This exercise does not require redrafting. But print this document anyway so you can mark it up while preparing for class.

Exercise 1-A

Chapter 1, pages 16–20

Read this case and answer the questions that follow:

Menora v. Illinois High School Association

683 F.2d 1030 (7th Cir. 1982)

Posner, Circuit Judge.

Interscholastic high school sports in Illinois, including basketball, are conducted under the aegis of the Illinois High School Association . . . . A rule of the Association forbids basketball players to wear hats or other headwear . . . .

[Rule 2-2 in the Association's 1980-81 rule book reads as follows: "The referee shall not permit any player to wear equipment which, in his or her judgment, is dangerous to other players. . . . Head decorations, headwear, or jewelry are illegal."]

This rule is challenged in the present case as an infringement of the religious freedom of orthodox Jews. According to a stipulation between the parties, orthodox Jewish males are required by their religion "to cover their heads at all times except when they are (a) unconscious, (b) immersed in water or (c) in imminent danger of loss of life." There is no exception for playing basketball. [Traditional Jewish law requires a head covering, in the district court's words, "as a sign of respect to God."] Orthodox Jews who play basketball comply, or at least try to comply, with this requirement by wearing yarmulkes (small skull caps that cover the crown of the head) fastened to the hair with bobby pins. Ordinarily a yarmulke just perches on the head; the bobby pins are an acknowledgment of the yarmulke's instability on a bobbing head. But bobby pins are not a secure method of fastening; yarmulkes fastened by them fall off in the heat of play with some frequency.

The Association has interpreted its rule to forbid the wearing of yarmulkes during play; and the plaintiffs in this lawsuit . . . contend that this interpretation forces them to choose between their religious observance and participating in

interscholastic basketball . . . .

[It is uncontested that the Association is acting as an arm of the state for First Amendment purposes.] Although the Association is nominally a private organization, public high schools comprise the bulk of its membership and dominate its decisionmaking. . . .

[The Supreme Court has interpreted the First Amendment's free exercise clause] to require the government, when it can do so without too much cost or inconvenience, to bend its regulations — even when they are secular, general, nondiscriminatory, and do not forbid but merely burden a religious observance — to spare religious people the painful choice between giving up a part of their religious observance and giving up a valuable government benefit. . . .

[This requires] a comparison of two burdens: the burden on the person who is seeking a government benefit of being denied the benefit as the price of observing his religion, and the burden on the government of extending the benefit to someone who fails to meet the usual requirements for eligibility. . . . The more valuable the benefit to the claimant and hence the greater the burden on him of forgoing it in order to continue to observe his religion, the greater must be the burden on the government of relaxing the conditions it places on that benefit for a refusal to make an exception for the claimant to survive a challenge based on the First Amendment. Free exercise of religion does not mean costless exercise of religion, but the state may not make the exercise of religion unreasonably costly. . . .

[W]hile we are not Talmudic scholars we are reasonably confident . . . that the precise nature of the head covering and the method by which it is kept on the head are not specified by Jewish law. The wearing of a yarmulke — which by its size and position is liable to fall off in any activity involving sudden movement — is conventional rather than prescribed; some orthodox Jews prefer to wear an ordinary hat instead. The affixing of the yarmulke to the head (more precisely, the hair) by bobby pins is even more obviously a convention rather than a religious obligation, and it happens to be an inherently insecure method of keeping the yarmulke attached during basketball play.

If the Talmud required basketball players to wear yarmulkes attached by bobby pins, there would be a conflict with the state's interest in safety. But it does not, so it would seem that all the plaintiffs have to do to obviate the state's concern with safety is to devise a method of affixing a head covering which will prevent it from falling off during basketball play. We are not the people to devise the method . . . . But we are reasonably sure that a secure head covering exists or can be devised at trivial cost without violating any tenet of orthodox Judaism; that, on the facts of this case at least, bobby pins do not implicate First Amendment values.

Of course the Illinois High School Association might decide that its rule forbade even a completely secure head covering (as, indeed, the language of the rule suggests) and might also, if it so concluded, refuse to change the rule. A letter from

an official of the Association, and testimony of Dr. Edward Steitz (who we are told is "Mr. Basketball"), provide some support for this supposition, though the point was not pressed below. But if the Association proves to be so obdurate — if it refuses to accommodate the indisputably sincere beliefs of a religious group though it can do so at no cost to the only objective, safety, that the rule in question is claimed to have — it will be standing on constitutional quicksand. Even if the interest in participating in interscholastic basketball is a slight one, a question we need not decide, it would by definition outweigh the burden on the state of accommodating that interest if there were no burden at all.

But by the same token the plaintiffs would be on weak ground if they claimed a constitutional right to wear yarmulkes fastened insecurely with bobby pins, on the theory that the state has no interest in more secure head coverings. It is true, as the district court found, that the Association's efforts to prove that insecurely fastened yarmulkes pose a substantial safety hazard were unconvincing. All it could prove was that yarmulkes fall off basketball players' heads once or twice a game, on average, despite the bobby pins, and that in principle any loose object on the floor can cause a player to slip or trip and thereby fall and injure himself. The Association was unable to produce an authenticated instance of a fall caused by a yarmulke. But we do not consider this failure of proof quite so devastating as the district court did. The state need not await disaster to regulate safety; the effort of the Association to take preventive measures against injury before a history of accidents has been compiled is rather to be commended than condemned. Because the rule, which was drafted by the national federation of state high school associations, is in force in most of the nation and not just in Illinois, experience with interscholastic basketball games in which players wear yarmulkes has been limited. And falls are such a common part of basketball that when someone does fall no one stops the game to investigate the cause. As a result we do not know how many of the falls that occur in games where players are wearing yarmulkes are due to that fact — we do not even know whether falls are more common in such games than in games where the Association's rule is enforced. . . .

. . . The district court should retain jurisdiction so that the plaintiffs can have an opportunity to propose to the Association a form of secure head covering that complies with Jewish law yet meets the Association's safety concerns. If the Association refuses to interpret or amend its rule to allow such a head covering to be worn by orthodox Jews, the district court should then proceed to determine, consistently with the analysis in this opinion, the plaintiffs' right to have the rule enjoined as a violation of their religious freedom.

Many basketball leagues have or have had rules like the one at issue here, affecting any player, male or female, who is religiously required to wear headgear. These rules have disadvantaged Sikhs (turbans) and Muslims (hijabs). See the Note at the end of this Exercise.

Different sources of rules. The *Menora* court interprets rules from three sources: the Illinois High School Association, traditional Jewish law, and the Constitution's First Amendment. The Association's Rule 2-2 is inserted into the opinion in the bracketed paragraph near the beginning. The court does not cite or quote any authority for the traditional Jewish rule. Instead it quotes the parties' stipulation about what they understand the rule to be. The First Amendment free exercise rule has been developed in the case law, and the *Menora* court summarizes what it believes to be that rule.

Clarity of rules and differing opinions about their meaning. Because Rule 2-2 was drafted by a single authority — the Association — it has one official expression in words, and those words constitute the rule, as with a statute where the drafters' words govern. Justice Frankfurter said that the first three steps in interpreting a statute are —

> (1) Read the statute;
> (2) read the statute;
> (3) read the statute![7]

But this is not so with the First Amendment's Free Exercise Clause. The rule is not in the First Amendment's words. It is in two centuries of case law. *Menora* states one formulation of the rule. Elsewhere in the case law are other formulations, and some are substantially different from *Menora*'s. That can happen when there is no single and authoritative drafted text of a rule. Something similar is true of the traditional Jewish rule on head coverings. *Menora* states a rule, but that is not the only version of it. Talmudic scholars can disagree about what the rule is and can support their arguments by quoting different expressions of the rule in different texts.

The Association's Rule 2-2 was actually two rules: a declaration ("Head decorations, headwear, or jewelry are illegal") and a duty ("The referee shall not permit any player to wear equipment which, in his or her judgment, is dangerous to other players"). The declaration establishes illegality. The duty requires that an official, the referee, take enforcement action.

Questions about Rule 2-2. Suppose you see a player wearing headgear while playing in a game governed by the Association's Rule 2-2 as it existed in 1982. You ask the referee what he plans to do about it. "Nothing," says the referee. You mention Rule 2-2. "I know the rule very well," says the referee. "But it doesn't require me to do anything here." Under what circumstances would the referee be right? Explain how the words support your answer.

Hint: Are Rule 2-2's duty (the first sentence) and its declaration (the second sentence) subject to identical tests or to different tests? Put another way, is it possible for headgear to be both illegal under the declaration and permitted because of the way the duty is drafted? Before you answer, do as Justice Frankfurter would command: (1) read Rule 2-2 carefully, (2) read it again carefully, and (3) read it yet again carefully. If you believe the duty and the declaration are subject to different tests, what might have caused the drafters to do that? Did they have a good reason? Or did they make a drafting mistake?

Questions about the traditional Jewish rule. What type of rule is it — a duty, discretionary authority, or a declaration? Three exceptions are listed in the opinion. Is the rule also subject to any conditions that you could express beginning with the word *if*?

Questions about the First Amendment's Free Exercise Clause. Where in the court's opinion do you find it expressed as a rule? What type of rule is it — a duty, discretionary authority, or a declaration? Is it subject to any conditions that you could express beginning with the word *if*? Is it subject to any exceptions that you could express beginning with *except* or *unless*? What aspect of the rule is at issue here?

The basketball rules today. The Illinois High School Association's rules have changed. The Association has adopted the rules of the National Federation of State High School Associations. Under the current National Federation rules, a "state association may approve a [head] covering or wrap" if three conditions are satisfied: (1) "there is documented evidence provided to the state association that a participant may not expose his/her uncovered head" for religious reasons; (2) the head covering "is not abrasive, hard or dangerous to any other player"; and (3) the head covering "is attached in such a way it is highly unlikely it will come off during play."[8]

The International Basketball Federation changed its rules similarly in 2017. But the issue continues to arise in other basketball leagues and competitions. You can find examples by doing Google searches for "basketball yarmulke," "basketball turban," and "basketball hijab."