994, available at <http://www.leginfo.ca.gov/>.

⁹⁵ See Id.

⁹⁶ Id.

⁹⁷ Id.

⁹⁸ Id.

expressed his willingness to sign it into law.⁹⁹ There is no record of any effort to reintroduce an amended version, probably due to the ruling in Cheema.

Since the overruling of Cheema, the need for such legislation is again apparent, especially in states such as California with large and longstanding Sikh populations. Such legislation may indeed be possible if the Sikh community actively mobilizes in favor of such measures; it is the increasing visibility of the Sikh community and recognition of its distinct identity which prompted Congress to include a statement condemning violence against Sikhs post-September 11th in the USA PATRIOT Act.¹⁰⁰

State-level RFRA's

Since the Supreme Court's ruling in City of Boerne v. Flores, several states have passed state-level RFRA's restoring the Court's pre-Smith free exercise standard within the state's bounds, or have passed legislation increasing accommodations on the basis of religion.¹⁰¹ Two states – Florida and Illinois – have passed state-level RFRA's are particularly instructive regarding the bounds of these laws because of the extent to which the state laws mirror the RFRA's language.¹⁰² Few cases have been brought under these

⁹⁹ Id.

¹⁰⁰ See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, H.R. 3162, 107th Cong. § 1002 (2001) (recognizing the Sikh religion and the contribution of its adherents in the United States, and condemning violence and bigotry against the Sikh-American community after the September 11th, 2001 terror attacks).

¹⁰¹ See Brian L. Porto, Annotation, Validity, Construction, and Operation of State Religious Freedom Restoration Acts, 116 A.L.R. FED. 233 (2005) (describing the state-level RFRA's as a reaction to Boerne, as well as providing notable cases under these state laws).

¹⁰² See id.; See also FLA. STAT. ch. 761 (2005) (Florida statute barring the Florida state government from substantially burdening the free exercise of religion without a compelling state interest, and allowing a person to assert that their religious freedom was burdened as a claim or a defense in court); ILL. COMP. STAT. 35/15 (2005) (Illinois statute barring the Illinois state government from substantially burdening the free exercise of religion without a compelling state interest).

provisions, and most of these have dealt with zoning issues.¹⁰³ In only one of these cases was a court willing to use the RFRA to prevent enforcement of a city or state law.¹⁰⁴

Although no kirpan cases have to date been brought under these statutes, decisions such as Cheema decided under the federal RFRA statute may be instructive to a court applying pre-Smith free exercise standards to a kirpan.

The Workplace Religious Freedoms Act

After the RFRA, many religious-based organizations have looked for a method to increase accommodations of religious beliefs, especially in places such as the workforce. One measure currently under consideration is the Workplace Religious Freedoms Act, proposed by a bipartisan coalition of senators and representatives in both houses of Congress.¹⁰⁵ Rather than attempting to change the Supreme Court's interpretation of the free exercise clause as RFRA did, this legislation takes a very different approach. The bill proposes to amend Title VII of the Civil Rights Act of 1964 to include religious accommodations into the workplace.¹⁰⁶ Except for small businesses and those employers for which it would be an undue hardship, the act would require that an employer accommodate religious practices related to religious clothing or religious holidays.¹⁰⁷

¹⁰³ Porto, supra note 98.

¹⁰⁴ See Abbott v. City of Fort Lauderdale, 783 So. 2d 1213, 1215 (Fla. Dist. Ct. App. 4 2001). In Abbott, a feeding program for the homeless sought a preliminary injunction preventing the city from enforcing a rule against business or social services in parks based on the Florida RFRA. Id. at 1214. The trial court agreed that the program's rights under the Florida RFRA were violated, and ordered the city to provide an alternate site for the program. Id. The Fourth District Court of Appeals upheld the trial court's determination that the city violated the program's rights under the Florida RFRA, and also held that a trial court had the authority to make a determination as to whether the city's compliance with its order was sufficient. Id. at 1215.

¹⁰⁵ See Workplace Religious Freedom Act of 2005, H.R. 1445, 109th Cong. (2005).

¹⁰⁶ See Id. at § 2.

¹⁰⁷ See Id. at § 2(a)(4) (adding religious accommodations into 42 U.S.C. 2000e(j)).

The bill is currently pending before the Subcommittee on Employer Employee Relations in the House, which has already held hearings in support and in opposition for the legislation.¹⁰⁸ A number of religious organizations have voiced support for the legislation, including supporters from Christian, Jewish, Muslim, and Sikh groups.¹⁰⁹ This legislation, though not creating a protected right to carry a kirpan directly, would have the effect of impacting discrimination against Sikhs where it is most common – the workplace.

The Decision Not to Prosecute

Prosecutorial and judicial discretion, while by no means a true legal protection of the right to carry a kirpan, have also insulated the Sikh community from prosecution for wearing a kirpan. In one such case, People v. Singh, decided before the Supreme Court's decision in Smith and well before the RFRA, a Sikh man¹¹⁰ standing on the Main Street station subway platform in Queens, New York City was arrested for possession of a knife in violation of New York City administrative code.¹¹¹ Upon discussing the nature of the Sikh religion and its tenets, Judge Milano engaged in a balancing act between a Sikh's

¹⁰⁸ See Bill Status and Summary, Workplace Religious Freedom Act of 2005, H.R. 1445, 109th Cong. (2005), available at <http://thomas.loc.gov/>.

¹⁰⁹ See Press Release: Subcommittee Hears Testimony on Souder Workplace Religious Freedom Legislation, Nov. 10, 2005, available at <http://edworkforce.house.gov/press/press109/first/11nov/religiousfreedom111005.htm>.

¹¹⁰ Although the case states that the man was a priest, this is a misleading label because Sikhism has no established clergy. There are, however, dedicated members of the faith who work daily at a Gurudwara and often lead services, and it is likely that this individual was one of them. However, any Sikh may lead a service. See People v. Singh, 516 N.Y.S.3d 412, 413 (N.Y. City Civ. Ct. 1987); see also Rehat Maryada § 3, at http://www.sgpc.net/rehat_maryada/section_three_chap_eight.html

¹¹¹ Singh, 516 N.Y.S.3d at 413; see also New York City Admin. Code. § 10-133 (criminalizing the possession of knives longer than four inches in public or the carrying of any exposed blade in public, with exceptions).

right to free exercise of religion and the government interest in public safety.¹¹² The Court concluded that the City of New York did have the right to prosecute the defendant, because “the intrusion on the defendant’s [F]irst [A]mendment rights are de minimus [sic] and must yield by necessity to the State’s primary duty to protect its citizens and to reduce the risk of crimes of violence and other conditions detrimental to the public peace and welfare.”¹¹³ Judge Milano recognized, however, that the Court had a duty to find a fair balance between religious freedom and enforcement of criminal statutes, and suggested that a kirpan be “encased in a solid protective element such as plastic or lucite” so that it would no longer be considered a knife or a weapon – the same debate between the kirpan as a weapon versus the kirpan as a symbol arose yet again.¹¹⁴

Importantly, even with the Court’s conclusion that the City of New York did have the right to prosecute the defendant, the court invoked judicial discretion and, sua sponte, dismissed the prosecution in the interest of justice.¹¹⁵

On September 12th, 2001, over 60 police officers of the Providence Police Department converged on an Amtrak station searching for “suspicious men” who may have information on the terror attacks that had taken place a day earlier.¹¹⁶ Police stopped and searched – without probable cause – Sher J.B. Singh, a 29-year-old engineer and co-founder of a communications business, and arrested him for possession of a

¹¹² Singh, 516 N.Y.S.3d at 413-15.

¹¹³ Id. at 415.

¹¹⁴ Id. at 416.

¹¹⁵ Id.

¹¹⁶ See Tom Mooney, Charges against Sikh dropped, Providence Journal-Bulletin (Rhode Island), Oct. 26, 2001, at A1.

concealed knife with blade longer than three inches.¹¹⁷ After the story received notoriety, the mayor of Providence, as well as the Attorney General of the City of Providence decided not to prosecute Singh for the kirpan.¹¹⁸ His kirpan was returned to him, alongside an apology from the police department and the City.¹¹⁹ Although Singh had initially considered filing a civil rights suit against the city based on his arrest without probable cause, he decided against it, and instead said that he was glad his arrest educated others about Sikhism.¹²⁰

At least one prosecutor's office has issued advisory memoranda to the police regarding the kirpan and when the office would not prosecute a Sikh for carrying a kirpan. George Kennedy, the District Attorney for Santa Clara County, California issued prosecution guidelines for kirpans under the California Penal Code.¹²¹ The guidelines state that while the law does criminalize the concealed possession of a kirpan-like knife, the law contains an exception for knives carried in sheaths that are worn openly suspended from the waist of the wearer are not concealed in the meaning of the statute which may exempt Sikhs.¹²² The guidelines also states that, regardless of how the kirpan is worn, a Sikh may still be in violation of the penal code if the kirpan is "capable of

¹¹⁷ Id.

¹¹⁸ See Id.

¹¹⁹ See Tom Mooney, [Tolerance, understanding undo arrest – Weapons charge dropped; ceremonial religious dagger returned](#), Providence Journal-Bulletin (Rhode Island), Nov. 1, 2001, at A1.

¹²⁰ See Tom Mooney, [Charges against Sikh dropped](#), Providence Journal-Bulletin (Rhode Island), Oct. 26, 2001, at A1.

¹²¹ See Advisory Memorandum Regarding the Sikh Practice of Wearing Ceremonial Swords, Jan. 6, 1998, available at <http://www.sikhcoalition.org/KirpanSantaClaraDA.pdf>; see also CAL. PENAL CODE § 12020(a)(4)(2005) (criminalizing the concealed possession of a dirk or dagger).

¹²² See Id. at § 12020(c)(25).

ready use as a stabbing weapon that may inflict great bodily injury or death.”¹²³ Thus, the guidelines suggest that a Sikh is not in violation if the kirpan cannot be easily removed from its sheath, if it is not capable of ready use, or if it is dulled or rounded such that it is incapable of inflicting great bodily injury or death.¹²⁴

Both People v. Singh and the Sher J.B. Singh incident reflect that, even if laws specifically protecting the right to carry a kirpan are not present, prosecution of Sikhs carrying a kirpan would “result in injustice and would so no useful purpose.”¹²⁵ And, the cases also indicate that the use of prosecutorial and judicial discretion in the favor of Sikhs could be a tremendous help to those Sikhs prosecuted under weapons laws. Guidelines such as these issued by the Santa Clara District Attorney’s Office are also a tremendous benefit to the Sikh community, as they clarify exactly for what type of kirpan a Sikh can or cannot be prosecuted.

VI. CONCLUSION

The kirpan is a religiously-mandated article of faith. Its origin stems from an imminent need to protect, even by the sword if all other options have failed, the Sikh religion and the oppressed of any faith. The danger of physical aggression is no longer prevalent against persons of faith. However, the kirpan serves as a constant reminder of that duty. Sikhs no longer fight for their identity on the battlefield; they now fight for their identity in their daily lives, often at work or in school, and even in the courtroom.

¹²³ See Advisory Memorandum Regarding the Sikh Practice of Wearing Ceremonial Swords, Jan. 6, 1998, available at <http://www.sikhcoalition.org/KirpanSantaClaraDA.pdf>.

¹²⁴ See id.

¹²⁵ Singh, 516 N.Y.S.3d at 416.

As the Sikh population increases in size and strength, the vitality of the community rests upon American acceptance of the outward symbols of Sikhism. Occasionally, Americans have looked to Sikh beliefs in awe and wonder. At other times, these symbols have drawn misguided parallels between Sikhs and media-generated images of terrorists and terrorism.

Like many minority groups, Sikhs have looked to the courts and the constitution for vindication of their rights. This has given the Sikhs some successes in the past through the free exercise clause of the First Amendment, though the viability of those prior successes is unlikely to guarantee future success with the presently narrow interpretation of the free exercise clause. Even if the free exercise clause remains narrowly interpreted, other avenues are available for the legal right to carry a kirpan. Some of these avenues involve statutory remedies, including expanding Title VII accommodations to include articles of faith or the inclusion of a concealed weapons law exception for the kirpan mirroring the United Kingdom's exception. Other judicial options may include arguments under state-level RFRAs passed in the wake of City of Boerne v. Flores.

If Sikhs cannot turn to the courts, the legislatures, or state law, they must turn towards education. The truth is that most Americans still do not know of the existence of Sikhism, much less have an understanding of the faith and its symbols. Amardeep Singh, a Sikh civil rights attorney and legal director of the Sikh Coalition, once pinpointed the need to educate Americans about Sikh beliefs when he stated:

"[Civil rights] [l]itigation in the Sikh community is unlike litigation in any other community I can think of, because [of] what we're doing for the judges beyond arguing the law. We're giving a mini history and religion lesson... we [have] to sort of give the

courts that background knowledge because, how can you apply a rule against a group who you don't understand?"¹²⁶

When Americans are knowledgeable about a religion and its articles of faith, whether that article is a weapon, a symbol, or both, something about the American psyche creates a great hesitancy to punish someone for their beliefs. It may not violate the free exercise of religion per se, but it still violates our personal notion of free exercise. I believe it is that same notion which compelled Judge Milano in People v. Singh to, sua sponte, dismiss a legally-sound prosecution, and stopped the Providence Police Department from prosecuting a man who had clearly violated the letter of the law. And the conclusion Judge Milano drew in People v. Singh remains true today – the prosecution of a Sikh for following his religious beliefs “would not be in the furtherance of justice.”¹²⁷

¹²⁶ Videotape: Dastaar (Sikh Coalition 2005), available at <http://www.sikhcoalition.org/>.

¹²⁷ Singh, 516 N.Y.S.3d at 416.