

**LIBERTÉ, ÉGALITÉ, VIE PRIVÉE:
THE IMPLICATIONS OF FRANCE’S ANTI-VEIL
LAWS FOR PRIVACY AND AUTONOMY**

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“For a small piece of cloth, the veil is heavy with meanings. . .”

—Joan Scott

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France’s approach to “the Muslim question” has long been the subject of fraught political and legal debate. From the 2005 riots in the suburbs of Paris¹ to critical UN reports,² signs of protracted social tensions have boiled

¹ In 2005, riots occurred in Parisian suburbs after two young men hiding from police were electrocuted, and “[l]ocal youths, who believed the police had chased the boys into the enclosure, took to the streets, setting cars on fire in protest.” See Craig Smith, *Immigrant Rioting Flares in France for Ninth Night*, N.Y. TIMES (Nov. 5, 2005), http://www.nytimes.com/2005/11/05/world/europe/immigrant-rioting-flares-in-france-for-ninth-night.html?_r=0 [<https://perma.cc/3JJS-KYX8>]. Paris’s suburbs have significant Muslim and immigrant populations, and the riots are still considered emblematic of social tensions in France related to race, religion, and national identity.

² See Mehdi Fedouach, *Racism in France on the Rise, Says UN*, RFI (Dec. 8, 2010), <http://en.rfi.fr/france/20100812-racism-france-rise-says-un> [<https://perma.cc/VZ28-FMLD>]. See also COMM’R FOR HUMAN RIGHTS, *France: Persistent Discrimination Endangers Human Rights*, COUNCIL OF EUROPE (Feb. 17, 2015), <http://www.coe.int/en/web/commissioner/-/france-persistent-discrimination-endangers-human-rights> [<https://perma.cc/2M7U-MP8Q>].

over repeatedly as France's racial and religious minorities seek a platform to highlight the discrimination they face in daily life.³ The contested status of Muslims in France has received newfound attention in the aftermath of the Charlie Hebdo⁴ and November 2015 attacks,⁵ which were followed by an increase in anti-Muslim and anti-Arab hate crimes⁶ as well as growing mainstream acceptance of the *Front National*.⁷

³ French discrimination law takes a "race-blind" approach and does not require religious accommodation to the extent American law does. Leland Ware, *Color-blind Racism in France: Bias Against Ethnic Minority Immigrants*, 46 WASH. U. J.L. & POL'Y 185, 215–19, 235–39 (2014). The divergence between the concepts employed by French discrimination law and the types of harm claimed by minorities are a tension that shapes the veil debate.

⁴ See Amy Davidson, *The Attack on Charlie Hebdo*, NEW YORKER (Jan. 7, 2015), <http://www.newyorker.com/news/amy-davidson/attack-charlie-hebdo> [https://perma.cc/9F2S-E63S] (summarizing the January 7, 2015 attack on the weekly satirical newspaper Charlie Hebdo).

⁵ *What Happened at the Bataclan?*, BBC NEWS (Dec. 9, 2015), <http://www.bbc.com/news/world-europe-34827497> [https://perma.cc/DVG5-VN8R].

⁶ Islamophobic attacks on Muslim women, including pregnant women, predate the 2015 attacks. See Steven Erlanger, *Muslim Woman Suffers Miscarriage after Attack in France*, N.Y. TIMES (June 18, 2013), http://www.nytimes.com/2013/06/19/world/europe/muslim-woman-suffers-miscarriage-after-attack-in-france.html?_r=0 [https://perma.cc/DVG5-VN8R]. However, 50 hate crimes against Muslim and Arab targets were reported within mere days of the Charlie Hebdo attacks. *France Sees More Than 50 Anti-Muslim Incidents After Charlie Hebdo Shootings*, THE JOURNAL.IE (Jan. 12, 2015), <http://www.thejournal.ie/anti-muslim-incidents-france-1877960-Jan2015/> [https://perma.cc/92SU-64CZ]; see also Editorial Board, *Paris Attacks Lay Bare Longtime Muslim Exclusion*, N.Y. TIMES (Jan. 19, 2015), http://www.nytimes.com/2015/01/19/opinion/paris-attacks-lay-bare-longtime-muslim-exclusion.html?_r=0 [https://perma.cc/39SN-ZJLR]; Oliver Gee, *Pregnant Muslim Woman Attacked in France*, LOCAL FR. (Mar. 27, 2015), <http://www.thelocal.fr/20150327/pregnant-muslim-woman-assaulted-in-france> [https://perma.cc/XK7E-CT3J]. Attacks on Muslim women were also reported following the November 2015 attacks. See *Veiled Muslim Woman Attacked in Southern France*, LOCAL FR. (Nov. 19, 2015), <http://www.thelocal.fr/20151119/veiled-woman-attacked-in-southern-france> [https://perma.cc/DTJ7-BHQ2].

⁷ Abel Mester, *Le Front National Séduit de Plus en Plus à Droite*, LE MONDE (Feb. 16, 2015), http://www.lemonde.fr/politique/article/2015/02/16/le-front-national-seduit-de-plus-en-plus-a-droite_4577198_823448.html [https://perma.cc/A9HP-WUBQ]. The *Front National* is a nationalistic far-right party known for its anti-immigrant stance whose most notable members are former head Jean-Marie Le Pen and his successor Marine Le Pen. For a brief history of the party, see Hugh McDonnell, *How the National Front Changed France*, JACOBIN (Nov. 23, 2015), <https://www.jacobinmag.com/2015/11/marine-jean-marie-le-pen-national-front-immigration-elections/> [https://perma.cc/L8LU-X77Q]. For a breakdown of the party's major policies, see *What Does France's National Front Stand for?*, FRANCE 24 (May 28, 2014), <http://www.france24.com/en/20140528-france-national-front-policy-eu> [https://perma.cc/JF9L-V4T7].

These tensions are particularly relevant to French Muslim⁸ women, who are the victims of 80% of Islamophobic attacks⁹ and whose conduct is disproportionately targeted by assimilationist legislation in the form of anti-veil laws and policies.¹⁰ Laws prohibiting women from wearing head coverings in public are often justified on purportedly feminist grounds and supporters of the prohibitions have not shied away from controversy; the Minister for Women's Rights, Laurence Rossignol, infamously compared women who choose to veil to "American negroes who were in favor of slavery."¹¹ Public perception continues to reflect the belief that Muslim women wear the veil against their will despite empirical research to the contrary.¹²

While expansive judicial interpretations of French secularism, or *laïcité*,¹³ have stymied challenges based on religious freedom, alternative arguments could provide new avenues for French Muslim women to assert their personal autonomy against intrusive state acts regulating identity. In

⁸ While I use the terms "French Muslim women," and "Muslims in France," Mayanthi L. Fernando translates the French phrase *citoyen français de confession musulmane* (French citizen of Muslim faith) as "Muslim French," and views the phrase "French Muslims" as "prioritiz[ing] a Muslim identity and mak[ing] the context of France a matter of happenstance." MAYANTHI L. FERNANDO, *THE REPUBLIC UNSETTLED: MUSLIM FRENCH AND THE CONTRADICTIONS OF SECULARISM* 63, (2014). Fernando explores the processes through which "Muslim French demand the right to be visible but unremarkable—put simply, the right to be," by challenging dominant Islamophobic rhetoric in France that pathologizes various aspects of their citizenship and identity, including but not limited to the wearing of the veil. *Id.* at 79.

⁹ Lucy Draper, *80% of Anti-Muslim Attacks in France Against Women, Says Report*, NEWSWEEK (Feb. 17, 2015), <http://europe.newsweek.com/80-anti-muslim-attacks-france-against-women-says-report-307389> [https://perma.cc/6HBE-SF9X].

¹⁰ Fernando describes the anti-veil legal framework as a "sexual 'clash of civilizations.'" FERNANDO, *supra* note 8, at 193.

¹¹ See, e.g., *French Minister: Muslim Women Who Wear Veils Like 'Negroes' Supporting Slavery*, FRANCE 24 (Mar. 31, 2016), <http://www.france24.com/en/20160330-french-minister-muslim-women-who-wear-veils-like-pro-slavery-negroes> [https://perma.cc/K296-ZLHQ]. Minister Rossignol doubled down on these sentiments following criticism, back-tracking on her use of the word "Negro" while reiterating "[o]utside of this error of language, I am not retracting a single word I said about Islamic dress," and describing French Muslims as "franco-musulmans," a linguistic formulation that implies "Muslim" is a nationality rather than a religion. Nabil Touati, "Franco-musulmans": Laurence Rossignol Corrige Discrètement son Autre Bourde, HUFFINGTON POST FR. (Apr. 1, 2016), http://www.huffingtonpost.fr/2016/04/01/laurence-rossignol-franco-musulman_n_9589526.html [https://perma.cc/SR84-LPDU] (translation by author).

¹² This article focuses on France, where there is no legal regime mandating the wearing of head coverings for religious reasons. As such, the context is distinguishable from countries in which such coverings are required and policed by the state. However, that is not to say that other forms of coercion do not exist that might pressure women to cover against their will. Here, I limit my discussion of the veil issue in France to the implications for women who do choose to veil and who defend that choice on various political and social grounds. See Eva Brems, *S.A.S. v. France: A Reality Check*, 25 NOTTINGHAM L. J. 58, 63–65 (2016).

¹³ See JOAN SCOTT, *THE POLITICS OF THE VEIL*, 15 (2007) (noting that French supporters of *laïcité* believe it is "so uniquely French as to be untranslatable," but argues that it "is not less translatable than any other term."). In this paper, I use both "*laïcité*" and "secularism" to refer to French secularism.

this article, I discuss French laws regulating religious symbols, their application to Muslim women, and the history of *laïcité* doctrine. I then address legal frameworks through two prominent cases involving the veil: *Baby Loup*, a workplace discrimination suit, and *S.A.S. v. France*, which challenged the full-face veil ban before the European Court of Human Rights. I next employ alternative frameworks deconstructing the meaning attributed to the veil by non-Muslims, and the role those meanings play in relation to social inequality, explored through recent incidents expanding the ban on religious dress to include long skirts and the “burkini.”¹⁴

Lastly, I endeavor to construct the veil as a tool of autonomy. The veil establishes a physical zone of privacy, premised on the fundamental concept of consent, which rejects certain gendered cultural expectations of sexual availability. The veil serves as a tool of sartorial resistance, highlighting and challenging xenophobia within France. In addition, the veil is a mechanism of individual identity, enabling the construction of self by drawing on heterogeneous cultural sources as well as fluid, transnational notions of belonging.

When viewed from these perspectives, the veil debate moves beyond the restrictive narratives of the secularism framework to take into account the various means by which individuals express sexual, political, and social values. Reframing the veil debate also reveals the consequences of the French state’s hardline approach to assimilation; the anti-veil laws can be understood as a form of political theater, which reinforces hierarchies of power rooted in the historical domination of colonial subjects, driven by anxiety over immigration to mainland France from its former colonies over the last several decades.¹⁵

¹⁴ A burkini is a swimsuit that covers the whole body except the hands, feet, and face. See *What is a Burkini and Why are People Talking About it?*, BBC NEWS (Aug. 25, 2016), <http://www.bbc.co.uk/newsround/37182988> [<https://perma.cc/5ZX7-J3ZG>].

¹⁵ The contemporary anti-veil legal regime must be understood against the backdrop of France’s imperial legacy, which continues to shape its politics. During France’s colonial rule of Algeria, colonized women did not have citizenship, as “the population of Algeria was divided into two categories of citizens: ‘French men of European stock (whites) and ‘Muslim Frenchman,’ voting in different ‘colleges,’ resulting in the vote of one Frenchman of European stock being worth the vote of five Muslim Frenchmen.” CHRISTINE DELPHY, *SEPARATE AND DOMINATE: FEMINISM AND RACISM AFTER THE WAR ON TERROR* 108 (2015). French rule was predicated on “the denigration of Islam . . . centered on the classically colonial opposition between the ‘civilized’ and the ‘barbaric.’” *Id.* at 109–110. In fact, France denied “citizenship to most of its colonized subjects in North and West Africa, usually on the basis that these natives were not yet civilized enough to properly exercise the rights of citizens.” FERNANDO, *supra* note 8, at 192. France instituted several “unveiling” campaigns against Algerian women, operating from the proposition that the French government’s subjugation of Algerian women was preferable to Algerian patriarchy. *Id.* These unveiling campaigns, portrayed as the liberation of colonized women from their oppressive indigenous culture, were another tool in the colonial strategy of divide-and-conquer. DELPHY, *supra* note 15, at 111 (“the purpose of these campaigns—like the rapes committed by soldiers or the use of ‘lascivious’ native women in brothels—was to demoralize Algerian men by ‘stealing’ their last bit of property: women.”). France’s colonial history “was not a detour from or

I. VEIL LAWS AND *LAÏCITÉ*

The major sources of law underlying the veil debate are (1) the 2004 prohibition on conspicuous religious symbols in schools, which includes the headscarf, and (2) the 2010 public ban on full-face veils. These laws are best understood not just by their plain text, but also their application in practice, and their relationship to the historical meaning of secularism under French law.

A. *The Anti-Veil Statutes*

The 2004 law¹⁶ prohibits clothing or symbols demonstrating religious affiliation in public primary and secondary schools.¹⁷ The law bans “conspicuous signs” of religion, including large crosses, veils, and skullcaps, but not “medallions, small crosses, stars of David, hands of Fatima, or small Qurans.”¹⁸ Despite its broad wording, the law is colloquially referred to as the “veil law,”¹⁹ referring to the *hijab*, or “Islamic veil.”²⁰ In theory, the

failure of the republic but rather integral to it, and racist colonial discourses and practices were internal to republicanism rather than violations of it.” FERNANDO, *supra* note 8, at 60.

¹⁶ See Lina Ragep Powell, *The Constitutionality of France's Ban on the Burqa in Light of the European Convention's Arslan v. Turkey Decision on Religious Freedom*, 31 WISCONSIN J. INTL L. 119, 125–128 (2013) (analyzing the legislative history of the 2004 and 2010 laws).

¹⁷ 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 of March 15, 2004 barring, in the principle of *laïcité*, the wearing of signs manifesting religion in public schools] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], March 17, 2004, p. 5190 (translation by author).

¹⁸ SCOTT, *supra* note 16 at 1.

¹⁹ Various news sources refer to law 2004-228 and the 2010 full veil ban as laws *contre le voile*, or *sur le voile*, and generally identify the legal debate as focused on *le port du voile*, in their coverage. See, e.g., Laurence Le Furet Vincent Mongaillard, « *Il n'y a pas besoin d'une loi contre le voile à la fac* », LE PARISIEN (Apr. 14, 2016), <http://www.leparisien.fr/espace-premium/actu/il-n-y-a-pas-besoin-d-une-loi-contre-le-voile-a-la-fac-14-04-2016-5713251.php> [<https://perma.cc/VJ6K-NS7M>] (translation by author). The law is also referred to as the law of *le foulard*, or the scarf. Ali Al-Saji, *The Racialization of Muslim Veils: A Philosophical Analysis*, 36 PHIL. & SOC. CRITICISM 875, 878 (2010) (noting that the use of the terms veil and scarf, rather than the Arabic *hijab*, “adapt[ed] an innocuous and familiar article of clothing, *le foulard*, to an apparently alien religious sense, ‘Islamic’” creating an ideological tension “between the scarf, as a mere article of clothing with seemingly practical and varied uses, and the perceived religious and symbolic weight of the specifically Islamic headscarf.”)

²⁰ I place this term in quotation marks, to challenge the dominant French approach ascribing absolute and exclusively religious meaning to the headscarf. Islamic scholars debate whether any form of head covering is mandatory for women in Islam, and Muslim women who choose to wear such a covering may do so for religious or non-religious reasons. See James Vyver, *Explainer: Why do Muslim Women Wear a Burka, Niqab or Hijab?* ABC AU (Oct. 2, 2014, 12:19 AM), <http://www.abc.net.au/news/2014-09-23/why-do-muslim-women-wear-a-burka-niqab-or-hijab/5761510> [<https://perma.cc/BJF7-T49G>] (quoting Dr. Raihan Ismail, a lecturer in Middle East Politics and Islamic Studies at the Australian National University who wears the hijab, saying “The Koran [Quran]

2004 law should apply to any symbols of religious affiliation regardless of faith of origin. In practice, however, its enforcement has centered on headscarves worn by Muslim women.²¹

The 2010 law bans the wearing of full-face veils such as the *niqab* and *burqa*,²² using similarly general language proscribing “the concealment of the face in public spaces.”²³ The law does not mention religion, but it arose in the context of political diatribes against the Islamic veil,²⁴ thus earning its title as the law “*contre le voile intégrale*.”²⁵ This law added a provision to the criminal code that makes it an offense to force a person “to conceal their face, by threat, duress, coercion, abuse of authority or of office, on account of their gender,” reflecting the perception that familial and/or community pressure forces Muslim women to wear the veil.²⁶

does not explicitly say you have to cover yourself in this manner . . . I wear [the *hijab*] for cultural reasons.”)

²¹ DELPHY *supra* note 15 at 101 (“It is generally believed that the only real target of the law banning the wearing of religious symbols is the ‘veil’, also known as the Islamic headscarf.”)

²² See Appendix A for an infographic on the *hijab*, *niqab*, and other head coverings. See also *At a Glance: Burqa, Niqab and Hijab*, SBS (Oct. 3, 2014), <http://www.sbs.com.au/news/article/2010/04/30/glance-burqa-niqab-and-hijab> [<https://perma.cc/3XMU-5Z2J>] (explaining how the *niqab* and *burqa* are worn).

²³ Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l’espace public [Law of October 11, 2010 barring the concealment of the face in public spaces] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344 (translation by author). The 2010 law has exceptions for public face coverings such as motorcycle helmets and masks worn in the performance of professional duties for security or health purposes. See *id.* art. 2. See also *European Court Upholds French Full Veil Ban*, BBC (July 1, 2014), <http://www.bbc.com/news/world-europe-28106900> [<https://perma.cc/QUX8-242Q>]; Gérald Roux, *Expliquez-nous. . . la loi sur le voile*, FRANCE INFO (Oct. 21, 2014), <http://www.franceinfo.fr/emission/expliquez-nous/2014-2015/expliquez-nous-la-loi-sur-le-voile-21-10-2014-07-38> [<https://perma.cc/XJ3H-LDKG>].

²⁴ See, e.g., *Nicolas Sarkozy: Burqa not Welcome in France*, THE TELEGRAPH (June 22, 2009), <http://www.telegraph.co.uk/news/worldnews/europe/france/5603070/Nicolas-Sarkozy-burqa-not-welcome-in-France.html> [<https://perma.cc/HT9H-3Q4U>]; Angelique Chrisafis, *Nicolas Sarkozy Says Islamic Veils are Not Welcome in France*, GUARDIAN (June 22, 2009), <https://www.theguardian.com/world/2009/jun/22/islamic-veils-sarkozy-speech-france> [<https://perma.cc/9DTH-HJXM>]; Aliyah Shahid, *French Senate Bans Women Wearing Veils in Public*, DAILY NEWS (Sept. 14, 2010), <http://www.nydailynews.com/news/world/french-senate-agreeing-president-nicolas-sarkozy-bans-women-wearing-burkas-public-article-1.189505#ixzz0zX1uBEiR> [<https://perma.cc/M92H-UG3A>] (“President Nicolas Sarkozy . . . said the ruling is to protect women from being forced to cover their faces and to uphold France’s secular values.”).

²⁵ “Against the full veil” (translation by author).

²⁶ When confronted with a lack of evidence of veiling due to overt coercion, proponents of the veil ban often imply internalized misogyny is the driving force behind women’s choice to veil. For example, the French government expressed “surprise” at the idea a woman would veil free of coercive influence in the case *S.A.S. v. France*, in which the applicant challenging the full-face veil ban emphasized that she wore the veil as a matter of personal choice. The government reiterated its position that the veil symbolizes gender inequality, leading the European Court of Human Rights to point out the contradiction in a law premised on prohibiting women’s choices in order to enhance their status. *S.A.S. v. France*, App. No. 43835/11, Eur. Ct. H.R. 38, 48 (2014).

This provision raises questions about the fundamental policies underlying the law, in particular the gender equality rationale,²⁷ which contradict its real-world effects restricting women's choices.²⁸ Aside from the inconsistency in the structure of the law, a more fundamental problem is the lack of empirical basis for the central assumption that coercive veiling occurs in French Muslim communities.²⁹

B. *Muslim Women at the Intersection*

Debates over the application of these provisions to Muslim women often center on the degree of "conspicuousness" attributed to different religious symbols. The 2004 law sets forth a framework in which certain religious symbols are an incursion into the public sphere, and thus an affront to secular values. According to this characterization, the law targets veils because they are inherently overt, not because they are Islamic.

Characterizations of clothing as "subtle" or "noticeable" are prone to subjectivity and personal preference, making for a poorly crafted legal rule without additional criteria. Other symbols of Muslim identity are also physi-

²⁷ This rationale should be considered in light of a broader context, where "sexuality has become a discourse of border control in France, so that deviations from the norm—veiling, polygamy, gang rape, arranged or forced marriage, and domestic or sexual violence—are taken as signs of deviant Muslim cultural alterity . . . not simply understood as un-French but as unsecular." FERNANDO, *supra* note 8, at 209. The inclusion of this criminal provision creates an additional mechanism to subject Muslim men, who are presumed to be forcing women to veil, to the carceral powers of the state. See Harriet Alexander, *What is Going Wrong in France's Prisons?*, TELEGRAPH (Jan. 17, 2015), <http://www.telegraph.co.uk/news/worldnews/europe/france/11352268/What-is-going-wrong-in-France-prisons.html> [<https://perma.cc/R63Y-MPL8>] (noting that, despite the fact that Muslims constitute less than 10% of the French population, roughly 70% of the country's prison population is Muslim men). Further, a French appellate court found that police engaged in profiling, targeting French men of Arab and African descent. See *France Condemned over Racial Profiling in Historic Court Ruling*, TELESUR (June 24, 2015), <http://www.telesurtv.net/english/news/France-Condemned-over-Racial-Profiling-in-Historic-Court-Ruling-20150624-0046.html> [<https://perma.cc/UDM5-WUSR>] ("a Black or Arab person [has] a 6.2 and 7.7 percent greater chance respectively of being stopped by police than a white person").

²⁸ Steven Erlanger & Elvire Camus, *In a Ban, a Measure of European Tolerance*, N.Y. TIMES (Sept. 1, 2012), <http://www.nytimes.com/2012/09/02/world/europe/tolerance-eases-impact-of-french-ban-on-full-face-veils.html> [<https://perma.cc/7XXU-NFJW>] ("425 women wearing full-face veils [had] been fined up to 150 euros (\$188) each and 66 others [had] received warnings . . . the police concede that they rarely enforce [the full-face veil ban], having no desire to further increase tensions"). The criminalization of the veil, and by extension, French Muslims, is linked to hostility in French society against immigrants from former French colonies. Unable to "kick them out," the dominant social group "has tried to uphold a strengthened a caste system. And one of the ways of doing so is to criminalize Islam." DELPHY, *supra* note 15, at 112.

²⁹ See Brems, *supra* note 12, at 62 ("In the discussions leading up to the face covering bans in France . . . it was widely assumed that most, if not all, women wearing an Islamic face veil do so because they are forced or pressurized by husbands or other men in their families to cover their face. All available empirical research on face veil wearers in Europe points out that this is not the case, and that in fact the very large majority of European face veil wearers make an individual autonomous choice to do so.").

cally noticeable, but have not been subjected to state scrutiny. Unsurprisingly, these symbols are those worn by men, such as the prayer cap³⁰ and the practice of dying one's beard³¹ with bright red henna after completing *hajj*.³² Looking beyond French Muslim men as a comparator group, other religious dress, such as the clothing and head coverings worn by both Orthodox Jewish men and women, or Christian crosses worn as jewelry, could be deemed equally conspicuous.

Anti-veil laws thus arise at the intersection of religious, racial, and gender discrimination.³³ The focus on Muslim women and the headscarf represents a colonialist narrative that sees Muslim women as oppressed by Muslim men.³⁴ In this narrative, the headscarf symbolizes a particularly Muslim oppression from which Muslim women need deliverance at the hands of secular actors.³⁵ The common use of the term “veil” rather than

³⁰ The prayer cap is known in Arabic as the *taqiyah*, and in Urdu as the *topi*. See *Questions on Islamic Dress and Head-dress for Men*, SUNNAH, http://www.sunnah.org/fiqh/islamic_dress.htm [<https://perma.cc/LV9T-7GT4>].

³¹ The practice of growing a beard could also be construed as conspicuously religious, but has not become the subject of regulatory conflict in France. See SCOTT, *supra* note 13, at 157 (“beards have a lot to do with sexuality[,] the difference was that beards were visible, while women’s bodies were disguised by veils.”). Though the beard and veil are both arguably Muslim religious symbols related to sexual norms that compete with “singularly” French notions of sexuality, the beard does not deny heterosexual French men access to the female body of women descended from a former colonized population. *Id.* at 157, 159 (arguing that the veil is a “denial . . . of women as objects of desire.”)

³² *Hajj* is the religious pilgrimage to Mecca. See Benazir Wehelie, *Orange: The New Black in Bangladesh?*, CNN (July 3, 2015), <http://www.cnn.com/2015/06/16/world/cnphotos-orange-beards-bangladesh/> [<https://perma.cc/63H8-8BDP>] (explaining the significance of dying one’s beard after *hajj*). See also FERNANDO, *supra* note 8, at 22 (“If headscarves were religious signs, were not beards as well—and in that case, how could one tell an Islamic beard from a secular one?”).

³³ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989) (“dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis” leading to “a distorted analysis of racism and sexism.”). Observations about the exclusion of Black women from feminist frameworks within the United States are also applicable to Muslim women in French feminist discourse. *Id.* at 166 (“[F]eminism must include an analysis of race if it hopes to express the aspirations of non-white women.”).

³⁴ See FERNANDO, *supra* note 8, at 196 (discussing the “well-worn colonial narrative of white men saving brown women from brown men,” and its increasing prevalence in discussions about Maghrebi-French women): DELPHY, *supra* note 15, at 117 (showing that Muslim French women are caught “between the very real sexism of their own surroundings—a sexism exacerbated by counter-racism, that is, men taking pride in the *machismo* that they’re reproached for—and the dominant society’s desire to capture them from the men it still sees as its enemies.”) (citing CHRISTELLE HAMEL, *L’INTRICATION DES RAPPORTS SOCIAUX DE SEXE, DE ‘RACE’, D’ÂGE ET DE CLASSE: SES EFFETS SUR LA GESTION DES RISQUES D’INFECTION PAR LE VIH CHEZ LES FRANÇAIS DESCENDANT DE MIGRANTS DU MAGHREB* (2003)).

³⁵ Carol Stable & Deepa Kumar, *Unveiling Imperialism: Media, Gender and the War on Afghanistan*, 27 MEDIA CULTURE & SOC’Y 765, 770 (2005) (“women, like the penetrable, feminized territory of the nation-state, must be protected from the predatory advances of some real or imaginary enemy”). The anti-veil narrative, explicitly gendered,

“headscarf” conveys Orientalist overtones particular to Muslim and Arab women, historically characterized in European cultures in a fetishized manner.³⁶ Moreover, the exclusion of French Muslim women from the decision-making processes³⁷ that led to the passage of anti-veil laws, such as the Stasi commission, casts Muslim women as passive objects to be governed, not liberal political subjects capable of participating in debates over their own practices.³⁸

C. *The Evolving Concept of Laïcité*

Laïcité encompasses the secular notion of the separation of church and state. In the United States, secularism is aimed at protecting religion from state interference.³⁹ In France, this separation serves to protect the individual from religion.⁴⁰ Over time, the scope of *laïcité* has expanded to potentially require the removal of all elements of religiosity from the public sphere.

does not see Muslim men as objects to be rescued. The demonization of Muslim men as sexually controlling plays into other stereotypes in Europe about “Muslim immigrants’ intolerance—their presumed homophobia, anti-Semitism, and misogyny—[that] has increasingly justified the political, cultural, and physical exclusion of Muslims as proper citizen subjects.” FERNANDO, *supra* note 8, at 224.

³⁶ See Al-Saji, *supra* note 19, at 878 (discussing the use of the term “veil” in propagating exotic stereotypes of colonized Muslim subjects).

³⁷ See Charlotte Bellomy, *Do Laws Removing French Muslims’ Hijabs Remove Them from the Conversation?*, PULITZER CENTER (Oct. 23, 2015), <http://pulitzercenter.org/reporting/do-laws-removing-french-muslims%E2%80%99-hijabs-remove-them-conversation> [<https://perma.cc/5AVS-JLQW>] (“Any time you suggest that women who are veiled are in need of liberation you make it very hard for a women [sic] in a veil to speak freely, because you’ve already put her free speech into this suspect category that is not free in some way.”).

³⁸ See DELPHY, *supra* note 15, at 101 (noting that the Stasi commission did not hold hearings with Muslim women during its debate over the passage of the anti-veil law, because it was not “predisposed to their arguments . . . so much so that they didn’t even want to hear them.”). See also FERNANDO, *supra* note 8, at 29–32 (discussing that Stasi and his peers excluded Muslim women and stigmatized both Muslim and Jewish communities as engaging in a “communitarianism” at odds with French values). The Stasi Commission “invited only two women in headscarves to its hearings, only on the very last day, and only as an afterthought.” *Id.* at 49. The failure to include Muslim women’s voices in discussions of their political rights is an example of the “internal exclusion” facing minorities in France generally. *Id.* at 14 (showing this internal exclusion comes from the treatment of nonwhite French as non-citizens of France, a country “of which they are *themselves a part, that in a way is part of themselves and their identity*”) (quoting ÉTIENNE BALIBAR, *THE FRENCH REPUBLIC* 51 (2007)).

³⁹ Kent Greenawalt, *Secularism, Religion, and Liberal Democracy in the United States*, 30 CARDOZO L. REV. 2383, 2384 (2009).

⁴⁰ SCOTT, *supra* note 13, at 15 (showing that *laïcité* is strongly rooted in France’s historical experience with the Catholic Church). The 1905 law on the Separation of the Churches and the State enshrined the separation of religion and government, banning the use of public funding for religious purposes. Despite this apparent bright line rule, the government regularly allocates public funds for religious purposes in Alsace-Moselle, a region in France in which religious education is mandatory in public schools; the President names the archbishop of two major cities; and the state pays the salaries of Catholic, Calvinist, Lutheran, and Jewish clergy. FERNANDO, *supra* note 8, at 9, 11.

However, the lack of clarity in the underlying theory should raise skepticism about this expansive interpretation of *laïcité*.

Proponents of the veil bans have argued that *laïcité* permits the expression of “faith, thought, [and] conscience” but not signs, behaviors, or religious practice, drawing a distinction between internal belief and external conduct.⁴¹ According to this approach, veiling is a “practice-as-sign,” which can be banned without restricting the conscience of a religious person.⁴² This dichotomy, however, fails to account for the multiplicity of meanings that veiling evokes for those who do not view it as exclusively religious.⁴³

Even if *laïcité* is divided between private and public religious experience, French Muslim identity is perceived as disrupting the public sphere, while French Catholic identity is seen as integral to the public sphere. *Laïcité* does not just function as a principle of governance, but also as a theory of social relations. French secularism has “never been a unified or stable formation,” but has manifested differently across the eight legal regimes in metropolitan and overseas France.⁴⁴ Varying applications of secularism in Alsace-Moselle, colonized Algeria, and other departments of the French state demonstrate “the heterogeneous arrangement of secular rule in France.”⁴⁵ The rigid interpretation of *laïcité* applied to restrictions on the veil is thus a recent departure from the development of secularism.

II. LEGAL FRAMEWORKS AND CRITIQUES

Both the headscarf and the full-face veil have become battlegrounds in the realm of *laïcité*. While they are subject to different restrictions—the full-face veil is forbidden in public generally and the headscarf from schools and certain workplaces—the underlying cultural assumptions regarding the items are shared. Discussions of both items tend to focus on the perception that women are forced to wear them due to familial and social pressure, and that the items are so inherently religious as to have a proselytizing effect.

The issue of the headscarf in the workplace has also played a key role in the development of the veil debate. The spillover of the veil debate onto the European level has enabled some external critique of the processes at work in regulating the veil, without accomplishing major change in the status of Muslim women in France.

⁴¹ FERNANDO, *supra* note 8, at 164 (quoting Gisèle Halimi, *Légiférer, pour qui Gagne le Droit*, LE MONDE, 2003 at 66.)

⁴² *Id.* at 165.

⁴³ Ironically, the lack of consensus over the significance of veiling in Islam is one reason why the practice is not strongly protected by the European Convention on Human Rights (“the Convention”) on religious freedom grounds. The Convention protects the manifestation of religious belief as an inalienable right only when a manifestation is required by religion. *See id.* at 166.

⁴⁴ *Id.* at 10–11.

⁴⁵ *Id.*

A. *The Headscarf*

In 2014, France's highest civil court, the *Cour de Cassation*,⁴⁶ issued a final judgment in the *Baby Loup* case, a nearly five-year legal saga over the question of wearing a religious headscarf in a private workplace whose internal policies advanced a policy of secularism.⁴⁷ *Baby Loup* is remarkable in terms of the divergent analytical approaches taken by each court involved, attesting to a legal landscape in flux.

Fatima Afif, a childcare worker, brought a religious discrimination suit against nursery school Baby Loup after she was fired for refusing to take off her headscarf at work.⁴⁸ Her termination was twice upheld by lower courts citing to the 1958 Constitution's principle of the Republic as "*indivisible, laïque, démocratique, et sociale*,"⁴⁹ and the impact on young children of encountering "ostentatious demonstrations of religious belonging" such as the headscarf.⁵⁰ On appeal, one court found that the constitutional principle of *laïcité* did not apply to private employees who were not engaged in a public service, and held the Baby Loup policy impermissible;⁵¹ the next framed Baby Loup's secularism policy as a belief in itself, referring to the possibility of an "*entreprise de conviction*," a company of belief, which demanded employee neutrality.⁵² The court linked this corporate belief to the awakening conscience of children,⁵³ implicitly accepting the framing of a headscarf as a threat to a child's social and moral development. Though the *Cour de Cassation* ultimately upheld Ms. Afif's termination and ended the case,⁵⁴ the variety of legal rationales raised at each stage has left ambiguity over the boundaries of the law today. Legal commenters were split on the

⁴⁶ France's highest civil court, *Cour de Cassation* translates as "Quashing Court." See *The Role of the Court of Cassation*, COUR DE CASSATION, https://www.courdecassation.fr/about_the_court_9256.html [<https://perma.cc/6E4N-QGX8>]. France's *Conseil D'Etat*, or "Council of State," advises the executive branch and acts as the highest administrative court. See *The Conseil d'Etat*, CONSEIL D'ETAT, <http://english.conseil-etat.fr/> [<https://perma.cc/Q4XH-69P4>]. The country also has a separate constitutional court, the Constitutional Council. See Constitutional Council of the French Republic, General Presentation, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/presentation/general-presentation/general-presentation.25739.html> [<https://perma.cc/CF93-FR64>].

⁴⁷ See Franck Johannès, *Baby-Loup: la Cour de cassation confirme le licenciement de la salariée voilée*, LE MONDE (June 25, 2014), http://www.lemonde.fr/societe/article/2014/06/25/baby-loup-le-licenciement-de-la-salariee-voilee-confirme_4445095_3224.html [<https://perma.cc/5APM-BBHH>].

⁴⁸ Conseil de prud'hommes [CP] [employee claims court] Mantes-la-Jolie, Dec. 13, 2010, F 10/00587 at 8 (translation by author).

⁴⁹ *Id.*

⁵⁰ Cour d'appel [CA] [regional court of appeal] Versailles, Oct. 27, 2011, F 10/05642, 4 (translation by author).

⁵¹ Cour de cassation [Cass.] [supreme court for judicial matters] March 19, 2013, 11-28,845 (translation by author).

⁵² Cour d'appel [CA] [regional court of appeal] Paris, Nov. 27, 2013, S 13/02981 4 (translation by author).

⁵³ *Id.* at 6.

⁵⁴ Johannès, *supra* note 47.

implications of the *Baby Loup* decision. Some viewed it as a narrow ruling that avoided the broader social debate over Islam in France while others found it to be “a great decision of principle.”⁵⁵

The convoluted analysis of *Baby Loup* by various courts demonstrates a lack of doctrinal coherence fueled by the problematic assumptions limited to the public perception of veiling. In particular, the argument that exposure to the headscarf at nursery school poses a threat to children’s well-being reflects the idea of Muslim identity as inherently proselytizing. By condoning the exclusion of women who wear the headscarf from the workplace, neutrality as formulated in *Baby Loup* means that only those who conform to a specific cultural identity may participate in the economy. The dominant cultural identity is never named nor acknowledged as such, but provides the substantive content for the concept of neutrality.⁵⁶ In this way, the courts side-stepped the issue of how the headscarf debate is a proxy for the intense scrutiny inflicted on minorities, obscuring the broader political consequences of the case.⁵⁷ Though the facts of the case situate it squarely within the context of private employment, its politicized nature has given *Baby Loup* a unique status as a proxy for conflicts regarding the place of Muslims in French society.⁵⁸

B. *The Full-Face Veil*

In 2014, the European Court of Human Rights ruled on a challenge to France’s full-face veil ban in the case *S.A.S. v. France*. While the court expressed skepticism about some of the rationales offered by the French government in support of the ban, it ultimately upheld the law.

The *S.A.S.* applicant contextualized her claims by explaining her practices concerning the full-face veil; she wore the *niqab* as part of her religious practice “but not systematically,” agreed to remove her *niqab* where necessary for security and identification purposes, and chose not to wear it in

⁵⁵ *Id.*

⁵⁶ Neutrality was interpreted as requiring the erasure of certain identities, but not others. However, given the location of the nursery, there is a high chance that the majority of parents of children at *Baby Loup* were themselves Muslim. MARIE MERCAT-BRUNS, DISCRIMINATION AT WORK: COMPARING EUROPEAN, FRENCH, AND AMERICAN LAW 229 (2016) (discussing that contrary to the assumptions in *Baby Loup*, “allowing the employee to wear the headscarf would contribute to a *more* welcoming environment.”).

⁵⁷ *See id.* at 230 (“[French] courts have continued to shy away from religious discrimination based on the headscarf. They have either denied that it is religious discrimination . . . or have asked the CJEU [Court of Justice of the European Union] for a preliminary ruling, when customer preference dictates that religion is a condition of employment.”).

⁵⁸ *See* Valentine Pasquesoone, *France: Does Headscarf Case Target Islam?*, AL-JAZEERA (June 25, 2014), <http://www.aljazeera.com/indepth/features/2014/06/france-does-headscarf-case-target-islam-201462581058575391.html> [https://perma.cc/5648-VE8E].

certain social settings.⁵⁹ Nonetheless, the French government insisted the veil was a male-imposed dress code representing the subservience of women⁶⁰ and affirmed its “surprise” that a woman’s choice to wear the full-face veil could signify personal emancipation. The face veil was presented as an attack on the uniqueness of the face, which “expresses the existence of the individual as a unique person, and reflects one’s shared humanity with the interlocutor, at the same time as one’s otherness.”⁶¹ Thus, to obscure the face symbolically “manifest[s] a refusal of the principle of ‘living together’ (*le vivre ensemble*)” by denying people the opportunity to interact socially with the veil-wearer.⁶²

The court rejected the French government’s characterization of veiling as a form of gender inequality, reasoning that “a State Party cannot invoke gender equality in order to ban a practice that is defended by women—such as the applicant—in the context of the exercise of the rights enshrined in those provisions, *unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.*”⁶³ Nonetheless, it upheld the ban under a deferential standard,⁶⁴ recognizing the French government’s special authority as local policymaker and accepting its articulation of *vivre ensemble* as a part of the country’s social and political culture. The French government was vindicated in its argument that the full-face veil “breach[ed] the right of others to live in a space of socialisation which makes living together easier.”⁶⁵

Critics of *S.A.S.* celebrated the court’s rejection of paternalistic arguments concerning gender equality, but found the case to be a “missed oppor-

⁵⁹ The applicant presented multiple grounds for her challenge to the full-face veil ban, referencing the European Convention on Human Rights’ prohibition on torture or degrading treatment, the right to respect for private and family life, and the freedoms of religion, expression, and assembly, taken separately and together with the Convention’s prohibition on discrimination. *S.A.S. v. France*, App. No. 43835/11, Eur. Ct. H.R. 48 (2014).

⁶⁰ *Id.* at 5.

⁶¹ *Id.* at 37–38.

⁶² *Id.* at 38.

⁶³ *Id.* at 48 (emphasis added).

⁶⁴ *Id.* at 58.

⁶⁵ *Id.* at 49. The French government’s approach to “living together” contrasts with the UK government’s approach. Lucy Vickers, *S.A.S. v France: The French Burqa Ban and Religious Freedom*, E-INTERNATIONAL RELATIONS (Sept. 10, 2014), <http://www.e-ir.info/2014/09/10/sas-v-france-the-french-burqa-ban-and-religious-freedom/> [<https://perma.cc/Z9PM-2TXJ>] (“a duty is imposed on all public sector authorities in the exercise of their functions to have due regard to the need to eliminate discrimination and to foster good relations between people of different religions and beliefs.”). Indeed, the ban may be a counterproductive assimilation policy. See Erica Howard, *S.A.S. v France: Living Together or Increased Social Division?*, EJIL TALK! (July 7, 2014), <http://www.ejiltalk.org/s-a-s-v-france-living-together-or-increased-social-division/> [<https://perma.cc/D237-CL6C>] (discussing July 2013 Trappes protests arising out of a police stop of a woman and her husband under the full-face veil ban); see also Eleanor Beardsley, ‘Burqa Ban’ Sparks Another Round of Clashes in France, NPR (July 22, 2013), <http://www.npr.org/sections/parallels/2013/07/22/204506345/burka-ban-stirs-another-round-of-clashes-in-france> [<https://perma.cc/9UN4-ZCN3>].

tunity” to fully protect the rights of women who wear the full-face veil by offering procedural but not substantive justice.⁶⁶ The court questioned the weight the French government gave to its arguments, which rendered “the lack of effective review . . . especially striking given the court’s own doubts about the legitimacy of the ‘living together’ aim and its concern over indications of prejudiced remarks in the debates preceding the ban.”⁶⁷ The S.A.S. court ultimately accepted an exclusionary and contradictory account of French identity while simultaneously touting the value of pluralism. Although the French government’s conceptualization of *vivre ensemble*⁶⁸ relied on a poorly defined subset of normative cultural values without delving into the processes that shape how citizens engage with one another socially and politically,⁶⁹ it succeeded in suggesting that the repression of political and personal expression facilitates discourse, protecting the social values of a democratic state.⁷⁰

France’s arguments do not just neglect the ways in which *vivre ensemble* is shaped by mechanisms of social interaction—they also promote Islamophobia. The Open Society Foundations found that women who wear the full-face veil generally have active social lives; over time, those who participated less in the public social sphere once they started wearing the veil “did so *only* to avoid the abuse leveled at them in public,” abuse which has risen to the level of voter discrimination.⁷¹ Thus, factually unsupported characteri-

⁶⁶ Saila Ouald Chaib & Lourdes Peroni, *S.A.S. v. France: Missed Opportunity to Do Full Justice to Women Wearing a Face Veil*, STRASBOURG OBSERVERS (July 3, 2014), <http://strasbourgobservers.com/2014/07/03/s-a-s-v-france-missed-opportunity-to-do-full-justice-to-women-wearing-a-face-veil/> [<https://perma.cc/6ZKS-QZ66>]; see also Hakeem Yusuf, *S.A.S. v. France: Supporting ‘Living Together’ or Forced Assimilation*, 3 INT’L HUMAN RIGHTS L. REV. 277, 296 (2014) (critiquing the “coercive, assimilative element inherent in the ‘living together’ jurisprudence.”).

⁶⁷ *Id.*

⁶⁸ Brems, *supra* note 12, at 66–67 (arguing that the *vivre ensemble* justification for the veil ban “expresses most closely the actual reasons why many people want the face veil banned. This is their experience of a profound unease when they are confronted with a woman wearing a face veil, and *even at the simple thought of such a woman.*”) (emphasis added).

⁶⁹ *Id.* at 66 (arguing that *vivre ensemble* in S.A.S. may stem from a misunderstanding of the idea of a moral right to see the “face of the other,” a concept which may actually stand for the principle of mutual respect and co-existence rather than literally gazing upon the face).

⁷⁰ American jurisprudence has acknowledged the idea that “even speech so unpopular with the majority that it might feed fears of a physically violent reaction made a fundamental contribution to our collective effort at democratic self-government.” Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 967 (1988–1989) (“[t]he First Amendment thesis that we are safe from tyranny only so long as we engage . . . in open social dialogue implicates a recognition that the protection of minority voices will be a most crucial function of the courts.”). While the French and American legal systems differ in significant ways, there is a common commitment to a norm of freedom of expression in the name of democracy.

⁷¹ OPEN SOCIETY FOUNDATIONS, UNVEILING THE TRUTH: WHY 32 MUSLIM WOMEN WEAR THE FULL-FACE VEIL IN FRANCE 13 (2011) (emphasis added). In addition to civilian hostility against women who wear the veil, a March 2004 study found “ten separate

zations of the practice of veiling as coerced stoke the “fears and feelings of uneasiness . . . not so much caused by the veil itself, which—unlike perhaps certain other dress-codes—cannot be perceived as aggressive *per se*, but by the philosophy that is presumed to be linked to it.”⁷²

The outcome in *S.A.S.* is surprising when compared to the court's prior decision in *Eweida v. United Kingdom*.⁷³ In *Eweida*, British Airways prohibited an employee from wearing a “discreet” Christian cross.⁷⁴ The court ruled that the British government, which had found the airline's implementation of its dress code to be proportionate to the underlying aim, failed to sufficiently protect the applicant's right to manifest her religion.⁷⁵ The court held this right to be fundamental, “because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others.”⁷⁶ Pluralism in *Eweida* confirmed the Christian individual's right to exist as such, but pluralism in *S.A.S.* required “a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society.”⁷⁷ Taken together, *Eweida* and *S.A.S.* demonstrate that the court's willingness to protect religious expression and pluralism is limited where challenges to restrictions invoke anxieties over national identity.

III. ALTERNATIVE FRAMEWORKS

The S.A.S. and *Baby Loup* decisions were shaped in large part by their respective plaintiffs' choices to base their arguments on freedom of religion. However, arguments about privacy and freedom of expression, as they relate to the identity-constituting function of clothing, provide support for shifting the veil debate conceptually.⁷⁸ The *S.A.S.* court, in fact, cited several European cases dealing with the rights to private and family life and freedom of

instances where women in headscarves were illegally denied entry to vote in town halls across France.” FERNANDO, *supra* note 8, at 46. This voting discrimination fits into a broader pattern observed wherein “much [Islamophobic] discrimination, especially against women in headscarves, comes from employees of public institutions like a school or mayor's office.” *Id.*; see also Brems, *supra* note 12, at 68 (concluding that *vivre ensemble* is a concept that is either “highly theoretical, or . . . does not bother about exclusion. Both are problematic.”).

⁷² *S.A.S. v. France*, App. No. 43835/11, Eur. Ct. H.R. 62 (2014) (Nussberger, J. & Jaderblom, J., dissenting).

⁷³ See *Eweida v. U.K.*, App. Nos. 48420/10, 59842/10, 51671/10, and 36516/10, Eur. Ct. H.R. (2013).

⁷⁴ *Id.* at 34–35.

⁷⁵ *Id.*

⁷⁶ *Id.* at 35.

⁷⁷ *S.A.S. v. France*, App. No. 43835/11 at 51.

⁷⁸ These alternative conceptualizations do not rely on a denial of any religious purpose in wearing the veil, which would contradict historical practice. Instead, they seek to explore the co-existing religious, social and political meanings of the veil.

expression,⁷⁹ and agreed that such rights encompass desired personal appearance, including clothing choice.⁸⁰ The court did not acknowledge the veil as an item of clothing that has significance beyond its religious connotations, but prior cases may indicate how a claim drawing on an alternative framing of the veil would fare.

In order to protect freedom of expression, “[s]tates must not try to indoctrinate their citizens”⁸¹ through oral and written language, and “pictures, images and actions intended to express an idea or to present information.”⁸² Expression via clothing can be protected when one is “expressing a particular opinion or idea by means of his clothing.”⁸³ Regarding the veil, this expression concerns bodily autonomy and a tool of privacy in the public space; like other items of clothing, the veil enacts a public-private distinction applied to the body, simultaneously defining bodily exposure and communicating a theory of physical privacy.⁸⁴

A. *Deconstructing the Veil as Marker*

The notion that the veil is exclusively religious is so deeply entrenched that it is necessary to explore the various potential meanings that the veil may represent in order to make legal arguments that rely on those meanings.⁸⁵ Despite its arguments to the contrary, the French state’s practices sup-

⁷⁹ See *S.A.S. v. France*, App. No. 43835/11 at 59; see also European Convention on Human Rights, art. 14 (prohibiting discrimination on the basis of “sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”).

⁸⁰ See *S.A.S. v. France*, App. No. 43835/11 at 45. In *Kara v. United Kingdom*, a man filed a complaint against his employer for violations of the European Convention on Human Rights based on their refusal to permit him to wear gender nonconforming attire. The commission analyzed dress restrictions as an interference with private life, but found the dress code requirement for employees to wear gender conforming clothing could be “reasonably regarded by the employer as necessary to safeguard their public image,” thus finding a legitimate aim. App. No. 36528/97, Eur. Comm’n H.R. (1998).

⁸¹ Monica Macovei, FREEDOM OF EXPRESSION: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 10 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS, at 8 (Council of Europe, Human Rights Handbooks Ser. No. 2, 2004).

⁸² *Id.* at 15 (citations omitted).

⁸³ *Stevens v. United Kingdom*, App. No. 11674/85, Eur. Ct. H.R. 245, 247 (1986) (emphasis added) (upholding a school dress code, as the challenged attire did not express a particular idea).

⁸⁴ *S.A.S. v. France*, App. No. 43835/11 at 62 (Nussberger, J. & Jaderblom, J., dissenting) (observing that whatever the aims of *vivre ensemble*, one cannot force socialization, as “it can hardly be argued that an individual has a right to enter into contact with other people, in public places, against their will.”). The French government’s interpretation of socialization has forcible undertones analogous to other contexts in which clothing plays a role, such as sexual consent.

⁸⁵ This is not to argue that the veil has no religious meaning, but to explore alternative routes for contesting its oversimplification in a legal framework that distorts secularism to prohibit religious veiling. See FERNANDO, *supra* note 8, at 168 (“the debate surrounding the doctrinal status of the *hijab*, and the open question of whether wearing the headscarf constitutes a religious prescription, is precisely what disqualifies it from being a religious requirement protected by the European Convention [on Human

port the acknowledgement of the various meanings of the veil. For example, the French government does not apply the 2004 anti-veil law to headscarves in the Muslim-majority overseas department of Mayotte, having concluded that “headscarves in Mayotte [are] cultural, not religious.”⁸⁶ The contrast between the interpretation of the veil in metropolitan France and Mayotte reveals not just that the veil is not a monolith, but also that there may be strategic significance in determining when the French government treats it as an illicit religious symbol versus as a permissible cultural symbol.

In 2009, President Sarkozy stated, “The problem of the *burka*⁸⁷ is not a religious problem, it’s a problem of liberty and women’s dignity.”⁸⁸ While Sarkozy meant to portray veiling as a form of gender subjugation, an opposing argument starts from the same premise, in which the threat against liberty and women’s dignity is invasive state regulation of the female body rather than imagined social pressure to veil.⁸⁹ This argument moves beyond the Orientalist protection scenario that posits the veil as an ideological symbol of oppressed Muslim women.⁹⁰ Because veiling is neither mandatory in Islam nor universally practiced throughout historically Muslim countries, the veil may derive its meaning from a variety of sources beyond the religious. By rejecting the oversimplification of the veil that underlies the anti-veil

Rights].”). Though French Muslim women who veil may conceptualize it as essential to their religious practice, the idea that the veil may be obligatory does not necessarily mean it is imposed by male oppressors in a negation of female autonomy. *Id.* (“There was simply no room in the secular French imagination, or in European or French law, to conceptualize obligation as a personal ethical commitment.”).

⁸⁶ FERNANDO, *supra* note 8, at 22.

⁸⁷ Sarkozy’s use of the term “*burka*,” a form of clothing worn in Afghanistan but distinct from the headscarf and *niqab*, reflects a conflation of diverse Muslim cultures. The majority of France’s Muslims are of Maghrebi origin, Jawad Iqbal, *Muslim Population in France*, BBC NEWS (Jan. 15, 2015), <http://www.bbc.com/news/the-reporters-30835554> [<https://perma.cc/7E82-KDR9>] and thus unlikely to wear the *burka* even if they do wear some form of head covering, *cf. A Brief History of the Veil in Islam*, FACING HISTORY (2016), <https://www.facinghistory.org/civic-dilemmas/brief-history-veil-islam> [<https://perma.cc/U6TF-JMX8>] (noting that the burqa is most common in Afghanistan and Pakistan).

⁸⁸ Angelique Chrisafis, *Nicolas Sarkozy Says Islamic Veils are Not Welcome in France*, GUARDIAN (June 22, 2009), <https://www.theguardian.com/world/2009/jun/22/islamic-veils-sarkozy-speech-france> [<https://perma.cc/XZV8-6DYA>].

⁸⁹ See *S.A.S. v. France*, App. No. 43835/11, Eur. Ct. H.R. 18, 35, 42–45 (2014) (discussing that many women who wear the full-face veil in France actually face opposition from their own families, who do not approve of the practice). While Sarkozy may be right that the *burka* represents a threat to women’s liberty, his statement disregards the difference between women wearing the veil in a country that requires veiling under penalty of law and a state in which there is no such requirement.

⁹⁰ See FERNANDO, *supra* note 8, at 147 (“the veil, even if worn as a matter of choice, perpetuates normative religious authority, polices female sexuality and prescribed gender roles, and reinforces patriarchal communal norms not only on the veiled woman in question but on all Muslim women around her.”) Given the lack of empirical evidence that one woman’s choice to veil pressures other women to veil, these arguments reflect stereotypes about Islam. See *id.* at 169 (noting that “the large majority of students do not (and do not even want to) wear [the veil].”).

laws⁹¹ and instead starting from the position that the veil is subject to diverse interpretations, we can assess the role of the French government's conceptual choices in structuring inequality.

i. *Beyond the Veil*

The lack of a fixed, inherent meaning in the wearing of the veil can be understood by comparing the veil to other items of clothing that have recently been categorized as Islamic and banned from public spaces. The experience of Sarah K., a Muslim student sent home from school for wearing a long skirt, illustrates this expansion, as does the controversy over the “burkini ban.”

In early 2015, Sarah K. was forced to leave school twice for wearing a floor-grazing skirt on the ground that it violated the ban on conspicuous religious symbols. Critics of the decision juxtaposed Sarah K.'s picture with pictures of white women, including prominent French public figures, wearing similar skirts, observing that her clothing was construed as Islamic because of her racial and religious background, not the clothing itself.⁹² School officials were characterized as “*ayatollahs* of secularism,” referencing the perception that *laïcité* has evolved from a constitutional principle to dogma.⁹³ While defenders of *laïcité* may point to religious rationales underlying veiling, the long skirt is a common item of clothing having no significance in Islam.⁹⁴ The Sarah K. incident did not take place in isolation; in fact, local media reported eight other Muslim students “were told to change by their school in Montpellier when they arrived in long skirts” and the

⁹¹ See FERNANDO, *supra* note 8, at 49 (discussing how Bernard Stasi of the Stasi Commission stated that the veil has one “objective” meaning: “the alienation of women.”). See also Martine Nouaille & Pauline Froissart, *France: une jupe relance la polémique sur la laïcité à l'école*, LA PRESSE CA (April 29, 2015, 1:32 PM), <http://www.lapresse.ca/international/europe/201504/29/01-4865521-france-une-jupe-relance-la-polemique-sur-la-laicite-a-lecole.php> [https://perma.cc/VE6E-6WFFY] (translation by author) (showing that this simplification is consistent with the general anti-veil argument that the veil has one meaning: the alienation of Muslim women by Muslim men). The incident led to the popularization of the hashtag #JePorteMaJupeCommeJeVeux (#IWearMySkirtHowIWant) on Twitter. *Id.*

⁹² *Laïcité à l'école: une collégienne interdite de cours à cause d'une jupe jugée comme un signe religieux ostentatoire*, HUFFINGTON POST (April 28, 2015, 10:06PM), http://www.huffingtonpost.fr/2015/04/28/laicite-ecole-interdiction-cours-jupe-longue-jupee-signe-religieux-ostentatoire_n_7164546.html [https://perma.cc/H7NQ-XK9D] (translation by author) (collecting critical tweets).

⁹³ *Id.*

⁹⁴ Despite this, a newspaper featured two photos of women wearing long skirts and the headline “Dresses of Discord,” referring to young Muslim women wearing “outfits with religious connotations.” *Les robes de la discorde*, LE PARISIEN (May 11, 2015), <http://www.eresse.fr/quotidien/le-parisien/2015-05-11> [https://perma.cc/B7UR-4MNB] (translation by author).

Collective Against Islamophobia in France recorded “nearly 130 similar incidents” over the prior year.⁹⁵

In August 2016, the regulation of women's clothing expanded further through the proliferation of “burkini bans.” Thirty coastal French towns passed identical bans requiring that beachwear “respect the principles of secularism.”⁹⁶ Though the bans did not specifically mention the burkini, they were widely understood to target the burkini, and by association, Muslim women. Politicians supporting the bans explicitly linked them to the Bastille Day terrorist attack in Nice, framing the bans as a means of maintaining public safety in addition to the more familiar rationales of gender equality and secularism.⁹⁷

The bans attracted international criticism in the wake of an incident in which armed police officers surrounded a woman on a beach and demanded she remove clothing to comply with the ban. As the woman removed her tunic, other beachgoers shouted xenophobic comments.⁹⁸ Amnesty International Europe Director John Dalhuisen condemned the incident, stating that “[n]ot only are [the bans] in themselves discriminatory, but as we have seen, the enforcement of these bans leads to abuses and the degrading treatment of Muslim women and girls.”⁹⁹ France's highest administrative court, the *Conseil d'Etat*, struck down one of the burkini bans, stating, “in the vast majority of cases, the woman is the one to have chosen to wear the burkini, she has not been forced to do so. Gender equality is an absolute principle, but that doesn't allow us to rule that the burkini violates one's fundamental

⁹⁵ *France outcry over Muslims schoolgirl's skirt ban*, BBC (Apr. 29, 2015), <http://www.bbc.com/news/world-europe-32510606> [https://perma.cc/9GYT-9CDJ].

⁹⁶ *French Resorts Lift Burkini Bans After Court Ruling*, BBC (Sept. 1, 2016), <http://www.bbc.com/news/world-europe-37243442> [https://perma.cc/2L48-HRE3].

⁹⁷ Officials in Nice stated that “wearing [an] outfit ostentatiously showing religious beliefs may be interpreted as affiliation with religious fundamentalism,” which was perceived as a threat in light of the Nice attack. Lauren Said-Moorhouse, *Burkini ban in Nice overturned by French court*, CNN (Sept. 2, 2016), <http://www.cnn.com/2016/09/02/europe/france-burkini-ban/> [https://perma.cc/HTD9-75C4]. Prime Minister Manuel Valls described the burkini as a “symbol of the enslavement of women,” while Marc Etienne Lansade, mayor of Cogolin, stated “If you don't want to live the way we do, don't come. You have to behave in the way that people behave in the country that accepted you, and that is it.” *Id.*

⁹⁸ Ben Quinn, *French Police Make Woman Remove Clothing on Nice Beach Following Burkini Ban*, GUARDIAN (Aug. 23, 2016), <https://www.theguardian.com/world/2016/aug/24/french-police-make-woman-remove-burkini-on-nice-beach> [https://perma.cc/9XBD-FPT7].

⁹⁹ Jim Bittermann, Sheena McKenzie & Catherine E. Shoichet, *French Court Suspends Burkini Ban*, CNN (Aug. 26, 2016, 12:30 PM), <http://www.cnn.com/2016/08/26/europe/france-burkini-ban-court-ruling> [https://perma.cc/76B9-VJJK].

freedoms.”¹⁰⁰ Despite the ruling, mayors in other cities declared that they would continue to enforce their local bans.¹⁰¹

Given that all thirty of the bans were drafted with identical language, there is little ambiguity concerning how the *Conseil d'Etat* would rule on subsequent challenges. While the precedential effect of the *Conseil's* decision may be limited outside the burkini context, its recognition of women's autonomy is a departure from the predominant assumptions of government officials about the veil, exhibiting more nuance regarding issues of gender equality and individual choice. In addition, the rejection of the public safety rationale may deter the passage of even more restrictive provisions targeting Muslims in the future. The inexplicable association of women's clothing with direct threats of terrorist violence is a dangerous pretext that could give rise to intrusive violations of French Muslims' civil liberties.

ii. *Implications of the Bans*

The long skirt is not unique to Islam by any stretch of the imagination. It becomes “Islamic” only when worn by a woman of color whose identity is reduced to her religion.¹⁰² The burkini ban was driven by the same underlying dynamic as the debate over the long skirt—the association of a culturally flexible item with Muslim women and a monolithic perception of Islamic theology, despite the variety of ways in which the item appears in daily life.

The application of *laïcité* to skirts worn by Muslim women followed the same script as, and served to expand, the anti-veil movement.¹⁰³ The re-interpretation of the skirt is a means of exerting power over the marginalized by appropriating the significance of their clothing and prohibiting the contested item from the public sphere as a way of erasing, by association, the marginalized person herself. The skirt, like the veil, is a proxy whose categorization as impermissibly religious marks the woman's body with an inferior social status, constraining her personal autonomy. If she wears the skirt, she

¹⁰⁰ See Marie-Amélie Lombard-Latune, Jean-Marc Sauvé: « Pourquoi le Conseil d'État a autorisé le burkini », LE FIGARO, <http://www.lefigaro.fr/vox/societe/2016/10/04/31003-20161004ARTFIG00186-jean-marc-sauve-pourquoi-le-conseil-d-etat-a-autorise-le-burkini.php> [<https://perma.cc/HN3U-LDLT>].

¹⁰¹ See *id.*; see also Sheena McKenzie, *French Mayors Maintain Burkini Bans Despite Court Ruling*, CNN (Aug. 29, 2016, 8:33 AM), <http://www.cnn.com/2016/08/29/europe/french-mayors-refuse-lift-burkini-ban/index.html> [<https://perma.cc/J7M2-PG3U>].

¹⁰² See Al-Saji, *supra* note 19, at 891, 889 (noting that “it is not only clothing as an envelope of the body but the body as a whole that is racialized in cultural racism,” which “naturalizes cultural difference to visible features of the body, including clothing.”).

¹⁰³ See Al-Saji, *supra* note 19, at 877 (arguing that Western representations of Muslim women “provide the foil or negative mirror in which western constructions of identity and gender can be positively reflected. It is by means of the projection of gender oppression onto Islam, specifically onto the bodies of veiled women, that such mirroring takes place. This constitutes . . . a form of racialization.”) (emphasis omitted).

cannot attend school. This infringement of her right to education simultaneously subjects her personal identity to an implicitly racist discourse.¹⁰⁴

The contradiction of justifying the burkini ban on the basis of gender equality is apparent when one considers the mobility-enhancing purpose of the garment. Aheda Zanetti, inventor of the burkini, explains that it provides women who choose higher-coverage clothing “freedom and happiness and lifestyle changes.”¹⁰⁵ Her goal in designing the burkini was “to introduce a full range of clothing to suit a Muslim woman—or any woman—that wanted a bit of modesty and wanted to participate in any sporting activities. It was also my aim for them not to be judged for who they are, or where they’re from, and who people think they’re representing.”¹⁰⁶ The burkini has also been adopted by non-Muslims.¹⁰⁷ Islamic sportswear manufacturer Ismail Sacranie notes that 35% of his customers are non-Muslims who choose to wear his products for sun protection and comfort.¹⁰⁸ How non-Muslims wearing the burkini would fare under the burkini ban remains an open question, though the burkini bears significant similarities to the wetsuit, an item of clothing ignored by the state.

The cases challenging individual anti-veil laws have led courts to assess the proportionality of each in isolation but not their combined effects, which exclude Muslim women from the public sphere. The burkini bans in particular exemplify the perception of Muslims as so inherently dangerous to France that even their beachwear is terroristic. Public safety has also served as a justification for prior restrictions, such as the ban on the full-face veil. In *S.A.S.*, the French government offered a plausible, if attenuated, account of the security risk posed by the veil—face coverings might hinder the identification of individuals.¹⁰⁹ However, proponents of the burkini ban have

¹⁰⁴ One of the tropes of this debate is that there is a movement to make veiling compulsory in France, despite a lack of evidence that there has been any advocacy for such a position. Based on this paranoia, the anti-veil laws “trash these girls’ fundamental right to education, under the pretext that their presence could *potentially* threaten others’ right not to wear the headscarf.” DELPHY, *supra* note 15 at 102.

¹⁰⁵ Dan Bilefsky, *France’s Burkini Debate Reverberates Around the World*, N.Y. TIMES (Aug. 31, 2016), http://www.nytimes.com/2016/09/01/world/europe/burkini-france-us-germany-africa.html?_r=0 [<https://perma.cc/TBQ7-MWG3>].

¹⁰⁶ *Id.* See also Alicia J. Rubin, *From Bikinis to Burkinis, Regulating What Women Wear*, N.Y. TIMES (Aug. 27, 2016), <https://www.nytimes.com/2016/08/28/world/europe/france-burkini-bikini-ban.html> [<https://perma.cc/3ZT3-L4CS>] (discussing a Non-Muslim designer who creates burkinis “to give Muslim women a chance to participate in the same activities as the rest of the community.”).

¹⁰⁷ See Bilefsky, *supra* note 105.

¹⁰⁸ *Id.* See also Adam Taylor, *The Surprising Australian Origin Story of the ‘Burkini’*, WASH. POST (Aug. 17, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/08/17/the-surprising-australian-origin-story-of-the-burkini/?utm_term=.87fdcfb9c370 [<https://perma.cc/ZCR4-NUPF>].

¹⁰⁹ *S.A.S. v. France*, App. No. 43835/11, Eur. Ct. H.R. 47 (2014). See also Brems, *supra* note 12, at 65 (questioning the French public safety rationale, noting that “no direct link between the face veil and safety threats has yet been established”). French women who wear the full-face veil have “shown a general willingness . . . to uncover their faces for identification purposes when requested to do so by an official.” *Id.* at 66. Thus, the

cited public safety in general terms without explaining how a garment that does not cover the face could present similar challenges to security.

Perhaps this is because the underlying threat posed by this clothing lies not in the items themselves, but in the tensions they highlight in French national identity as the country struggles with the concept that its former colonized subjects are rights-holding members of French society.¹¹⁰ The skirt and burkini debates are not exceptions to an otherwise well-reasoned rule, but representative examples of the rule's purpose. Any item of clothing that covers the body comes to represent gender inequality, excessive religiosity, and the ever-encroaching specter of Islamic terrorism when worn by French women of Arab or African descent.

B. *The Veil as Tool*

The veil debate is a mechanism by which power is wielded between groups presenting competing claims to national identity. Generally, such power is expressed politically and socially by the marking of human bodies to reflect social status.¹¹¹ This marking can take the form of voluntary markings, "those markings that people choose for themselves, such as hair styles, clothing styles, piercings, tattoos," and involuntary markings, those "made on individuals' bodies without their consent such as the brandings performed by slave-owners on the foreheads of slaves, and the tattooed numbers on prisoners' arms that Nazis used to identify concentration camp inmates."¹¹² The act of marking another's body denotes the inferiority of the marked person, providing a basis for their social subjugation. The construction of this hierarchy privileges bodies that are either marked with symbols of power or "unmarked," i.e. perceived as natural and superior. Thus, "some bodies are experienced as more powerful than others because of their markings (e.g. royal dress, uniforms, etc.) or the alleged absence of markings (e.g. their white skin, or maleness)."¹¹³

The functioning of power in this system of social marking is normalized; examples of "the dominating group impos[ing] its fixed inscription on those who are materially subject to them" include *ancien régime* convicts, concentration camp victims, and American chattel slaves, permanently and physically inscribed with their social status.¹¹⁴ Marking does not have to be

French public safety rationale is one premised on both subjective and objective safety concerns.

¹¹⁰ Amanda Taub, *France's 'Burkini' Bans Are About More Than Religion or Clothing*, N.Y. TIMES (Aug. 18, 2016), <https://www.nytimes.com/2016/08/19/world/europe/frances-burkini-bans-are-about-more-than-religion-or-clothing.html> [<https://perma.cc/EYZ6-RU6V>].

¹¹¹ COLETTE GUILLAUMIN, RACISM, SEXISM, POWER AND IDEOLOGY 139 (2002).

¹¹² Gail Weiss, *Intertwined Identities: Challenges to Bodily Autonomy*, 2 INT'L POST-GRADUATE J. OF PHIL. 22, 23 (2009).

¹¹³ *Id.*

¹¹⁴ *Id.* at 140.

permanent to have its effect; anti-veil rhetoric serves as a form of marking in which cultural interpretation is translated into political force through the authority of law. This rhetoric defines a practice of a marginalized group in such a way that it reflects and reifies their relative powerlessness in society, constantly affirming their otherness¹¹⁵ in a process of national identity construction.

The French government and certain French feminists categorize veiling as a form of subjugation¹¹⁶ despite the lack of evidence of coerced veiling, thereby contradicting the testimony of actual women who argue that they veil as a personal choice.¹¹⁷ By ignoring this evidence, the dominant group posits oppressed Muslim women as a pretext for passing laws that diminish their autonomy and criminalize their personal choices.¹¹⁸ Anti-veil legislation “marks” by appropriating the cultural significance of the veil, casting it as a symbol of oppression in order to legitimize the expulsion of competing accounts of French identity and experience from the public sphere. However, by reconsidering the meanings associated with the veil, one can better discern the full spectrum of rights infringed upon by its restriction.

i. *Sexual Autonomy*

An alternative understanding of the veil based on sexual privacy is supported by the European Convention on Human Rights’ (“the Convention”) protection of the physical, psychological, and moral integrity of a person.¹¹⁹

¹¹⁵ DELPHY, *supra* note 15, at 19 (describing the phenomenon of racial othering, or *altérisation*, in France as one that creates dominant personalities defined in opposition to their subjugated counterparts). One telling example of the pervasiveness of this othering concerns a café in the south of France that rejected North African customers. Delphy observes that the French media “described this situation as if it were just how things are, not showing the slightest indignation or finding out if by chance this ‘ban’ might be illegal.” *Id.* at 21.

¹¹⁶ *See id.* at 35 (noting that “the ‘women’s cause’ has been instrumentalized in a shameful way . . . by the imperial war . . . curiously, many feminists seem not to have noticed. Or perhaps they do approve of this war, putting being white above being women?”). The role of some French feminists in promoting the anti-veil law demonstrates the danger of a one-dimensional feminism that rejects the experiences of minority women. *Cf.* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1291 (1991) (“the production of images of women of color and the contestations over those images tend to ignore the intersectional interests of women of color.”). *See also S.A.S. v. France*, App. No. 43835/11, Eur. Ct. H.R. 62 (2014).

¹¹⁷ Third-party interveners in the *S.A.S.* case seeking to challenge the perception that forced veiling occurs in France shared the stories of many women who choose to wear the full-face veil despite their families’ desire for them *not* to veil. FERNANDO, *supra* note 8, at 41.

¹¹⁸ Brems, *supra* note 12, at 15 (showing that the full face veil ban is not “about protecting the autonomy rights of women to decide whether or not to wear the face veil. It is instead about removing (perceived) symbols of gender oppression from the public sphere, giving in to majority constructs of minority behavior as undesirable symbols.”).

¹¹⁹ European Convention on Human Rights, art. 8 (including such protections within “the right to respect for [] private and family life, [] home and [] correspondence.”).

This protection extends to social identity, including gender identification, name, sexual orientation, and sexual life.¹²⁰ Although case law has not explicitly established a right of self-determination, the European Court of Human Rights (“ECtHR”) “considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.”¹²¹ The inclusion of autonomy with reference to social interaction points to a line of analysis that French and European courts have overlooked—the role of the individual’s right to regulate the boundaries of private and public social interactions on their own terms.

Veiling, whether partial or full, implicates both the physical and psychological privacy of the veil-wearer, and should be assessed as a mode of dress falling under ECtHR precedents relating to other clothing choices. If the veil were analyzed as a literal and metaphorical tool of sexual privacy, the French government would have more difficulty justifying bans as responding to “a pressing social need” as required by the Convention.¹²² The sexual life approach frames the veil as a tool enabling a woman to control to what degree her body is exposed in public as a way of regulating who has visual access to her body. The veil serves as a physical symbol—not of religious extremism, but of bodily privacy.

Each individual may have a unique idea of what portions of their body implicate sexuality, to be covered through clothing and excluded from the public sphere. Public decency laws represent the establishment of a legal floor that limits exposure of certain body parts to the private sphere under threat of criminal sanction. The categorization of indecent exposure as a sexual crime demonstrates that these areas of the body are coded as sexual and therefore private.¹²³ Conversely, the veil law is an attempt to set a legal ceiling on bodily coverage. This contrast may imply that the state has coded body parts which one *cannot* cover in public as (1) de-sexualized, or (2) permissible manifestations of sexuality. When individuals disagree with these categorizations, anti-veil laws force them to either comply with a state theory of sexuality or avoid the public sphere. This forces a standardized

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² European Convention on Human Rights, *supra* note 119.

¹²³ Joseph Fok, *Outraging Public Decency: In Your Face and Up Your Skirt—The Dynamism and Limits of the Common Law* (Oct. 27, 2016), <http://www.hkcfa.hk/filemanager/speech/en/upload/172/Outraging%20public%20decency%20In%20your%20face%20and%20up%20your%20skirt.pdf> [<https://perma.cc/NK5G-M6FB>] (noting that key elements of the offense are the perceived obscenity and the publicity of the prohibited conduct). Over time, the offense has evolved “from one justified on the basis of regulating behaviour to prevent the subversion of public morals to one based on the suppression of harm to members of the public by reason of offensive, anti-social behavior.” *Id.* See also *Female Artist Arrested After Nude Stunt at Paris Museum*, FRANCE 24 (Jan. 18, 2016), <http://www.france24.com/en/20160118-france-artist-nude-museum-ma-net-deborah-robertois> [<https://perma.cc/Z87E-2W36>] (discussing an artist arrested in France under decency laws for public nudity).

norm of bodily sexuality through clothing,¹²⁴ which is less defensible under the Convention. Interferences with sexual life receive less deference than other restrictions, as they are reviewed under a narrow margin of appreciation.¹²⁵ The justification of an infringement upon sexual consent as a form of *vivre ensemble* would require arguments so extreme that it could not rely on feminist theory the way that the popular “veil as subservience” argument does.

Though legal and political literature discusses sexual violence, the notion of sexual consent is underdeveloped, characterized by a lack of consensus on its definition and how it is conveyed.¹²⁶ Consent to in-person sexual contact often involves the question of the role of clothing in representing access to the body. In her work on non-verbal sexual cues, Pineau uses the following example:

If you undo one of my buttons, and I help with the rest, you may presume that I am happy to get undressed. If you undo my button, and I try to do it back up again or clutch at the gap created, then you should presume the opposite.¹²⁷

Therefore, “non-verbal behaviors [including the removal of clothing] are used more frequently than verbal behaviors to communicate consent.”¹²⁸

If, as some argue, a singularly French sexuality¹²⁹ is performed through public non-verbal cues,¹³⁰ the refusal to participate in cultural ritual by covering one's body from the gaze of others is an expression of non-consent. This does not mean that certain clothing invites physical contact, nor that every body part covered in public is thus defined as necessarily sexual, but that clothing conveys boundaries concerning what areas of the body one

¹²⁴ In *Les filles voilées parlent*, or “The veiled girls speak,” one young woman says at her school “there are girls dressed . . . in miniskirts or low-slung jeans with their thongs showing . . . but we, we aren't allowed the right to our veil. It's called a 'religious sign' even though it's just a piece of clothing.” FERNANDO, *supra* note 8, at 171. These comments may reflect how young Frenchwomen “have to deemphasize [the veil's] Islamic character” to counter Islamophobic stereotypes. *Id.* at 213 (“Muslim women who choose to veil create confusion because they have opted out of a mainstream vision of female sexuality as overtly and publicly alluring.”) (quoting Anna Kemp, *Marianne d'Aujourd'hui?: The Figure of the Beurette in Contemporary French Feminist Discourse*, MODERN & CONTEMPORARY FRANCE 12, 2009 at 26–27).

¹²⁵ *Sex Life, Sexual Orientation and Sexual Identity*, ECHR ONLINE, <http://echr-online.info/sex-life-sexual-orientation-and-sexual-identity> [<https://perma.cc/YXS4-D8RZ>].

¹²⁶ Melanie A. Beres, ‘Spontaneous’ Sexual Consent: An Analysis of Sexual Consent Literature, 17 FEMINISM & PSYCHOLOGY 93, 94 (2007).

¹²⁷ Beres, *supra* note 126, at 103 (quoting Lois Pineau, *A Response to My Critics*, in DATE RAPE: FEMINISM, PHILOSOPHY AND THE LAW (Leslie Francis ed., 1996)). Under the affirmative consent standard, the hypothetical would likely involve unbuttoning that is not followed by an indication of approval or disapproval, at which point an individual is obligated to ask their partner directly if they consent to continue rather than presume consent.

¹²⁸ *Id.* at 104.

¹²⁹ SCOTT, *supra* note 13, at 161.

¹³⁰ *Id.* at 159.

permits to be perceived visually by others. The most direct means of ensuring others will not see a part of your body is to cover it with clothing, a reality which points to the need for more nuanced recognition of the function of clothing as a means of protecting bodily autonomy.

The history of *laïcité* does not suggest that individuals must submit to a standard norm of sexual privacy by exposing a minimum amount of the body. Likewise, the notion of *vivre ensemble* cannot require forced sexual interaction between members of the public. The symbolism of the veil as an assertion of bodily privacy and autonomy is particularly resonant given the history of “unveiling” campaigns and violence against colonized women under French rule.¹³¹ Thus, while privacy does not necessarily conflict with *laïcité*, it poses a problem for a specific idea of French culture, “a distinctively French form of sexuality”¹³² that is considered a singular national character.¹³³ Under this model of sexuality, the veil signals “the sexual unavailability of women,” challenging norms of heterosexual interaction ascribed to by French men and women.¹³⁴ The anti-veil regime is thus a regulatory framework of sexual conformity; as the government argued in *S.A.S.*, the face has a unique role in social interaction, and the language of prominent proponents of the full-face veil ban points to the sexual undertones of what exactly the role of the face is.¹³⁵ When French Muslim women who veil frustrate a colonizing gaze, this resistance is met with state incursions into their bodily privacy.¹³⁶

¹³¹ See DELPHY, *supra* note 14, at 119 (arguing that this history plays a large role in shaping the anti-veil narrative today). If Frenchmen “faced with the unanswerable dilemma [of living with the descendants of Arabs] . . . hatched a plan: if they took these women, even taking them as their wives . . . then given that women are nothing more than receptacles for men’s semen, this ‘race’ would soon disappear.” *Id.*

¹³² SCOTT, *supra* note 13, at 168 (describing the Stasi Commission’s emphasis on sexual self-expression, in which “[t]he visibility of the bodies of women and men, their easy accessibility to one another, the free play of seduction, were taken to be hallmarks of liberty and equality”). However, given that the French political system conceptualizes equality as sameness, while women are perceived through the lens of difference, it poses a problem for how this sexuality frames the assertion of political autonomy by female citizens.

¹³³ *Id.* at 161.

¹³⁴ *Id.* at 159–60 (constructing sexual identity was “the exchange of desirous looks”: “men confirm their sexuality not only by being able to look at—to openly desire—women, but also by receiving a ‘look’ from women in return.”)

¹³⁵ Bernard-Henri Lévy, *Why I Support a Ban on Burqas*, THE HUFFINGTON POST (Feb. 15, 2010), http://www.huffingtonpost.com/bernardhenri-levy/why-i-support-a-ban-on-bu_b_463192.html [https://perma.cc/NZ5Z-KRYW] (proposing that covering the face “divide[s] humanity between those of a glorious body, graced with no less glorious a face, and those whose bodies and faces are . . . a filthy thing not to be seen but hidden or neutralized”). See also SCOTT, *supra* note 13, at 159–60 (“[T]he uncovered face stands for the visibility of the entire body and, more importantly, its sexual availability.”).

¹³⁶ See SCOTT, *supra* note 13, at 158 (“the aggression of the woman consisted in denying (French) men the pleasure—understood as a natural right (a male prerogative)—to see behind the veil. This was taken to be an assault on male sexuality, a kind of castration”).

The veil bans function as a requirement of a minimum performance of sexual availability by French Muslim women, one that is not formally imposed on non-Muslim French women nor French men. In this way, the bans continue a legacy of violence dating back to French colonial rule. When viewed in the context of that legacy, the actual effect of the bans—eroding rather than supporting autonomy—becomes apparent. Though feminist rhetoric is employed in support of the anti-veil laws, such an approach fails to recognize that French Muslim women need not comply with the normative sexuality of non-Muslim French women to be free; their participation in their own forms of sexual expression is not a product of Muslim male oppression requiring the criminalizing intervention of the state.

ii. *Sartorial Resistance*

The second theory of the veil as personal expression relies on its use as a proxy for immigrant identity and a non-verbal protest in favor of pluralism. Under this theory, because French Muslims are largely Arab and African immigrants or the descendants of immigrants, the French government's regulation of the veil is a means of stigmatizing those who are not considered truly French under the country's rule of *jus sanguinis*.¹³⁷ The decision to wear the veil is sartorial resistance, subverting the logic of "effacement" cited by the French government in *S.A.S.*¹³⁸ Since the veil is an item of clothing with origins outside of France, it symbolizes the cultural, religious and racial diversity in France today caused by immigration. Its ban from the public sphere is an erasure of French immigrant identity.

France's rejection of race-conscious discrimination law prevents minority immigrants from fully critiquing the ways in which they are disenfranchised in society,¹³⁹ which have come to be symbolized by the veil.¹⁴⁰

¹³⁷ SCOTT, *supra* note 13, at 116 ("It is hard to imagine that a few schoolgirls wearing headscarves could bring down the nation or even produce fractures in its foundation. But that was how the argument went It was as if the headscarf were the flag of an alien nation whose forces were intent on compromising national integrity."). The perception of the veil as a symbol of the threats posed to French identity by immigrants from France's former colonies fueled "a particularly defensive nationalism" manifested in the anti-veil laws. *Id.* The colonial perception that Muslims are not fit for republican citizenship because their beliefs render them "incapable of assimilation" persists today. *Id.* at 117.

¹³⁸ FERNANDO, *supra* note 8, at 73 ("Wearers seek to transform the veil from a 'sign of stigma' into a 'sign of prestige.'") (quoting Nilüfer Göle INTERPÉNÉTRATIONS: L'ISLAM ET L'EUROPE, 123 (2005)).

¹³⁹ See DELPHY, *supra* note 14, at 17 ("Declaring one's colour—unlike declaring one's sex—is not only not allowed, but explicitly forbidden. This allows the eradication of the very basis of this question: in France there are no races, so there are no racial problems."). However, the very real discrimination experienced by racial minorities in France contradicts the presumptions of this illusory post-racial regime.

¹⁴⁰ See FERNANDO, *supra* note 8, at 17 ("Muslims are increasingly perceived . . . in racialized terms. The term *Muslims* has come to identify, pejoratively, a population of North and West African descent . . . [signaling] a fusion of racial, religious, and cultural bases for alterity."); see also Al-Saji, *supra* note 19, at 883 (noting that in Algeria, the veil was seen "as the marker of Islamic or Algerian cultural difference[s]" in a "field of

For example, claimants who experience racial discrimination may seek redress under the framework of national origin and appearance-based discrimination. The implication of this legal framework is that a racial minority in France, no matter how many generations their family has lived in the country, is not French.¹⁴¹ Thus, people of color in France are cast as perpetual outsiders, incapable of identifying as African-French, French Blacks and/or French Arabs, but forever Africans *in* France. The ban on the veil, a symbol of familial and cultural roots outside France, effectively presents an ultimatum to French Muslim women who wish to wear it: avoid the public sphere entirely, or hide this component of your identity as a condition to participation in public life. Because culturally generic clothing is coded as religious when worn by Muslim women but not non-Muslim white women,¹⁴² the veil debate furthers the proposition that minority women are themselves inherently religious, unfit for the public sphere because of their refusal to conform to a restrictive principle of *laïcité*. These connotations are significant in shaping the veil as a tool of anti-racist resistance.¹⁴³

The increase in veiling over the last fifteen years speaks to the protest connotations of the headscarf. Immigrants from majority-Muslim countries have been moving to France since the era of decolonization, but more recently Islamophobic and racist rhetoric have become particularly politically expedient on the national stage. Abderrahim Hafidi, host of France 2's program "Islam," notes that as Islamophobia grows in French society, for example after the Charlie Hebdo attacks, young French Muslim women

vision . . . structured by colonialism, in terms of both material exploitation and representational violence"). The contemporary debate over the veil has its roots in France's colonial attempts to "unveil" Algerian women, demonstrating the underlying purpose to subject colonized women to the control of colonizing men. *Id.* at 886–87 ("Women who continue to veil seem to place themselves beyond (colonial male) recognition. . . . The obstacle that the veil constitutes for the colonial male gaze is naturalized to the veil as itself limiting to the women wearing it.").

¹⁴¹ See DELPHY, *supra* note 14, at 30–31 (pointing out the illogical implication of the term "second generation immigrant," "as if the quality of being an immigrant could be inherited"). Despite the French government's formal rejection of the concept of race, the acceptance of this idea demonstrates the formation of "racial castes" in France comparable to those in the United States. *Id.* The discourse around integration puts racial minorities in France in "a formidable double bind: they are called on to show that they're 'the same' but they are perceived and labeled as 'different' . . . The unspoken reality is that the [criteria of Frenchness] exclude anyone of Maghrebian or African origin *by definition*." *Id.* at 115.

¹⁴² See Martine Nouaille & Pauline Froissart, *supra* note 91.

¹⁴³ See FERNANDO, *supra* note 8, at 53 (describing a December 2003 protest against the law banning the headscarf in schools). In this protest, "three or four thousand demonstrators—most of them young women and many of them clad in red, white and blue headscarves—marched from the Place de la République to the Place de la Bastille, chanting slogans and holding placards, all in French." *Id.* ("[T]he women in the demonstration inscribed themselves into the French nation, presenting themselves as classical *citoyennes* [citizens] adorned not only with the symbolic accouterments of the citizen (the flag) but also with the practical tools of active citizenship [voting cards].") Given the highly charged debate around the veil, wearing the veil in daily life is as much an expression of one's political voice as it is in the context of a demonstration.

increasingly wear clothing perceived as traditional in order to resist the “vindicative” gaze cast upon them by mainstream French society.¹⁴⁴ Their clothing choice is a form of “provocation, affirmation and resistance,”¹⁴⁵ rather than an exclusively religious gesture.¹⁴⁶ As the French government and media stigmatize immigrants by casting the veil as a symbol of a barbaric Islamic threat, reminiscent of the theories that supported French colonization,¹⁴⁷ French Muslim women choose to veil to push back against this characterization. The wearing of the veil embraces the French republican spirit of *manifestation*¹⁴⁸ in a uniquely performative way. The veil as item of protest clothing transforms daily life, serving as a mode for critiquing constant political and social attacks on one's right to participate in public life.

The veil as a non-religious political symbol must not be confused with transnational Islamist ideology. The resistance veil does not promote the reestablishment of the caliphate, governance according to Quranic values, or solidarity with Islamist regimes. The veil has been defined in the European imagination as an Orientalist symbol of the Maghreb and Africa,¹⁴⁹ in a process by which cultural and racial identities are interpreted through a colonialist framework. Thus, its use as an anti-racist protest symbol is not contingent on religious content or belief. Though the French government argues that the veil renders women invisible, on the contrary, it amplifies their political commentary.

iii. *Pluralism and Individual Identity*

A third alternative interpretation of the veil relates to both the theory of sexual privacy and anti-racist sartorial resistance. Under this approach, the veil conveys the citizen's philosophical authority to draw upon a variety of cultural and historical sources in constructing an individual identity. This theory relies on an understanding of the ways in which globalization, through modern technology and historical patterns of migration, has contributed to a contemporary landscape of vast cultural accessibility.

¹⁴⁴ *L'analyse de l'islamologue*, LE PARISIEN (May 11, 2015, 12:00 AM), http://m.leparisien.fr/informations/l-analyse-de-l-islamologue-11-05-2015-4761037.php#player_load [<https://perma.cc/9CL3-88G7>].

¹⁴⁵ *Id.*

¹⁴⁶ See OPEN SOCIETY FOUNDATIONS, UNVEILING THE TRUTH: WHY 32 MUSLIM WOMEN WEAR THE FULL-FACE VEIL IN FRANCE 13–14 (2011) (“Perhaps the controversy [over veiling] itself encouraged a number of interviewees, especially younger ones, to adopt the full-face veil, about which they may have had little knowledge before politicians and the mass media made it a ‘hot topic.’ Ten of the 32 women started wearing the *niqab* after the controversy broke out in April 2009 . . . Twenty-five of the women in the sample initially adopted the *niqab* after 2005 compared to four who did so in the 1990s”) (emphasis added).

¹⁴⁷ See FERNANDO, *supra* note 8, at 18 (“Contemporary designations of the Muslim as Other continue to draw on older figurations of alterity.”).

¹⁴⁸ To demonstrate or protest (translation by author).

¹⁴⁹ See Emily Crosby, *Faux Feminism: France's Veil Ban as Orientalism*, 15 J. INT'L WOMEN'S STUDIES 46, 51 (2014).

The French government's narrow articulation of *vivre ensemble* represents a hegemonic process through which a social group with disparate access to institutions that influence culture and law constructs their own French identity in opposition to the imagined "Islamic identity" as represented by the veil, a proxy for Muslims in France. This conventional account does not call into question the processes by which cultures overlap, exchange ideas, and are internally contested such that categorization in absolute terms fails due to a lack of stable, coherent boundaries. Culture evolves, contradicts, and is both produced and experienced differently by individuals within any given society. A person may wear a *hijab*, *niqab* or *burqa* at different times and in pursuit of different goals, each of which takes precedence in a particular social milieu.

In addition to the issue of cultural flux, there exists today unparalleled access to a plethora of value systems from which an individual can draw to form their personal beliefs and sense of self. Veiling is one example of cultural interchange, but there are many forms of dress that include some type of head or face covering originating from varying regions of the world and calling upon unrelated justificatory traditions. The reduction of the headscarf to one static meaning, defined by politicians who themselves have never worn it, interferes with citizens' engagement with particular substantive values, as well as the methodology they employ in personal identification. In this sense, pluralism is not just a philosophical perspective, but also a procedure under which one does not limit oneself to the ideas available within the geographical and historical boundaries of a single state. The anti-veil framework attacks not only sexual privacy and anti-racist affirmation, but the European citizen's incorporation of pluralism into their personal identity.

IV. CONCLUSION

The use of the veil as a tool of sexual, political, and social expression shows that its meaning is more complex than the French government acknowledges. The anti-veil laws not only interfere with a segment of the population's exercise of their full legal rights, but also preclude the development of an inclusive understanding of French identity and contribute to an ongoing process of political theater. Underlying the veil discourse is the equation of a woman's identity with the performance of sexual availability and conformity. This scrutiny of the body denies women of color in France¹⁵⁰ their

¹⁵⁰ While this paper has focused on the veil debate in France, similar tensions are visible in other European countries. See Sewell Chan, *E.U. Legal Opinion Upholds Employer's Ban on Head Scarves*, N.Y. TIMES (May 31, 2016), https://www.nytimes.com/2016/06/01/world/europe/eu-legal-opinion-upholds-employers-ban-on-head-scarves.html?_r=0 [<https://perma.cc/AGP9-VE73>] (discussing an advisory opinion upholding an employer's veil ban in Belgium in a case reminiscent of *S.A.S. v. France*). Other recent cases focus on religious attire outside Europe, such as U.S. cases involving "an Orthodox Jewish recruit to the Coast Guard who wanted to wear a skullcap on duty; an Army officer of

political subjecthood, presuming that their choices are coerced in order to justify a legal regime that is itself coercive.

Despite the empire's formal withdrawal from its colonies, the anti-veil laws continue to promote a colonial legal regime of sexual, racial, and cultural inequality within France today. Not only does this framework violate individual rights, it also undermines social cohesion by fueling stereotypes of and hostility towards a visible and vulnerable minority group. Though the appearance of unfamiliar constructions of identity may be jarring to some within France, rejecting the politics of exclusion could deepen the country's commitment to human rights, including freedom of expression, in the long run.

the Sikh faith who sought to wear a turban while in uniform; and a Muslim woman who was denied a job by the clothing retailer Abercrombie & Fitch because she wore a head scarf." *Id.*

APPENDIX A¹⁵¹**Niqab**

A veil covering the head and face, but not the eyes, usually worn with a loose black garment (abaya) that covers from head to feet.

**Hijab**

A general term meaning 'to cover' or 'veil', most commonly refers to a headscarf that covers the hair and neck, but not the face.

**Burka**

A veil that covers the entire body and face, with a mesh window or grille across the eyes for a woman to see out of.

**Chador**

A full-length cloak worn by many Iranian women, typically held closed at the front by the wearer's hands or under their arms.

**Dupatta**

A long scarf loosely draped across the head and shoulders, common in south Asia and often paired with matching garments.



¹⁵¹ James Vyver, *Explainer: Why do Muslim Women Wear a Burka, Niqab or Hijab?*, AUSTRALIAN BROADCASTING CORPORATION (Oct. 2, 2014, 12:19 AM), <http://www.abc.net.au/news/2014-09-23/why-do-muslim-women-wear-a-burka-niqab-or-hijab/5761510> [<https://perma.cc/8GJ6-H6R5>].