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# France: Banning Legal Pluralism by Passing a Law

By JESSICA FOURNERET\*

## Introduction

On September 2, 2004, the first day of *la rentrée*<sup>1</sup> in France, an estimated million<sup>2</sup> French Muslim students were forced to either take off their headscarves—or watch their female counterparts do so—upon entering the school buildings.<sup>3</sup> The consequences for failing to comply were temporary suspension, expulsion, or even, prosecution.<sup>4</sup> This is because on March 15, 2004, French president Jacques Chirac enacted a law to prohibit public school students from wearing clothing and insignia that “openly manifest a religious affiliation.”<sup>5</sup> While the law, on its face, bans “all such symbols,” including “large” Catholic crucifixes, Jewish yarmulkes and Sikh turbans, the unstated but clear aim of the law was to

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1. *La rentrée* is the French term for returning to school after the summer vacation.

2. Carol Eisenberg, *France's Secularism: An Uneasy Fit*, THE SEATTLE TIMES, December 14, 2004, at A3.

3. Sebastian Rotella, *The Conflict In Iraq; Chirac Demands Captors Release Two Journalists*, L.A. TIMES, Aug. 30, 2004, at A6.

4. See, e.g., *Chirac: Those Breaking Religious Symbols Ban Will Be Prosecuted*, REUTERS, July 14, 2004, at <[www.pluralism.org/news/intl/index.php?xref=Controversy+Over+the+Headscarf&sort=DESC](http://www.pluralism.org/news/intl/index.php?xref=Controversy+Over+the+Headscarf&sort=DESC)> (visited Oct. 22, 2005); Nicola Clark, *French unite to ask for hostages' release*, INT'L HERALD TRIB., Aug. 30, 2004, at A1.

5. *Projet de Loi Encadrant, en Application du Principe de Laïcité, le Port de Signes ou de Tenues Manifestant une Appartenance Religieuse dans les Ecoles, Collèges et Lycées Publics*, No. 253, Assemblée Nationale, Douzième Législature (2004), available at <[www.assemblee-nat.fr/12/pdf/ta/ta0253.pdf](http://www.assemblee-nat.fr/12/pdf/ta/ta0253.pdf)> (“Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestant ostensiblement une appartenance religieuse est interdit. Le règlement intérieur rappelle que la mise en oeuvre d’une procédure disciplinaire est précédée d’un dialogue avec l’élève.” [It is forbidden to wear symbols or clothing that openly manifests membership to a religion in public elementary, intermediate and high schools. The rules of procedure require that disciplinary proceedings be preceded by a discussion with the pupil.]).

prohibit female Muslim students from wearing the *hijab*,<sup>6</sup> or headscarf.<sup>7</sup> The French parliament voted almost unanimously (494 to 36) to pass the ban.<sup>8</sup> Early polls indicated that the French public understood the motive behind the law in the same way and were overwhelmingly supportive of it.<sup>9</sup>

Unfortunately for the French, the Muslim community was not as supportive. There were threats of schoolgirl strikes, threats of huge sympathy strikes, threats of mass lawsuits, threats of violence from terrorists, and threats of Islamist retribution, including warnings to the country's Muslim women's-rights activists.<sup>10</sup> One explanation for the anger and frustration is that, according to some Muslims, wearing the hijab is not a choice that the students make; it is an obligation stemming from Islamic law.<sup>11</sup> Whether or not each student feels obliged to wear the scarf is difficult to determine. Assuming a student does indeed feel such an obligation, the ban creates a conflict of laws. On the one hand, the girl wants to cooperate with the laws of her country and of her school, while on the other, she may feel a personal duty to wear the scarf and may suffer from societal and familial pressure to do so.

This note will discuss the impossible choice that these two laws impose on school-aged children. I will first discuss the current French attitude towards religion and state, and its historical basis. I will then put forth several alternative explanations for the current desire to keep religion out of the classrooms. In the following section, I will discuss the personality principle of Islam, several conflicting theories about the veil, and reasons why the veil poses such a threat to Western society. I will examine the Western system of laws and the conflict between that system and religious belief systems which impose differing sets of laws. Finally, I

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6. *The Question Of Hijab: Suppression Or Liberation?*, THE INSTITUTE OF ISLAMIC INFORMATION AND EDUCATION, at <[www.usc.edu/dept/MSA/humanrelations/womeninislam/whatishijab.html](http://www.usc.edu/dept/MSA/humanrelations/womeninislam/whatishijab.html)> (visited Mar. 6, 2005) ("The word '*hijab*' comes from the Arabic word '*hajaba*' meaning to hide from view or conceal. In the present time, the context of *hijab* is the modest covering of a Muslim woman.").

7. Derek H. Davis, *Reacting to France's Ban: Headscarves and Other Religious Attire in American Public Schools*, 46 J. CHURCH & STATE, at 221 (Spring 2004).

8. Elisa T. Beller, *The Headscarf Affair: The Conseil d'Etat on the Role of Religion and Culture in French Society*, 39 TEX. INT'L L.J. 581, 581 (2004).

9. Davis, *supra* note 7, at 221.

10. Jane Kramer, *Taking the Veil; How France's Public Schools Became the Battleground in a Culture War*, THE NEW YORKER, Nov. 22, 2004, at 58.

11. Megan K. Stack, *The Many Layers of the Veil*, L.A. TIMES, Jan. 12, 2005, at A1. The article tells the story of Egypt's former chief justice, Said Ashmawi, whose life changed dramatically after writing a book that gathered and interpreted religious arguments for the *hijab* and claimed that Islam does not require women to cover their hair. Once a respected judge he is now confined to his home with a guard at his door due to receiving death threats.

will explain the reasons why this ban on religious clothing is counterproductive.

### I. The History of French *Laïcité*

*Laïcité* is a concept regarding the separation of church and state, yet it is also a state of mind that incorporates a long history of cultural ideas.<sup>12</sup> The French attitude towards *laïcité* dates back to the French Revolution of 1789.<sup>13</sup> The Declaration of the Rights of Man and of the Citizen of August 26, 1789<sup>14</sup> guaranteed the freedom of belief; and the Constitution of 1791<sup>15</sup> declared the freedom of religious observance. Two important events occurred at this time: the nationalization of the clergy's property and the beginning of state financial assistance for the church.<sup>16</sup> A decade later, an agreement dated July 15, 1801, between Napoleon and the Pope, restored religious peace.<sup>17</sup> By 1879, however, the republicans gained power and enacted anticlerical legislation in order to reduce the influence of the church.<sup>18</sup> Finally, in 1905, legislation was passed to officially separate church and state and to cut off financial aid to churches, which would, in turn, guarantee freedom of public worship.<sup>19</sup>

The word *laïcité* is used to summarize prevailing beliefs regarding the proper relationship between religion and the French state.<sup>20</sup> It has been compared and translated to the English word "secular" yet is infused with historical meaning. For example, *laïcité* has the connotation of the state protecting itself from the excesses of religion as opposed to the U.S. conception that religion must be protected from the excesses of the state.<sup>21</sup>

12. "Laïcité is a prevailing conception of the separation of church and state and the absence of religious interference into government affairs. The concept is related to secularism, but does not imply hostility towards religious beliefs. The French government is legally prohibited from recognizing any religion." WIKIPEDIA at <en.wikipedia.org/wiki/La%EFc9t%EF99> (visited Mar. 6, 2005).

13. T. Jeremy Gunn, *Religious Freedom and Laicite: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 420 (2004) (discussing the development of the French conception of *laïcité* in detail).

14. Declaration of the Rights of Man and of the Citizen, Aug. 26, 1789, art. 6, available at <www.conseil-constitutionnel.fr/textes/d1789.htm>.

15. FR. CONST. art. I, (1791), available at <sourcebook.fsc.edu/history/constitutionof1791.html>.

16. Rik Torfs, *Church and State in France, Belgium, and the Netherlands: Unexpected Similarities and Hidden Differences*, 1996 BYU L. REV. 945, 947 (1996).

17. *Id.*

18. *Id.*

19. *Id.* at 948.

20. Gunn, *supra* note 13, at 420.

21. T. Jeremy Gunn, *Under God but Not the Scarf: The Founding Myths of Religious*

In a speech made supporting the ban, Chirac stated: “*Laïcité* guarantees freedom of conscience. It protects the freedom to believe or not to believe. It assures everyone of the possibility to express and practice their faith peaceably, freely, though without threatening others with one’s own convictions or beliefs.”<sup>22</sup>

The French proclaim that France is a land of diversity in which *laïcité* promotes tolerance.<sup>23</sup> The purpose of the law is to ban any symbol which makes the religious faith of the wearer obvious at first sight. The idea, according to the President, is that “danger lies in divisiveness, discrimination and confrontation.”<sup>24</sup> The ban, in theory, will therefore preserve equality between children of all faiths and between both genders. It will protect the children from exposure to “divisive ill winds, which drive people apart and set them against one another,” according to Chirac.<sup>25</sup>

Although the stated purpose of the ban may seem reasonable to the French public when viewed through this historical and cultural context, it is difficult for the external world to understand how excluding an article of religious clothing will further a goal of inclusion. In other words, Chirac has stated that the objective of the ban is “to open hearts and minds,”<sup>26</sup> yet the law is foreclosing the opportunity for the children to experience multiculturalism in their classrooms. The United States, by contrast, has generally allowed a great amount of leeway for religious practices and attire, although there are some notable exceptions. These exceptions usually involve more marginal religious groups, which may suggest that tolerance exists only when the two systems do not conflict.<sup>27</sup> Nonetheless, the U.S. policy regarding separation of church and state usually overlaps with a person’s constitutional right to freedom of expression, and, as such, is permissive. The idea that excluding certain religious symbols or dress would “open hearts and minds” seems counterintuitive for Americans who live in a country founded upon the idea of freedom from religious persecution. It seems more likely that, by seeking to make schools

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*Freedom in the United States and Laïcité in France*, 46 J. CHURCH & STATE 1 (Winter 2004).

22. Jacques Chirac, Speech at the Elysee Palace (Dec. 17, 2003) [hereinafter Chirac, Elysee Palace Speech], available at <[elysee.fr/elysee/anglais/speeches\\_and\\_documents/2003/speech\\_by\\_jacques\\_chirac\\_president\\_of\\_the\\_republic\\_on\\_respecting\\_the\\_principle\\_of\\_secularism\\_in\\_the\\_republic-excerpts.2675.html](http://elysee.fr/elysee/anglais/speeches_and_documents/2003/speech_by_jacques_chirac_president_of_the_republic_on_respecting_the_principle_of_secularism_in_the_republic-excerpts.2675.html)>.

23. Gunn, *supra* note 13, at 420.

24. Chirac, Elysee Palace Speech, *supra* note 22.

25. *Id.*

26. *Id.*

27. See *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990); *Braunfeld v. Brown*, 366 U.S. 599 (1961).

completely devoid of religious insignia, the French are pushing for a homogenization of their population and a destruction of individual religious identity.<sup>28</sup>

## II. Fears of Islamic Fundamentalism

An alternative justification for the ban's enactment has been suggested by many critics and insinuated by the French government itself. France had been considering legislation of this type for over fifteen years.<sup>29</sup> Yet in December 2003, Chirac, in a live address to the nation, presented the ban as vital to the preservation of France's "secular character."<sup>30</sup> Within three months, the ban was signed into law.

An increasing fear of Islamic fundamentalism appears to be the real impetus for the ban. The apparent rise in immigrated, as well as French-born children wearing the veil to school<sup>31</sup> could be due to several distinct possibilities. There was either an influx of people of religious faith, an increase in pressure put on Muslim girls to begin wearing the veil, or a dramatic recruitment of new children to the religion. Due to the timing of the ban's passage it appears the government believes in the third explanation for the increase in veils. Many are consequently angered at what appears to be the government's way of cracking down on the young Muslim population and equating what may simply be religious orthodoxy with increasing extremism.<sup>32</sup> Indeed, Chirac himself addressed this issue upon justifying the ban: "At a time when the great ideologies are collapsing, obscurantism and fanaticism are gaining ground in the world."<sup>33</sup> Chirac is insinuating that forcing girls to remove their veils will decrease confusion and fanatical behavior.

The purpose of the ban, according to Chirac, "is to make the young people involved understand what is at stake and protect them from influences and passions which, far from liberating them or allowing them

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28. Editorial, *French School Headdress Ban Creates 'Convenient Religion,'* THE COLLEGIATE TIMES, Feb. 11, 2004, available at <[www.collegiatetimes.com/news/2/ARTICLE/2814/2004-02-11.html](http://www.collegiatetimes.com/news/2/ARTICLE/2814/2004-02-11.html)>.

29. Elaine Sciolino, *Ban Religious Attire in School, French Panel Says*, N.Y. TIMES, Dec. 12, 2003, at A1. "A ruling in 1989 by France's Council of State declared that religious symbols could not be worn in public schools if they 'constitute an act of intimidation, provocation, proselytizing or propaganda,' threaten health, security or the freedom of others or 'disturb order.'"

30. Chirac, Elysee Palace Speech, *supra* note 22.

31. Kramer, *supra* note 10, at 58.

32. Charles Bremner, *Europe Wakes up to the Conflict Within*, TIMES (London), Nov. 17, 2004, at 38.

33. Chirac, Elysee Palace Speech, *supra* note 22.

to make free choices, constrain or threaten them.”<sup>34</sup> The ban is therefore the government’s solution to what it perceives as an internal Islamic threat to the cultural identity of France as a whole and to the identity of its next generation.

### *A. Immigration Equals Assimilation*

France has seen its Muslim population increase dramatically in recent years and has a larger Muslim population than any other Western European country.<sup>35</sup> This population has indeed risen rapidly over the past ten years and was estimated to make up eight percent of the French population in 2003.<sup>36</sup> There were estimates of at least five million Muslim people living in France in 2000, which makes Islam France’s second most popular religion.<sup>37</sup>

France has coupled its near open-door policy with a tradition of assimilating immigrants to turn them into “children of France.”<sup>38</sup> There is a strong sense of French national identity that is promoted as a unifying force. The compulsory use of the French language is one example.<sup>39</sup> Similarly, the government has recently insisted that Muslim imams<sup>40</sup> receive training in French laws and society.<sup>41</sup> Upon nationalization,

34. *Id.*

35. In 2004 there were 4.16 million Muslims in France, 3.2 million in Germany, and 1.8 million in the U.K. See Young, Muslim, and French, WIDE ANGLE, PBS, at <[www.pbs.org/wnet/wideangle/shows/france/info.html](http://www.pbs.org/wnet/wideangle/shows/france/info.html)> (visited Mar. 10, 2005).

The Muslim population is now estimated at 4 to 5 million compared to a total French population of about 60 million people. This is only an estimate, since census of religious adherence is prohibited by French law. Most social scientists believe this number is too low, and speak of as many as 8 million Muslims in France (compared to 12 to 20 million in the European Union).

THE REAL FACTS CONTRIBUTION COMPANY, at <[www.therfcc.org/islam-in-france-5193.html](http://www.therfcc.org/islam-in-france-5193.html)> (visited Mar. 10, 2005).

36. See FINANCIAL TIMES, WORLD DESK REFERENCE 255 (Andrew Heritage ed., Dorling Kindersley Publishing 2003) (1994); see also CIA WORLD FACTBOOK, at <[www.odci.gov/cia/publications/factbook/geos/fr.html#People](http://www.odci.gov/cia/publications/factbook/geos/fr.html#People)> (visited Feb. 10, 2005).

37. See Religion in France, Embassy of France in Australia, at <[www.ambafrance-au.org/aboutfrance/pages/religion.en.htm](http://www.ambafrance-au.org/aboutfrance/pages/religion.en.htm)> (visited Mar. 10, 2005).

38. Chirac, Elysee Palace Speech, *supra* note 22 (“All the children of France, whatever their background, whatever their origin, whatever their beliefs, are daughters and sons of the Republic”).

39. FINANCIAL TIMES, WORLD DESK REFERENCE, *supra* note 36.

40. Imam is an Arabic word meaning “leader.” WIKIPEDIA, at <[www.answers.com/imam?gwp=11&ver=1.0.4.128&method=3#Wikipedia](http://www.answers.com/imam?gwp=11&ver=1.0.4.128&method=3#Wikipedia)> (visited Mar. 10, 2005).

41. Chirac, Elysee Palace Speech, *supra* note 22 (“A new milestone will also be reached when French imams can be trained in France, allowing the assertion of the identity of a French-based Islam.”); Carol Eisenberg, *Standoff Over Head Scarfs*, NEWSDAY, Dec.

immigrants are encouraged to take classes on French culture, including language and culinary education.<sup>42</sup>

However, many immigrants of the Muslim faith do not have the same idea of secularism as the French and cannot simply separate their “French” selves from their “Muslim” selves. An inherent conflict results when the government tells the young Muslim woman to remove her veil but she feels that wearing it is a religious obligation imposed on her by God.

One Muslim woman describes the culture clash that results in identity protectionism:

The mass immigration of Muslims is bringing faith back into the public realm and creating a post-Enlightenment modernity for Western Europe. This return of religion threatens secular humanism, the orthodoxy that has prevailed since the French Revolution. Paradoxically, because many Western Europeans feel that they’re losing Enlightenment values amid the flood of “people of faith,” they wind up sympathizing with those in the Muslim world who resent imported values that challenge their own. Both groups are identity protectionists.<sup>43</sup>

This influx of religious immigrants is occurring contemporaneously with a dramatic decrease in French religiosity.<sup>44</sup> Coupled with France’s self-described identity as a secular country, a very tense atmosphere is created. To exacerbate those fears, many see a large amount of the young Muslims as angry, alienated, impressionable, and demanding their particular French “identity.”<sup>45</sup>

13, 2004, at A20 (“the French interior minister announced plans to ‘strongly encourage’ imams to take university classes in French law and society starting next fall”).

42. See e.g., Cynthia DeBula Baines, *L’Affaire des Foulards – Discrimination, or the Price of a Secular Public Education System?*, 29 VAND. J. TRANSNAT’L L. 303, 312-13 (Mar. 1996); Augustin Motilla, *Religious Pluralism in Spain: Striking the Balance Between Religious Freedom and Constitutional Rights*, 2004 BYU L. Rev. 575, 596 (2004) (“A 1993 law modified the requirements for French citizenship to require applicants to show linguistic and cultural assimilation”).

43. Irshad Manji, Editorial, *Under the Cover of Islam*, N.Y. TIMES, Nov. 18, 2004, at A31.

44. For many years Roman Catholicism was the official religion of France. In 2000, the French Embassy described it as the traditional religion of France yet declared that it no longer influences the culture in the same way it used to. “During the last fifteen years, religious observance and beliefs have declined as regards . . . weddings (which have fallen from 85% to 50%), belief that God exists (61% today, 66% fifteen years ago) . . .” Most young people seem to be more and more indifferent to and ignorant of religion: 40% today say they have no religion. Embassy of France in Australia, at <[www.ambafrance-au.org/aboutfrance/pages/religion.en.htm](http://www.ambafrance-au.org/aboutfrance/pages/religion.en.htm)> (visited Mar. 10, 2005).

45. Kramer, *supra* note 10, at 58.

## ***B. Conditioning Hatred***

The problem is further inflamed by the conditions in which many French Muslims live; specifically in project-style housing the French have termed *les cités*.<sup>46</sup> A report commissioned by the president acknowledges that, until recently, authorities have allowed them to “languish at the edges of French society.”<sup>47</sup> Amir Taheri, an Iranian journalist based in Paris, compares the situation of these people—the majority, North African Arabs—to that of African Americans in the United States. She says, “They lack opportunity and are mostly parked in huge Stalinist suburbs around large cities – it is almost like living in hell.”<sup>48</sup> However, with the apparent rise of Islamic fundamentalism, and particularly the risk that bitter Muslim youths might form a ready recruiting pool for militants, the government has belatedly moved to integrate the Muslim community into French society as a whole.<sup>49</sup>

In a seeming affirmation of the government’s fear, the students returned to school amid demands by Islamic radicals, holding two French hostages in Iraq, that the law banning headscarves be scrapped.<sup>50</sup> The issue clearly was of importance to the world outside the French classrooms.

Nevertheless, on the first day of school, only 639 of an estimated million Muslim students showed up in religious symbols and most were persuaded to remove them voluntarily.<sup>51</sup> As of November 2004, forty such students had been expelled, including thirty-six Muslim girls and four Sikh boys who wore turbans.<sup>52</sup> Lawsuits related to many of these cases have been filed.<sup>53</sup> These paltry numbers suggest this highly controversial law targeting schoolgirls is misplaced. The idea behind it is also flawed. Instead of reaching out to include these young Muslims in mainstream society, the French are forcing them first to conform. Promoting a policy

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46. *Id.*

47. The PRS Group, *International Country Risk Guide*, Nov. 01, 2003, available at <[www.prsgroup.com/icrg/icrg.html](http://www.prsgroup.com/icrg/icrg.html)>. See Comm’n de Reflexion sur l’Application du Principe de Laïcité dans la République, Rapport au Président de la République, 4.2.2.1, at 58-59 (Dec. 11, 2003) [hereinafter Stasi Commission Report], at 4). The Stasi report to the President acknowledged the miserable conditions in which many belonging to this group are forced to live.

48. *Viewpoints: Europe and the Headscarf*, BBC NEWS, Feb. 10, 2004, at <[news.bbc.co.uk/2/hi/europe/3459963.stm](http://news.bbc.co.uk/2/hi/europe/3459963.stm)> (visited Mar. 7, 2005).

49. *Id.*

50. Elaine Ganley, *French Students Encounter Head Scarf Ban*, ASSOCIATED PRESS (Paris), Sept. 2, 2004, available at <[www.1510.com/storyReader.asp?article=5922](http://www.1510.com/storyReader.asp?article=5922)>.

51. Eisenberg, *supra* note 41, at A20.

52. *Id.*

53. *Id.*

of cultural uniformity can work to increase social tension, eventually favoring the proliferation of cultural ghettos hostile to the dominant society.<sup>54</sup> Thus, it is likely that religious minorities will rebel against the dominant religion.<sup>55</sup>

### *C. France Puts Her Foot Down*

Many see the passage of the law as Chirac merely making a tough statement on what it means to be French, and more importantly, what is not French.<sup>56</sup> The Prime Minister of France at the time of the ban's passage, Jean-Pierre Raffarin, insisted the government's vision of *laïcité* was not hostile to religions.<sup>57</sup> His stated view upon passage of the bill was that everyone has the right to freely express his or her faith on the condition that, while at school, he or she obeys the law.<sup>58</sup> The purpose of the ban is to send a "strong message, fast,"<sup>59</sup> he added. The message, however, seems to be that one must not be a Muslim in public (at least while attending French public school), because the presence of Muslims will confuse and fluster the children by creating divisiveness. It is important to note that the law, according to the President, is not meant to ban Catholic crosses on the condition that they are not excessive in size.<sup>60</sup> Most Catholics, when they do wear crosses, generally do not wear ones of an "excessive size."<sup>61</sup> In addition, wearing a cross is usually the result of a personal choice rather than a sense of obligation. The law therefore clearly has a discriminatory effect on the Muslim students.

Others see the ban as the government's response to an increasingly-demanding segment of the population. For example, rather than create a slippery slope of requests for accommodations, such as segregated classrooms for male and female students,<sup>62</sup> the government is foreclosing

54. Motilla, *supra* note 42, at 579.

55. *Id.*

56. Kramer, *supra* note 10, at 58. ("Chirac clearly felt that the time had come to make a tough, resoundingly 'French' statement on secularism.")

57. *Le Senat Francais Adopte le Projet de Loi sur les Signes Religieux a l'Ecole*, LE MONDE (Paris), Mar. 3, 2004, available at <[www.lemonde.fr/web/recherche\\_articleweb/1,13-0,36-355392,0.html](http://www.lemonde.fr/web/recherche_articleweb/1,13-0,36-355392,0.html)>.

58. *Id.* ("Notre vision de la laïcité n'est pas contre les religions. Chacun a droit à l'expression de sa foi, à condition qu'à l'intérieur de l'école de la République, il respecte les lois de la République.")

59. *Id.* ("[Il a réaffirmé] qu'il ne s'agissait pas de s'en prendre aux religions mais d'envoyer un signal fort et rapide.")

60. Chirac, Elysee Palace Speech, *supra* note 22.

61. *Id.*

62. Kramer, *supra* note 10, at 58.

all such demands while labeling them categorically un-French. Yet, how much should the government be required to accommodate religions of minority sub-populations? Although the highest French administrative court (the Conseil d'Etat) had ruled as early as 1989 that French children have the constitutional right to wear religious insignia to school,<sup>63</sup> according to Chirac's conception of the *laïcité* doctrine, the French do not have to accommodate religious groups at all.<sup>64</sup>

Still others view the ban as a way to gain some small amount of control over a situation in which children are being "recruited" to an Islamic cause and consequently are revolting against what they see as a bourgeois, capitalist system.<sup>65</sup> For instance, ten years ago, young French-born Muslim women were seldom veiled.<sup>66</sup> In 1989, no more than a few hundred schoolgirls were reported by their teachers or principals to be wearing headscarves.<sup>67</sup> There is a fear that the increasing number of women wearing headscarves do so therefore, not out of personal piety, but rather because they are "expressing subservience to (or fear of) the radical indoctrination of young French-born Muslim men."<sup>68</sup> Such fears are exacerbated by reports of increasing violence to non-veiled Muslim girls

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63. Gunn, *supra* note 21.

The Conseil ruled, on November 27, 1989, that wearing religious symbols to school is permissible as long as those symbols are not so 'ostentatious' as to 'constitute an act of intimidation, provocation, proselytizing, or propaganda; threaten the dignity and freedom of students or other members of the educational community[;]' or disrupt the school's normal functioning.

Beller, *supra* note 8, at 584.

64. Chirac, Elysee Palace Speech, *supra* note 22.

65. Kramer, *supra* note 10, at 58.

66. *Id.*

67. *Id.*

68. Author Jane Kramer describes the situation from personal observations, Then . . . September 11th happened and . . . the invasion of Iraq. It didn't matter that France stayed out of the war; France was the West, regardless. This was when the recruitment of young French Muslim men into the terror network feeding the Chechen and Afghan and Iraqi insurgencies picked up in earnest, with Osama making his debut as a start-up image on cell phones and Islamist Web sites—an action hero brandishing a Kalashnikov. It was also when an increasing number of Muslim schoolgirls started attempting to enter classrooms draped in clothing that had less to do with the places their families came from than with a kind of global ur-Islam, which may be why it was dismissed, for a while, as some sort of adolescent fad. Sometimes it was. But more often those girls were under orders from their fathers and uncles and brothers and even their male classmates. For the boys, transforming a bluejeaned teen-age sister into a docile and observant "Muslim" virgin was a *rite de passage* into authority, the fast track to becoming a man and, more important, a Muslim man.

*Id.*

throughout the country.<sup>69</sup>

Yet to a lot of Europeans, still steeped in memories of the Catholic Church's intellectual repression, religion is an irrational force.<sup>70</sup> So women who cover themselves are foolish at best and dangerous otherwise.<sup>71</sup> The ban on headscarves, to many Europeans is a desirable development as it is a step in the direction of freedom from religion rather than religious freedom.<sup>72</sup>

### III. Legal Pluralism and Doubly Damning Muslim Schoolgirls

#### A. Societal Pressure or Personal Piety?

One reason the external Muslim world is so appalled by the French ban relates to the controversy over whether wearing the *hijab* is obligatory for female Muslims. There has been a wave of assertions that it is indeed a mandatory element of complying with Qur'anic law and that France is therefore depriving these girls of a fundamental right, a right to religious freedom which is embodied in the Declaration of the Rights of Man and of the Citizen.<sup>73</sup> Others proclaim that to wear the veil is a personal choice, made by the individual woman.<sup>74</sup>

It is practically impossible to determine why one wears the headscarf because there is no uniform justification. As one author explains:

For some girls it may offer a strong sense of identity; for others, an oppressive symbol. The hijab may represent (to both its wearers and viewers) religious faith, extremist politics, gender inequality, cultural identity, and solidarity with other Muslim women, all at the same time. These girls belong to their particular religious and cultural communities and may feel compelled to wear the hijab because of their membership in, and allegiance to, their families and religious faith. In this sense, they may not feel that they make a choice free from influence

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69. Stack, *supra*, note 11, at A1. Jane Kramer describes some horrific events, Girls who did not conform [to wearing the veil] were excoriated, or chased, or beaten by fanatical young men meting out 'Islamic justice.' Sometimes, the girls were gang-raped. In 2002, an unveiled Muslim girl in the *cit * of Vitry-sur-Seine was burned alive by a boy she had turned down.

Kramer, *supra*, note 10, at 58

70. Manji, *supra* note 43, at A31.

71. *Id.*

72. Kramer, *supra* note 10, at 58.

73. Declaration of the Rights of Man and of the Citizen, *supra* note 14.

74. Stack, *supra* note 11, at A1.

and constraint.<sup>75</sup>

For example, a former chief justice in Egypt insists that, as a result of community values, girls do not have a choice.<sup>76</sup> When asked about girls who choose the *hijab* for reasons of their own, such as religious devotion, asserting their Islamic identity or keeping up with a fashion trend, he replied: "What choice? They are ordered, that's all. The father, the brother, he teaches her. They are forcing them. They are not free, not at all."<sup>77</sup>

Yet "many Muslim feminists maintain that the [Qur'an] does not so much prescribe veils as record that the wives of the Prophet went veiled and in this way were able to recognize one another and to be honored by other women for their distinction."<sup>78</sup>

Many women, however, assert a strong desire to wear the veil. As one self-proclaimed modern Muslim woman explains her faith:

Religion supplies a set of values, including discipline, that serve as a counterweight to the materialism of life in the West. I could have become a runaway materialist, a robotic mall rat who resorts to retail therapy in pursuit of fulfillment. I didn't. That's because religion introduces competing claims. It injects a tension that compels me to think and allows me to avoid fundamentalisms of my own.<sup>79</sup>

Still others insist there is no choice; that to practice the religion, women of a certain age must wear the *hijab*. Indeed, one such girl, Cennet Doganay, a 15-year-old French Muslim of Turkish origin, shaved her head in order to avoid making a decision about which "law" to obey.<sup>80</sup> She said, "I will respect both French law and Muslim law by taking off what I have on my head and not showing my hair."<sup>81</sup>

It is impossible to know what the veil represents to all of the women who are now forbidden to wear it at certain times and in certain places. The infamous Stasi Report (named after its chairman, Bernard Stasi) that Chirac commissioned on the subject of *laïcité* in France, listed several

75. Shauna Van Praagh, *The Education of Religious Children: Families, Communities and Constitutions*, 47 BUFF. L. REV. 1343, 1382 (1999).

76. Stack, *supra* note 11, at A1.

77. *Id.*

78. Kramer, *supra* note 10, at 58.

79. Manji, *supra* note 43, at A31.

80. *Bald Protest Against Head-Scarf Ban*, N.Y. TIMES, Oct. 2, 2004, at A4; Elaine Sciolino, *France Turns to Tough Policy on Students' Religious Garb*, N.Y. TIMES, Oct. 22, 2004, at A3.

81. *Bald Protest Against Head-Scarf Ban*, N.Y. TIMES, Oct. 2, 2004, at A4.

explanations for why Muslim girls wear headscarves to school.<sup>82</sup> The first was that young men force them to wear asexual clothing and to lower their gaze in order to avoid being stigmatized as whores.<sup>83</sup> Second, the headscarf is imposed on girls by violence and thus wearing it offers protection.<sup>84</sup> Third, they are victims of pressure imposed by the family or community.<sup>85</sup> The report concluded that Muslim girls are pressured to wear religious insignia by both their families and social environments and therefore have no choice of their own.<sup>86</sup> The Commission clearly felt that the overwhelming reason girls wear headscarves is not for personal piety but due to unwanted coercion.<sup>87</sup> The report stamped these girls as oppressed victims of their own communities.

Nevertheless, to many, the headscarf is viewed as an obligatory part of their religious devotion. Consequently, banning this element is extremely disruptive as it presents a difficult choice between their external French laws (their community and its school system, which defines itself as open, liberal, diverse, and committed to individual rights and autonomy)<sup>88</sup> and their internal sense of obligations. The government cannot simply write this duty out of their religious practices by passing a law. All the opining on the question of whether the veil is necessary or not to the definition of a devout Muslim is irrelevant; non-Muslims' understanding of Islam will not change the minds of Muslim girls who believe they must (or who sincerely want to) wear the veil.

### ***B. Where Does Religion Fit?***

France, like the United States, has a system comprised of the government and the individual. The individual must answer to the government while everything else—such as the church—is on the side: We either do not call it law or we outlaw it.

Islamic law is personal and non-geographical.<sup>89</sup> Regardless of where

82. Stasi Commission Report, *supra* note 47, at 44-45; see Gunn, *supra* note 13, at 462.

83. Stasi Commission Report, *supra* note 47, at 44.

84. *Id.* at 45.

85. *Id.*

86. *Id.*

87. *Id.*

88. Manji, *supra* note 43, at A31.

89. See, e.g., *Near/Middle East: Round-up of Friday Sermons*, BBC NEWS (Jan. 2, 2004):

For the Muslim woman, putting on the hijab is an act of worship and a religious duty. It applies to every Muslim woman from the east to the west of the globe at any time and place in the midst of men. [T]he hijab is clearly sanctioned in the Koranic verse in which God says: "They should draw their veils over their bosoms

a Muslim finds himself on the globe, he must operate under Islamic law. Similarly, merchants used to internalize the law so that they carried it with them, from port to port.<sup>90</sup> The internality of Islamic law can also be analogized to the idea behind the eighteenth-century panoptical prison. The omniscient gaze pervaded the collective psyche of the prisoners by conditioning them to internalize discipline and behave as if the authoritative, punitive gaze were always watching them.<sup>91</sup>

The West, by contrast, bases law on territory instead of on individuals. When those two systems collide, there is an inherent conflict that a Muslim cannot rationalize away; she will either break her country's law or her own religious law that she internalizes and carries with her at all times, regardless of the characterization of the soil under her feet.

### C. The Coexistence of Two Legal Systems

Unlike the Christian faith, the laws of Islam dictate more specific daily rituals and rules.<sup>92</sup> Islam is more than a set of beliefs about an after-life; it is a way of life. *Shari'a*,<sup>93</sup> the Arabic word connoting Islamic law, provides fundamental principles that followers of Islam must live by.<sup>94</sup> Under *shari'a*, secularism does not exist.<sup>95</sup> Muslims believe that they have a clear and definite obligation to conduct every aspect of their public and private lives in accordance with the principles outlined in the Qur'an.<sup>96</sup> Furthermore, it provides for a positive legal system and an ethical system that covers all aspects of a Muslim's activities including religious rituals, social manners, political institutions, personal relationships, civil, commercial, criminal, and family law matters.<sup>97</sup> It includes a system of stringent rules for living—how to wash, what to eat, how to pray, when to pray, how to dress, and when to fast—which is deemed law among devout Muslims.

The verse in the Qur'an triggering the debate over obligatory or

and not display their beauty.”

90. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 743 (2004).

91. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Sheridan trans., Vintage Books 2d ed. 1995).

92. “In Islam, the hijab is a religious duty. It is like praying five times a day, fasting in the month of Ramadan every year, and going to pilgrimage to Mecca once in a lifetime.” BBC NEWS, *supra* note 89.

93. *Shari'a* is the code of law based on the Qur'an. WIKIPEDIA, at <[www.answers.com/sharia?gwp=11&ver=1.0.4.128&method=3](http://www.answers.com/sharia?gwp=11&ver=1.0.4.128&method=3)> (visited Mar. 10, 2005).

94. DeBula Baines, *supra* note 42, at 308.

95. *Id.*

96. *Id.* at 309.

97. *Id.*

voluntary veil wearing is the following: "They should draw their veils over their bosoms and not display their beauty."<sup>98</sup> The French law, Article 141-5-1, that bans headscarves in classrooms states: "In public elementary schools, middle schools, and high schools, it is forbidden to wear symbols or clothes through which students openly [*ostensiblement*] display their religious affiliation."<sup>99</sup>

Legal pluralism refers to situations where "two or more legal systems coexist in the same social field,"<sup>100</sup> even if one or both of those legal systems is not an "official," state-based system. Although Islamic law is obviously not an official, state-based system in France, as discussed above, it is carried with individual Muslims as an internal law. As is the case with most statutes, the Islamic provision has been subject to many interpretations. Under a broad definition it mandates the covering of female "beauty" and thus, the hair and neck. This interpretation clearly conflicts with Article 141-5-1 thereby creating a situation of legal pluralism whereby a law of Islam is in direct conflict with a law of the State.

#### IV. The United States Example

This type of religious-based legal pluralism creates a problem for many religious groups, including those in the United States. When the law you follow is internal rather than jurisdictional, traditional conflict of law rules do not suffice. For example, two members of the Native American Church were fired from their jobs in Oregon because they ingested peyote, an illegal drug, as part of a religious ceremony.<sup>101</sup> They were denied unemployment benefits on the ground that they had been fired for illegal conduct.<sup>102</sup> The state made no religious exception for the use of drugs that were statutorily defined as illegal.<sup>103</sup> The Supreme Court held that "[t]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the grounds that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"<sup>104</sup> In sum, a Native American who believes he must ingest peyote as part of his religious devotion is prohibited from doing so because it conflicts with the laws of the state in which he resides.

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98. THE HOLY QURAN, available at <web.umn.edu/~msaumr/Quran/>.

99. C. EDUC. art. 141-5-1, Law No. 2004-228.

100. Sally Engel Merry, *Legal Pluralism*, 22 Law & Soc'y Rev. 869, 870 (1988).

101. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 874 (1990).

102. *Id.*

103. *Id.* at 879.

104. *Id.*

The Native American is therefore left with no choice but to break the law. Like the Muslim schoolgirl in France, he must either disobey his own internal laws dictated by his faith or break the law of his state and face the consequences of either decision.

In most cases, the United States is much less concerned with religious dress—which it views as linked to free exercise of religion—than it is with behavior. However, there have been conflicting court decisions even in the area of religious clothing. For example, one case held that the Black Muslim faith is religion and that discharge for wearing a long skirt was unlawful bias.<sup>105</sup> Yet another held that it would have imposed an “undue hardship” on the school board to require it to accommodate a Muslim public school teacher by allowing her to teach in her religious clothes.<sup>106</sup> Still another case involved a sixth-grade Muslim girl who sued the Oklahoma school district after it suspended her from school for wearing her headscarf in violation of the district’s dress code.<sup>107</sup> This suit caught the attention of the U.S. Department of Justice, which joined the suit against the school district.<sup>108</sup> The Assistant Attorney General announced, “No student should be forced to choose between following her faith and enjoying the benefits of a public education.”<sup>109</sup> Considering the United States’ reaction to the French ban, we can presume the Assistant Attorney General summed up the country’s policy on the issue quite accurately.

## Conclusion

An outright prohibition on practicing an element of one’s religion does not seem to further any goal of creating an inclusive and compassionate society. Instead, cultural accommodations and legal concessions can help to integrate Muslims into European society without requiring them to sacrifice all their cultural and legal autonomy.<sup>110</sup> Although one of the most obvious signs confirming the fall of the Taliban in Afghanistan was that the women of that country had the choice to remove their headscarves,<sup>111</sup> this was because the individual then had the

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105. DeBula Baines, *supra* note 42, at n.143.

106. U.S. v. Bd. of Educ. for the School Dist. of Phila., 911 F.2d 882, 894 (3d Cir. 1990).

107. Geoffrey Fattah, *Outward Expressions of Faith*, DESERET MORNING NEWS (Salt Lake City), May 29, 2004.

108. *Id.*

109. *Id.*

110. John D. Snethen, *The Crescent and the Union: Islam Returns to Western Europe*, 8 IND. J. GLOBAL LEGAL STUD. 251, 264-65 (Fall 2000).

111. *French School Headdress Ban Creates ‘Convenient Religion’*, *supra*, note 28.

freedom to practice her religion in whatever way she wished. By removing that choice, the French government has made the first move towards a form of reverse religious oppression.<sup>112</sup>

France's stated interest in prohibiting headscarves seems less weighty than the Muslim students' interests in practicing their religion. If the ban is meant to solve the problem of fanaticism it errs in equating Islamic orthodoxy with extremism.<sup>113</sup> In other words, if the governmental interest in passing this law is to stamp out the unwanted pressure placed on children who do not desire to wear the veil, the law is clearly over-inclusive as it forbids all children—willing hijab-wearers as well as coerced or forced—from doing so. If the interest is rather to stamp out radical fundamentalism it may be punishing the wrong members of its society. Finally, if the interest is to further an atmosphere of inclusion it is more likely creating a highly stressful situation among children, many of whom may feel they are being punished by their government.

The schoolgirls are the primary victims of this law. They are left with only one choice – who to disappoint and disobey. Their options are their families and communities, their schoolteachers and headmasters, or their God.

Although the pressures young girls face may be real and France's desire to find a remedy for those pressures may be strong, a ban that targets the veil is not the answer. The presence of Muslim girls clothed in religious garb at secular schools does not transform the education of the children. The curriculum remains unchanged. In addition, the students will benefit from the multiculturalism the veiled girls bring, and consequently, learn tolerance for difference. Rather, the government is asking them to disregard their religious beliefs to create a "secular" bubble that is completely artificial and unrealistic. Although it may seem to the government to be a solution to the problem of Islamic fundamentalism, it cannot simply write the religion out of existence by passing a law that serves to ban it. The government should look to solutions designed to include all the citizens of the country rather than ostracize some and create more divisive lines between religious groups. The current "solution" will most likely have the counterproductive effect of fanning the very fires that may have caused the so-called fundamentalism in the first place.

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112. *Id.*

113. Andrew Wright, Letter to the Editor, *A Veiled Threat to Freedom in France?*, WASH. POST, Dec. 31, 2003, at A18.

