

Fordham International Law Journal

Volume 35, Issue 4

2017

Article 2

Protecting the Space to be Unveiled: Why France's Full Veil Ban Does Not Violate the European Convention on Human Rights

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NOTES

PROTECTING THE SPACE TO BE UNVEILED: WHY FRANCE'S FULL VEIL BAN DOES NOT VIOLATE THE EUROPEAN CONVENTION ON HUMAN RIGHTS

*Bridgette Dunlap**

INTRODUCTION	969
I. THE VEIL AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS	973
A. Implicated Rights Under the Convention	974
1. Reasons Women Veil and Their Corresponding Rights	975
2. The Prohibition Against Discrimination	979
B. Other Interested Parties: Interest Balancing in <i>Şahin v. Turkey</i>	980
1. Legitimate Aims of the State: Public Order and the Rights and Freedoms of Others	981
2. Proportionality	984
3. Judge Tulkens' Dissent	986
II. THE CONFLICT IN THE FRENCH CONTEXT	987
A. A Context Unfamiliar to Outside Observers	987
B. The Headscarf and Niqab in France	992
1. The French Ban on Religious Symbols	993
2. The Niqab Ban	1001
a. Allegations of Islamophobia and the Intra-Muslim Debate	1002
b. Regulating the Public Space	1004
C. Balancing the Interests at Stake	1008

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2012]	<i>PROTECTING THE SPACE TO BE UNVEILED</i>	969
	1. Weighing the Rights of Women Forced or Pressured to Veil	1008
	2. Unintended Harms to Women Forced to Veil	1011
	3. Considering the Protections of Secularism	1016
III.	SECULARISM AND GENDER EQUALITY: MEANS OF PROTECTING THE PUBLIC ORDER AND THE RIGHTS OF OTHERS	1018
	A. Secularism and Gender Equality: Vital Protections of the Human Rights of Women	1018
	B. An Invasive Regulation of an Extreme Practice	1021
	C. Why the International Misunderstanding of the Ban Matters	1023
	D. Paternalism or the Reasonable Imposition of a Duty on Women?	1024
	CONCLUSION	1025

INTRODUCTION

“No one shall, in any public space, wear clothing designed to conceal the face.”¹

In 2010, the French Senate and National Assembly approved a statute that, though facially neutral, was intended to ban full face veils worn by Muslim women in France, specifically the burqa and niqab.² The French public largely supported the law, known as the niqab ban, but global commentators allege that the statute constitutes an impermissible violation of personal freedom, and is racist,

1. Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of Oct. 11, 2010 Prohibiting the Concealment of the Face in Public], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344 (“Nul ne peut, dans l'espace public, porter une tenue destinée à dissimuler son visage.”); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-613DC, Oct. 7, 2010, J.O. 18345 (Fr.).

2. Law 2010-1192 of Oct. 11, 2010, art. 1 (Fr.) (prohibiting the concealing of one's face in public without mention of religious attire); see Malcolm D. Evans, *From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression Before the European Court of Human Rights*, 26 J.L. & RELIGION 345, 364–65 (placing the French bill among proposed European laws that are “couched in other language” but constructively ban the burqa); see also Steven Erlanger, *Parliament Moves France Closer to a Ban on Facial Veils*, N.Y. TIMES, July 14, 2010, at A6 (describing French legislators' plans to ban full facial veils). The burqa covers a woman's entire face; the niqab covers all but a woman's eyes. *Id.*

paternalistic, and ultimately the product of political opportunism.³ Despite this criticism, France's Constitutional Council upheld the law in an October 7, 2010 ruling.⁴ Although the law went into effect on April 11, 2011, officials levied no fines for violations until six months after its enactment.⁵ Since then, women in France who wear full face veils in public have been subject to a fine or mandatory citizenship classes.⁶ Opponents of the ban contend that it violates the European Convention on Human Rights ("Convention"), and the first two women fined in a French court for wearing full veils intend to challenge the law in the European Court of Human Rights ("ECtHR").⁷

Suspicion of efforts to control what women can and cannot wear may be well-founded, especially in light of ongoing efforts to control women's bodies and punish deviance from societal norms.⁸ The

3. See, e.g., Editorial, *The Taliban Would Applaud*, N.Y. TIMES, Jan. 27, 2010, at A26 (describing the law as a violation of individual liberties and motivated by electoral politics); Tony Cross, *France's Burka Bill—Background to a Bitter Debate*, RFI ENG. (June 23, 2010), <http://www.english.rfi.fr/france/20100526-sarkozy-and-burka> (reporting that fifty-seven percent of the French population supports the bill and describing the view that the ban is motivated by Islamophobia and political opportunism); David Hirschman, *Is France's Burqa Ban Racist?*, BIG THINK (July 14, 2010, 2:56 PM), <http://bigthink.com/ideas/20914> (noting that Joan Wallach Scott, author of *The Politics of the Veil*, stated that the ban is a form of racism); Yasmine Ryan, *French Court Approves Veil Ban*, AL JAZEERA (Oct. 8, 2010, 1:42 PM), <http://english.aljazeera.net/news/europe/2010/10/2010108113056514496.html> (questioning whether the ban is racist and quoting a jurist who believes it "would signal a terrible paternalistic evolution"). Although the law often is referred to in the English-speaking media as the "burqa ban," few women wear the burqa in France. The law will primarily affect women who wear the niqab. See Erlanger, *supra* note 2, at A6.

4. CC decision No. 2010-613DC, Oct. 7, 2010 (Fr.).

5. See Stephen Erlanger, *French Legislation Takes Effect Banning Full-Face Coverings*, N.Y. TIMES, Apr. 12, 2011, at A4 (reporting that the ban went into effect on April 11, 2011); see also Angelique Chrisafis, *Niqab Women Fined by French Court*, GUARDIAN (U.K.), Sept. 22, 2011, at 29 (documenting that the first court-imposed fines were levied in September 2011); *France Imposes First Niqab Fines*, BBC NEWS (Sept. 22, 2011, 12:32 PM), <http://www.bbc.co.uk/news/world-europe-15013383> (noting the first fines).

6. See Maia de la Baume, *Enforcing Veil Ban, the French Have Stopped 46 Violators*, N.Y. TIMES, May 11, 2011, at A8 (explaining that a violation of the veil law is punishable by a fine or citizenship classes); Erlanger, *supra* note 2, at A6 (discussing the penalties).

7. See Chrisafis, *supra* note 5, at 29 (describing the intentions of the first two women who received court-ordered fines to appeal the decision to the European Court of Human Rights ("ECtHR") and discussing their lawyer's belief that the veil law contravenes European human rights legislation); see, e.g., *French Court Imposes First 'Burqa Ban' Fines*, MSNBC.COM (Sept. 22, 2011, 12:12 PM), <http://news.mobile.msn.com/en-us/articles.aspx?aid=44626717&afid=1> (quoting one of the women regarding her plans to appeal the decision).

8. See Karima Bennouna, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality Under International Law*, 45

regulation of veiling, however, may be justified in some circumstances given the implications of the practice for women who do not wish to veil.⁹ This Note contends that the niqab ban does not violate the Convention, as France has legitimate state interests in maintaining the public order and protecting the rights and freedoms of others that justify limitations on veiling. In Europe, fundamentalist groups increasingly seek to enforce norms contrary to secularism and gender equality.¹⁰ Given the specific circumstances in France, the interests of women who wish to veil are outweighed by the interests of women who lack a meaningful choice due to community pressure, family coercion, or threats of violence, as well as those of women

COLUM. J. TRANSNAT'L L. 367, 392 (2007) (citing POLITICS OF WOMEN'S BODIES: SEXUALITY, APPEARANCE, AND BEHAVIOR (Rose Weitz ed., 1998)) (acknowledging that regulating women's clothing may feel viscerally wrong because controlling women's bodies has been crucial in maintaining women's subordination). Professor Bennoune is a scholar of religious extremism and women's human rights, especially in Muslim contexts. *Karima Bennoune*, RUTGERS.EDU, Feb. 22, 2011 <http://news.rutgers.edu/medrel/newark-2011/karima-bennoune-name-20110107> (last visited May 16, 2012); see also Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1312 (1991) (analyzing the disadvantage that results from women being "systematically denied meaningful control over the reproductive uses of their bodies through sex").

9. Cf. Karima Bennoune, *The Law of the Republic Versus the "Law of the Brothers": A Story of France's Law Banning Religious Symbols in Public Schools*, in HUMAN RIGHTS ADVOCACY STORIES 155, 175 (Deena R. Hurwitz et al. eds., 2009) (describing the stigmatization of Muslim girls who choose not to veil); Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743, 761 (2006) (explaining that some girls may veil to avoid being labeled a "slut"). The term "veil" is used throughout this Note to include face-covering full veils, like the burqa and niqab, as well as garments that do not cover the face, such as the hijab. The hijab "covers the hair, neck and shoulders, and often the outer rim of the face." Bennoune, *supra*, at 159 n.12. Joan Wallach Scott has cautioned against conflating the terms. See generally Joan W. Scott, *Symptomatic Politics: The Banning of Islamic Head Scarves in French Public Schools*, 23 FRENCH POL. CULTURE & SOC'Y 106 (2005). However, following Professor Bennoune's approach, the general term "veiling" will be used when the garments raise similar issues. Distinctions between the full face veil and headscarf will be made when relevant.

10. See Bennoune, *supra* note 9, at 173–74 (quoting a commentator who believes the law of the Islamic Brotherhood has prevailed in recent years); see also Wing & Smith, *supra* note 9, at 769–70 (describing the view that fundamentalists who wish to implement a strict interpretation of the Qur'an are imposing a headscarf requirement to assert control over European Muslims at a time when they are under attack from far right groups); cf. Claire Berlinski, *Ban the Burqa*, NAT'L REV., Aug. 16, 2010, at 38, 39 (explaining that girls have begun to veil to escape violence in housing projects, where the number of rapes has risen fifteen to twenty percent every year since 1999).

who do not veil.¹¹ While France is arguably restricting protected rights to religion, conscience, and expression, it does so in order to foster freedom overall.¹²

Because opponents of the ban have primarily described it as one that violates a woman's right to dress as she desires, this Note characterizes women opposed to the ban who wear the niqab as making a fully autonomous choice to veil.¹³ In fact, whether a woman, who may have internalized oppressive societal or religious norms, can realistically enjoy such freedom is a complicated and much debated issue.¹⁴ In weighing the competing interests of women,

11. See *infra* Part III.A (discussing France's legitimate interest in protecting the rights of others given pressure and threats of violence experienced by women who do not adhere to modesty norms).

12. See *infra* Part III.D (arguing that balancing all of the interests at stake leads to the conclusion that the interests of those protected by secularism justify restrictions on the right to manifest one's religious beliefs).

13. See, e.g., Martha Nussbaum, *Veiled Threats?*, N.Y. TIMES, July 11, 2010, <http://opinionator.blogs.nytimes.com/2010/07/11/veiled-threats/> (characterizing the ban as one that inhibits liberty and analogizing it to a ban on high heels); Judith Sunderland, *How Not to Liberate Women*, GUARDIAN (U.K.), Apr. 24, 2010, <http://www.guardian.co.uk/commentisfree/belief/2010/apr/24/belgium-niqab-islam-women> (arguing that restrictions on veiling are as much a violation of the rights of women as is forcing them to wear a veil); *The Taliban Would Applaud*, *supra* note 3, at A26 (asserting people must be free to make such decisions without government imposition); Press Release, Amnesty Int'l, France Votes to Ban Full-Face Veils (July 13, 2010), available at <http://www.amnesty.org/en/news-and-updates/france-votes-ban-full-face-veils-2010-07-13> [hereinafter Amnesty Int'l Press Release] (quoting an advocate asserting that the rights to freedom of religion and expression entail that all people should be free to choose whether to veil). Even Osama bin Laden seemed to reject the bans on feminist grounds: "If you unjustly thought that it is your right to prevent *free Muslim women* from wearing the face veil, is it not our right to expel your invading men and cut their necks?" *Bin Laden in Warning to France*, AL JAZEERA (Oct. 27, 2010, 7:27 PM), <http://english.aljazeera.net/news/europe/2010/10/2010102710253569309.html> (emphasis added).

14. See, e.g., Bennoune, *supra* note 9, at 160 (listing internalized misogynist views about modesty among the many reasons women may wear the veil); Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in IS MULTICULTURALISM BAD FOR WOMEN? 7, 22 (Joshua Cohen et al. eds., 1999) (examining culturally reinforced and internalized inequality); see also AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 17–19 (2001) (exploring factors that complicate a woman's ability to reject a cultural or religious group or practice). See generally MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2000) (discussing divergent views of the role that preference should play in the formation of political principles, given that preferences may be formed in response to restricted options); Marie-Aimée Hélie-Lucas, *The Preferential Symbol for Islamic Identity: Women in Muslim Personal Laws*, in IDENTITY POLITICS AND WOMEN: CULTURAL REASSERTIONS AND FEMINISMS IN INTERNATIONAL PERSPECTIVE 391 (Valentine M. Moghadam ed., 1994) (arguing that when women become a symbol of Islamic identity, their autonomy is limited by efforts to silence or punish deviance).

however, this Note employs an oversimplified dichotomy between women who freely choose to veil and those who either do not veil or veil due to pressure or coercion. Because critics have charged that the ban treats Muslim women as undifferentiated victims or children whose decisions are suspect, it is useful to conceive of the woman whose freedom stands to be limited by the ban as engaged in a practice she finds to be empowering or fulfilling.¹⁵

Part I of this Note examines rights protected by the Convention, which may be infringed by the niqab ban, and the leading case from the ECtHR addressing state-imposed restrictions on religious dress.¹⁶ Part II details the veiling controversy in France. Finally, Part III analyzes the legality of the niqab ban and argues that it does not violate the Convention because of France's legitimate interest in maintaining public order and protecting the rights and freedoms of others. It further argues that international commentators have largely misunderstood the law's context and that this misunderstanding matters because of the detrimental effects it has on efforts of Muslim reformers and on the approaches of preeminent human rights organizations.

1. THE VEIL AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

On May 5, 2011, Najate Nait Ali and Hind Ahmas, set out, fully veiled, to bring a birthday cake to the mayor of Meaux, France, in protest of the new niqab ban, which he had supported.¹⁷ On September 22, 2011, the women received the first court-imposed fines

15. See, e.g., Catherine Warrick, Editorial, *Ban the Burqa, Ban the Bonnet?: Why Do We Decry Head-Covering as a Violation of Women's Rights Only When Muslim Women Do It?*, PITTSBURGH POST-GAZETTE, Nov. 7, 2010, at B1 (alleging that the law treats women as helpless victims and is "breath-takingly paternalistic and demeaning"); Antoine Blua, *French Senate Votes to Ban Full-Face Veils*, RADIO FREE EUR./RADIO LIBERTY (Sept. 14, 2010, 9:01 AM), http://www.rferl.org/content/French_Senate_To_Vote_On_Ban_Of_Face_Covering_Veils/2157025.html (quoting M'hammed Henniche of the Union of Muslim Associations in the Seine-Saint-Denis district north of Paris: "We mustn't treat a woman like a child."). For an example of women describing their practice of veiling as freely chosen, see Lorraine Ali, *Behind the Veil*, N.Y. TIMES, June 13, 2010, at ST1.

16. Şahin v. Turkey, 2005-XI Eur. Ct. H.R. 173.

17. See, e.g., Chrisafis, *supra* note 5, at 29 (recounting the story of these women); *France's Burqa Ban: Two Women Fined for Covering Faces*, ABC NEWS, Sept. 25, 2011, <http://abcnews.go.com/International/frances-burqa-ban-women-fined-covering-faces/story?id=14591682#.TrbT37JNKul> (describing the events resulting in the fines).

under the law.¹⁸ They plan to appeal the decision to France's Supreme Court, and, if necessary, to the ECtHR.¹⁹ Part I of this Note describes the legal background for such a challenge. Section A examines the rights of women who wish to fully veil that are protected by the Convention and potentially infringed by the law. Section B describes the jurisprudence of the ECtHR regarding the regulation of religious dress, focusing on the leading case of *Şahin v. Turkey*.

A. Implicated Rights Under the Convention

Because Muslim women report diverse reasons for wearing the veil, the niqab ban implicates a number of rights protected by the Convention. Opponents often characterize the ban as a violation of religious freedom, but it may be subject to challenges on other grounds as well.²⁰ If the ECtHR finds that the niqab ban infringes a right that is protected but subject to limitation by the Convention, the court must then determine whether the limitation serves a legitimate state interest and is proportional to the societal need for the restriction.²¹ The ECtHR has twice found that although the veiling regulations do interfere with the right to manifest one's religion, the regulations served the legitimate state interest of protecting the public order and rights of others by maintaining secularism and gender equality.²²

18. See, e.g., Chrisafis, *supra* note 5, at 29 (reporting on the fines); *France's Burqa Ban: Two Women Fined for Covering Faces*, *supra* note 17 (detailing the first fines).

19. See, e.g., Chrisafis, *supra* note 5, at 29 (reporting the women's plans to appeal the fines); *France's Burqa Ban: Two Women Fined for Covering Faces*, *supra* note 17 (describing the women's plans to challenge the law in the ECtHR).

20. See, e.g., *Şahin*, 2005-XI Eur. Ct. H.R. ¶¶ 3, 29, 70, 163 (documenting Leyla Şahin's allegations that a ban on headscarves at her university not only violated her religious freedom but also infringed upon her right to respect for private life, right to freedom of expression, right to freedom from discrimination, and right to education).

21. See Benroune, *supra* note 8, at 370–71 (explaining the test used in the jurisprudence of the ECtHR); see also, e.g., *Şahin*, 2005-XI Eur. Ct. H.R. ¶¶ 99, 121–22 (holding that the state had a legitimate interest in protecting the public order and the rights of others, and that the ban is proportional to this legitimate state interest); *Dogru v. France*, 49 Eur. H.R. Rep. 179, ¶¶ 60, 74–77 (2009) (reaching the same conclusion as the *Şahin* court).

22. See *Şahin*, 2005-XI Eur. Ct. H.R. ¶¶ 106–08, 122–23 (upholding a prohibition of headscarves in Turkish universities and highlighting the state's need to advance a democratic society that promotes pluralism, tolerance, and broadmindedness); *Dogru*, 49 Eur. H.R. Rep. ¶¶ 62–64, 76–77 (finding that the expulsion of a girl who regularly refused to remove her headscarf in gym class did not violate her rights under the Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention"), and noting the state's role as the "neutral and impartial organiser of the exercise of various religions" and the protector of the public order); cf. NICHOLAS D. KRISTOF & SHERYL WUDUNN, *HALF THE SKY: TURNING*

1. Reasons Women Veil and Their Corresponding Rights

One reason why a woman may veil is a belief that the modesty extolled in the Qur'an requires her to cover her hair or face in the presence of men.²³ Although many Muslim religious leaders and scholars agree that the niqab is not required by Islam, a significant number of Muslims worldwide ascribe the full face veil to Qur'anic dictates.²⁴ Because the state is ill-suited to evaluate the theological soundness of a religious practice, some suggest that the niqab should be treated as a religiously compelled practice for some Muslims in evaluating veiling restrictions.²⁵ A ban on covering one's face potentially infringes a woman's right to manifest her religion under the Convention.²⁶ Article 9 of the Convention provides:

OPPRESSION INTO OPPORTUNITY FOR WOMEN WORLDWIDE, at xix–xxi (2009) (discussing the fact that gender equality correlates to, and probably promotes, stability and prosperity).

23. See, e.g., TRICA DANIELLE KEATON, MUSLIM GIRLS AND THE OTHER FRANCE: RACE, IDENTITY POLITICS, & SOCIAL EXCLUSION 187 (2006) (“Personally, I want to wear the veil because I’m Muslim and the Koran requires women to dress this way.”); OPEN SOC’Y FOUNDS., UNVEILING THE TRUTH: WHY 32 WOMEN WEAR THE FULL-FACE VEIL IN FRANCE 44 (2011), available at http://www.soros.org/initiatives/home/articles_publications/publications/unveiling-the-truth-20110411/a-unveiling-the-truth-20100510.pdf (reporting that of the twenty-seven women asked whether they believed the full face veil was, from an Islamic perspective, compulsory, ten replied in the affirmative); *Opinion: Why I’m Proud to Wear the Burqa*, CNN (Feb. 4, 2010, 12:07 PM), <http://edition.cnn.com/2010/OPINION/02/04/france.burqa.ban/> (“I wear the burqa for the simple reason that I am a Muslim and the Koran says that I must wear the full veil in order to be modest. I am proud of my Muslim faith and my modesty. I am proud to follow God’s law.”).

24. See Berlinski, *supra* note 10, at 39 (stating that many Muslims view the veil as required despite the views of Islamic scholars to the contrary); see also Steven Erlanger, *For a French Imam, Islam’s True Enemy is Radicalism*, N.Y. TIMES, Feb. 13, 2010, at A6 (profiling an Imam who sees the face-veil as “a symbol of inequality with no justification in Islam or the Koran”).

25. See *Dogru*, 49 Eur. H.R. Rep. ¶ 62 (explaining that the state’s duty of neutrality and impartiality is incompatible with any authority to assess the legitimacy of religious beliefs); *Regina v. Governors of Denbigh High School*, [2005] EWCA (Civ.) 199, ¶¶ 48–49, [2005] 2 All E.R. 396 (Eng.), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2005/199.html> (finding that although the claimant held a minority view amount South Asian Muslims that the jilbab was required, her sincere belief in the requirement was what mattered because the state generally lacks discretion to determine the legitimacy of a religious belief or expression under the Convention); see also Berlinski, *supra* note 10, at 39 (characterizing assertions that the niqab is not a religious obligation as well-founded but irrelevant given that millions of Muslims worldwide believe it to be required); Wing & Smith, *supra* note 9, at 759 (explaining that many Muslims consider the headscarf to be required by the Qur’an).

26. See *Evans*, *supra* note 2, at 365–66 (questioning whether proposed European bans on religious wear will survive scrutiny at the ECtHR); see also *Chrisafis*, *supra* note 5, at 29 (describing potential plans to challenge the law at the ECtHR).

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.²⁷

Other women may not believe wearing the full veil is mandatory but consider it an element of a more pious way of life that deepens their commitment to their faith.²⁸ Whether a practice is optional might have some relevance to how burdensome a restriction is to believers, but the Convention does not distinguish between mandatory and optional religious manifestations.²⁹ The ECtHR has interpreted the right to manifest one's religion to include acts of devotion "motivated or inspired" by religious belief without requiring a showing that a practice is religiously compelled.³⁰

Women may also choose to veil in order to maintain ties with a particular culture.³¹ Some commentators assert that veiling is a cultural rather than a religious tradition, implying that it is less deserving of protection than a religious practice.³² The Convention

27. Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention].

28. See, e.g., Ali, *supra* note 15, at ST1 ("[A]lthough the Muslim faith does not require women to cover their faces, all believe the niqab gave them a bit of extra credit in the eyes of God. 'The more clothes you wear, the closer you are to God,' Ms. Muhammad said."); OPEN SOC'Y FOUNDS., *supra* note 23, at 83 ("In fact there are several paths to be nearer to God. . . . [S]piritually I yearned for something stronger in fact. But I didn't consider it as an obligation. For me it was something extra, it was good.").

29. European Convention, *supra* note 27, art. 9.

30. See *Dogru*, 49 Eur. H.R. Rep. ¶ 47 (quoting *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173, ¶ 78). Both cases accept the claimant's belief that the practice was mandatory without determining the theological soundness of that belief.

31. See Wing & Smith, *supra* note 9, at 764–65 (describing veiling as a sign of positive affirmation of an Islamic identity); see also Bennoune, *supra* note 9, at 160 (listing expressing pride in their heritage among the reasons women wear the veil in France).

32. See, e.g., Nicole Atwill, *France: Highlights of Parliamentary Report on the Wearing of the Full Veil (BURQA)*, LAW LIBR. CONGRESS, <http://www.loc.gov/law/help/france-veil.php#t11> (last updated Mar. 21, 2012) (quoting Mr. Mohammed Tantawi, the Grand Sheikh of Al-Azhar University in Egypt, who instructed a pupil at a secondary school in Cairo to remove her niqab and stated that "the niqab is a tradition, it has no connection with religion"); see also David Barrett, *British Schools Where Girls Must Wear the Islamic Veil*,

does not explicitly protect a right to manifest one's culture.³³ Unlike the International Covenant on Civil and Political Rights, the Convention does not contain provisions relating to self-determination or the rights of minority groups.³⁴ The Convention does, however, protect manifestations of "religion or beliefs" "either alone or in community with others," as well as freedom of expression, respect for private and family life, and other rights that have been read to protect cultural traditions.³⁵

Other women report that they wear the veil as a statement against imperialism or oppression by the majority.³⁶ Iranian and

TELEGRAPH (London) (Oct. 2, 2010, 9:00 PM), <http://www.telegraph.co.uk/education/educationnews/8038820/British-schools-where-girls-must-wear-the-Islamic-veil.html> (quoting Imam Dr. Taj Hargey as saying, "[t]he wearing of the burka or niqab is a tribal custom and these garments are not even mentioned in the Koran"); Khalid Hasan, *Ladies as Hooded Bandits*, KHALID HASAN ONLINE (Oct. 20, 2006, 1:42 PM), <http://www.khalidhasan.net/2006/10/20/ladies-as-hooded-bandits> (accusing Muslim women "who confuse tribal customs with divine commandments" of harming other Muslims).

33. See European Convention, *supra* note 27. *But cf.* COUNCIL OF EUROPE/EUROPEAN COURT OF HUMAN RIGHTS, CULTURAL RIGHTS IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS 4 (2011), available at http://www.echr.coe.int/NR/rdonlyres/F8123ACC-5A5A-4802-86BE-8CDA93FE58DF/0/RAPPORT_RECHERCHE_Droits_culturels_EN.pdf (explaining that although the Convention does not explicitly protect the right to culture, the ECtHR has gradually recognized substantive rights that can be classified as "cultural rights" under the auspices of other rights under the Convention).

34. Compare European Convention, *supra* note 27 (failing to include protections for self-determination and the rights of minority groups), with International Covenant on Civil and Political Rights arts. 1, 27, Dec. 16, 1966, 999 U.N.T.S. 171 (guaranteeing rights to self-determination and the right of minorities "to enjoy their own culture, to profess and practise their own religion, or to use their own language"). *E.g.* France is a signatory to the International Covenant on Civil and Political Rights, but this Note's analysis is limited to the jurisprudence of the ECtHR, where the ban is expected to be challenged. *Status of Treaties: International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Apr. 9, 2012); see also Chrisafis, *supra* note 5, at 29 (reporting that a woman who has been fined plans to challenge the permissibility of the ban under the Convention only).

35. European Convention, *supra* note 27, arts. 8–11; see COUNCIL OF EUROPE/EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 33, at 4 (listing the Convention's provisions that were found to protect rights to culture).

36. See Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Cultural Practices in the Family that Are Violent Towards Women*, Comm'n on Human Rights, ¶ 5, U.N. Doc. E/CN.4/2002/83 (Jan. 31, 2002) (by Radhika Coomaraswamy) (reporting that some women do not mind wearing the veil because they see it as subversive against imperialism, and stating that the cultural markers that groups use to stand together against oppression often entail limiting the rights of women); see also Bennoune, *supra* note 8, at 369 (describing the haik, a veil worn in Algeria, as a symbol of women's oppression that was, at one time, also a symbol of nationalist resistance to French colonialism).

Saudi-style veils have become increasingly common among women of North African origin in France, leading commentators to assert that the practice is not primarily cultural or religious, but political.³⁷ A woman who alters her style of religious dress to one associated with a culture different from her own may in some cases be exercising her Article 9 right to “change [her] religion or beliefs.”³⁸ In other cases, her decision to veil may be an expression of solidarity with the broader Muslim population, an assertion of her status as an outsider, a rejection of her parents’ liberalism or assimilation, or a way to assert her political beliefs.³⁹ As Professor Ayelet Shachar has noted, various female Muslim writers who defend the practice of veiling accept this interpretation of veiling as a political rather than religious expression, particularly in societies with a non-Muslim majority.⁴⁰ Although political ideologies have not received the same deference as religious claims, these reasons implicate the right to freedom of expression protected by Article 10 of the Convention.⁴¹

Commentators have been critical of the idea that a “right to veil” exists.⁴² Even stipulating there is no right as such, the Convention

37. See, e.g., Bennoune, *supra* note 9, at 157 (“Telling the often overlooked ‘other’ side of the story demonstrates that the policy debate about headscarves in school is not just a question of identity, but of political choices with political consequences.”); *id.* at 164 (quoting former Mufti of Marseille, Soheib Bencheikh as saying “[w]e are not talking about any veil. We are talking about an Iranian-style or Saudi-style garment; sometimes even worn with gloves. This is the avant-garde of a creeping ideology”); Bennoune, *supra* note 8, at 379 (quoting a female Turkish human rights attorney: “[T]he turban or headscarf is not just a dress but a sign of political conviction.”).

38. European Convention, *supra* note 27, art. 9(1).

39. See Bennoune, *supra* note 9, at 176 (describing veiling as a form of rebellion against one’s parents); see also Ali, *supra* note 15, at ST1 (telling the story of an American woman who began wearing the niqab in response to post-9/11 anti-Muslim sentiment); Wing & Smith, *supra* note 9, at 765 (highlighting the choice to veil as a way to discover and affirm one’s identity during adolescence).

40. See Ayelet Shachar, *Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies*, 50 MCGILL L.J. 49, 80 (2005) (discussing veiling as political expression).

41. See Karima Bennoune, *Remembering the Other’s Others: Theorizing the Approach of International Law to Muslim Fundamentalism*, 41 COLUM. HUM. RTS. L. REV. 635, 646–47 (2010) (citing RELIGION, HUMAN RIGHTS AND INTERNATIONAL LAW: A CRITICAL EXAMINATION OF ISLAMIC STATE PRACTICES (Javaid Rehman & Susan C. Breau eds., 2007)) (describing religious claims under Article 9 as receiving greater deference than Article 10 claims).

42. See Bennoune, *supra* note 9, at 167 (“As [Marieme Hélie Lucas] and others view it, the demand for ‘the right to veil’ is part of a broader fundamentalist agenda”); see also *id.* at 181 (criticizing human rights lawyers who have defended the “right to veil” in school, such as when a father sought to have his twelve-year-old daughter wear a full face veil). See

specifically protects multiple rights implicated by the diverse reasons women veil discussed above.⁴³ For the law to withstand scrutiny, the state must demonstrate that the limitation of these personal freedoms is justified by a state interest outlined in the Convention and that the measures enacted are proportional to the societal need.⁴⁴

2. The Prohibition Against Discrimination

While the specific reasons women choose to wear the niqab vary, ultimately all veil because they identify as Muslims.⁴⁵ A law aimed directly at prohibiting a practice exclusive to adherents of Islam is potentially a violation of the Convention's prohibition of discrimination based on religion or membership in a national minority.⁴⁶ The "niqab ban" does not literally ban the niqab; it is applicable to a person of any religion, group, or sex who covers his or her face in public.⁴⁷ The intent behind the law, however, is widely known and openly admitted: to ban the niqab.⁴⁸ Unlike the provisions discussed above, the prohibition against denying rights based on religion is absolute; it does not contain language concerning the state's interest.⁴⁹ It follows that if opponents are able to demonstrate that the law is a consequence of Islamophobia meant to target and

generally Mary Ann Case, *Feminist Fundamentalism as an Individual and Constitutional Commitment*, 19 AM. U. J. GENDER SOC. POL'Y & L. 549 (2011) (challenging proponents of "the right to veil").

43. See *supra* Part I.A.1 (regarding the reasons women veil and their corresponding rights).

44. See, e.g., *Dogru v. France*, 49 Eur. H.R. Rep. 179, ¶¶ 60, 74–77 (2009) (holding that the refusal to allow a girl to wear her headscarf in gym class met this test); *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173, ¶¶ 99, 121–22 (finding that a ban in Turkey met this test).

45. See *supra* Part I.A.1 (surveying the range of reasons that women give for veiling).

46. See European Convention, *supra* note 27, art. 14; see, e.g., *Şahin*, 2005-XI Eur. Ct. H.R. ¶ 165 (addressing the applicant's claim that a headscarf ban violated her rights under Article 14).

47. See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-613DC, Oct. 7, 2010, J.O. 18345, ¶ 2 (Fr.). The law provides exemptions for "medical or professional grounds," "sporting practices, festivities, or artistic or traditional events." *Id.*; see also Evans, *supra* note 2, at 365 (placing the ban among those using neutral terms).

48. See Cross, *supra* note 3 ("There is really no doubt that the targets of the bill are the burka and the niqab . . ."); see also Erlanger, *supra* note 2, at A6 (characterizing the law as aimed at the burqa and niqab).

49. See European Convention, *supra* note 27, art. 14; see also Evans, *supra* note 2, at 366 ("Whether [the ECtHR] would be so forgiving of bans transparently intended to stigmatize and penalize individuals who wish to adhere to their religious traditions remains to be seen.").

stigmatize Muslims under the false pretense of promoting women's rights, as has been alleged, it must be struck down.⁵⁰

B. Other Interested Parties: Interest Balancing in Şahin v. Turkey

Prominent human rights organizations, American leaders, and pundits in the English-speaking media have framed the legality of the ban as a question of the rights of the individual as against the state.⁵¹ Some proponents of prior regulations of religious dress, however, have argued that this approach ignores the reality of extralegal restrictions on the freedom of women in French neighborhoods where fundamentalist ideas have taken hold, and silences the perspectives of Muslim reformers working to protect the freedom and safety of women.⁵² The ruling of the ECtHR in *Şahin v. Turkey* demonstrates that the interests of a wider group of rights-bearers whom the state also is obligated to protect must be considered as well.⁵³

In 1998, during Leyla Şahin's fifth year of medical school, Istanbul University instituted penalties for students who violated a 1982 circular that banned beards or headscarves in class.⁵⁴ Şahin, however, considered it her religious duty to wear a headscarf and continued to do so.⁵⁵ As a result, University officials denied Şahin admission to her lectures and exams, and ultimately suspended her.⁵⁶ Şahin unsuccessfully challenged her suspension in the Istanbul Administrative Court.⁵⁷ She appealed to the Supreme Administrative

50. See European Convention, *supra* note 27, art. 14; see also Evans, *supra* note 2, at 366 (questioning whether the ban will survive review at the ECtHR).

51. See *supra* note 14 and accompanying text (listing examples of commentators framing the question as one of individual rights).

52. See Bennoune, *supra* note 41, at 696–97 (arguing that international lawyers have avoided discussion of Muslim fundamentalism disempowering antifundamentalists of Muslim heritage). See generally Bennoune, *supra* note 9 (surveying the view of Muslims who advocate for reform and arguing that too little attention has been paid to the problem of fundamentalism in France).

53. See *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173, ¶ 165 (finding that the protection of the rights and freedoms of others are a legitimate government aim).

54. See *id.* ¶ 16 (describing the 1998 circular, which barred students in headscarves from classrooms); *id.* ¶ 37 (detailing the 1982 circular instituting the original rule banning headscarves and beards).

55. See *id.* ¶ 14 (“She comes from a traditional family of practising Muslims and considers it her religious duty to wear the Islamic headscarf.”).

56. See *id.* ¶¶ 21–28 (recounting the disciplinary actions taken against Şahin).

57. See *id.* ¶ 19 (“In a judgment of March 19, 1999, the Istanbul Administrative Court dismissed the application . . .”).

Court, but a subsequent law released students from dress code related penalties, making her appeal moot.⁵⁸

Şahin sought relief from the ECtHR, alleging that the headscarf ban infringed her right to manifest her religion under Article 9 of the Convention.⁵⁹ After the fourth section chamber of the ECtHR held that Şahin's rights under the Convention had not been violated, she appealed to the Grand Chamber.⁶⁰ The ECtHR agreed with the fourth section that the rule against headscarves and beards interfered with Şahin's Article 9 right to manifest her religion.⁶¹ The *Şahin* court then addressed whether the limitation of her rights was justified by a legitimate state objective outlined in the Convention and, if so, whether the means employed were proportionate to that objective.⁶² Subsection 1 examines the *Şahin* court's analysis of Turkey's claim that it had legitimate state interests in protecting the public order and the rights of others justifying the headscarf rule. Subsection 2 describes the *Şahin* court's consideration of whether the rule was proportionate to the societal need it sought to address. Subsection 3 discusses Judge Françoise Tulkens' dissent from the majority opinion in *Şahin*.

1. Legitimate Aims of the State: Public Order and the Rights and Freedoms of Others

Under the Convention, protecting the public order and the rights of others are legitimate aims of the state that justify some restrictions on the right to manifest one's religion.⁶³ In determining whether the headscarf rule in Turkey served these aims, the *Şahin* court noted that, because reasonable opinions may differ as to questions of separation of church and state, domestic decisionmaking bodies deserve special

58. See *id.* ¶¶ 25–26 (explaining that Law No. 4584 enacted in June 2000 “provided for students to be given an amnesty in respect of penalties imposed for disciplinary offences”).

59. See *id.* ¶ 70. Şahin also alleged violations of her rights under Articles 8 (respect for private and family life), 10 (freedom of expression), and 14 (prohibition of discrimination), and Article 2 of Protocol No. 1 (education). See *id.* ¶¶ 125, 163.

60. See *Şahin v. Turkey*, App. No. 44774/98, ¶ 111 (Eur. Ct. H.R. Fourth Section June 29, 2004), *aff'd by Şahin*, 2005-XI Eur. Ct. H.R. 173); *Şahin*, 2005-XI Eur. Ct. H.R. ¶ 78.

61. See *Şahin*, 2005-XI Eur. Ct. H.R. ¶ 78.

62. See *id.* ¶¶ 110, 117.

63. See European Convention, *supra* note 27, art. 9 (“Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”); *Şahin*, 2005-XI Eur. Ct. H.R. ¶ 70 (quoting Article 9 of the Convention).

deference.⁶⁴ Furthermore, the court found that “the meaning or impact of the public expression of a religious belief will differ according to time and context.”⁶⁵

Accordingly, in making its decision, the ECtHR considered not only Turkey’s domestic jurisprudence but also the country’s history and legal context.⁶⁶ *Laik*, or secularism, is a fundamental principle enshrined in the second article of the Turkish Constitution.⁶⁷ It states: “The Republic of Turkey is a democratic, secular and social State governed by the rule of law”⁶⁸ The phenomenon of students wearing headscarves in school was fairly new at the time that the 1982 circular banned the practice.⁶⁹ The headscarf was a subject of much debate in the overwhelmingly Muslim country between those who saw it as a duty or expression linked to religious identity and those who considered it a symbol of political Islam that threatened principles of secularism.⁷⁰

Turkey first regulated religious dress in higher education in 1925 in a law requiring public employees to wear modern dress and forbidding face veils.⁷¹ In 1982, Turkey banned headscarves from educational institutions.⁷² This ban was upheld in 1984 by the Supreme Administrative Court on the grounds that the headscarf was “in the process of becoming a symbol of a vision that is contrary to the freedoms of women and the fundamental principles of the Republic.”⁷³ A 1988 law allowing headscarves back into educational institutions was struck down in 1989 by Turkey’s Constitutional Court, which found that it violated the constitutional guarantees of

64. See *Şahin*, 2005-XI Eur. Ct. H.R. ¶ 109.

65. *Id.*

66. See *id.* ¶¶ 30–40 (considering the law’s context).

67. TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] Nov. 7, 1982, art. 2. (Turk.). An English translation is available at <http://www.anayasa.gen.tr/1982Constitution-1995-1.pdf>; see *Şahin*, 2005-XI Eur. Ct. H.R. ¶ 30 (“The Turkish Republic was founded on the principle that the State should be secular.”).

68. TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] Nov. 7, 1982, art. 2. (Turk.).

69. See *Şahin*, 2005-XI Eur. Ct. H.R. ¶ 35 (explaining that the headscarf phenomenon began in the 1980s).

70. See *id.*

71. See Law No. 671 of Nov. 25, 1925, Resmi Gazete [R.G.] No. 230 (Nov. 28, 1925) (Turk.) (Hat Law of 1925) (restricting the use of religious headgear of citizens, without permission from the government). An English description of the Hat Law of 1925 is available at <http://www.kultur.gov.tr/EN/belge/2-15009/1925.html>.

72. See *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173, ¶ 37.

73. *Id.* ¶ 37 (quoting the December 13, 1984 judgment of the Supreme Administrative Court).

secularism, equality before the law, and freedom of religion, as well as the implicit principle of gender equality.⁷⁴ The Constitutional Court noted that a symbol presented or perceived as religiously compelled has an impact on those wishing not to wear it.⁷⁵

The *Şahin* court explained that the freedom of religion enshrined in the Convention includes the “freedom to hold or not to hold religious beliefs and to practise or not to practise a religion.”⁷⁶ Not every act inspired by religious belief is protected, and, in a pluralistic society, restrictions may be necessary in order to reconcile competing interests and to ensure that everyone’s beliefs are respected equally.⁷⁷ The ECtHR cited its earlier decision in *Dahlab v. Switzerland*, in which it upheld a prohibition of headscarves worn by public school teachers in class because the hijab, or headscarf, was “imposed on women by a religious precept that was hard to reconcile with the principle of gender equality,” and might have a proselytizing effect on children.⁷⁸ The ECtHR also cited *Karaduman v. Turkey*, in which it upheld measures taken to prevent fundamentalist groups in Turkey from exerting pressure on non-Muslim or nonpracticing university students to veil, indicating that institutions of higher education may also regulate religious expression in order to promote public order and the rights of others even though university students are ostensibly less vulnerable to proselytizing than children in grade schools.⁷⁹

74. Anayasa Mahkemesi [Constitutional Court], Mar. 7, 1989, Esas No. 1989/1 [Basis Number], Karar No. 1989/12 [Decision Number] (TC Resmi Gazete [Official Gazette of Republic of Turkey], 1989, No. 20216, Safya No. 25 [page]) (Turk.).

75. *Id.*

76. See *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173, ¶ 104.

77. See *id.* ¶ 106.

78. See *id.* ¶ 111 (citing *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 449). This assertion has been criticized by commentators who reject that the veil has any fixed meaning. See, e.g., Nusrat Choudhury, *From the Stasi Commission to the European Court of Human Rights: L’Affaire du Foulard and the Challenge of Protecting the Rights of Muslim Girls*, 16 COLUM. J. GENDER & L. 199, 282–83 (rejecting the assertion that the veil is difficult to reconcile with gender equality). One verse in the Qur’an instructs both sexes to dress modestly. See *Qur’an* 7:26. Others instruct men to see that their women are covered or instruct only women to “lower their gaze and guard their modesty.” See *id.* at 24:31, 33:59. Whether the precept is “laid down in the Qur’an” is disputed, but the practice is difficult to reconcile with gender equality for a number of reasons. See generally Bennoune, *supra* note 8 (characterizing the veil as problematic for women’s human rights).

79. See *Şahin*, 2005-XI Eur. Ct. H.R. ¶ 111 (citing *Karaduman v. Turkey*, App. No. 16278/90, 74 Eur. Comm’n H.R. Dec. & Rep. 93 (1993)); see also *id.* ¶ 10 (Tulkens, J., dissenting) (“She is a young adult woman and a university student, and might reasonably be expected to have a heightened capacity to resist pressure.”).

The ECtHR took special notice of the context of the regulations at issue in *Şahin*. When enacting the ban, the Turkish government was reacting to increasing fundamentalism that threatened the secular public order and the rights of women.⁸⁰ In its decision, the ECtHR acknowledged the presence of extremist political movements seeking to impose their religious precepts on Turkish society.⁸¹ A state party to the Convention has the right to take a stance against such political movements, based on its historical experience.⁸²

Thus, the ECtHR demonstrated that a state seeking to fulfill its obligations under the Convention has responsibilities to all of its citizens, not only those wishing to manifest their religion.⁸³ The Convention explicitly states that this right, like nearly all the rights it protects, is subject to limitation.⁸⁴ The reasonableness of such a limitation is not an abstract question but turns on the specific situation considered within the country's historical, legal, and political contexts.⁸⁵ In the case of Turkey, the court found that a nation founded on principles of secularism and equality was justified in addressing the fundamentalist threat of veiling to its citizens' freedom from religion.⁸⁶

2. Proportionality

A state-imposed restriction on an individual's religious expression must not only have a legitimate aim but must also be "proportional" and "necessary in a democratic society."⁸⁷ Because freedom of thought, conscience, and religion are foundations of a democratic society, the ECtHR found that protecting the right to hold or not hold religious beliefs was also necessary.⁸⁸ The *Şahin* court

80. *See id.* ¶ 115.

81. *See id.*

82. *See id.* Turkey's historical experience includes the founding of a secular state and, more recently, growing fundamentalism. *See id.* ¶¶ 30, 115.

83. *See id.* ¶ 159 (discussing the university's attempts to avoid turning away students in headscarves while protecting the rights of others); *see also* Benounne, *supra* note 8, at 397–98 (outlining the conflicting rights that states are obligated to protect).

84. *See* European Convention, *supra* note 27, art. 9.

85. *See Şahin*, 2005-XI Eur. Ct. H.R. ¶¶ 109–11 (noting that "the meaning or impact of the public expression of a religious belief will differ according to time and context" and affirming that contracting states are entitled to take steps against extremist political elements in light of their historical experience).

86. *See id.* ¶¶ 104–15.

87. *See id.* ¶¶ 104–06, 117.

88. *See id.* ¶ 104.

directly addressed whether “there was a reasonable relationship of proportionality between the means employed and the legitimate objectives pursued by the interference” with the rights at stake only briefly.⁸⁹ Granting a significant “margin of appreciation” to the state, the ECtHR deferred to the university’s judgments, citing a school’s greater ability to evaluate local needs than an international court.⁹⁰ The ECtHR noted that the headscarf was not the only religious attire banned by the university and that students remained otherwise free to perform their religious duties.⁹¹ The court emphasized that these regulations were developed and implemented over several years in which the issue was debated in the teaching professions and by society at large.⁹² Further, the university officials also engaged the students in dialogue ensuring that they understood the purpose of the regulations and would not be barred from attending their classes.⁹³ Despite the court’s review of these considerations, commentators have criticized the lack of attention to the proportionality analysis.⁹⁴ The question of proportionality, however, imbues the earlier discussion as to whether the regulation was justified in principle.⁹⁵ In establishing Turkey’s interests in protecting public order and women’s rights, the *Şahin* court engaged in a detailed analysis of the specific context of the regulations.⁹⁶

89. *See id.* ¶¶ 117–21; *see also* Bennoune, *supra* note 8, at 382 (“As to proportionality, as some of its critics have noted, the Court did not engage at this level in an explicit, thorough application of the principle.” (citation omitted)); Evans, *supra* note 2, at 353 (asserting the “paucity of reasoning regarding the proportionality issue is a point of weakness in the case” and referring to this issue as “one of the most sparsely reasoned sections of the judgment”).

90. *See Şahin*, 2005-XI Eur. Ct. H.R. ¶ 121.

91. *See id.* ¶ 118.

92. *See id.* ¶ 120.

93. *See id.*

94. *See, e.g.*, Bennoune, *supra* note 8, at 382 (acknowledging, as critics have noted, the lack of an explicit and thorough application of the principle of proportionality in the *Şahin* case); Evans, *supra* note 2, at 353 (criticizing the proportionality analysis).

95. *See* Bennoune, *supra* note 8, at 382 (stating that the court’s “painstaking explication of the Turkish context reflects upon” the question of proportionality); *supra* Part I.B.1 (discussing the ECtHR’s detailed analysis of the Turkish context justifying measures to address the societal need).

96. *See Şahin v. Turkey*, App. No. 44774/98, ¶ 111 (Eur. Ct. H.R. Fourth Section June 29, 2004), *aff’d by Şahin*, 2005-XI Eur. Ct. H.R. 173); *see also* Bennoune, *supra* note 8, at 382 (noting the ECtHR’s consideration of the legal and social context of the disputed Turkish restrictions).

3. Judge Tulkens' Dissent

Judge Françoise Tulkens dissented from the opinion in *Şahin* for reasons shared by a number of prominent human rights organizations.⁹⁷ She argued the majority had granted too wide a margin of appreciation to the state in service of abstract ideas of secularism and equality without identifying a “pressing social need.”⁹⁸ Judge Tulkens gave significant weight to the assertions of Leila Şahin that she had no intention of challenging the principle of secularism, proselytizing, or pressuring other students, and that she wore the headscarf of her own free will.⁹⁹ Judge Tulkens concluded her dissent by placing the controversy in the context of hostility against Muslims identified in that year’s activity report of the European Commission Against Racism and Intolerance.¹⁰⁰ Judge Tulkens and sympathetic nongovernmental organizations have been criticized, however, for their projection of anti-Muslim attitudes in non-Muslim majority countries onto a Muslim country.¹⁰¹ Some commentators have argued that conflating anti-Muslim sentiment with legitimate questioning and regulation of Islamic practices silences important intra-Muslim debate.¹⁰²

97. See *Şahin*, 2005-XI Eur. Ct. H.R. ¶¶ O-111 to O-1120 (Tulkens, J., dissenting) (arguing the Court’s decision amounted to paternalism and highlighting the prevalence of anti-Muslim sentiment); see also HUMAN RIGHTS WATCH, MEMORANDUM TO THE TURKISH GOVERNMENT ON HUMAN RIGHTS WATCH’S CONCERNS WITH REGARD TO ACADEMIC FREEDOM IN HIGHER EDUCATION, AND ACCESS TO HIGHER EDUCATION FOR WOMEN WHO WEAR THE HEADSCARF 4 (2004), available at http://www.hrw.org/legacy/backgrounder/eca/turkey/2004/headscarf_memo.pdf (“Headscarves do not pose a threat to public safety, health, order, or morals, and they do not impinge on the rights of others. They are not inherently dangerous or disruptive of order, and do not undermine the educational function.”).

98. See *Şahin*, 2005-XI Eur. Ct. H.R. ¶¶ O-114 to O-115 (Tulkens, J., dissenting).

99. See *id.* ¶¶ O-117 to O-1112 (Tulkens, J., dissenting).

100. See *id.* ¶ O-1120 (Tulkens, J., dissenting) (citing EUR. COMM’N AGAINST RACISM & INTOLERANCE, COUNCIL OF EUR., CRI (2005) 36, ANNUAL REPORT ON ECRI’S ACTIVITIES COVERING THE PERIOD FROM 1 JANUARY TO 31 DECEMBER 2004 (2005), which documented hostility towards Muslims in Europe).

101. See, e.g., Bennoune, *supra* note 8, at 424 (quoting Seyla Benhabib, *Reclaiming Universalism: Negotiating Republican Self-Determination and Cosmopolitan Norms*, in 25 THE TANNER LECTURES ON HUMAN VALUES 111, 157 n.26 (2005)) (“This projection of the legitimate non-Muslim context concern with Islamophobia onto internal debates in Muslim countries and communities also surfaces in the views of the Court’s NGO critics and should be avoided.”).

102. See, e.g., *id.* at 395 (citing CHETAN BHATT, LIBERATION AND PURITY: RACE, NEW RELIGIOUS MOVEMENTS AND THE ETHICS OF POSTMODERNITY, at xx (1997)) (“As Chetan Bhatt has noted in the context of the United Kingdom, ‘generally . . . black and multiracial feminism has been virtually alone in creating an activist political challenge to fundamentalism.’ To be anti-racist also means to support this challenge and to do so is not

II. THE CONFLICT IN THE FRENCH CONTEXT

Given the weight that the ECtHR placed on the domestic context in *Şahin*, Part II outlines the history of the debate over veiling in France. Section A explains that both the facts on the ground and France's legal obligations may be unfamiliar to international observers, especially those with an American conception of rights. Section B provides the background and debate surrounding the niqab ban and the earlier French law restricting religious symbols in school. Section C examines arguments for and against the niqab ban based on how the ban will affect those who do not wish to veil.

A. A Context Unfamiliar to Outside Observers

In a June 4, 2009 speech at Cairo University, US President Barack Obama extolled freedom of religion in America: “[F]reedom in America is indivisible from the freedom to practice one’s religion. . . . That’s why the United States Government has gone to court to protect the right of women and girls to wear the hijab and to punish those who would deny it.”¹⁰³ As critics pointed out, women’s rights were addressed only briefly in the president’s speech to “the Muslim world.”¹⁰⁴ Noticeably absent is any mention of Muslim

Islamophobic. In the era of the war against terrorism, many read solely the inter-cultural aspects of the debate, not the intra-cultural. This is a mistake.” (citations omitted)); Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399 (2003) (“[L]aw, rather than facilitating human rights and modernity, is buttressing the power of traditionalists against change . . . to protect and preserve cultural stasis and hierarchy against the challenges to cultural and religious authority emerging on the ground.”).

103. Presidential Remarks in Cairo, 1 PUB. PAPERS 760, 762 (June 4, 2009).

104. See Katha Pollitt, *Muslim Women’s Rights, Continued*, NATION, July 13, 2009, at 10 (describing the section on women’s rights in the speech as “rather minimal”); see also Karima Bennoune, *Obama in Cairo: The Religionizing of Politics*, EUR. SOLIDAIRE SANS FRONTIÈRES, June 4, 2009, <http://www.europe-solidaire.org/spip.php?article13989> (“[T]he President made no mention whatsoever of the pressure, coercion and even violence sometimes employed within some Muslim populations and families to get women and girls to wear—and believe they are required to wear—the hijab and other ‘modest’ gear.”). Critics have suggested there is no such thing as “the Muslim world” and that the term treats diverse groups as monolithic. See, e.g., Bennoune, *supra* (rejecting the conception of “the Muslim world”); Christopher Hitchens, *When the Extreme Becomes the Norm: What Connects Obama’s Pronouncements on Head Scarves and the Argument over Released Guantanamo Detainees?*, SLATE (June 8, 2009, 12:26 PM), <http://www.slate.com/id/2220000/> (“Any person with the smallest pretense to cultural literacy knows that there is no such place or thing as ‘the Muslim world,’ or, rather, that it consists of many places and many things. (It is precisely the aim of the jihadists to bring it all under one rulership preparatory to making Islam the world’s only religion.”).

women's struggles under theocratic governments or those fighting for the right *not* to veil around the world.¹⁰⁵ The United States' struggles with Islamic fundamentalism have for the most part consisted of attacks from outside rather than illiberal ideas taking hold in alienated immigrant groups; the US Muslim population is generally more affluent, educated, and religiously moderate than that of Europe.¹⁰⁶ In Europe, on the other hand, states' failures to integrate immigrant groups have led to poverty and unrest conducive to the spread of fundamentalism.¹⁰⁷

A student wearing a headscarf at an American university might have little or no proselytizing effect.¹⁰⁸ It does not create a division

105. See Pollitt, *supra* note 104, at 10 ("What about Saudi or Iranian women, who are forced by law to cover?"); see also Bennoune, *supra* note 104 ("This is remarkably one-sided as the President made no mention whatsoever of the pressure, coercion and even violence sometimes employed within some Muslim populations and families to get women and girls to wear—and believe they are required to wear—the hijab and other 'modest' gear."); Hitchens, *supra* note 104 ("But to the women who are *compelled* to dress according to the requirements of others, Obama had nothing to say at all, as if the only 'right' at stake were the right to obey an instruction that is, in fact—if it matters—not found in the Quran.").

106. See Bennoune, *supra* note 104 (suggesting that President Obama's speech demonstrated a willingness to ignore human rights violations stemming from growing Islamic fundamentalism in order to neutralize the threat of outside terrorism faced by the United States); see also PEW RESEARCH CTR., MUSLIM AMERICANS: NO SIGNS OF GROWTH IN ALIENATION OR SUPPORT FOR EXTREMISM 1, 6–7, 37, 54 (2011) (reporting the results of a 2011 nationwide survey of Muslim Americans and finding that most Muslims living in the United States were middle class and mainstream, largely assimilated, happy with their lives and moderate with respect to global issues, especially in comparison with minority Muslim publics surveyed in several European countries by the Pew Global Attitudes Project); Bruce Bawer, *Tolerating Intolerance: The Challenge of Fundamentalist Islam in Western Europe*, 69 PARTISAN REV. 338, 338 (2002) ("Muslims in America tend to be more affluent, more assimilated, and more religiously moderate than their co-religionists in Europe.").

107. See Bennoune, *supra* note 9, at 170 ("[Marie-Aimée] Hélié-Lucas and others blame the failures of the French state for the success of fundamentalist movements in France. 'Like in Algeria, when the French state refuses to provide services, the fundamentalists rush in, and they also provide their ideology. When the state is not doing its job, it leaves space to these fascist organizations.'"); *Contemporary Issues Panel Discussion on Laïcité in France*, 49 J. CATH. LEGAL STUD. 53, 74 (2010) (locating poverty, unemployment, and unequal educational opportunities at the root of the disaffection of young Muslims and growing Islamic fundamentalism); see also Ayelet Shachar, *supra* note 40, at 85 ("The problem of Muslim social exclusion in France has manifested in various ways, including a disturbing correlation of Muslim ethnic or religious affiliation with low socio-economic status, high unemployment, and lack of political representation at the national level.").

108. See Bennoune, *supra* note 8, at 389–90 (describing the situation of students at Rutgers University School of Law, where there are few Muslim students, a tiny number who wear the headscarf, and little interest in the law school from outside Muslim fundamentalist groups); see also Berlinski, *supra* note 10, at 39–40 (highlighting contextual differences regarding veiling).

between good Muslims and bad, leading to strife and threats to the “bad” women.¹⁰⁹ The assertion of her religion, culture, or politics might be empowering in a setting where there is little risk that she or women around her are being coerced.¹¹⁰

Looking at the issue of veiling in the abstract through an American lens, it may not be understood that those who President Obama suggested should be punished for denying the “right of women and girls to wear the hijab” may themselves be Muslim women reacting to specific circumstances in their countries.¹¹¹ Among those seeking to regulate veiling in any particular controversy, there may be individuals who have fled repressive regimes that mandate veiling, or lived in communities where an unveiled woman is subject to harassment or violent attack.¹¹² There may, however, be individuals who are racist, xenophobic, or misinformed as well.¹¹³ The motives and actions of those supporting a

109. See Bennoune, *supra* note 8, at 390–91 (explaining that headscarving at Rutgers might have no impact on the rights of other students, but that the context could shift should more students begin to cover or experience pressure from campaigners for “modest dress”); see also Wing & Smith, *supra* note 9, at 770–71 (listing the division created among Muslim women as a reason some Muslim women support banning the headscarf in French schools).

110. See Bennoune, *supra* note 8, at 424 (agreeing that in some contexts some women who cover feel independent and empowered); see also Peter G. Danchin, *Islam in the Secular Nomos of the European Court of Human Rights*, 32 MICH. J. INT’L L. 663, 725 (2011) (including expressions of autonomy and self-realization among the reasons why women and girls veil). This is not to say that Muslim women in the US do not experience pressure to cover, only that it is not currently comparable to that which is common in other countries. See, e.g., Lauren Gilbert, *Citizenship, Civic Virtue, and Immigrant Integration: The Enduring Power of Community Based Norms*, 27 YALE L. & POL’Y REV. 335, 383–84 (2009) (describing the “oppression of women by women” in a Somali community in Maine, specifically a woman in Bantu attire being chased down the street by Somali women in hijab).

111. See HUMAN RIGHTS WATCH, *supra* note 97, at 37–38 (considering the position of Şenal Sarihan, a lawyer and president of Turkey’s Republican Women’s Association who described the headscarf as a “near and present danger” and argued that an end to the ban would pose a serious threat to Turkish women’s hard-won freedoms). See generally Bennoune, *supra* note 9 (surveying the experiences and opinions of commentators of Muslim heritage in France).

112. See Bennoune, *supra* note 9, at 166–67 (“[E]specially those who come from countries that have seen the rise of fundamentalism (Algeria, Iran, etc.) recognize the danger. Such immigrants and refugees warn that . . . if the fundamentalists are victorious in schools, this problem will only spread.”); see also Wing & Smith, *supra* note 9, at 767, 767 n.154 (quoting a supporter of the French school ban who had fled Algeria and who noted that in some French villages, “girls and young women are intimidated by Muslim men who oblige them to wear the scarf”).

113. See Bennoune, *supra* note 9, at 178 (acknowledging racist and xenophobic discourses on headscarves, fundamentalism, terrorism, and women’s rights that have proliferated since 9/11); see also Guy Haarscher, *Secularism, the Veil and “Reasonable*

regulation of religious attire should be evaluated against the regulation's specific factual and historical backdrop in order to weigh the competing interests at stake.¹¹⁴

A further difference is that the United States embraces religious pluralism rather than secularism, perhaps because it lacks the history of religious wars endured by Europe.¹¹⁵ Elsewhere in the world, however, limitations on religious expression to maintain secularism are seen as protecting religious freedom.¹¹⁶ Furthermore, freedom of expression is a significantly more expansive right in the United States than in most other countries.¹¹⁷ In Europe, the right is balanced against the interests of those affected, allowing for laws banning hate speech and offensive symbols, strict defamation laws, and robust privacy protections for the subjects of speech.¹¹⁸

Interlocutors": *Why France Is Not That Wrong*, 28 PENN ST. INT'L L. REV. 367, 368 (2010) (recognizing the range of motivations behind the headscarf ban and that there are both "democrats and racists against the veil"); *The Taliban Would Applaud*, *supra* note 3, at A26 (referencing the ease of fanning anti-Muslim prejudice and, in France's case, using the headscarf ban to deflect public anger over high unemployment).

114. See *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173, ¶¶ 98–99 (finding a legitimate interest in protecting the rights of others based on the specific circumstances); see also Bennoune *supra* note 8, at 396 (proposing a contextual approach to restrictions on religious attire that takes into account the range of interests at stake in a particular situation).

115. See Ryan Brown, *In Defense of the Burqa Ban*, SALON (July 12, 2010, 9:01 AM), http://www.salon.com/2010/07/12/yes_to_the_burqa_ban/ (quoting Mona Eltahawy's explanation of the difference between the American and European approaches to religious freedom); Danchin, *supra* note 110, at 735 (stating that the modern-day European state emerged following massive religious conflict); see also KEATON, *supra* note 23, at 177 (describing secularism in France as descending from its history of religious wars); Wing & Smith, *supra* note 9, at 755 ("The theory is that to be French is to be part of a proverbial melting pot, rather than an American style salad bowl of religious and other identities.").

116. See *Şahin*, 2005-XI Eur. Ct. H.R. ¶ 39 ("[S]ecularism was an essential condition for democracy and acted as a guarantor of freedom of religion and of equality before the law."); see also Bennoune, *supra* note 8, at 423 ("[T]he human rights impact of secularism in protecting individuals from religious coercion is much more important than its function as an abstract state value.").

117. See Jeremy Waldron, *Dignity And Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1598 (2010) (describing the constitutional acceptability of hate speech laws in the United States as more or less an impossibility in stark contrast to "laws we find in Europe and in the other advanced democracies of the world"); see also Elisabeth Zoller, *Foreword: Freedom of Expression: "Precious Right" in Europe, "Sacred Right" in the United States?*, 84 IND. L.J. 803, 807–08 (2009) ("In the United States, this freedom passes for an absolute In Europe, however . . . [t]he decisive point is that the exercise of this freedom involves 'duties and responsibilities,' as stated in the text of the European Convention (Article 10, section 2), and so it is a relative freedom.").

118. See, e.g., *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R. 41, ¶¶ 76–77 (balancing the freedom of the press against the rights to dignity and privacy of the applicant); see also Robert A. Kahn, *Fleming Rose, the Danish Cartoon Controversy, and the New*

Furthermore, the United States generally does not recognize an affirmative duty to protect its citizens from rights violations by private actors.¹¹⁹ The US Constitution has primarily been interpreted to protect only individual rights as against the state.¹²⁰ This is not the standard under international law, which recognizes affirmative state duties to protect against violations by nonstate actors.¹²¹ The obligations of state parties to international human rights treaties have been interpreted as the obligations to *respect, protect, and fulfill* human rights.¹²² The obligation to *respect* is an immediate obligation that governments refrain from taking actions that violate human

European Freedom of Speech, 40 CAL. W. INT'L L.J. 253, 255 n.8 (2010) (noting the German ban on the swastika and the Nazi salute and explaining that the concerns that led to the ban "also found expression in international treaties that either allowed or required member states to enact bans on hate speech"); Sebnem Arsu, *Turkey Lashes Out over French Bill About Genocide*, N.Y. TIMES, Dec. 23, 2011, at A9 (reporting that the lower house of the French Parliament approved legislation criminalizing denial that the Turkish Army committed genocide against Armenians in the early twentieth century).

119. See *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.* 489 U.S. 189, 195 (1989) (holding that a state's failure to protect an individual against violence by a *private* actor is not a violation of due process); see also *Lenahan (Gonzales) et al. v. United States, Merits*, Inter-Am. Ct. H.R. No. 80/11, ¶ 55 (July 21, 2011) available at <http://www.oas.org/en/iachr/decisions/2011/USPU12626EN.doc> (describing the US government's position that no provision of the American Declaration "imposes on the United States an affirmative duty, such as the exercise of due diligence, to prevent the commission of individual crimes by private parties").

120. See *DeShaney*, 489 U.S. at 195 ("[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."); see also G. Kristian Miccio, *The Death of the Fourteenth Amendment: Castle Rock and Its Progeny*, 17 WM. & MARY J. WOMEN & L. 277, 288 (2011) ("What drove the majority in *DeShaney* was Justice Rehnquist's belief that the Constitution is primarily a negative rights document that rules out positive rights claims Consequently, there is no affirmative duty to protect unless the danger or harm is created by the State").

121. See *Velásquez-Rodríguez v. Honduras, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶¶ 172, 182 (July 29, 1988) (finding a state obligation of due diligence to prevent rights violations by private actors); see also *Lenahan*, Inter-Am. Ct. H.R. No. 80/11, ¶¶ 160–63 (holding the United States in violation of the American Declaration due to its systemic failure to protect against domestic violence).

122. See, e.g., Comm. on Econ., Soc., and Cultural Rights, 22d Sess., Apr. 25–May 12, 2000, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (article 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) (setting out the state obligations to respect, protect, and fulfill "[t]he right to health, like all human rights"); *International Human Rights Law*, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx> (last visited Jan. 25, 2012) ("By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights.").

rights.¹²³ The obligation to *protect* requires that governments protect individuals from rights abuses at the hands of nonstate actors.¹²⁴ The obligation to *fulfill* is a positive obligation to “adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures” towards the full enjoyment of human rights.¹²⁵

Not only has the United States rejected interpretations of treaties as imposing affirmative duties, it is not a signatory to some major human rights treaties that explicitly impose such obligations.¹²⁶ France, on the other hand, is a state party to the Convention on the Elimination of All Forms of Discrimination Against Women, which requires that states “take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.”¹²⁷ Even more expansively, state parties must take measures:

To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women¹²⁸

Thus, France cannot focus on the rights of women who choose to veil to the exclusion of those affected if veiling is a practice harmful to gender equality.¹²⁹

B. The Headscarf and Niqab in France

The French debate over state intervention in veiling predates the new niqab ban by at least twenty years.¹³⁰ Although the 2004 French

123. See Comm. on Econ., Soc. and Cultural Rights, *supra* note 122, ¶ 33.

124. See *id.*

125. See *id.*

126. See, e.g., Convention on the Elimination of All Forms of Discrimination Against Women art. 2, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] (requiring the adoption of measures to end discrimination and ensure equality for women); International Covenant on Economic, Social and Cultural Rights art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3 (requiring signatories to ensure full realization of human rights).

127. CEDAW, *supra* note 126, art. 2(e).

128. *Id.* art. 5(a).

129. See *id.*; see also Bennoune, *supra* note 9, at 188–89 (referencing France’s obligations to bring about substantive equality under international human rights law and citing the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”)); cf. Amnesty Int’l Press Release, *supra* note 13 (opposing the ban but acknowledging that “[s]tates do have an obligation to protect women against pressure or coercion in their homes or communities to wear full face veils”).

law banning the “ostentatious” display of religious symbols in schools was taken as a reflection of growing anti-Muslim sentiment by many international commentators, it was in fact a way to address a longstanding problem for students and teachers after less restrictive attempts had failed.¹³¹ As some commentators have argued, it is important to recognize that the issues of the headscarf in schools and the niqab on the street must be understood as part of a complicated debate among people of Muslim heritage.¹³² Dismissing all veiling regulations as Islamophobic, they argue, marginalizes the voices of Muslims fighting for the rights of women threatened by fundamentalists.¹³³ To understand the context and history of France’s niqab ban, Subsection 1 discusses the 2004 ban on religious symbols in French public schools, addressing the presence of headscarves in school within the context of the intra-Muslim debate and the specific circumstances in France. Subsection 2 analyzes the niqab ban, a highly contested law that further limits public religious expression in the name of upholding French values.

1. The French Ban on Religious Symbols

The French veiling controversy, known as *L’Affaire du Foulard*, began in 1989 when three high school girls wore hijabs to school.¹³⁴ When they refused to remove them, their principal expelled the girls

130. See Bennoune, *supra* note 9, at 174–75 (citing a commentator who traces the debate back to the rise of fundamentalism in Algeria in the 1980s); see also Haarscher, *supra* note 113, at 369–70 (dating the start of the hijab controversy in France to 1989).

131. See Bennoune, *supra* note 9, at 160 (outlining the problems with the case-by-case approach); see also Haarscher, *supra* note 113, at 380–81 (arguing that the law was a good-faith and wise attempt to deal with a difficult problem about which reasonable minds differ).

132. See Bennoune, *supra* note 8, at 394–95 (calling the overemphasis on intercultural debate at the expense of intracultural concerns a mistake); see also Wing & Smith, *supra* note 9, at 748–49 (surveying the wide range of views among Muslim women regarding the headscarf debate).

133. See Bennoune, *supra* note 41, at 671–72 (cautioning against spurious allegations of prejudice, which are made to disable valid critique of supposed religious movements that violate international law or human rights); see also *id.* at 687 (reporting the frustration of antifundamentalists of Muslim heritage with Western academics who ignore the significance of Muslim fundamentalism in debates such as those regarding headscarf regulations); COMM’N ON BRITISH MUSLIMS & ISLAMOPHOBIA, ISLAMOPHOBIA: ISSUES, CHALLENGES, AND ACTION 9 (Robin Richardson ed., 2004), available at <http://www.insted.co.uk/islambook.pdf> (quoting a Muslim scholar regarding the “silencing of self-criticism and the slide into defending the indefensible” that results from Islamophobic actions).

134. See Bennoune, *supra* note 9, at 159; see also Haarscher, *supra* note 113, at 370–71 (recounting the 1989 incident). In France, the hijab is referred to as the *foulard islamique*. See Bennoune, *supra* note 9, at 159.

on the grounds that headscarves contravened *laïcité*.¹³⁵ *Laïcité*, a “particularly French” principle of secularism, descends from France’s fight to free itself from the control of the Catholic Church.¹³⁶

The girls sought to wear a symbol that had come to be associated with state-imposed religion.¹³⁷ Ten years prior, Ayatollah Ruhollah Khomeini had come to power, forcing the *chador* on the “modern and emancipated” women of Iran’s cities.¹³⁸ As the controversy grew, France’s Minister of Education requested an advisory opinion from the Council of State.¹³⁹ The council held that wearing religious symbols in school was not necessarily incompatible with *laïcité*.¹⁴⁰ Administrators would be justified, however, in regulating or even banning the veil if certain other elements were present: where the symbol constituted an act of pressure, provocation, proselytizing, a

135. See Bennoune, *supra* note 9, at 160 (describing how the principal found the girls’ headscarves to contravene *laïcité*); see also Haarscher, *supra* note 113, at 370–71 (reporting on the girls’ expulsions and discussing the intracountry debate about whether wearing the veil in public school was compatible with *laïcité*).

136. See Bennoune, *supra* note 9, at 159 (defining *laïcité* as a “particularly French” concept of secularism); see also *Contemporary Issues Panel Discussion on Laïcité in France*, *supra* note 107, at 53 (“The French Republic rests on a secular ideal . . . called *laïcité* It is the result of a long historical process, which put an end to the domination of the Catholic Church.”)

137. See Bennoune, *supra* note 9, at 165. (relaying the view that the veil is a symbol of militancy); see also Haarscher, *supra* note 113, at 370 (“Imposing the veil was the most blatant symptom of the ascent of official religion in the Muslim world.”).

138. See Haarscher, *supra* note 113, at 370 (recounting the forced veiling implemented by Ayatollah Khomeini); see also Susan W. Tiefenbrun, *The Semiotics of Women’s Human Rights in Iran*, 23 *CONN. J. INT’L L.* 1, 14 (2007) (describing Khomeini’s March 8, 1979 order that Iranian women wear the *chador* and the resulting demonstrations that day by hundreds of Iranian feminists in Tehran and Qom). The demonstration in protest of Khomeini’s order continued for five days and grew to tens of thousands in Tehran, where armed attackers from the newly formed Hezbollah, or Party of God, chanted: “You will cover yourselves or be beaten,” and threw stones, knives, and bullets at female activists. See Tiefenbrun, *supra*. The Komiteh, a political police force controlled by Khomeini and other mullahs, also harassed and detained women. See *id.*; Benhabib, *supra* note 101, at 142 n.9 (“The *chador* is essentially Iranian and refers to the long black robe and headscarf worn in a rectangular manner around the face.”).

139. See Haarscher, *supra* note 113, at 371 (reporting the request for the Council d’Etat opinion). The Council d’Etat (Council of State) is France’s highest administrative court, which also performs legislative and administrative functions such as providing advisory opinions. Bennoune, *supra* note 9, at 159 n.16 (explaining the function of the council from which the opinion was requested).

140. See Bennoune, *supra* note 9, at 159 (reporting the council’s holding that religious symbols do not necessarily contravene *laïcité*); see also Haarscher, *supra* note 113, at 371–72 (recounting the council’s holding).

threat to another student's rights, or some other disturbance of public order.¹⁴¹

Schools attempted a case-by-case approach to veiling that proved unworkable.¹⁴² The controversy grew: it began with three girls in 1989, but by 1994, 3000 sought to wear headscarves to school.¹⁴³ The dispute led to expulsions, strikes by both supporters and opponents of the veil, lengthy administrative proceedings, and a role for fundamentalist organizations in campaigns for the "right to veil."¹⁴⁴ French President Jacques Chirac established the Stasi Commission to address what some saw as a growing threat to *laïcité*.¹⁴⁵ The Stasi Commission, which met over several months, included a number of prominent Muslims and "pro-veil" academics.¹⁴⁶ Those commission members who began the process opposed to a ban, however, reported that they changed their positions once they discovered that the headscarf was typically accompanied by the conditions, such as pressure and proselytism, which the Council of State had indicated would contravene *laïcité*.¹⁴⁷ The Commission

141. See Bennoune, *supra* note 9, at 159 (recounting the council's decision); see also Haarscher, *supra* note 113, at 371–72 (listing the elements that the council found would not be compatible with *laïcité*).

142. See Haarscher, *supra* note 114, at 373 (explaining teachers and administrators found the case-by-case approach unmanageable and that, with the increasingly radical pro-veil movement, it became less possible to separate the elements contravening *laïcité* from veiling); cf. Bennoune, *supra* note 9, at 160 (reporting that some proponents of the headscarf ban found it preferable to the "piecemeal approach" because it "resulted in more girls being excluded from school for wearing headscarves . . . than were excluded after [the ban] came into effect").

143. See Bennoune, *supra* note 9, at 159–60. (stating that only three girls sought to wear the veil in 1989, but the number grew to 3000 by 1994); see also Haarscher, *supra* note 113, at 370–74 (describing how a few girls' wish to veil had started the controversy, increasingly causing problems for teachers and administrators as the controversy progressed).

144. See Bennoune, *supra* note 9, at 160 ("When girls faced problems in schools for wearing headscarves, they were vigorously supported by Muslim fundamentalist organizations which campaigned for the 'right to veil.'"); see also Haarscher, *supra* note 113, at 373 (stating that "the movement in favor of the veil had become increasingly radical").

145. See Bennoune, *supra* note 9, at 160 (explaining that President Chirac established the Stasi Commission in order to address what some saw as a growing threat to *laïcité* and generally describing the Stasi Commission); Haarscher, *supra* note 113, at 374 (stating that the commission, comprised of experts, was requested by President Chirac after school authorities asked the French Parliament to resolve the controversy).

146. See Bennoune, *supra* note 9, at 160 (reporting that the commission included prominent Muslims); Haarscher, *supra* note 113, at 374 (explaining the makeup of the commission, which included "pro-veil" academics and headed by Bernard Stasi, a highly respected French Centrist politician).

147. See Haarscher, *supra* note 113, at 374 (explaining that commission members who had been opposed to a ban reported changing their positions upon discovering that the

unanimously recommended a law banning religious symbols in schools.¹⁴⁸

In 2004, Parliament enacted Law No. 2004-228, banning large religious symbols from public schools.¹⁴⁹ Although criticized heavily abroad, the law's proponents largely consider it a success.¹⁵⁰ During the law's first year in effect, schools recorded 639 religious symbols, which was less than fifty percent of the previous year's total.¹⁵¹ Ninety-six students opted to study elsewhere and forty-seven were suspended, a decrease from the years under the ad hoc system.¹⁵² Suspensions also decreased relative to expulsions in preceding years, and those that occurred generally did so only after negotiation with parents and students.¹⁵³ The debate surrounding the law remains divisive, but commentators have argued persuasively that it has been misunderstood abroad because the voices of Muslims supporting it have been underrepresented.¹⁵⁴

headscarf was typically accompanied by the conditions that the Council of State had indicated would contravene *laïcité*).

148. *See id.* One member abstained from voting. *See id.*

149. Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law 2004-228 of Mar. 15, 2004 Concerning, as an Application of the Principle of the Separation of Church and State, the Wearing of Symbols or Garb Which Show Religious Affiliation in Public Primary and Secondary Schools], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2004, p. 5190 (“Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves.”).

150. *See* Bennoune, *supra* note 9, at 161 (asserting that Law No. 2004-228's proponents consider it a success and surveying their views); *see also* Steven G. Gey, *Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools*, 42 HOUS. L. REV. 1, 13 (2005) (“In contrast to the largely hostile response to this law outside France, within the country a wide range of French citizens, spanning the country's broad political spectrum, support the new law.”); Tiefenbrun, *supra* note 138, at 31 (“Despite the arguments raised against the ban and the fears of its impact on French society, the implementation of the French ban on wearing a headscarf in public schools has been rather smooth.”).

151. *See* HANIFA CHERIFI, APPLICATIONS DE LA LOI DU 15 MARS 2004 SUR LE PORT DES SIGNES RELIGIEUX OSTENSIBLES DANS LES ÉTABLISSEMENTS D'ENSEIGNEMENT PUBLICS: RAPPORT À MONSIEUR LE MINISTRE DE L'ÉDUCATION NATIONALE DE L'ENSEIGNEMENT SUPÉRIEUR DE LA RECHERCHE 34-35 (2005), available at <http://www.acb54.com/IMG/pdf/hanifa-cherifi.pdf>.

152. *See id.* at 35 (stating that ninety-six students opted to study elsewhere, while forty-seven were suspended, a smaller figure than under the ad hoc system).

153. *See* Bennoune, *supra* note 9, at 161 (reporting that negotiations occurred before suspensions and decreased relative to the number of expulsions in prior years).

154. *See* Haarscher, *supra* note 113, at 368-69 (recognizing that there are both advocates and opponents of veiling who “seriously and sincerely defend liberal-democratic values”). *See*

In 2007, Professor Karima Bennoune interviewed a number of Muslim supporters of the law.¹⁵⁵ Professor Bennoune found that for many of the experts she interviewed, “the growth and power of religious extremist movements, both internationally and in France, and their stance vis-à-vis women’s rights imbue the struggle over headscarves in schools with a particular political meaning.”¹⁵⁶ Developments in Muslim majority countries significantly affect the situation in France, where the ideology of the Muslim Brotherhood is thought to be an increasingly “powerful force.”¹⁵⁷ Fundamentalists who reject women’s equality and advocate violence against those who oppose their agenda have used questions of identity to enlist young Muslims suffering from the failures of integration in France.¹⁵⁸

Commentators have argued that allegations that the law stems from racism and fear or hatred of Muslims obscure the complicated experiences and histories of Muslims in France.¹⁵⁹ Many Muslim activists trace the hijab controversy to the rise of fundamentalism in Algeria.¹⁶⁰ Among the supporters of regulations on veiling are

generally Bennoune, *supra* note 9 (arguing that the law has been mischaracterized because the diversity of opinion among individuals of Muslim heritage has not been acknowledged).

155. See Bennoune, *supra* note 9, at 157. Professor Bennoune is an Algerian-American Professor of Law at Rutgers School of Law. Bennoune, *supra* note 8, at 367 n.1.

156. Bennoune, *supra* note 9, at 163; see Wing & Smith, *supra* note 9, at 769–70 (chronicling the views of Muslim women who oppose the veil on the grounds that it fosters extremism).

157. See Bennoune, *supra* note 9, at 162–63 (explaining that to Bennoune’s interviewees, “the single most important factor was the emergence of Islamic fundamentalism both internationally and in France. In the era of globalization, these stories conceptualize the debate as one that is inherently transnational. What happens in Algeria, Iran, Lebanon, or other countries on these issues has tremendous significance in France (citations omitted)); Wing & Smith, *supra* note 9, at 769–70 (explaining that while economic and social conditions in Europe have led many young Muslims to turn to Islam, some followers take it to the point of extremism). The Muslim Brotherhood is a group founded in Egypt in 1928 that “views its own radical interpretation of Islam as a comprehensive way of life and political system.” See Bennoune, *supra* note 9, at 163 n.26.

158. See Bennoune, *supra* note 9, at 163 (“Hanifa Chérifi has argued that these groups have chosen to focus on questions of identity that have a powerful resonance with a young generation suffering from the failures of integration.”); see also Wing & Smith, *supra* note 9, at 769–70 (citing a Muslim commentator who sees those who wish to impose the requirement of a headscarf as seeking to assert control over European Muslims).

159. See *generally* Bennoune, *supra* note 9 (collecting the views of commentators of Muslim heritage who believe that too little attention has been paid to the voices of Muslims opposed to the veil and what they believe it represents); Haarscher, *supra* note 113 (rejecting the idea that the headscarf ban is primarily motivated by anti-Muslim sentiment).

160. See Bennoune, *supra* note 9, at 162–70 (reporting the views of individuals of Muslim heritage who link the controversy to the rise of fundamentalism in Algeria); see also Bennoune, *supra* note 8, at 426 (“The fundamentalist armed groups on one side of the

Muslims who have fled countries where women have paid with their lives for refusing to veil.¹⁶¹ Algerian sociologist and Women Living Under Muslim Laws founder Marieme Hélie-Lucas claims the media portrayed the school law inaccurately, giving wide coverage to the few demonstrations by veiled women but little coverage to the more prevalent demonstrations in favor of the law, which included people of Muslim heritage.¹⁶² Antifundamentalists have expressed frustration with groups that justly criticize racism in France but show less fortitude in condemning Muslim fundamentalism.¹⁶³ This, some argue, perpetuates ignorance about fundamentalist groups who “have played on the lack of knowledge of their ideology and strategy, especially in human rights circles.”¹⁶⁴

[Algerian civil war of the 1990s] killed many women who went out unveiled.”); Ann Luerssen Crowther, Note, *Empty Gestures: The (In)significance of Recent Attempts to Liberalize Algerian Family Law*, 6 WM. & MARY J. WOMEN & L. 611, 632–33 (2000) (“[W]hen Islamic extremists threaten, rape, and kill women who do not wear the hijab, their wish to transform Algerian culture into an Islamist state makes itself plain.”).

161. See Bennoune, *supra* note 9, at 166 (relaying the views of ban proponents from Algeria); see also Bennoune, *supra* note 8, at 391 (quoting Ghaïs Jasser, *The Twin Evils of the Veil*, 5 SOC. IDENTITIES 31, 37 (1999)) (“If, then, you claim that the veil is simply a manifestation of cultural particularity, you lack solidarity with women opposing purdah—of which the head-covering is but one expression among others—at the cost of their very lives.”).

162. See Bennoune, *supra* note 9, at 168 (reporting assertions that pro-veil demonstrations received greater coverage than anti-veil demonstrations); see also Wing & Smith, *supra* note 9, at 766–67 (reporting that polling a wider base of women than those who attended pro-veil demonstrations reveals a majority of Muslim women of North African background in France supported the ban); *France: Issues Related to the Headscarf Ban*, WOMEN LIVING UNDER MUSLIM LAW (Apr. 20, 2004), <http://www.wluml.org/english/newsfulltxt.shtml?cmd%5B157%5D=x-157-44910> (“A very mediatised minority has demonstrated around the importance of religion in their way of life and that the stand taken by the government was running counter to their freedom of religion. But this principle of religious freedom contradicts the one of secularity.”). Women Living Under Muslim Laws is a network of advocates from a range of countries working to protect the rights of women affected by laws and customs said to derive from Islam. See *About WLURL*, WOMEN LIVING UNDER MUSLIM LAW, <http://www.wluml.org/node/5408> (last visited Jan. 2, 2012).

163. See Bennoune, *supra* note 9, at 168 (asserting that antifundamentalists have expressed frustration with groups that criticize racism in France but do not condemn Muslim fundamentalism strongly); see also Marieme Hélie-Lucas, *A South-North Transfer of Political Competence: Women of Migrant Muslim Descent in France—An Overview*, in WOMEN LIVING UNDER MUSLIM LAWS, DOSSIER 30-31: THE STRUGGLE FOR SECULARISM IN EUROPE AND NORTH AMERICA 43, 45 (Marieme Hélie-Lucas ed., 2011) (alleging that groups in France that should be women’s allies against fundamentalism, such as feminists and human rights organizations, fail to support women’s rights against fundamentalist attacks out of fear of being labeled “Islamophobic”).

164. See Bennoune, *supra* note 9, at 168 (citing commentators of Muslim heritage who believe fundamentalists have taken advantage of this lack of knowledge in human rights circles); see also Bennoune, *supra* note 41, at 666–67 (“As Tunisian born sociologist Jeanne

Fundamentalism in France has benefited from failures of the state.¹⁶⁵ The *banlieues*, outer-city housing areas associated with working-class, postcolonial populations, are filled with disaffected youth whose legitimate grievances due to racism and extremely high unemployment can be exploited.¹⁶⁶ Life in the *banlieues* has posed particular challenges for women and girls, where radicalized brothers and fathers have pushed their sisters and daughters to veil.¹⁶⁷ Other girls decide to veil in order “to not be treated as prostitutes or ‘loose’ in their neighborhoods.”¹⁶⁸ Baggy clothing and a headscarf became necessary for safety.¹⁶⁹ Women choosing not to cover have

Favret-Saada acerbically notes, “the Islamists are happy to meet Europeans who are so naïve . . . and talk only about [religious] discrimination.”)

165. See Bennoune, *supra* note 9, at 170 (“Hélie-Lucas and others blame the failures of the French state for the success of fundamentalist movements in France.”); see also KEATON, *supra* note 23, at 185–86 (citing scholars who view economic and social exclusion as the cause of young Muslims embracing customs that are not necessarily grounded in doctrine); Wing & Smith, *supra* note 9, at 769–70 (describing the view of some Muslim women that “high unemployment rates, discrimination in development opportunities, and overall isolation of Muslim communities in Europe” are leading young Muslims to turn to Islam, and occasionally to extremist forms of Islam).

166. See Bennoune, *supra* note 9, at 170 (“[Hélie-Lucas] and others particularly highlight the terribly high, disproportionate rate of unemployment in the *banlieues*, which creates a fertile ground for fundamentalist recruitment and conditions ripe for the manipulation of legitimate grievances. While the general rate of unemployment in France is at about ten percent, it is reported to be at least fifty percent among youth in the *banlieues*.”); see also Cross, *supra* note 3 (explaining that many French Muslims are concentrated in working-class *banlieues* and come from families that came to France from former colonies). “[*Banlieues*], which roughly translates as ‘suburbs,’ now refers specifically to the ‘depressing, outer city high-rise housing estates which have become identified with France’s working class and multiethnic postcolonial populations.” Bennoune, *supra* note 9, at 165 n.36.

167. See Bennoune, *supra* note 9, at 173 (“[S]ome adolescent boys and their fathers, having listened to radical Imams telling them that their women must veil, pushed their sisters and daughters to do so.”); see also Wing & Smith, *supra* note 9, at 767 (reporting that many Muslim women view the law as protecting girls from the decisions of parents and brothers).

168. Bennoune, *supra* note 9, at 173 (detailing the view of one commentator who suggests that the headscarf is a visible sign of inferior status for women, evidenced by their veiling to avoid being seen as sexually promiscuous); see also Wing & Smith, *supra* note 9, at 761 (“‘A girl who wears the veil, that means that she’s pure and that the other who doesn’t wear the veil, she’s not pure . . . it’s that she’s a slut.’ Thus some girls may wear the headscarf to avoid being labeled in such a derogatory fashion.”).

169. See Bennoune, *supra* note 9, at 173 (“For many, the veil, often accompanied by baggy clothing, became a kind of *laissez-passer*, allowing a girl to go out or to move around safely . . .”); see also Wing & Smith, *supra* note 9, at 760 (noting a particular problem in schools with largely Muslim student populations where girls who do not wear the headscarf are viewed as whores and are potential targets for violence, such as gang rape or murder).

experienced stigma, family pressure, violence, and even death.¹⁷⁰ Some girls who rejected the de facto dress code were subjected to the *tournante*, a ritualized gang rape of girls deemed “loose.”¹⁷¹ Given this atmosphere, supporters argue that the headscarf ban is a reasonable restriction that creates an environment free from family and community pressures to cover.¹⁷²

Algerian journalist Malika Zouba argues that Law No. 2004-228 is not racist but rather “it is racist to assume that the veil is ‘naturally’ to be found on Muslim and North African women’s heads.”¹⁷³ Assuming that all Muslims oppose the ban treats them as a monolithic group when, in fact, according to one poll, forty-nine percent of French Muslim women supported the ban, and a majority of women of North African background were hostile to headscarves in schools.¹⁷⁴ The debate has led to conflicts within major French Muslim organizations struggling with the balance between *laïcité* and religious freedom.¹⁷⁵

170. See Bennoune, *supra* note 9, at 175 (“Not-being-veiled has led to a range of terrible consequences for women and girls, including social stigma, family pressure and violence, attacks in the community, and even death.”); see also Wing & Smith, *supra* note 9, at 760, 763 (referencing the risk of violence to unveiled girls).

171. See Bennoune, *supra* note 9, at 175–76 (“[W]omen in the *banlieues* have been attacked and gang raped, in the ritual known as the *tournante*, and even murdered for wearing miniskirts, appearing ‘loose,’ or being disobedient.”); see also Gey, *supra* note 150, at 15 (“Gang rape of young Muslim women has become both a rite of sexual initiation for young men and a means of enforcing Islamic strictures against female sexual and social independence . . .”).

172. See Bennoune, *supra* note 9, at 184 (quoting an interviewee who was initially opposed to the headscarf ban but decided it was worthwhile so that girls pressured to veil in their neighborhoods would at least be free from fundamentalists in school); see also Haarscher, *supra* note 113, at 381 (presenting arguments for and against veiling at school and explaining one view that the headscarf ban is a reasonable protection of secularism).

173. Bennoune, *supra* note 9, at 171. Malika Zouba is a journalist and activist living in France. *Id.* at 158.

174. See Wing & Smith, *supra* note 9, at 766–67 (citing a poll by *Elle* magazine that found that fifty-three percent of Muslim women of North African background living in France were opposed to headscarves in schools); *Veil of Tears*, *ECONOMIST*, Jan. 15, 2004, at 34 (citing polling by *Elle* magazine and showing how this issue divides French Muslims); see also Bennoune, *supra* note 9, at 171 (“[D]espite the stereotypical portrayals of the views of Muslims in France in the international media, a majority support the Law.”).

175. See Caroline Nagel, *Introduction* to *GEOGRAPHIES OF MUSLIM WOMEN: GENDER, RELIGION, AND SPACE* 3 (Ghazi-Walid Fallah & Caroline Nagel eds., 2005) (explaining that the controversy has led to conflicts within major French Muslim organizations seeking to balance secularism and religious freedom); see also Bennoune, *supra* note 8, at 415 (recognizing the divergence of opinion among Muslim organizations).

The ECtHR ruled on the permissibility of banning religious symbols in schools in a case predating the law's enactment, *Dogru v. France*.¹⁷⁶ Eleven-year-old Belgian Dogru refused to remove her headscarf for physical education class on seven occasions before the school expelled her for failing to participate actively in these classes.¹⁷⁷ She argued that this violated her right to religious freedom and her right to education.¹⁷⁸ After extensive discussion of the history of secularism, its enshrinement in French law, and the veil debate in France, the ECtHR found that the interference with Dogru's religious freedom pursued the legitimate aims of protecting the public order and the rights of others.¹⁷⁹ As to whether the regulation at issue was "necessary in a democratic society," the Court cited *Şahin* in finding that upholding the domestic system of secularism, which protected others against external pressure from extremist movements, was necessary.¹⁸⁰ As in *Şahin*, the ECtHR granted a significant margin of appreciation to the state, but considered the process that preceded the penalty of expulsion and the safeguards requiring conformity with statute and judicial review in finding the restriction was proportionate.¹⁸¹

2. The Niqab Ban

In 2009, the French National Assembly appointed thirty-two lawmakers to investigate ways of restricting the use of the full face veil.¹⁸² After a six-month investigation that included extensive hearings and interviews, the committee concluded that the full veil infringes republican values of liberty, equality, and fraternity and is an intolerable infringement of the freedom and dignity of women,

176. See generally *Dogru v. France*, 49 Eur. H.R. Rep. 179 (2009) (finding that the expulsion of a student who refused to remove her headscarf for gym class did not violate the student's right to manifest her religious beliefs and right to education).

177. See *id.* ¶¶ 7–8.

178. See *id.* ¶ 3. The right to education is guaranteed by Article 2 of Protocol No. 1 of the Convention. *Id.*

179. See *id.* ¶¶ 17–22, 60.

180. See *id.* ¶¶ 61–66.

181. See *id.* ¶¶ 74–77.

182. See Atwill, *supra* note 32 (stating that the Commission was established on June 23, 2009); *France Sets Up Burka Commission*, BBC NEWS (June 23, 2009, 10:48 PM), <http://news.bbc.co.uk/2/hi/europe/8114590.stm> ("The French National Assembly has appointed 32 lawmakers on a fact-finding mission to look at ways of restricting [the burqa's] use.").

representing the denial of gender equality and a mixed society.¹⁸³ The commission identified three primary reasons women wear the full veil: “the desire for purity through the practice of a more austere form of the religion and to keep one’s distance from a society perceived as perverted; to conform with family and community values, to appear respectable to such community; or coercion.”¹⁸⁴

The commission did not unanimously recommend a full ban.¹⁸⁵ The Conseil d’Etat then considered various bans and warned that they might not withstand constitutional scrutiny.¹⁸⁶ When the Constitutional Council considered the specific law that was ultimately voted on in the Senate and National Assembly, however, it found that the prohibition of concealing one’s face in public did not violate the Constitution, so long as it did not apply to places of worship.¹⁸⁷ The law was set to go into effect six months after the president signed it, a period during which the government would work to educate affected individuals about the law.¹⁸⁸

a. Allegations of Islamophobia and the Intra-Muslim Debate

Debate in the English-speaking media surrounding the niqab ban has exhibited many of the alleged mischaracterizations of the controversy over banning religious symbols in schools.¹⁸⁹ President Nicholas Sarkozy’s declaration that the burqa is “not welcome” in

183. See Atwill, *supra* note 32 (concluding that the full veil is contrary to the principles enshrined in the French “motto” and finding that “[t]he full veil is an intolerable infringement on the freedom and the dignity of women. It is the denial of gender equality and of a mixed society”).

184. *Id.* (quoting the Commission’s report).

185. See *id.* (“[T]he members of the Commission were not unanimous as to whether or not a law banning the full veil in public places should be adopted by Parliament.”).

186. See PLENARY GENERAL ASSEMBLY, CONSEIL D’ETAT, STUDY OF POSSIBLE LEGAL GROUNDS FOR BANNING THE FULL VEIL 8, (2010), available at http://www.conseil-etat.fr/cde/media/document/RAPPORT%20ETUDES/resume_presse_anglais.pdf (warning that some veil bans might be unconstitutional).

187. See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-613DC, Oct. 7, 2010, J.O. 18345 (Fr.) (finding the law constitutional as long as it did not apply in places of worship).

188. See Erlanger, *supra* note 2, at A6 (discussing how the law would be effective after a six-month period for education about the law); see also Ryan, *supra* note 3 (reporting the purpose of the six-month waiting period).

189. See, e.g., *The Taliban Would Applaud*, *supra* note 3, at A26 (describing the bill as the result of anti-Muslim prejudice without referencing the disagreement over the bill among Muslims); Nussbaum, *supra* note 13 (attributing the ban to individuals who know little about Islam despite the ban proponents of Muslim heritage discussed *infra* in Part II.B).

France was met with accusations of “Muslim-bashing” and “hate-mongering.”¹⁹⁰ Criticizing the argument that the burqa is inherently oppressive and objectifying, and specifically attacking one politician’s claim that the burqa is a “degrading prison,” Professor Martha Nussbaum claims, “the people who make [this argument] typically don’t know much about Islam and would have a hard time saying what symbolizes what in that religion.”¹⁹¹ Former French Minister for Urban Affairs Fadela Amara, however, who believes that “[w]e must do everything to stop burqas from spreading, in the name of democracy, of the republic, of respect for women,” has referred to the burqa as a prison as well.¹⁹² Amara is a practicing Muslim of Algerian descent and a revered feminist activist.¹⁹³ She founded the women’s group *Ni Putes, Ni Soumises* (Neither Whores, Nor Submissives) to address fundamentalist threats to the women of the *banlieues*.¹⁹⁴

Regulations in predominantly Muslim countries demonstrate that limitations on veiling are not inherently anti-Muslim.¹⁹⁵ It is possible,

190. See, e.g., *The Taliban Would Applaud*, *supra* note 3, at A26 (“It is . . . far too easy to fan anti-Muslim prejudices. . . . Muslim-bashing has been a potent vote-getter for French far-right politicians . . .”); Nussbaum, *supra* note 13 (alleging that five arguments in favor of the niqab ban are discriminatory).

191. Nussbaum, *supra* note 13.

192. See Henry Samuel, *Burqa Is a Prison, Says French Minister*, TELEGRAPH (London) (July 17, 2008, 1:44 PM), <http://www.telegraph.co.uk/news/worldnews/europe/france/2421220/Burqa-is-a-prison-says-French-minister.html> (reporting that Fadela Amara described the burqa as a “prison” and a “strait-jacket”); see also Henry Samuel, *France to Consider Banning the Burqa*, TELEGRAPH (London) (June 19, 2009, 8:18 PM), <http://www.telegraph.co.uk/news/worldnews/europe/france/5580732/France-to-consider-banning-the-burqa.html> (quoting Amara, who called the burqa a “kind of tomb for women”).

193. See Wing & Smith, *supra* note 9, at 767–68 (describing Amara as “a practicing Muslim herself, [who] fights for the girls of the *cités* [ghetto areas where some Muslim girls live] who are facing a return to obscurantism—girls who, if they do not want to wear the headscarf, are considered by some as rebels and by others as whores”); see also Bennoune, *supra* note 8, at 415 (calling Amara a “prominent beur (French-Algerian) feminist”).

194. See Bennoune, *supra* note 9, at 171 (identifying Amara as a founder of *Ni Putes, Ni Soumises*); see also Wing & Smith, *supra* note 9, at 767–68 (describing Amara as president of *Ni Putes, Ni Soumises* and as fighting for girls facing “mandatory wearing of the veil, constant surveillance by ‘big brothers,’ forced marriages, and the monitoring of a girl’s virginity . . .”).

195. See, e.g., Case no. 8/1996/Supreme Constitutional Court (Egypt), translated in Nathan J. Brown & Clark B. Lombardi, *The Supreme Constitutional Court of Egypt on Islamic Law, Veiling and Civil Rights: An Annotated Translation of Supreme Constitutional Court of Egypt Case No. 8 of Judicial Year 17 (May 18, 1996)*, 21 AM. U. INT’L L. REV. 437, 441–42, 460 (2006) (rejecting a father’s challenge to a regulation forbidding girls in public schools from wearing the niqab); Mohammad Ahmad, *Tunisia’s Hijab Ban Unconstitutional*, J. TURK. WKLY., Oct. 11, 2007, <http://www.turkishweeky.net/news/49443/tunisia-s-hijab-ban->

however, as some have alleged, that some French politicians' condemnation of the full veil is a cynical ploy for the xenophobic vote rather than a sincere defense of republican values.¹⁹⁶ Still, the fact that discrimination against Muslims exists in France "does not mean that a victim of racism is incapable of being himself an oppressor."¹⁹⁷ There are likely multiple and conflicting motivations behind the niqab ban, but this fact should not silence the voices of those who condemn both Islamophobia and Islamic fundamentalism.¹⁹⁸ Antifundamentalists of Muslim heritage have described the concept of Islamophobia as itself problematic to efforts to protect human rights, arguing that it conflates legitimate criticism of religious or political movements with discrimination and silences intra-Muslim debate.¹⁹⁹

b. Regulating the Public Space

Regulating what adults can wear in public represents a much greater state intrusion than regulating attire in the classroom. In *Dahlab*, the ECtHR relied heavily on the potential proselytizing effect on children learning from a teacher wearing a headscarf.²⁰⁰ When children wish to veil at school, there may be concerns about

unconstitutional.html (reporting a Tunisian court's holding that the hijab ban is unconstitutional).

196. See *The Taliban Would Applaud*, *supra* note 3, at A26 (accusing Sarkozy of "fan[ning] anti-Muslim prejudice" for political gain); see also Sarah Joseph, *Indecent Exposure Burqa Ban Turns a Right into a Crime*, CNN.COM, Apr. 13, 2011, http://articles.cnn.com/2011-04-13/opinion/joseph.burqa.ban_1_niqab-face-covering-veil-burqa-ban?_s=PM:OPINION ("The ban . . . is simply dangerous gesture politics, representing little more than pandering to the far right in France."); see Atwill, *supra* note 32 (describing the republican values of liberty, equality, and fraternity).

197. Bennoune, *supra* note 9, at 172 (quoting Jeanne Favret-Saada); see Bennoune, *supra* note 41, at 676–77 (highlighting how fear of accusations of Islamophobia may lead policymakers to actually protect "the purveyors of discrimination").

198. See Bennoune, *supra* note 41, at 672 (arguing that a space must be found in human rights discourse to condemn both racism and fundamentalism); see also Khaled Abou El Fadl, *The Culture of Ugliness in Modern Islam and Reengaging Morality*, 2 *UCLA J. ISLAMIC & NEAR E. L.* 33, 43–44 (2003) (describing ways that the views of Islam's internal critics can be discounted).

199. See Bennoune, *supra* note 41, at 671 (discussing the effect of allegations of Islamophobia on intracultural debate); see also Bennoune, *supra* note 9, at 182 (reporting that, for some veil ban supporters of Muslim heritage "human rights arguments for the veil in school are a kind of cultural relativism, ironically emanating from a human rights movement putatively committed to universality").

200. See *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 449, 454.

consent.²⁰¹ Although Leyla Şahin argued that university students are “discerning adults who enjoy[] full legal capacity” and are “capable of deciding for themselves what [is] appropriate conduct,” the ECtHR still found limitations on religious dress to be permissible in higher education.²⁰² Not only does the niqab ban lack the pedagogical justifications found in school veiling cases, it also extends the reach of regulations outside state institutions to the street, where the state has less interest in uniformity.²⁰³

The niqab, however, is potentially a greater harm than the headscarf, justifying a more significant limitation of the rights of the women who wish to wear it.²⁰⁴ Among the more concrete distinctions is the fact that the physical limitations of the headscarf are not such that a woman cannot speak clearly, eat, see, or converse in an unimpeded way.²⁰⁵ The headscarf also has lesser adverse physical

201. See Frances Raday, *Culture, Religion, and Gender*, 1 INT’L J. CONST. L. 663, 709 (2003) (raising the issue of whether young girls consent to veiling); see also Haarscher, *supra* note 113, at 375 (identifying an issue of “real vulnerability” based on concerns regarding consent).

202. See Şahin v. Turkey, 2005-XI Eur. Ct. H.R. 173, ¶¶ 101, 113–115 (noting Şahin’s arguments regarding the capacity of university students yet still finding legitimate state aims to prohibit the headscarf); cf. Haarscher, *supra* note 113, at 382 (arguing that veil bans aimed at adult women “would not be acceptable in the framework of liberal values”).

203. See Haarscher, *supra* note 113, at 382 (“Acting for the good of the individual against his will would amount to paternalism. So in the case of adult girls—for instance at the university—a general measure of prohibition would not be acceptable in the framework of liberal values.”); see also BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* (2001) (concluding that a Sikh motorcycle-rider’s interest in his religious headgear is greater than that of the government in uniform helmet regulations); Abner S. Greene, *Three Theories of Religious Equality . . . and of Exemptions*, 87 TEX. L. REV. 963, 997, 997 n.219 (2009) (reviewing MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY* (2008); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007)).

204. See, e.g., Bennoune, *supra* note 9, at 186–87 (quoting French sociologist and veiling researcher Françoise Gaspard, who opposed the headscarf ban but believes that covering the face should be prohibited because “it is useful in a society to see the face”); Erlanger, *supra* note 26, at A6 (describing an Imam whose wife wears the hijab but who sees the niqab as a sign of growing radicalism that must be banned); see also Berlinski, *supra* note 10, at 39 (“The sheer outrageousness of the burqa makes it an easy target . . .”).

205. See, e.g., Selena Roberts, *Enlightening the Clothes-Minded*, SI.COM, (Mar. 5, 2009, 9:13 AM), http://sportsillustrated.cnn.com/2009/writers/selena_roberts/03/05/clothesminded/index.html (reporting that Bilqis Abdul-Qaadir expects to play Division I NCAA basketball with her hair and limbs covered); see also Yasmin Alibhai-Brown, *Nothing to Hide*, TIME, Oct. 16, 2006, at 64 (“State institutions as well as private companies should have the right to stipulate that a person whose face cannot be seen need not be served. That would not discriminate against Muslims; it would, for example, also affect men whose faces were

health consequences stemming from Vitamin D deficiencies brought on by lack of sunlight.²⁰⁶ The niqab also obscures the age of the wearer, which makes distinguishing between women old enough to consent to wearing it impracticable.²⁰⁷

Some argue the niqab has greater symbolic and historical significance as well.²⁰⁸ Professor Jeremy Waldron, although opposed to the niqab ban, acknowledges the difficulty of balancing freedom of religious expression with the perception of societal endorsement.²⁰⁹ He characterizes ban proponents as concerned with what a well-ordered society should look like and whether people “dress in a way that connotes the dignity of a free person, not in a way that intimates their subordination.”²¹⁰ Despite his opposition, he is sympathetic to the idea that how individuals present themselves matters to society: “maybe not the burqa, but the appearance of large numbers of masked men in white sheets and pointy hats is a problem, protestations about purely private dress codes notwithstanding.”²¹¹ Some public expression can have a very detrimental effect on the listener and on a

obscured by motorcycle helmets. The principle expressed, in other words, would not be anti-Muslim, but one in favor of communication.”).

206. See A. Batiha et al., *Vitamin D Status in Jordan: Dress Style and Gender Discrepancies*, 58 *ANNALS NUTRITION & METABOLISM* 10 (2011) (finding that dress style in females was independently related to low vitamin D status and that the high prevalence of low vitamin D status contrasted the low prevalence in males, indicating the need for increase awareness and efforts to reduce the risk among women, in particular those who cover most or all of their skin); see also A.A. Mishal, *Effects of Different Dress Styles on Vitamin D Levels in Healthy Young Jordanian Women*, 12 *OSTEOPOROSIS INT’L* 931 (2001) (“Dress styles covering the whole body, totally or nearly totally, have adverse effects on 25(OH)D levels and may produce a state of secondary hyperparathyroidism on the long run. Although Jordan enjoys plenty of sunshine, these data are suggestive of widespread hypovitaminosis D in Jordan.”).

207. Cf. Haarscher, *supra* note 113, at 375 (finding that questions of whether nonadult girls can consent to veiling strengthens the argument for the headscarf ban); Raday, *supra* note 201, at 709 (discussing concerns about consent among girls in school).

208. See Alibhai-Brown, *supra* note 205, at 64 (“The robe is a physical manifestation of the pernicious idea of women as carriers of original sin; it assumes that the sight of a cheek or a lock of hair turns Muslim men into predators.”); see also Waldron, *supra* note 117, at 1625 (comparing the burqa to a “portable private realm . . . like an Edwardian bathing machine—as though women may appear in public only by remaining in effect in the private realm”).

209. See Waldron, *supra* note 117, at 1625–26 (using veiling controversies to demonstrate the complexity of balancing religious expression with society’s perceived endorsement).

210. *Id.*

211. *Id.* at 1626.

society; the laws of most liberal democracies reflect this reality and require a balancing of interests as a result.²¹²

This raises the highly contested question of the meaning of the veil.²¹³ Many scholars agree that the veil has no fixed meaning.²¹⁴ It may be an expression of religious devotion or identity.²¹⁵ In the case of Najate Nait Ali and Hind Ahmas's veiled protest at the Meaux, France, town hall, it might be an assertion of women's autonomy.²¹⁶ Others assert that the niqab makes a more dangerous statement, such as that women do not have responsibilities to society but belong in the private sphere, or that women need not wear attire conducive to study or employment.²¹⁷ The niqab may embody the view that the sight of

212. See, e.g., *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R. 43, ¶¶ 76–77 (balancing the interests of the press and the public in freedom of information against the applicant's rights to dignity and privacy); Waldron, *supra* note 117, at 1598–99 (characterizing the hate speech laws of Europe and other advanced democracies as recognizing an “affirmative responsibility for protecting the atmosphere of mutual respect against certain forms of vicious attack,” arguing that “[t]he [real] question is about the direct targets of the abuse. Can their lives be led, can their children be brought up, can their hopes be maintained and their worst fears dispelled, in a social environment polluted by these materials? Those are the concerns that need to be answered when we defend the use of the First Amendment to strike down laws prohibiting the publication of racial hatred,” and contrasting “most liberal democracies [that have] undertaken to prohibit these manifestations of hatred, these visible defamations of social groups” with the United States).

213. See, e.g., DORIS H. GRAY, *MUSLIM WOMEN ON THE MOVE: MOROCCAN WOMEN AND FRENCH WOMEN OF MOROCCAN ORIGIN SPEAK OUT* 67 (2008) (quoting a mother whose daughter wished to wear the hijab in reclamation of her Moroccan heritage: “For me the veil is too much a symbol of oppression. . . . I cannot sit still and watch as my own daughter is trying to turn back the clock”); see Wing & Smith, *supra* note 9, at 758–71 (describing a broad range of meanings that Muslim women attribute to the veil).

214. See Danchin, *supra* note 110, at 725 (“As many scholars have argued, wearing the Islamic headscarf has no single or fixed meaning. Muslim women and girls wear the hijab for many, often conflicting and conflicted reasons”); see also Robert A. Kahn, *Are Muslims the New Catholics? Europe's Headscarf Laws in Comparative Historical Perspective*, 21 *DUKE J. COMP. & INT'L L.* 567, 593 (2011) (posing questions raised by the fact that the headscarf means different things to different people).

215. See *supra* notes 23–44 and accompanying text (discussing the multiple reasons why women veil).

216. See *supra* notes 17–19 and accompanying text (describing Nait Ali and Ahmas's protest); see also Danchin, *supra* note 110, at 725 (listing among the reasons women veil “expressions of autonomy, self-realization, resistance, and freedom”).

217. See, e.g., CAITLIN KILLIAN, *NORTH AFRICAN WOMEN IN FRANCE: GENDER, CULTURE, AND IDENTITY* 230 (2006) (“The traditional practice of veiling in Muslim countries demarcates men's space, or public space, from women's space in the home.”); KEATON, *supra* note 23, at 185 (noting concerns that the headscarf of a student majoring in science would block her view or catch fire during laboratory experiments); Bennoune, *supra* note 8, at 387 (noting the Turkish government's argument in *Şahin* that a “conservative religious approach would undoubtedly be incompatible with hygiene requirements” for a medical student); Wing

women corrupts men, that men are incapable of controlling themselves, or that women are the property of their husbands.²¹⁸ The fact that many individuals of Muslim heritage consider the veil to be a sign of subjugation is in part a product of the historic and ongoing violent imposition of the veil by both theocratic governments and nonstate actors.²¹⁹

C. Balancing the Interests at Stake

1. Weighing the Rights of Women Forced or Pressured to Veil

The potential harms caused by the wearing of the niqab in public range from the concrete to more abstract concepts of the societal conditions that promote order and human rights. Those most directly harmed by state tolerance of the niqab are those who wear it unwillingly.²²⁰ If no one is permitted to wear the niqab, no one can be forced to wear it.²²¹ Women who wear the niqab and many other opponents of the ban reject the idea that the niqab is frequently imposed on women, and argue that the number of women forced to wear the niqab is too small to constitute a threat justifying the

& Smith, *supra* note 9, at 768 (describing Muslim secular feminist view, which associates the veil with the seclusion and isolation of women); Berlinski, *supra* note 10, at 40 (arguing the choice to wear the veil has a “deeply sinister political and cultural meaning,” disqualifying wearers from working for the government or teaching children).

218. See KEATON, *supra* note 23, at 186 (quoting a student aide on the issue of why women should veil but not men: “It’s God who says it. It’s because of man’s weakness If a man sees a woman pass by, he’ll have bad thoughts about her”); see also Wing & Smith, *supra* note 9, at 768–69 (noting critics of the veil who reject the idea that Muslim men cannot control themselves necessitating that women cover and explaining that, according to Muslim feminists, statements by Muslim men that the headscarf protects women from the “carnivorous gaze of men” promote the idea that the veil covers a woman from all men except her husband, who in that sense owns her).

219. See Wing & Smith, *supra* note 9, at 767 (describing the views of Muslims who see the veil as a symbol of subjugation); see also El Fadl, *supra* note 198, at 33–34 (describing the deaths of school girls in Saudi Arabia who were kept from escaping a burning building because they were not wearing niqabs); Luerssen Crowther, *supra* note 160, at 632–33 (discussing the imposition of the hijab through Islamist threats of rape or death).

220. See Atwill, *supra* note 32 (relaying the finding of the commission established by the French National Assembly that coercion is one of three primary reasons women veil); see also Wing & Smith, *supra* note 9, at 763 (including protection from violence among reasons women veil). See generally Bennoune, *supra* note 9 (describing the pressures that cause unwilling women to veil).

221. See Bennoune, *supra* note 8, at 426 (“Not-being-veiled is a condition that can only exist in the presence of veiling.”); see also Nussbaum, *supra* note 13 (acknowledging that in Turkey “women who went unveiled were being subjected to harassment and violence. The ban protected a space for the choice to be unveiled . . .”).

limitations on those who wish to wear it.²²² Ban opponents suggest that laws already exist to address any coercion to veil and that focusing on the women who veil against their will paints all Muslim women as victims and Muslim men as oppressors.²²³ Even if most women freely choose to wear the niqab, however, as those who speak to the press almost uniformly assert they do, focusing on their situations to the exclusion of unwilling women may also unhelpfully treat Muslim women as monolithic.²²⁴ The law will affect women in different ways and their varying interests should be weighed accordingly.²²⁵ Even ban opponents acknowledge that some women in France are made to wear the niqab against their will.²²⁶

222. See *The Taliban Would Applaud*, *supra* note 3, at A26 (arguing that the fewer than 2000 women who thought to wear full body veils do not threaten French identity or security). See generally OPEN SOC'Y FOUNDS., *supra* note 23 (surveying thirty-two women who wear the niqab, none of whom stated or implied that they veiled under duress). A 2009 study found that 1900 women wore the niqab in France. Half of these women were under thirty years old and ninety percent were under forty; a quarter of them were converts to Islam and two-thirds were French nationals. In 2000, the niqab was virtually nonexistent in France. See Atwill, *supra* note 32.

223. See Nussbaum, *supra* note 13 (“[O]f course all forms of violence and physical coercion in the home are illegal already, and laws against domestic violence and abuse should be enforced much more zealously than they are.”); Warrick, *supra* note 15, at B1 (alleging that the law treats Muslim women as victims).

224. See, e.g., Angélique Chrisafis, *French Burqa and Niqab Ban: ‘Muslim Women Are Being Scapegoated’*, GUARDIAN (U.K.), Apr. 12, 2011, at 15 (asserting that the decision to veil is an intellectual one and has nothing to do with marriage); Angélique Chrisafis, *Muslim Women Protest on First Day of France’s Veil Ban*, GUARDIAN (U.K.), Apr. 12, 2011, at 15 (reporting on women protesting for their right “to dress as they please”); see Bennoune, *supra* note 41, at 670 (arguing that concealing heterogeneity among Muslims “privileges voices like fundamentalists that claim to represent a singular and monolithic reality”); see also Wing & Smith, *supra* note 9, at 749 (“Muslim female views cannot be essentialized.”).

225. See *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173 ¶ 106 (“[I]t may be necessary to place restrictions on freedom to manifest one’s religion or belief in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected”); see also Bennoune, *supra* note 8, at 396 (“[H]uman rights advocates weighing restrictions on ‘modest’ garments for Muslim women and girls in public schools . . . should consider the following factors: the impact of the garments on other women (or girls) in the same environment; coercion of women in the context, including activities of religious extremist organizations; gender discrimination; [and] related violence against women in the location . . .”).

226. See, e.g., *Human Rights Watch Submission to the National Assembly Information Committee on the Full Muslim Veil on National Territory*, HUM. RTS. WATCH (Nov. 20, 2009), <http://www.hrw.org/en/news/2009/11/20/human-rights-watch-submission-national-assembly-information-committee-full-muslim-ve> (“[P]rohibiting [the] wearing [of the full veil] in public would likely harm, rather than help, those who do so under coercion.”); see also Amnesty Int’l Press Release, *supra* note 13 (“A generally applicable ban would restrict the rights of those who freely choose to wear full face veils, while punishing those who do so against their will.”).

States regularly limit the freedom of autonomous individuals in order to protect the vulnerable. France allowed North African immigrants to practice polygamy in the 1980s, exhibiting deference to cultural traditions and the rights of adults to form whatever relationships they choose.²²⁷ Because polygamy proved so detrimental to some women, however, the state ultimately had to sacrifice the interests of those who believed they would benefit from the arrangement in order to protect those harmed.²²⁸ Similarly, some sex workers argue that prohibitions of prostitution restrict their self-determination and right to control their own bodies.²²⁹ Even if this is true, states may still limit the freedom of consenting adults, not just to ensure public health and morals, but also to protect those who would engage in prostitution under duress.²³⁰

227. See Okin, *supra* note 14, at 9 (“During the 1980s, the French government quietly permitted immigrant men to bring multiple wives into the country, to the point where an estimated 200,000 families are now polygamous.”); see also Jennifer M. Collins et al., *Punishing Family Status*, 88 B.U. L. REV. 1327, 1409–10 (2008) (discussing the decriminalization of bigamy in the United States and arguing that a liberal state should not be opposed to that private ordering arrangement if harms to third parties are trivial).

228. See Okin, *supra* note 14, at 10 (“[O]nce reporters finally got around to interviewing the wives, they discovered . . . that women affected by polygamy regarded it as an inescapable and barely tolerable institution in their African countries of origin, and an unbearable imposition in the French context.”); see also Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1957–58 (2010) (“Some [legal scholars] have framed [polygamy] as a question of how far constitutional protection for religious freedom and privacy rights extends . . . Others have debated decriminalization, based on the contested effects of polygamy on matters ranging from women’s subordination, to fraudulent behavior, to democracy.”).

229. See Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 297 (2011) (acknowledging the argument that prostitution “can make a woman’s life more autonomous and independent”); see also David A.J. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195, 1202 (1979) (“[T]here are forceful moral arguments . . . that demonstrate that laws criminalizing commercial sex violate certain basic rights of the person.”).

230. See Richards, *supra* note 229, at 1215 (identifying criminogenesis, venereal disease, immorality, and self-destructiveness as the most familiar justifications for American prostitution bans); see also KRISTOF & WUDUNN, *supra* note 22, at 25–32 (arguing for prohibitions on prostitution in light of the increases in sex trafficking that attend legalization); Max Waltman, *Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law*, 33 MICH. J. INT’L L. 133, 141 (2011) (“[I]n most situations, coercive circumstances—including child sexual abuse, homelessness, sex discrimination, economic discrimination, and often racial discrimination—propel persons into prostitution.”).

2. Unintended Harms to Women Forced to Veil

Other commentators accept that some women are forced to veil and oppose the ban on the grounds that it will be harmful to these women. They warn that the law could have the unintended consequence of confining women to their homes.²³¹ For those forced to veil by family members who believe that a woman must not be seen by men other than her husband and family, this presents a serious risk.²³²

The ban on religious symbols in schools had adverse consequences for some girls as well. Adrien Katherine Wing and Monica Nigh Smith have described girls required to unveil in school as experiencing a “spirit injury,” the symptoms of which include “defilement, silence, denial, shame, guilt, fear, blaming the victim, violence, self-destructive behaviors, [and] acute despair/emotional death.”²³³ Women they interviewed recounted feeling uneasy or unwell without their headscarves, and one described unveiling as a form of rape.²³⁴ In the school year that the regulation went into effect, forty-four students were suspended for wearing headscarves, and ninety-six reported transferring to private schools, enrolling in correspondence classes, or dropping out.²³⁵ These numbers are significantly lower than expected and, as Professor Bennoune notes, do not quantify the number of girls who felt less coerced because the

231. See Sunderland, *supra* note 13 (arguing that headscarf bans will trap women who are coerced to veil at home, isolating them from society); see also Katha Pollitt, *Veil of Fears*, NATION (U.K.), June 14, 2010, at 10 (“[T]he ban may make [veiled women’s] situation[s] worse if the men who force them into the niqab decide that without it, they can’t leave the house at all.”).

232. See Richard Owen, *Italian Police Fine Woman for Wearing Burqa in Public*, TIMES (London), May 5, 2010 (quoting a man stating that he will confine his wife to comply with the Italian ban on face coverings in public because he believes that Islam prohibits other men from looking at her); see also Amnesty Int’l Press Release, *supra* note 13 (“For those women who are being coerced into wearing full face veils, the ban means they will either face state punishment if they go out in public—or more likely—they will be confined to their homes.”).

233. See Wing & Smith, *supra* note 9, at 777 (quoting Adrien Katherine Wing & Mark Richard Johnson, *The Promise of a Post-Genocide Constitution: Healing Rwandan Spirit Injuries*, 7 MICH. J. RACE & L. 247, 289 (2002)).

234. See *id.* at 778–79 (describing the experiences of women forced to unveil).

235. See CHÉRIFI, *supra* note 151, at 35; see also Wing & Smith, *supra* note 9, at 783 (“[T]he headscarf ban has its price: the exclusion of a number of young Muslim girls who will be removed from the public schools which may be their only chance to escape from the cage that segregationists plan for them.”).

ban protected their desire not to wear the headscarf.²³⁶ Still, even proponents of the law agree that “the expulsion of a girl [from school] is a failure.”²³⁷ Expulsion removes her from “an environment where different cultures can come together to learn.”²³⁸ A girl whose parents will not allow her to attend school without a headscarf may face greater imposition of religion when schooled privately or at home.²³⁹ The beliefs of a girl who refuses to remove her headscarf may harden in the absence of diverse peers and in response to the perceived injustice of her removal.²⁴⁰ Some girls over sixteen may end their educations all together.²⁴¹ Professor Ayelet Shachar argues that rather than encouraging inclusion, “the law hinders the attainment of education, which is the only long-term strategy that has consistently

236. See Bennoune, *supra* note 9, at 162 (reporting numbers were much lower than predicted and stating that “these statistics do not quantify the number of girls who, thanks to the Law, felt less coercion in school because the ban reinforced their personal choice not to wear the headscarf, despite familial or community pressure to do so”); see also Wing & Smith, *supra* note 9, at 767 (“Those girls [in favor of a ban] asked their instructors not to back down so that they would not feel compelled by their families or community to wear a scarf.”).

237. Bennoune, *supra* note 9, at 186; see Wing & Smith, *supra* note 9, at 780 (“The consequences of girls being excluded from the classroom are far-reaching.”).

238. Wing & Smith, *supra* note 9, at 780; see Danchin, *supra* note 110, at 722 (“The presentation of and engagement with different points of view is an intrinsic part of the educative process.”).

239. See Wing & Smith, *supra* note 9, at 761 (citing students who said that their parents would not allow them to go to school if they did not wear the scarf); see also Raday, *supra* note 201, at 709 (noting veil bans may result in traditionalist families not sending their children to public schools); Tiefenbrun, *supra* note 138, at 30 (warning of “the social isolation of private schools where they can be influenced by some dangerous imams in madrassas or schools that reportedly harbor intense anti-West sentiments”); Peter G. Danchin, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law*, 33 *YALE J. INT’L L.* 1, 7–8 (2008) (“[I]f there is an exercise of pressure or proselytizing to be found, it is more likely to exist in the home between parents and their children.”).

240. See Michel Troper, *Religion and Constitutional Rights: French Secularism, or Laïcité*, 21 *CARDOZO L. REV.* 1267, 1279 n.17 (2000) (“If the wearing of the veil is prohibited, the young women dismissed from public school will not have any contact with the values of tolerance and equality that only the school can inculcate.”); see also Wing & Smith, *supra* note 9, at 782 (“[I]f Muslims are being forced to choose between their religious convictions and a public education, more may look to starting their own private schools. This may only further their alienation from French society.”).

241. See Bennoune, *supra* note 9, at 161 (suggesting that some of the ninety-six students who were over sixteen years old who voluntarily left public schools in the first year of the ban may have dropped out completely). Education is compulsory from ages six to sixteen in France. See, e.g., *INCA Summary Profile Education in France*, *INT’L REV. OF CURRICULUM AND ASSESSMENT FRAMEWORKS* INTERNET ARCHIVE <http://www.inca.org.uk/france-system-mainstream.html> (last visited May 16, 2012).

been linked to improved life chances and empowerment for girls.”²⁴² Still, despite the “misfortune for national education” that at least 140 girls who would have otherwise attended public French schools in 2004 did not, proponents argue that the harm was necessary to combat the growing misfortunes of divisions among students, pressures to veil, and girls’ bodies becoming the battlegrounds of Islamists.²⁴³

Veiling controversies throughout the world demonstrate the need for difficult line drawing. The controversy leading to the English case *Regina v. Governors of Denbigh High School* started when the brother of a girl attending a majority Muslim private school, whose carefully designed uniform included the *shalwar kameeze*, arrived with her at school and demanded she be permitted to wear the *jilbab*, a more restrictive coat-like garment, instead.²⁴⁴ As a controversy ensued, her fellow Muslim students who wore the *shalwar kameeze* faced fundamentalist demonstrators outside the school demanding the students cover even more.²⁴⁵ Despite the brother’s loss in a lengthy legal battle on her behalf, England has since faced demands that children be allowed to attend school in full face veils, as have other countries.²⁴⁶

242. Shachar, *supra* note 40, at 85; *see also* Wing & Smith, *supra* note 9, at 784–85 (advocating for a focus on empowerment of French Muslim women and girls through education).

243. Wing & Smith, *supra* note 9, at 783; *see* Wing & Smith, *supra* note 9, at 770–71 (discussing how headscarves create divisions among students); Bennoune, *supra* note 9, at 186 (reporting that proponents believe that the freedom from pressure to veil provided by the ban is worth its negative consequences). *See generally* Mona Eltahawy, *Why Do They Hate Us?*, FOREIGN POL’Y, May/June 2012, http://www.foreignpolicy.com/articles/2012/04/23/why_do_they_hate_us (discussing current manifestations of “Islamist hatred of women” such as dress codes, genital mutilation, and virginity testing).

244. *See* *Regina v. Governors of Denbigh High School*, [2007] 1 A.C. 100 (H.L.) 100 (Eng.). The *shalwar kameeze* is a loose-fitting South Asian pants suit that conceals the body. *See* Bennoune, *supra* note 8, at 411.

245. *See* *Governors of Denbigh High School*, [2007] 1 A.C. at 111 (recounting the demonstrations by fundamentalists); *see also* Bennoune *supra* note 8, at 412 (reporting that fundamentalist demonstrators were at the school gates pressuring the girls to cover themselves).

246. *See* *Governors of Denbigh High School*, [2007] 1 A.C. at 101; *see also* Shachar, *supra* note 40, at 59 (referencing debates in France over the headscarf as being similar to those in France in Belgium, Denmark, Germany, Russia, and Singapore); Rasheed Kidwai, *Burqa Row in School*, TELEGRAPH (India), Oct. 12, 2004, http://www.telegraphindia.com/1041013/asp/nation/story_3876610.asp. (describing a “burqa campaign” at a high school); Neil Sears, *Muslim Father Gets Legal Aid to Fight School over Veil Ban*, DAILY MAIL (U.K.) (Jan. 22, 2007, 11:54 PM), <http://www.dailymail.co.uk/news/article-430705/Muslim-father-gets-legal-aid-fight-school-veil-ban.html> (reporting on a father’s demand that his twelve-year-old daughter be allowed to wear a full face veil to school).

Some commentators argue that public school is the proper place for a student to learn the responsibilities that come with citizenship: that she will sometimes have to make compromises in order to be part of society and that her desires and needs must sometimes be subordinated to those of others.²⁴⁷ In some cases, parents have the greatest difficulty accepting such limitations; where they refuse, their daughters suffer deprivation of a public education.²⁴⁸ Thus, the headscarf ban sacrifices protection of these students in the hope of protecting their peers and future students.²⁴⁹

A child who was never permitted to wear a headscarf to school will not experience the “spirit injury” of having to remove it.²⁵⁰ The number of students who accepted the French headscarf ban without incident suggests that the ban may encourage groups to embrace modified religious and cultural practices in order to receive the benefit of a public education.²⁵¹ Furthermore, state-imposed limitations on religious manifestations may even provide theological justification for the moderation of practices, as where religious

247. See Leonardo Álvarez Álvarez, *Education and Pluralism: Towards A Democratic Theory of Education in Europe*, 6 *Intercultural Hum. Rts. L. Rev.* 349, 356 (2011) (describing one conception of the function of education in which “education does not enable the individual to decide freely and autonomously, but to preserve the nations’ political and cultural values, these being superior to the rights of the individuals”); see also Wing & Smith, *supra* note 9, at 755 (“It is believed that schools are where the future leaders and citizens will be molded in the spirit of the Republic, which is based on the ideal citizen who is ‘French’ before any other identity.” (footnote omitted)).

248. See Shachar, *supra* note 40, at 85 (arguing the headscarf law deprives girls of education and thus empowerment); see also Wing & Smith, *supra* note 9, at 761 (discussing the statements of girls who said their families would not allow them to go to school unveiled).

249. See Bennoune, *supra* note 9, at 186 (reporting the views of commentators who view the detrimental effects of the headscarf ban as necessary); see also Haarscher, *supra* note 113, at 369 (concluding that fundamental democratic values cannot “be taught and defended—which is vital indeed for the future of our children—while accepting the veil at school”).

250. See Wing & Smith, *supra* note 9, at 777–79 (identifying “spirit injury” as a result of having to remove the veil and explaining “spirit injury” as a Critical Race Feminism term that contemplates the psychological, spiritual, and cultural effects of multiple types of assaults upon women); see also Adrien Katherine Wing, *Brief Reflections Toward a Multiplicative Theory and Praxis of Being*, 6 *BERKELEY WOMEN’S L.J.* 181, 186 (1990) (explaining “spirit injuries”).

251. See *Governors of Denbigh High School*, [2007] 1 A.C. at 134 (opinion of Baroness Hale) (“[S]uch a policy may send a clear message that the benefits of state education are tied to the obligation to respect women’s and girls’ rights to equality and freedom.” (quoting Raday, *supra* note 201, at 709)); see also Bennoune, *supra* note 9, at 162 (describing the number of expulsions and departures from school to be much lower than predicted).

leaders teach that God requires the faithfulness within the bounds of earthly laws.²⁵²

Still, as was the case with the school ban, the niqab ban could harm some vulnerable women in the name of protecting a wider population. In October 2010, Italian authorities fined a fully veiled woman for violating an ordinance banning from public buildings any clothing that prevents the identification of the wearer.²⁵³ The woman's husband said he would respect the ordinance and pay the fine, but because he believes his wife cannot be looked at by other men according to the Qur'an, he would no longer allow her to leave the house.²⁵⁴

In 2005, France denied citizenship to Faiza Silmi on the grounds that her niqab demonstrated "insufficient assimilation" and a rejection of gender equality.²⁵⁵ When she challenged the decision, Silmi claimed that the choice to wear the niqab was her own.²⁵⁶ On other occasions, however, she stated she had adopted the niqab at her husband's request when she moved to France.²⁵⁷ The denial of her citizenship application in the name of gender equality potentially put Silmi in a position of greater reliance on her citizen husband.²⁵⁸ It is unclear whether the decision to wear the niqab was truly her own.²⁵⁹

252. See ALI RAFAA ET AL., *THE BOOK OF ESSENTIAL ISLAM* 29 (2005) ("The guidance to respect earthly laws and at the same time seek God's support is mentioned in various ways in the Holy Qur'an . . ."); see also SHACHAR, *supra* note 14, at 34–35 (describing one response to pressures to assimilate in which groups amend certain traditions in order to align them more closely with majority norms).

253. See Owen, *supra* note 232 (reporting on a woman fined for violating an Italian ban on face-coverings in government buildings).

254. See *id.* (reporting the husband's assertions that he would confine his wife).

255. See Katrin Bennhold, *A Muslim Woman Too Orthodox for France*, N.Y. TIMES, July 18, 2008, <http://www.nytimes.com/2008/07/18/world/europe/18iht-france.4.14618011.html?pagewanted=all> (reporting on the citizenship determination). The Council of State upheld the decision to deny citizenship. See *id.*; see also *A Burqa Barrier*, ECONOMIST, July 19, 2008, at 61 (reporting the same story but identifying Faiza Silmi as Faiza M); *France Rejects Veiled Muslim Wife*, BBC NEWS (July 12, 2008, 8:34 PM), <http://news.bbc.co.uk/2/hi/europe/7503757.stm> (reporting that the Conseil d'Etat upheld the decision to deny her citizenship).

256. See Bennhold, *supra* note 255 (reporting Silmi's assertions the decision to veil was her own).

257. See *A Burqa Barrier*, *supra* note 255, at 61 ("The woman adopted the burqa at her husband's request in France . . .").

258. See Gilbert, *supra* note 110, at 394 (arguing that denial of French citizenship to Faiza Silmi was likely to make her even more dependent on her male relatives for protection).

259. See *id.* (noting that Silmi may not have had the option of not wearing the niqab, "Ms. Silmi, who was eligible for citizenship through her spouse, apparently would have had to place herself in the untenable and potentially dangerous position of challenging gender

Despite the possibility that the niqab ban risks harming some of the vulnerable women it is meant to protect, Mona Eltahawy, an Egyptian-born Muslim journalist, hopes that men will have sufficient incentives to let their wives leave the house because they need them to continue to work.²⁶⁰ Others have speculated that men forcing their wives to stay home would “pay the price” by having to take on responsibilities like taking children to school, shopping, paying bills, and going to the bank or post office.²⁶¹ The fact that an estimated half of French women who wore the niqab prior to the ban removed their full veils in the absence of enforcement may support these predictions.²⁶² Still, it must be acknowledged that the ban could lead to the extreme isolation of women who feel they cannot leave their homes with their faces uncovered or are not allowed to do so.²⁶³

3. Considering the Protections of Secularism

As Professor Nussbaum explains, the headscarf ban in Turkey was necessary given threats to the safety and well-being of unveiled women in that country: “The ban protected a space for the choice to be unveiled, and was legitimate so long as women did not have that choice.”²⁶⁴ She concludes, however, that European bans are not justified because women in Europe are generally free to dress as they please today.²⁶⁵ As the scholarship discussed above demonstrates, this

roles within her family and her community.”); *see also A Burqa Barrier*, *supra* note 255, at 61 (“The paradox is that it was only when Faiza M came to France [from her native Morocco] that she felt obliged to don the burqa.”).

260. *See* Brown, *supra* note 115 (expressing Mona Etahawy’s hope that women will not be confined because their husbands will need them to work).

261. *See, e.g.*, Owen, *supra* note 232 (suggesting husbands will allow their wives to remove the veil rather than accept these tasks).

262. *See* de la Baume, *supra* note 6 (reporting one half of women have removed the veil in public according to an anti-ban leader); *see also First Women Fined Under France’s Burka Ban*, RFI ENG. (Sept. 22, 2011), <http://www.english.rfi.fr/france/20110922-women-fined-wearing-islamic-niqab-public> (reporting that half of the 2000 women who wore the full veil before the ban are believed to have stopped since the ban went into effect).

263. *See, e.g.*, Owen, *supra* note 232 (reporting that an Italian man will pay the fine imposed on his wife for wearing a face covering in public, but will no longer allow his wife to go outside); *see also* Press Release, Amnesty Int’l, *supra* note 13 (stating that some women may be confined to their homes because of the French law).

264. Nussbaum, *supra* note 13 (describing threats to women in Turkey who went unveiled).

265. *See id.* (claiming that women in Europe can dress as they wish today).

is not true for a significant segment of French women of Muslim heritage.²⁶⁶

Opponents of the ban argue that the number of French women who wear the niqab, an estimated 2000 at the time of the law's passage, was too small to justify the intrusion.²⁶⁷ Mohamed Sifaoui, an Algerian journalist exiled to France, who has experienced threats and attacks attributed to his antifundamentalist and secularist views, drew the opposite conclusion from the small number of girls seeking to veil in the context of the school ban debate.²⁶⁸ He argues that the secularism of the entire society should not be jeopardized for the small minority of Muslims who sought to veil in school.²⁶⁹ Scholars have argued that religious fundamentalism is among the greatest threats to the human rights of women worldwide, against which secularism is an important protection.²⁷⁰ A woman need not be the subject of explicit violence or threats in order to be affected by other women wearing the niqab.²⁷¹ While individual women are not

266. See *supra* notes 169–71 and accompanying text (describing the violent attacks and gang rapes of women thought to be violating “modesty” norms in France).

267. See, e.g., *2 Arrested as France’s Ban on Burqas, Niqabs Takes Effect*, CNN, Apr. 11, 2011, http://articles.cnn.com/2011-04-11/world/france.burqa.ban_1_france-s-islamic-burqas-french-muslim?_s=PM:WORLD (quoting an American political science professor as saying, “It’s an unnecessary confrontation. . . . This is not an epidemic”); see also, e.g., Thomas Hammarberg, *Penalising Women Who Wear the Burqa Does Not Liberate Them*, COUNCIL EUR. COMMISSIONER’S HUM. RTS. COMMENT (July 20, 2011, 9:27 AM), http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=157 (“The way the dress of a small number of women has been portrayed as a key problem requiring urgent discussion and legislation is a sad capitulation to the prejudices of the xenophobes.”).

268. See Bennoune, *supra* note 9, at 163 (describing Mohamed Sifaoui’s position); see also *France Must Ensure Police Protection for Mohamed Sifaoui*, SECULARISM IS A WOMEN’S ISSUE (Aug. 19, 2008), <http://www.siawi.org/article507.html> (calling for public support on behalf of Mohamed Sifaoui after he was threatened by fundamentalists).

269. See Bennoune, *supra* note 9, at 183 (reporting Sifaoui’s view that secularism should not be undermined for the few girls who seek to veil).

270. Bennoune, *supra* note 41, at 637–38 (“Unfailingly, such [Muslim fundamentalist] movements purvey systemic discrimination against women and religious minorities, and advocate other violations of human rights”); see also Raday, *supra* note 201, at 675 (“Under most of the monotheistic religious norms, women are not entitled to equality in inheritance, guardianship, custody of children, or division of matrimonial property. In most of the branches of the monotheistic religions, women are not eligible for religious office and, in some, they are limited in their freedom to participate in public life, whether political or economic.”).

271. See Bennoune, *supra* note 9, at 175 (quoting Bennoune, *supra* note 8, at 426) (“[N]ot-being-veiled is a condition that can only exist in the presence of veiling. Not-being veiled has led to a range of terrible consequences for women and girls”); see also Wing & Smith, *supra* note 9, at 760 (reporting that at French schools with largely Muslim populations, unveiled Muslim girls are viewed as whores and potential targets of violence).

responsible for the broader political context in which they veil, that context can determine the meaning of the choice and what impact it has on others.²⁷² The veil is a symbol that, in some contexts, is harmful to women's equality and the secularism that protects it.²⁷³

III. *SECULARISM AND GENDER EQUALITY: MEANS OF PROTECTING THE PUBLIC ORDER AND THE RIGHTS OF OTHERS*

Part II outlined the history and unique social and legal context of the veil debate in France. This Part analyzes the legality of the niqab ban and argues that it does not violate the European Convention on Human Rights due to the state's legitimate interest in protecting the public order and the rights and freedoms of others by upholding secularism and gender equality. It further argues that international misunderstanding of the law's context is problematic due to its effect on the efforts of Muslim reformers and influence on preeminent human rights organizations.

A. *Secularism and Gender Equality: Vital Protections of the Human Rights of Women*

As the ECtHR has repeatedly held, secularism and gender equality are vital to the protection of public order and the rights of others and thus justify some limitations on individual rights.²⁷⁴ In

272. See Bennoune, *supra* note 8, at 418 (agreeing with HUMAN RIGHTS WATCH, *supra* note 97, that women choosing to cover their heads are not at fault for the political circumstances, but arguing the meaning in context makes the religious expression subject to limitation regardless); see also Phyllis Chesler, *Ban the Burqa? The Argument in Favor*, MIDDLE EAST Q. 33, 44 (Fall 2010) ("The burqa is harmful not only to the wearer but to others as well. The sight of women in burqas can be demoralizing and frightening to Westerners of all faiths, including Muslims, not to mention secularists. Their presence visually signals the subordination of women.").

273. See *id.* (noting that limiting expression may be necessary "in pursuit of other goals, whether women's equality as mandated by the Women's Convention or the secularism which makes it possible"); see also Wing & Smith, *supra* note 9, at 768 (quoting feminist Anne Vigerie, who sees the veil as a "flag on the head" that confirms the underdeveloped status of women in radical Islam and symbolizes the acceptance of all the conditions that Islam mandates).

274. See *supra* Part I.B (discussing *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173, and related cases addressing limitations of religious expression); see also notes 176–81 and accompanying text (discussing *Dogru v. France*, App. No. 27058/05, 49 Eur. H.R. Rep. 179 (2008)).

some cases, this may justify regulation of even the public space.²⁷⁵ The state will sometimes have to make value judgments as to conflicting protected freedoms.²⁷⁶ The freedom to wear a symbol that is widely considered offensive to secularism and gender equality deserves less protection than the rights to liberty, freedom of conscience, and freedom from violence of a woman experiencing pressure or coercion to veil. France has constitutionally enshrined the value of secularism.²⁷⁷ Where the rights of a woman to manifest her religion conflict with the rights of someone who wishes to enjoy the protections of a secular society, France is correct to favor the interests of the individual embracing and seeking the protections of the foundational values central to the public order.²⁷⁸ The woman who chooses to wear the niqab makes a decision affecting those who must interact with her, other Muslim women, and women in general.²⁷⁹

As in Turkey, the veil presents a genuine threat to secularists, particularly Muslim secularists.²⁸⁰ France has a legitimate interest in protecting *laïcité*, just as Turkey protects *laik*.²⁸¹ Both states' regulations seek to protect the public order by responding to religious divisions and threats to the safety of women; both states' "historical experiences" include struggles against theocracy that led to the founding of secular states.²⁸²

Commentators have been highly critical of the idea expressed by the *Dahlab* court that the veil is "imposed on women by a religious

275. See *supra* Part II.B.2.b and accompanying text (discussing justifications for regulations of religious dress beyond those in schools).

276. See *supra* Part II.C (discussing the balance of interests at stake between the individual rights of women who wish to veil and others that are affected).

277. See *supra* notes 135–36 and accompanying text (describing the concept of *laïcité*).

278. See *supra* Part I.B.1 and accompanying text (describing the ECtHR's identification of secularism and gender equality as vital to the public order); see also *supra* note 196 and accompanying text (explaining the concept of republicanism and listing values considered central to it).

279. See *supra* notes 271–73 and accompanying text (discussing the impacts of veiling on unveiled women).

280. See *supra* notes 268–69 and accompanying text (quoting a Muslim who views the headscarf in school as putting the secularism of society at risk).

281. See *supra* notes 67–70 and accompanying text (explaining the Turkish concept of secularism and detailing how some perceive the headscarf as a threat to this principle).

282. See *supra* note 82 and accompanying text (citing *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173, ¶ 115, regarding the significance of states' historical experiences); see also *supra* note 115 and accompanying text (discussing the history of religious wars in Europe); *supra* note 136 and accompanying text (describing France's struggle with the Catholic Church and legal enshrinement of secularism).

precept that [is] hard to reconcile with the principle of gender equality.”²⁸³ However, the niqab and burqa have been and continue to be instrumental in the violent oppression of women.²⁸⁴ Even where it is not imposed by force, the veil represents a discriminatory interpretation of the Qur’an given that it is only required of women, despite the Qur’an’s directions to all Muslims to dress “modestly.”²⁸⁵ Unlike the headscarf, the full veil accomplishes the complete disappearance of a woman’s identity.²⁸⁶ Thus, beyond the immediate practical threat it poses to the safety of some women in France, it is a symbolic harm.²⁸⁷

Furthermore, although this Note has characterized the rights-bearing woman who wishes to veil as making a fully autonomous choice, it should be noted that this assumption is problematic. Relying on the choice of individual women to veil or their consent to membership in a religious group risks absolving the state of its responsibility to address harms to women.²⁸⁸ The decision to deny Faiza Silmi citizenship essentially punishes her in the name of gender equality for a choice that may not truly have been her own.²⁸⁹ Authorities not only construed her choice as a failure to meet citizenship criteria of which she had no notice but also relied on an unrealistic assumption that she could choose not to veil should her husband want her to do so.²⁹⁰ The niqab ban is a more coherent and realistic attempt to address the practice, rather than an abdication of responsibility based on the assumption that a woman can simply choose not to veil.

283. *See supra* note 78 and accompanying text (citing criticism of this assertion and noting relevant provisions in the Qur’an).

284. *See supra* note 232 and accompanying text (describing family coercion to veil); *see also supra* note 219 and accompanying text (describing the violent imposition of the veil on women by theocrats).

285. *See supra* note 78 (discussing allegations that the precept underlying the veil is difficult to reconcile with equality).

286. *See supra* note 217 and accompanying text (citing commentators equating the veil with a woman’s disappearance from active citizenry and individually recognized public life).

287. *See supra* notes 165–71 and accompanying text (describing some of the harms to women stemming from the symbolism of the veil).

288. *See supra* notes 126–29 and accompanying text (discussing state obligations under CEDAW).

289. *See supra* notes 255–59 and accompanying text (describing the rejection of Silmi’s citizenship application).

290. *See supra* notes 255–59 and accompanying text (questioning whether Silmi made the decision to wear the niqab).

B. *An Invasive Regulation of an Extreme Practice*

The niqab ban is certainly a more extreme regulation than the one at issue in *Şahin*, but it is aimed at a more extreme practice.²⁹¹ As in *Şahin* and *Dogru*, the ECtHR should grant a margin of appreciation to French officials' greater ability to evaluate local needs, especially given the evident failure of the international community to recognize the severity of the problem sought to be remedied and the diversity of viewpoints among Muslims.²⁹² The ECtHR should, however, weigh the circumstances on the grounds against the intrusion more explicitly than it did in its proportionality analysis in *Şahin*.²⁹³

The decision leading to the French ban was arguably more thoroughly investigated and debated and the process of implementation more lengthy and considered than was the case in *Şahin*. In *Şahin*, the ECtHR found that the careful implementation of the rule demonstrated the proportionality of the measures to the ends that the state sought to achieve.²⁹⁴ In the case of the niqab ban, the law was preceded by a commission to study the phenomenon, extensive debate, approval of the *Conseil d'Etat*, and a six-month window prior to implementation to educate the public about the law.²⁹⁵ The penalty of a fine or citizenship class is not so severe as to be disproportionate to the need to protect secularism and gender equality. Furthermore, citations by law enforcement provide an important opportunity for state intervention where a woman has been coerced into wearing the niqab, for example under threat of violence or threats regarding withholding immigration sponsorship.²⁹⁶

In analyzing the proportionality of the law, the ECtHR should consider the differing effects it will likely have on a range of women. The law risks harming women whose husbands or fathers will confine

291. See *supra* Part II.B.2.b (discussing differences between the laws and the practices they seek to regulate).

292. See *supra* note 90 and accompanying text (discussing the *Şahin* court's grant of a significant margin of appreciation based on the greater understanding of local needs); see also *supra* Part II.B (discussing misconceptions about the debate in France).

293. See *supra* Part I.B.2 (discussing the ECtHR's proportionality analysis and criticism thereof).

294. See *supra* Part I.B.2 (discussing the *Şahin* court's proportionality analysis).

295. See *supra* notes 182–88 and accompanying text (describing the commission researching the ban, constitutional review of the law, and the six-month period allotted after passage of the law for education of the public prior to implementation).

296. See *supra* note 232 and accompanying text (discussing a woman whose husband stated he would not let her leave the house unveiled); see also notes 255–59 (discussing how a woman was denied French citizenship in part due to wearing a niqab).

them rather than let them show their faces in public.²⁹⁷ In such cases, however, the situation is so extreme they need to seek the assistance of law enforcement. The state should be encouraging these women to do so rather than protecting a rights-violative status quo out of fear that an already intolerable situation might become worse. These coerced women already are victims of the ideas the ban seeks to combat, especially that women are lesser humans who should be confined to the private sphere.²⁹⁸ The French ban is a reasonable step to prevent this idea from taking hold in its society by sending the message that the economic, political, educational, and other benefits of life in a democracy are conditioned on acceptance of certain minimums.²⁹⁹ Gender equality certainly correlates to and likely promotes the stability and prosperity of a country.³⁰⁰ The qualities of a country that attract immigrants from various traditions may be a powerful incentive to moderate unjust practices, but this cannot be the case if the state is overly deferential to demands for tolerance that facilitate the oppression of less powerful members of religious or cultural groups.³⁰¹

Perhaps the youth of the majority of niqabis in France and the newness of the phenomenon of full veiling suggests that the psychological trauma to women required to unveil by the state will be less than one might expect.³⁰² One can hope that abandoning a new practice early will be less traumatic than deserting an entrenched one that a woman has practiced for much of her life.³⁰³ Not only is the experience of women forced by the state to unveil likely to vary widely from person to person, however, women who do not fit the majority profile among niqabis, such as a recent immigrant or an older woman, may have worn the veil for most of their lives. Still, one

297. *See supra* notes 231–32, 263 and accompanying text (discussing the possibility the ban will result in the confinement of women to their homes).

298. *See supra* notes 217–19 and accompanying text (discussing harmful meanings attributed to the veil).

299. *See supra* note 260–61 and accompanying text (discussing coercive veiling and incentives to modify repressive religious or cultural practices).

300. *See supra* note 22 and accompanying text (discussing the correlation of gender equality to stability and the maintenance of public order).

301. *See supra* notes 260–63 and accompanying text (discussing the law's modification of cultural and religious practices).

302. *See supra* note 222 (presenting statistics regarding the age of women who wear the niqab and the high number of converts among them).

303. *See supra* notes 233–34 and accompanying text (describing the traumatic experience of girls having to unveil at school).

can hope that, among women who experience trauma at having to show their face, there will be some for whom undergoing it will ultimately be beneficial. For women who refuse to unveil and resolve not to leave their homes, the law will certainly have a very detrimental impact.³⁰⁴ Yet, the risk to these women is necessary to avoid harm to other women by ending a marginal practice that was growing rapidly prior to the ban.³⁰⁵

C. Why the International Misunderstanding of the Ban Matters

Critics of the French niqab ban who approve of the Turkish headscarf ban upheld in *Şahin* rightly identify significant differences between the regulations.³⁰⁶ Two primary differences are the fact that Turkey is a Muslim-majority country, and that the headscarf ban did not extend to the public space.³⁰⁷ It is true that, unlike in Turkey, Islamophobia is a serious concern in France.³⁰⁸ Reflexively blaming Islamophobia, however, conflates legitimate opposition to fundamentalist movements with anti-Muslim bias and thus silences Islam's internal critics.³⁰⁹ Regulating veiling is not necessarily Islamophobic, as the restrictions in place in Turkey as well as other majority Muslim countries demonstrate.³¹⁰ This idea reflects a dangerous ignorance of the very real threats to Muslim women's freedom and safety.³¹¹ It also devalues secularism as an important protection for the rights of French citizens in general and women in particular.

Both the headscarf ban in schools and the niqab ban are attempts to address specific circumstances in France. Simplistic accusations of

304. See *supra* note 263 and accompanying text (describing a man who says he will not allow his wife to leave the house due to a comparable Italian ordinance).

305. See *supra* notes 233–43 and accompanying text (weighing the harms of the headscarf ban against its continued and growing presence in schools).

306. See *supra* notes 264–65 and accompanying text (citing Professor Nussbaum's argument that the ban in Turkey protected a space to unveil in a context of pressure whereas women can wear what they like in Europe today).

307. See *supra* notes 200–03 and accompanying text (discussing the significance of the ban in a school setting).

308. See *supra* note 199 and accompanying text (citing concerns of racism in France).

309. See *supra* note 198 and accompanying text (discussing the effects of allegations of Islamophobia on intra-Muslim debate).

310. See *supra* note 195 and accompanying text (citing veiling restrictions in Muslim majority countries).

311. See *supra* note 170–71 (describing violent attacks and gang rapes of French Muslim women deemed in violation of modesty norms).

racism and Islamophobia obscure the complicated intra-Muslim debate and have the potential to silence those who do not fit Western or American stereotypes of Muslims.³¹² The debates resulting from competing visions of Islam have tangible effects on women's lives, and therefore, the state will sometimes have to take a side.³¹³

The mischaracterization of the ban in the English-speaking media, particularly in the United States, matters not only because it silences Muslim reformers and ignores the facts on the ground for Muslim women in France, but also because of the influence that this narrative has on the major international human rights organizations.³¹⁴ These groups are extremely influential in setting the global human rights agenda, an agenda that has been criticized for protecting religious freedom at the expense of the human rights of women and failing to recognize those who are oppressed can also be oppressors, usually of women.³¹⁵ This highlights the importance of the contextual analysis demonstrated by the *Şahin* court.³¹⁶ Abstract concepts of individual religious freedom imported from other jurisdictions and societies cannot be determinative.³¹⁷ Without considering the actual circumstances on the ground in a particular country, women stand to be harmed in the name of women's rights.³¹⁸

D. Paternalism or the Reasonable Imposition of a Duty on Women?

The statements of women demanding their right to veil in the media and to scholars are overwhelmingly devoid of any acknowledgement of the historic and ongoing violent imposition of the veil on other women, or the possibility that their individual

312. *See supra* note 173–75 and accompanying text (discussing assumptions that Muslims generally wear veils and therefore oppose the ban).

313. *See supra* notes 165–71 and accompanying text (describing the harms to women that have resulted in part from veiling in the French context).

314. *See supra* notes 13, 129 and accompanying text (citing Amnesty International and Human Rights Watch among the organizations opposing the veil bans on individual freedom grounds).

315. *See supra* notes 198–200 and accompanying text (discussing the phenomenon of Islamophobia obscuring the oppression of Muslims by other Muslims).

316. *See supra* notes 80–86 and accompanying text (discussing the *Şahin* court's attention to the circumstances in Turkey).

317. *See supra* Part II.A (contrasting the legal and social contexts in France and the United States).

318. *See supra* notes 264–66 and accompanying text (discussing the context in Turkey of violence against unveiled women as sufficient to justify restrictions).

choices could have harmful effects on others.³¹⁹ These women assert that the choice to fully veil is their own and adamantly reject any implication that someone is forcing them to do so, seemingly without any recognition that other women may not enjoy such freedom from coercion and pressure.³²⁰ This emphasis on personal choice is divorced from the fact that women have such autonomy thanks to the good fortune of living in a liberal society that protects equality. It evidences a conception of rights as concerning only those of the individual as against the state, typical of American jurisprudence.³²¹ As international human rights law recognizes, state inaction is not necessarily protective of rights and states have affirmative duties to protect rights and actively promote equality.³²² Especially in the case of women, rights are often violated by private action and oppressive social norms rather than state action.³²³ France's positive obligations to protect the rights of all women will sometimes entail limiting the rights of some women.³²⁴ Rather than a paternalistic attempt to make women do what the state thinks is best for them, the niqab ban is a statement that women have minimum duties to other women and to society.

CONCLUSION

The English-speaking media and prominent international human rights organizations have generally analyzed the French niqab ban with insufficient understanding of its context. Attention to the actual circumstances in France and the range of views among French Muslims are imperative for a sound balancing of interests. As in *Şahin*, France has a legitimate objective in protecting secularism and gender equality, values fundamental to the public order and women's

319. See *supra* note 224 and accompanying text (describing women asserting their rights to veil as a matter of personal autonomy).

320. See *supra* notes 224, 256 and accompanying text (discussing accounts of women who wish to veil).

321. See *supra* notes 119–20 and accompanying text (contrasting US jurisprudence interpreting the Constitution as protecting primarily individual rights and international law).

322. See *supra* notes 121–29 and accompanying text (contrasting US and international law, which imposes affirmative duties on governments).

323. See *supra* notes 121–29 and accompanying text (discussing the affirmative duty to protect against the acts of third parties under CEDAW and other treaties and citing precedent of the Inter-American Court of Human Rights concerning domestic violence).

324. See *supra* note 129 and accompanying text (discussing state obligations under CEDAW).

rights. Although the law places on all women a responsibility that will limit the religious, cultural, or political expression of some, it should be seen as fostering freedom rather than infringing it. It is reasonable and just to require a woman who enjoys the benefit of life in a liberal democracy to show her face in public so that other women may live more freely.