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# THE BURQA BAN: AN UNREASONABLE LIMITATION ON RELIGIOUS FREEDOM OR A JUSTIFIABLE RESTRICTION?

## INTRODUCTION

In the spring of 2011, France enacted a law banning the concealment of the face in public spaces (the “burqa ban”). The burqa ban creates two new punishable offenses in France.<sup>1</sup> First, wearing clothing designed to conceal one’s face in a public space is punishable by either a maximum of a €150 fine or by being required to take a class on the meaning of citizenship, or both.<sup>2</sup> Second, forcing a woman to wear a face-covering veil is punishable by one year of imprisonment or a €30,000 fine.<sup>3</sup> The burqa ban, which was first introduced by the French National Assembly<sup>4</sup> and passed “overwhelmingly” through both houses of the French Parliament,<sup>5</sup> went into effect in France on April 11, 2011.<sup>6</sup>

On its face, the burqa ban is a neutral provision; it refrains from mentioning any specific religion or community, and its main concerns are the promotion of gender equality and women’s rights, and the protection of national security.<sup>7</sup>

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<sup>1</sup> Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l’espace public [Law 2010-1192 of Oct. 11, 2010 Banning the Concealment of the Face in the Public Space] arts. 2–4, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 1.

<sup>2</sup> *Id.* art. 3; see also CODE PÉNAL [C. PÉN.] art. 131-13. The law defines “public space” broadly to include public roads and spaces that are open to the public. Loi 2010-1192 art. 2.

<sup>3</sup> Loi 2010-1192 art. 4. If a man forces a minor to wear a face-covering veil, the possible fine is increased to €60,000. *Id.*

<sup>4</sup> Projet de loi interdisant la dissimulation du visage dans l’espace public [Bill Banning the Concealment of the Face in the Public Space], Assemblée Nationale No. 2520 (May 19, 2010) [hereinafter Assemblée Nationale No. 2520], available at <http://www.assemblee-nationale.fr/13/pdf/projets/pl2520.pdf>.

<sup>5</sup> CNN Wire Staff, *French Senate Approves Burqa Ban*, CNN (Sept. 15, 2010, 5:17 AM), <http://www.cnn.com/2010/WORLD/europe/09/14/france.burqa.ban/index.html> [hereinafter *French Senate Approves Burqa Ban*]; see also *France Votes To Ban Full-Face Veils*, AMNESTY INT’L (July 13, 2010), <http://www.amnesty.org/en/news-and-updates/france-votes-ban-full-face-veils-2010-07-13>.

<sup>6</sup> Steven Erlanger, *French Legislation Takes Effect Banning Full-Face Coverings*, N.Y. TIMES, April 12, 2011, at A4; Loi 2010-1192 art. 5.

<sup>7</sup> Loi 2010-1192 arts. 1–4; Assemblée Nationale No. 2520, *supra* note 4, at 3–5; Jean-François Copé, Op-Ed., *Tearing Away the Veil*, N.Y. TIMES, May 5, 2010, at A31. While this Comment does not explore this justification, the veil’s hindrance upon social interaction has also been used as a justification for the prohibition. Copé, *supra*. Jean-François Copé described the veil as “an insurmountable obstacle to the affirmation of a political community that unites citizens without regard to differences in sex, origin or religious faith.” *Id.* He further went on to question how one can “establish a relationship with a person who, by hiding a smile or a glance—those universal signs of our common humanity—refuses to exist in the eyes of others?” *Id.*

However, it is common knowledge that the ban is aimed at eliminating the burqas, niqabs, and sitars, worn almost exclusively by Muslim women, from the French public sphere.<sup>8</sup> While this prohibition directly affects only a small portion of France's population,<sup>9</sup> the burqa ban has elicited protests within France<sup>10</sup> and has sparked a heated debate throughout the world: is the burqa ban a discriminatory and unreasonable limitation on freedom of religion or a justifiable restriction in a secular society, concerned with public safety and gender equality?

In considering this issue, it is important to note the existence of several competing factors:

[A]ny truly satisfactory approach to this issue must be able to embrace a series of dualities. These include the simultaneous importance of freedom of religion and gender equality, the interrelationship and yet crucial distinction between freedom of conscience and expression of that conscience, concern for the rights of women seeking to express themselves by wearing headscarves and for those of other women in the same context, coercion and agency, the religious meanings of the veil and its political meanings, discomfort with veiling and discomfort with restrictions on veils. Only by weighing all of these factors and contradictions in context can one begin to discover an adequate response to this problem.<sup>11</sup>

In other words, to consider whether the burqa ban infringes on the rights of the women who wear them, one must weigh several competing factors. While the ban implicates important concerns regarding the restriction of freedom of expression, many members of Western populations feel extreme discomfort in reaction to the veil.<sup>12</sup> Similarly, while the ban implicates important freedom of religion concerns, many argue that, because Islam does not even prescribe the

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<sup>8</sup> See Benjamin Ismail, *Ban the Burqa? France Votes Yes*, MIDDLE E.Q., Fall 2010, at 47, 51–52; *France Sets Up Burka Commission*, BBC NEWS, <http://news.bbc.co.uk/2/hi/europe/8114590.stm> (last updated June 23, 2010, 10:48 AM). See generally *France: Highlights of Parliamentary Report on the Wearing of the Full Veil (BURQA)*, LIBRARY OF CONG., <http://www.loc.gov/law/help/france-veil.php> (last updated Apr. 4, 2011) [hereinafter *Highlights of Parliamentary Report*] (discussing the Parliamentary Commission report on the burqa in France).

<sup>9</sup> Erlanger, *supra* note 6 (noting that approximately 2,000 women in France, out of an estimated Muslim population of six million, wear face-covering veils).

<sup>10</sup> See, e.g., *France's Controversial Burqa Ban Takes Effect*, CNN (Apr. 10, 2011, 1:19 PM), <http://religion.blogs.cnn.com/2011/04/10/french-police-arrest-burqa-ban-protesters>.

<sup>11</sup> Karima Bennoune, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality Under International Law*, 45 COLUM. J. TRANSNAT'L L. 367, 386 (2007).

<sup>12</sup> See *id.* at 369–77.

practice of wearing the veil, a ban on wearing the veil does not infringe upon anyone's religious freedom.<sup>13</sup>

Finally, the burqa ban implicates discrimination concerns on many fronts, all of which are prohibited by Article 14 of the European Convention on Human Rights<sup>14</sup> ("European Convention"). Article 14 forbids "discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."<sup>15</sup> The burqa ban potentially violates this article; by prohibiting women from wearing face-covering veils, the burqa ban discriminates against France's Muslim population. However, France may also violate Article 14 if it does not ban the veil; by allowing people to wear face-covering veils in French public spaces, France would possibly be condoning a symbol of the inequality of women and gender discrimination.<sup>16</sup>

While this Comment considers all these factors, it argues that the burqa ban is an unjustifiable restriction upon the fundamental freedom of religion guaranteed by Article 9 of the European Convention.<sup>17</sup> This Comment focuses on Article 9, rather than on French constitutional law, for two reasons. First, a French constitutional analysis of the burqa ban is virtually moot, as the French Conseil Constitutionnel ("Constitutional Council") has already decided that the burqa ban is compatible with the French Constitution,<sup>18</sup> and a ruling by the Constitutional Council cannot be overcome easily.<sup>19</sup> Second, an Article 9

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<sup>13</sup> *Id.* at 388–91.

<sup>14</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Apr. 11, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention].

<sup>15</sup> *Id.* art 14.

<sup>16</sup> See *Highlights of Parliamentary Report*, *supra* note 8. The French Parliamentary Commission, comprised to study the wearing of the full veil in France, concluded that "[t]he full veil is the symbol of subservience, the ambulatory expression of a denial of liberty that touches a specific category of the population: women. In this it also constitutes a negation of the principle of equality." *Id.* (translating Rapport d'Information au Nom de la Mission d'Information sur la Pratique du Port du Voile Intégral sur le Territoire National [Report of the Commission on the Practice of Wearing the Full Veil in France], Assemblée Nationale Rapport No. 2262, at 107 (Jan. 26, 2010) [hereinafter Rapport No. 2262], available at <http://www.assemblee-nationale.fr/13/pdf/rap-info/t2262.pdf>).

<sup>17</sup> When a case regarding the burqa ban is heard by the European Court of Human Rights ("ECHR"), the court will likely also analyze whether the ban complies with Article 14 of the European Convention. However, this Comment focuses on the ban's infringement on religious liberties, and thus analyzes the ban in accordance with Article 9 of the European Convention, rather than Article 14.

<sup>18</sup> Pierre-Antoine Souchard, *France's Constitutional Panel OKs Burqa Ban*, MSNBC (Oct. 7, 2010, 2:00 PM), <http://www.msnbc.msn.com/id/39559671>.

<sup>19</sup> Eilsa T. Beller, *The Headscarf Affair: The Conseil d'État on the Role of Religion and Culture in French Society*, 39 TEX. INT'L L.J. 581, 603 (2004) (noting that a ruling by the Constitutional Council can only be overruled by amending the constitution).

analysis of the burqa ban is increasingly important in Europe, as several other parties to the European Convention are considering legislation similar to the French burqa ban.<sup>20</sup> These European countries would be less inclined to pass versions of the burqa ban if the French burqa ban does not comply with Article 9.

Article 9 of the European Convention grants freedom of religion to all European citizens by stating that “[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.”<sup>21</sup> Yet, through Subsection 2, Article 9 also allows for limitations where they are justified.<sup>22</sup> According to Subsection 2, interferences with religious freedom are justified in cases where the limiting policy is prescribed by law, in pursuit of legitimate aims, and necessary in a democratic society.<sup>23</sup> The ECHR, the principal body that interprets the European Convention, rarely strikes down legislation based on whether the limitation at issue is prescribed by law or in pursuit of a legitimate aim,<sup>24</sup> so this Comment does not focus heavily on either of the two limitation clause requirements. Instead, in asserting that the burqa ban is an unjustifiable limit on French Muslims’ freedom of religion, this Comment focuses on the third limitation requirement: whether the burqa ban is necessary in a democratic society.

Part I of this Comment analyzes the background to the burqa ban—the significance of the veil in Islam, the bill’s legal history, the French ideal of *laïcité*, and France’s relationship with its Muslim population. Part II of this Comment then lays a framework for an ECHR analysis. Part III of this Comment follows an ECHR analysis of Article 9: (1) whether the ban interferes with freedom of religion; (2) whether the ban is proportionate to its legitimate aims; and (3) whether a margin of appreciation should be accorded

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<sup>20</sup> See discussion, *infra* Part I.B.

<sup>21</sup> European Convention, *supra* note 14, art. 9(1).

<sup>22</sup> *Id.* art 9(2). The European Convention is not alone in recognizing that limitations may be justifiably placed on citizens’ right to freedom of religion. Rather, “all legal systems presume that States legitimately may limit the exercise of protected rights under certain circumstances.” T. Jeremy Gunn, *Deconstructing Proportionality in Limitations Analysis*, 19 EMORY INT’L L. REV. 465, 469 (2005).

<sup>23</sup> European Convention, *supra* note 14, art. 9(2).

<sup>24</sup> Jilan Kamal, Comment, *Justified Interference with Religious Freedom: The European Court of Human Rights and the Need for Mediating Doctrine Under Article 9(2)*, 46 COLUM. J. TRANSNAT’L L. 667, 672 (2008).

to France to justify the ban. Finally, Part IV of this Comment concludes that, while the promotion of gender equality and safety are both legitimate aims for an interference with religious freedom, the burqa ban is not necessary to achieve these aims. Thus, the burqa ban constitutes an unreasonable limitation on religious freedom, and the ECHR should recognize that, in light of these aims, the ban does not comply with Article 9.

## I. BACKGROUND TO THE BURQA BAN

To better explain the burqa ban's incompatibility with Article 9, this Comment uses the ECHR's decisions in *Şahin v. Turkey*,<sup>25</sup> *Dahlab v. Switzerland*,<sup>26</sup> and *Dogru v. France*<sup>27</sup> to establish the framework through which the court is likely to analyze this ban. First, however, it is helpful to understand the social environment in France that led to the adoption of the burqa ban and the role that the veil plays for those who wear it and in Islam. This Part explains the role of the veil. Then, it summarizes the French social climate by touching upon the legislative history of the ban, the French concept of *laïcité*, and France's relationship with its Muslim population.

### A. *The Veil's Role in Islam*

For the burqa ban to constitute an infringement of Article 9 rights, the practice of wearing face-covering veils must be a religious practice.<sup>28</sup> Whether veiling is a religious practice, however, is a heavily debated issue. The Islamic practice of veiling originated from interpretations of the text of the Quran,<sup>29</sup> although the text itself does not mandate that women wear veils. Instead, it requires that women dress modestly, and this requirement is interpreted to require veiling.<sup>30</sup> A woman's duty to veil herself stems from the following text of the Quran:

And say to the believing women

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<sup>25</sup> *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173.

<sup>26</sup> *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447.

<sup>27</sup> *Dogru v. France*, Eur. Ct. H.R. (2008), [http://www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN) (follow "Case-Law" hyperlink; then follow "HUDOC" hyperlink; then search by placing "Dogru" in the "Case Title" box and "France" in the "Respondent State" box).

<sup>28</sup> See European Convention, *supra* note 14, art. 9(1).

<sup>29</sup> The Quran is the religious text of the Islamic faith. When referring to specific verses of the Quran, this Comment uses A. Yusuf Ali's translation, *The Holy Qur'ān: Text, Translation and Commentary*.

<sup>30</sup> Mukul Saxena, *The French Headscarf Law and the Right To Manifest Religious Belief*, 84 U. DET. MERCY L. REV. 765, 778–79 (2007).

That they should lower  
Their gaze and guard  
Their modesty; that they  
Should not display their  
Beauty and ornaments except  
What (must ordinarily) appear  
Thereof; that they should  
Draw their veils over  
Their bosoms and not display  
Their beauty except  
To their husbands, their fathers,  
Their husbands' fathers, their sons,  
Their husbands' sons,  
Their brothers or their brothers' sons.<sup>31</sup>

Views differ as to what “modesty,” as defined in this provision, actually means. What portions of a woman’s “beauty” may appear in public, and what must a Muslim woman cover to appear modest?<sup>32</sup> This lack of clear direction has led to several forms of veiling in Muslim society, including the burqa, the niqab, the sitar, the chador, and the headscarf. The burqa is a cloth that covers a woman’s entire head and body; a mesh covering conceals the woman’s face and eyes.<sup>33</sup> The sitar is a long veil that covers a woman’s eyes and full body.<sup>34</sup> The niqab covers a woman’s face and body, but allows the eyes to be seen.<sup>35</sup> The chador is a full body cloak that does not cover the face.<sup>36</sup> Finally, the headscarf is a loosely tied scarf that only covers a woman’s neck and hair.<sup>37</sup>

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<sup>31</sup> QURAN 24:31.

<sup>32</sup> Saxena, *supra* note 30, at 779–80.

<sup>33</sup> Chidi Emmanuel, ‘Hijab Is Not a Ticket to Heaven,’ KUWAIT TIMES, Jan. 29, 2010, at 4, available at <http://issuu.com/kuwaitnews/docs/kt20100129>.

<sup>34</sup> *Highlights of Parliamentary Report*, *supra* note 8.

<sup>35</sup> Emmanuel, *supra* note 33.

<sup>36</sup> Oriana Mazza, Note, *The Right To Wear Headscarves and Other Religious Symbols in French, Turkish, and American Schools: How the Government Draws a Veil on Free Expression of Faith*, 48 J. CATH. LEGAL STUD. 303, 305 (2009).

<sup>37</sup> *Id.*

A woman's choice of veil depends upon her interpretation of this modesty provision. Some Muslim women interpret their duty to be modest as the duty to "draw their veils" over their hair only and not over their hands or eyes; thus these women would dress modestly by wearing headscarves.<sup>38</sup> Other Muslim women include their face, their hands, and their eyes as part of their beauty. These women would wear burqas to cover these body parts as well. Some other Muslim women read no obligation to wear religious garb into the provision, arguing that the absence of the mandate in the Quran means that women are free to choose for themselves whether to wear religious garb.<sup>39</sup>

Muslim scholars have offered equally divergent views regarding the meaning of "modesty" in this verse.<sup>40</sup> The interpretation of the provision, however, is "relative to the culture in which Muslims find themselves."<sup>41</sup> Women who come from stricter Muslim schools of interpretation, such as the Salafists, often are compelled to wear the burqa or the niqab, while women who are from less strict religious sects often wear the headscarf, or no religious garb at all.<sup>42</sup>

In France, approximately 1,900 women wear the niqab and no women wear the burqa, according to a study prepared in 2009 and cited by the January 26, 2010 Parliamentary Commission's report ("Parliamentary Commission's Report").<sup>43</sup> Half of the women who wear the niqab are under thirty years old, and ninety percent of the women are under forty years old.<sup>44</sup> Further, two-thirds of these women are of French nationality, and one-fourth of them are converts to Islam.<sup>45</sup> A statistic that was not ascertained, however, is how many of these women wear the niqab because they choose to (based on religious conviction, fear of harassment in public spaces, or cultural pride) and how many of these women are pressured to wear the niqab by their husbands, fathers, or Muslim religious officials.

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<sup>38</sup> Saxena, *supra* note 30, at 779.

<sup>39</sup> See Emmanuel, *supra* note 33.

<sup>40</sup> Saxena, *supra* note 30, at 779–80.

<sup>41</sup> *Id.* at 779.

<sup>42</sup> See *Highlights of Parliamentary Report*, *supra* note 8 (noting that forty percent of the women who wear niqabs in France are Salafists).

<sup>43</sup> *Id.* The Parliamentary Commission's Report is a report issued by the French Parliament that explained the significance of face-covering veils and also explored ways to ban them. See discussion *infra* Part I.B.

<sup>44</sup> *Highlights of Parliamentary Report*, *supra* note 8.

<sup>45</sup> *Id.*

The compatibility of wearing the veil and gender equality is a contentious issue. To many, the veil represents an oppressive instrument that signifies women's second-class status in Islam, rather than the fulfillment of a religious obligation for the women who wear them.<sup>46</sup> The Quran instructs men to ensure that women under their care or responsibility are "covered" when they go out in public,<sup>47</sup> and, accordingly, some women who wear any of the forms of veils see them as "sign[s] of male domination over women's bodies and lives."<sup>48</sup> Those who believe that the veil is a symbol of oppression regard regulations like the burqa ban as protection for women who would otherwise be forced to wear veils. They view the ban as addressing "[o]ne of the most salient concerns" for women who wear religious garb—that they do not choose to wear veils, but rather are required to wear them "by their family, their community, and their religion."<sup>49</sup>

Proponents of the ban are also concerned about the veil representing sexism. A Muslim feminist, Fatima Mernissi, characterized the veil as a means to "relegate women to the domestic sphere and 'to highlight their illegal position on male territory by means of a mask.'"<sup>50</sup> Further, Elisabeth Badinter, a French feminist, "believes that the choice to wear this symbol signifies that Muslim women are 'closed up in their homes and confined to domestic tasks.'"<sup>51</sup> In other words, the veil serves as a constant reminder to women that their role is confined to the kitchen and domestic activities.

"While it is a truism that numerous Muslim women wear religious garb as a direct result of patriarchal imposition,"<sup>52</sup> many Muslim women in France choose to wear veils. Faiza Silmi, a Muslim woman who wears the niqab, acknowledges that many believe that she is "under [her] husband's command and that [she] is a recluse."<sup>53</sup> However, while explaining her choice to wear the niqab, Silmi clearly asserted that this is not the case: "It is my choice. I take

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<sup>46</sup> MONICA MOOKHERJEE, WOMEN'S RIGHTS AS MULTICULTURAL CLAIMS: RECONFIGURING GENDER AND DIVERSITY IN POLITICAL PHILOSOPHY 131 (2009).

<sup>47</sup> Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743, 751 (2006).

<sup>48</sup> Bennoune, *supra* note 11, at 390 (internal quotation mark omitted).

<sup>49</sup> Wing & Smith, *supra* note 47, at 767.

<sup>50</sup> MOOKHERJEE, *supra* note 46, at 131 (quoting Fatima Mernissi, *Virginity and Patriarchy*, in WOMEN IN ISLAM 183, 189 (Azizah al-Hibri ed., 1982)).

<sup>51</sup> *Id.* at 132.

<sup>52</sup> Yael Barbibay, Note, *Citizenship Privilege or the Right to Religious Freedom: The Blackmailing of France's Islamic Women*, 18 CARDOZO J. INT'L & COMP. L. 159, 201 (2010).

<sup>53</sup> Katrin Bennhold, *A Veil Closes France's Door to Citizenship*, N.Y. TIMES, July 19, 2008, at A1 (internal quotation mark omitted).

care of my children, and I leave the house when I please. I have my own car. I do the shopping on my own. Yes, I am a practicing Muslim, I am orthodox. But is that not my right?"<sup>54</sup>

Because "Islamic garments are religious, political, and personal signifiers,"<sup>55</sup> the choice to wear the veil can be motivated by a variety of reasons. Most importantly for Article 9 purposes, the choice to wear a full veil is often driven by religious beliefs.<sup>56</sup> After France passed the 2004 law, a prototype of the current burqa ban,<sup>57</sup> Professor Adrien Katherine Wing, an Arab American woman of Muslim origin, and Monica Nigh Smith collected comments from Muslim women in France regarding their reasons for wearing the headscarf. She found that many "believing Muslims" saw wearing the headscarf as a requirement of the Quran and that, while girls felt pressure from their families to wear the headscarf, "young women, between eighteen and twenty-two, often decided to adopt the headscarf out of personal religious conviction or pride."<sup>58</sup> Women understood the meaning of the headscarf in Islam and chose to wear it for its significance.<sup>59</sup> Notably, many of the young girls who wore the headscarf had mothers who did not, which indicates a lack of pressure from the family.<sup>60</sup>

However, the choice to wear the veil is not always motivated by religious beliefs. Many women wear veils based on their own desire to dress modestly, in an effort to avoid harassment from males and to appear less sexual.<sup>61</sup> A young Kuwaiti girl who wears a veil explained that "Islam is not only a religion but a way of life. . . . [D]ressing in an Islamic way makes me feel more relaxed and secure in a way. . . . The way you dress is the way you will be addressed. . . . [I]f you dress respectfully, you will be respected."<sup>62</sup>

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<sup>54</sup> *Id.* (internal quotation mark omitted).

<sup>55</sup> Barbibay, *supra* note 52, at 201.

<sup>56</sup> Sadanand Dhume, *The French Burqa Ban: Culture Clash Unveiled*, YALEGLOBAL (Feb. 8, 2010), <http://yaleglobal.yale.edu/content/french-burqa-ban-culture-clash-unveiled>.

<sup>57</sup> See discussion *infra* Part I.C.

<sup>58</sup> Wing & Smith, *supra* note 47, at 759.

<sup>59</sup> See *id.* at 759–62.

<sup>60</sup> *Id.* at 761–63. While the headscarf is a less extreme form of religious garb than face-covering veils, Professor Wing's research offers a useful comparison. It shows that some women find the requirement to dress modestly, in general, to be a requirement of Islam. The women who dress modestly by wearing a headscarf simply interpret the modesty requirement differently than those who wear the burqa, niqab, or sitar.

<sup>61</sup> Wing & Smith, *supra* note 47, at 762–64. The Parliamentary Commission's Report listed the desire "to keep one's distance from a society perceived as perverted" as one of the primary motivations for women to wear the veil. *Highlights of Parliamentary Report*, *supra* note 8 (citing Rapport No. 2262, *supra* note 16).

<sup>62</sup> Emmanuel, *supra* note 33 (internal quotation mark omitted).

Professor Wing and Ms. Smith explained that girls covered their heads and bodies as “a form of protection . . . because they can come and go without being an object of harassment by Muslim men.”<sup>63</sup> Silmi also cited this reason for her choice to wear a niqab: “I don’t like to draw men’s looks. . . . I want to belong to my husband and my husband only.”<sup>64</sup>

In short, the choice to wear a veil can be based on “personal religious conviction, freedom of religion, acceptance as a good Muslim female, compliance with family values, neutralization of sexuality and protection from harassment from Muslim males, and individual choice and religious/cultural identity.”<sup>65</sup> This Comment focuses on those women in France who wear face-covering veils as a manifestation of “personal religious conviction,” because it is only in these cases that the burqa ban interferes with Article 9 religious freedom.<sup>66</sup>

### B. *The Legal History of the Burqa Ban*

French President Nicolas Sarkozy did not acknowledge the fact that women sometimes themselves choose to wear the veil when he announced his intention to prohibit the practice during an address to both houses of the French Parliament. During the June 22, 2009 speech, President Sarkozy characterized the burqa as “a sign of subservience” and explained that France “cannot accept that women be prisoners behind a screen, cut off from all social life, deprived of all identity.”<sup>67</sup> Thus, he declared that the burqa “will not be welcome on the territory of the French Republic.”<sup>68</sup>

On June 23, 2009, following President Sarkozy’s address, the French National Assembly assembled a commission of inquiry, comprised of thirty-two lawmakers, to “study the practice of wearing the ‘full veil’” and to explore ways of restricting the veil’s use.<sup>69</sup> The Parliamentary Commission’s mandate

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<sup>63</sup> Wing & Smith, *supra* note 47, at 763.

<sup>64</sup> Bennhold, *supra* note 53 (internal quotation marks omitted).

<sup>65</sup> Wing & Smith, *supra* note 47, at 758.

<sup>66</sup> Article 9 is not interpreted to include every act motivated by religion when a neutral law, such as the burqa ban, conflicts with freedom of religion. Rather, Article 9 application is limited to acts that are manifestations of religion. Javier Martínez-Torrón, *Limitations on Religious Freedom in the Case Law of the European Court of Human Rights*, 19 EMORY INT’L L. REV. 587, 595–96 (2005).

<sup>67</sup> Associated Press, *Sarkozy: Burqas ‘Not Welcome’ in France*, CBS NEWS (June 22, 2009), <http://www.cbsnews.com/stories/2009/06/22/world/main5103076.shtml> [hereinafter *Burqas ‘Not Welcome’*].

<sup>68</sup> *Id.*

<sup>69</sup> Ismail, *supra* note 8, at 51; *accord France Sets Up Burka Commission*, *supra* note 8. See generally Rapport No. 2262, *supra* note 16.

did not specifically mention the burqa, the niqab, or the sitar, but used the more “neutral” term “full veil.”<sup>70</sup> The commission conducted research over six months; it “heard 211 witnesses and experts, sent questionnaires to the French Embassies located in the E.U. Members States, the United States, Canada, Turkey, and several Arab countries” and visited Belgium, where a draft bill banning people from wearing face-covering veils was pending in the senate.<sup>71</sup> The Parliamentary Commission’s Report characterized the full veil as “contrary to the values of the Republic.”<sup>72</sup> The commission recommended that parliament adopt a resolution describing the full veil as such and a “law prohibiting the full veil as well as any other clothing entirely covering the face in public spaces, based upon the notion of public order.”<sup>73</sup>

Following the Parliamentary Commission’s Report, the French Prime Minister requested that the *Conseil d’État* (“Council of State”)<sup>74</sup> examine the “legal grounds for a ban on the full veil,” specifying that the study should be “as wide and effective as possible.”<sup>75</sup> The Council of State issued a report on March 25, 2010, which “found that no incontestable legal basis can be relied upon in support of a ban on wearing the full veil.”<sup>76</sup> The report further stated that a “[p]rohibition of the full veil would violate various fundamental rights and freedoms: individual freedom, personal freedom, right to privacy, freedom of expression and freedom to manifest [one’s] convictions, notably religious, and prohibition of any discrimination.”<sup>77</sup> Despite these findings, the Council of State reported that it was “possible” to envision ways of banning face-concealing clothing.<sup>78</sup> It envisioned a ban that would “rely on the need for public security,” and suggested that the prohibition “be backed by a system of sanctions . . . [that] should be harsher for a person convicted of obliging

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<sup>70</sup> Ismail, *supra* note 8, at 51.

<sup>71</sup> *Highlights of Parliamentary Report*, *supra* note 8.

<sup>72</sup> *Id.* (internal quotation mark omitted).

<sup>73</sup> *Id.*

<sup>74</sup> The Council of State is one of the three high courts in France. Beller, *supra* note 19, at 602. It, along with the Constitutional Council and the *Cour de Cassation*, decides the constitutionality of French laws. *See id.* The Council of State is an administrative court that hears cases brought by private citizens, but its decisions can be overruled by an ordinary statute. *Id.* at 603.

<sup>75</sup> REPORTS & STUDIES SECTION, *CONSEIL D’ETAT*, STUDY OF POSSIBLE LEGAL GROUNDS FOR BANNING THE FULL VEIL: REPORT ADOPTED BY THE PLENARY GENERAL ASSEMBLY OF THE *CONSEIL D’ETAT* 7 (2010) [hereinafter COUNCIL OF STATE REPORT] (internal quotation marks omitted), available at [http://www.conseil-etat.fr/cde/media/document/rapport%20etudes/etude\\_voile\\_integral\\_anglais.pdf](http://www.conseil-etat.fr/cde/media/document/rapport%20etudes/etude_voile_integral_anglais.pdf). This request was made on January 29, 2010, just three days after the commission issued its report. *Id.*

<sup>76</sup> *Id.* at 19.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 40.

somebody.”<sup>79</sup> The report included the assessment of fines and citizenship classes as possible sanctions.<sup>80</sup>

On May 19, 2010, the French National Assembly issued a draft bill, containing seven articles.<sup>81</sup> This bill passed through the lower house of parliament by a vote of 336 to 1.<sup>82</sup> The senate then approved the ban on September 14, 2010, by a vote of 246 to 1.<sup>83</sup> Finally, the presidents of each house of parliament submitted the bill to the Constitutional Council,<sup>84</sup> which had previously warned that “a blanket ban on all veils in the streets of France might not [pass] constitutional muster.”<sup>85</sup> On October 7, 2010, despite its previous warning, the Constitutional Council endorsed the bill, and the burqa ban passed its last domestic legal obstacle.<sup>86</sup> In its decision, the Constitutional Council explained that the ban conforms to the French Constitution because the ban “[does] not impose disproportionate punishments or prevent the free exercise of religion in a place of worship.”<sup>87</sup> The burqa ban, having surpassed all of the domestic legal hurdles, went into effect on April 11, 2011.<sup>88</sup>

Notably, the final provisions of the burqa ban are similar to those that the Council of State recommended in its report.<sup>89</sup> The burqa ban creates two punishable offenses, both wearing a face-covering veil and forcing another to wear a face-covering veil, and punishes the latter more harshly.<sup>90</sup> Supporters of the bill cite public security and the promotion of gender equality as two main justifications for the ban.<sup>91</sup> Finally, the burqa ban imposes a system of

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<sup>79</sup> *Id.* at 40–42.

<sup>80</sup> *Id.* at 43.

<sup>81</sup> Assemblée Nationale No. 2520, *supra* note 4.

<sup>82</sup> *France Votes To Ban Full-Face Veils*, *supra* note 5.

<sup>83</sup> *French Senate Approves Burqa Ban*, *supra* note 5.

<sup>84</sup> The Constitutional Council is the tribunal in France that decides the constitutionality of laws that are under consideration in the French Parliament. Beller, *supra* note 19, at 602. It decides only cases that are brought to it by government officials. *Id.* Its decisions carry considerable weight in France; a constitutional ruling by the Constitutional Council can only be overruled by amending the constitution. *Id.* at 603.

<sup>85</sup> Souchard, *supra* note 18.

<sup>86</sup> *Id.*; CNN Wire Staff, *French Burqa Ban Clears Last Legal Obstacle*, CNN (Oct. 7, 2010, 3:19 PM), <http://www.cnn.com/2010/WORLD/europe/10/07/france.burqa.ban/index.html> [hereinafter *French Burqa Ban Clears Last Legal Obstacle*].

<sup>87</sup> *French Burqa Ban Clears Last Legal Obstacle*, *supra* note 86.

<sup>88</sup> See Erlanger, *supra* note 6.

<sup>89</sup> *Compare* Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of Oct. 11, 2010 Banning the Concealment of the Face in the Public Space] arts. 1–4, J.O., Oct. 12, 2010, p. 1, with COUNCIL OF STATE REPORT, *supra* note 75, at 40–44.

<sup>90</sup> Loi 2010-1192 arts. 1–4.

<sup>91</sup> See Copé, *supra* note 7. A third justification for the burqa ban is the argument that face-covering veils hamper social relations. *Id.* This justification, however, is not considered in this Comment.

sanctions for violating the bill, including fines and mandatory citizenship classes.<sup>92</sup>

At the time of this writing, France's new burqa ban is the first general prohibition of full veils in Western Europe, but several European countries have engaged in public debates regarding the full veil and are considering similar laws.<sup>93</sup> Italy, a country with more than one million Muslims, has tried to expand a preexisting law to forbid people from wearing religious garments that make facial identification impossible.<sup>94</sup> Belgium has proposed a law imposing sanctions on those who conceal their faces with clothing, which was passed by the House of Representatives on April 29, 2010.<sup>95</sup> The Spanish community of Catalonia passed multiple local regulations that ban facial concealment in public.<sup>96</sup> Denmark is engaged in a "passionate" debate regarding the full veil, and is studying ways to ban the veil without violating its constitution.<sup>97</sup> Finally, Germany and Austria adopted legislation that prohibits people attending outdoor events from wearing garments that prevent identification, except if the outdoor event is one of several, specified religious services.<sup>98</sup> Because decisions by the ECHR are binding upon the European Union as a whole,<sup>99</sup> a decision by the ECHR regarding the burqa ban would likely have implications upon all of these countries and their efforts to prohibit Muslim women from wearing the burqa, niqab, and sitar.

### *C. The Concept of Laïcité and the Relationship Between France and Its Muslim Population*

Although France did not cite *laïcité* as a justification for the burqa ban, this principle is central to the deeply engrained value of freedom of religion in France, and it contributes significantly to a culture in which the prohibition of

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<sup>92</sup> Loi 2010-1192 arts. 3–4.

<sup>93</sup> COUNCIL OF STATE REPORT, *supra* note 75, at 15–17.

<sup>94</sup> Nick Pisa, *Now Italy Considers Banning the Burqa Too*, DAILY MAIL, <http://www.dailymail.co.uk/news/worldnews/article-1218543/Now-Italy-considers-banning-burqa-too.html> (last updated Oct. 7, 2009, 6:16 PM).

<sup>95</sup> Rapport au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale sur le projet de loi [Report on Behalf of the Committee on Constitutional Law, Legislation, Universal Suffrage, the Regulations, and General Administration], Sénat Rapport No. 699, at 12 (Sept. 8, 2010) [hereinafter Sénat Rapport No. 699], <http://www.senat.fr/rap/109-699/109-6991.pdf>.

<sup>96</sup> *Id.*

<sup>97</sup> *Highlights of Parliamentary Report*, *supra* note 8.

<sup>98</sup> COUNCIL OF STATE REPORT, *supra* note 75, at 16.

<sup>99</sup> DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 111 (2d ed. 2006).

the veil is possible.<sup>100</sup> The French concept of *laïcité* is often translated as “secular,” but that definition fails to “evoke the important connotations of the French” term.<sup>101</sup> Generally, however, *laïcité* means “a separation between church and state that protects the freedom of religion and of non-religion, whose intention is to avoid any discrimination against people on the basis of their religious affiliation or lack thereof.”<sup>102</sup>

This definition seems to take a neutral stance on the issue of religious freedom, similar to the United States’ concept of freedom of religion under the First Amendment.<sup>103</sup> However, that is not the case; “[t]he theory is that to be French is to be part of a proverbial melting pot, rather than an American style salad bowl of religious and other identities.”<sup>104</sup> *Laïcité* is a secular concept that “conveys . . . a profound suspicion” and “a somewhat tense attitude where religion is concerned.”<sup>105</sup> Rather than allowing the free exercise and expression of all religions, France has moved toward “fundamentalist secularism,” where the government “denies religious conviction or belief any place for expression in the public realm.”<sup>106</sup> *Laïcité* has “functioned as a tool of coercive cultural uniformity . . . especially among immigrant populations” instead of as a means of multiculturalism.<sup>107</sup>

The French attitude of fundamentalist secularism is reflected in France’s treatment of its Muslim population and Muslims’ difficulties with integration into French society; though *laïcité* originated as a principle that separates church from state, it has become a French excuse for increasing Islamophobia.<sup>108</sup> With an estimated five to six million Muslim residents, many

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<sup>100</sup> Article 1 of the French Constitution reflects the importance of *laïcité* in France, declaring that France is an indivisible, secular, democratic, and social republic that ensures the equality of all citizens before the law. 1958 CONST. 1.

<sup>101</sup> W. COLE DURHAM, JR. & BRETT G. SCHARFFS, LAW AND RELIGION: NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES 154 (2010).

<sup>102</sup> Jean-Paul Willaime, *The Paradoxes of Laïcité in France* (Allyn Hardycy trans.), in THE CENTRALITY OF RELIGION IN SOCIAL LIFE: ESSAYS IN HONOUR OF JAMES A. BECKFORD 41, 41 (Eileen Barker ed., 2010).

<sup>103</sup> The First Amendment reads, in part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend I.

<sup>104</sup> Wing & Smith, *supra* note 47, at 755.

<sup>105</sup> Willaime, *supra* note 102, at 41.

<sup>106</sup> Jennifer M. Westerfield, Note, *Behind the Veil: An American Legal Perspective on the European Headscarf Debate*, 54 AM. J. COMP. L. 637, 639 (2006).

<sup>107</sup> ABDULLAHI AHMED AN-NA’IM, ISLAM AND THE SECULAR STATE: NEGOTIATING THE FUTURE OF SHARI’A 40 (2008).

<sup>108</sup> Bruce Crumley, *France’s Crusade Against Faith*, TIME (Oct. 18, 2010), <http://www.time.com/time/magazine/article/0,9171,2024135,00.html>. Islamophobia is a term that “denotes hostility towards Islam and Muslims.” Bennoune, *supra* note 11, at 393.

of whom are French citizens, France has the largest Muslim population in Western Europe.<sup>109</sup> However, despite their considerable presence within France, French Muslims are “[o]ften the victims of racism and discrimination . . . [and] uniformly perceived and treated as outsiders in French society.”<sup>110</sup> In reaction to the attacks of 9/11, the war in Iraq, and France’s concerns regarding terrorism, France has dealt with its large Muslim population “in a context of heightened security” and discrimination.<sup>111</sup> This discrimination especially affects Muslim women who, because of their religious dress, “become[] . . . easy target[s] for those fearing Islamic fundamentalists.”<sup>112</sup>

On March 15, 2004, France passed the statute regulating, as part of the implementation of the principle of *laïcité*, the wearing of symbols or clothing that evince religious affiliation in public elementary schools, junior high schools, and high schools (“2004 Law”).<sup>113</sup> This law, which also passed by an overwhelming majority, prohibited children in public schools from wearing symbols or clothing that manifest any religious affiliation.<sup>114</sup> The 2004 Law technically affected children of all religions, including those who wore yarmulkes, crosses, and turbans.<sup>115</sup> Despite its universal application, however, the 2004 Law “has been and is effectively still seen as the ‘law on the Muslim headscarf.’”<sup>116</sup> It was aimed specifically at the headscarf,<sup>117</sup> which represented a challenge to “the fragile compromise . . . achieved between different religious groups in Europe, and which [was] weakened by a new community

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<sup>109</sup> Souchard, *supra* note 18; AN-NA’IM, *supra* note 107, at 41.

<sup>110</sup> AN-NA’IM, *supra* note 107, at 41.

<sup>111</sup> Willaime, *supra* note 102, at 47.

<sup>112</sup> Wing & Smith, *supra* note 47, at 753.

<sup>113</sup> Dominique Custos, *Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004*, 54 AM. J. COMP. L. 337, 343 (2006).

<sup>114</sup> Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law 2004-228 of Mar. 15, 2004 Regulating, in Accordance with the Principle of Laïcité, the Wearing of Symbols or Clothing Denoting Religious Affiliation in Schools, Colleges and High Schools], J.O., Mar. 17, 2004, p. 5190; *see also* DURHAM & SCHARFFS, *supra* note 101, at 154–58.

<sup>115</sup> *See* DURHAM & SCHARFFS, *supra* note 101, at 155. *See generally* Loi 2004-228.

<sup>116</sup> Willaime, *supra* note 102, at 48. Because of France’s secular philosophy, it is unable to pass a law concerning a particular religion. *Id.* To legislate the wearing of headscarves, France had to pass a law aimed at all religious dress in public schools. *Id.*

<sup>117</sup> *See* DURHAM & SCHARFFS, *supra* note 101, at 154 (noting that the Prime Minister said during a radio interview prior to the adoption of the law that “Muslim headscarves ‘should absolutely’ be prohibited in public schools”).

that wants to be recognized and identified with its religion.”<sup>118</sup> The 2004 Law was the French government’s “way of dealing with religious expression . . . by singling out and stigmatising some of [Islam’s] followers.”<sup>119</sup> Although France defended the law by citing *laïcité* as its justification, some argue that the 2004 Law was actually “driven by irrational fear of the Muslim alien.”<sup>120</sup>

The 2004 Law was only one of several signs of the rising Islamophobia in France. In October 2005, the tense relationship between France and its Muslim population erupted into a series of riots that lasted for several weeks.<sup>121</sup> The riots took place in “squalid” suburban neighborhoods and were led by France’s poor, minority population, consisting mostly of Muslims of Arab and African descent.<sup>122</sup> They were “spontaneous revolt[s] by youths frustrated by racial and economic discrimination”<sup>123</sup> and were extremely violent, consisting of torching, explosions, and vandalism.<sup>124</sup> Mohammed Job, a young African Muslim who took part in the riots, described the frustration that led to the revolts; according to Job, living in France granted minorities the “freedom to be poor and unequal . . . . The French want to suppress anything that doesn’t seem purely French.”<sup>125</sup> The riots tapered off by mid-November, but served as a tool by France’s minority population to get the government to notice its struggles.<sup>126</sup>

Islamophobia in France is also demonstrated through Muslim women’s difficulty in attaining French citizenship; women who wear the veil feel discriminated against while applying for citizenship.<sup>127</sup> In 2008, *The Economist* and *The New York Times* published articles about Faiza Silmi, a young Moroccan woman whose “application for French nationality was rejected for ‘lack of assimilation.’”<sup>128</sup> She appealed the decision, and was denied French

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<sup>118</sup> Charles Fleming, *French Bid To Ban Religious Garb Vexes Muslims*, WALL ST. J., Dec. 18, 2003, at A15 (quoting Marie-Claire Foblets, professor of law and anthropology at the Catholic University of Leven in Belgium).

<sup>119</sup> Willaime, *supra* note 102, at 48.

<sup>120</sup> AN-NA’IM, *supra* note 107, at 41.

<sup>121</sup> Colin Nickerson, *Behind French Unrest, Cries of Racism, Neglect*, BOS. GLOBE, Nov. 13, 2005, at A1.

<sup>122</sup> *Id.*

<sup>123</sup> Charles Bremner, *Paris Riots Sparked by Frustration, Report Says*, AUSTRALIAN, Dec. 9, 2005, at 10.

<sup>124</sup> See Nickerson, *supra* note 121.

<sup>125</sup> *Id.*

<sup>126</sup> See *id.*

<sup>127</sup> *A Burqa Barrier: How Islamic Headgear Can Stop a Woman Becoming French*, ECONOMIST (July 17, 2008), <http://www.economist.com/node/11751650> [hereinafter *A Burqa Barrier*].

<sup>128</sup> *Id.*; accord Bennhold, *supra* note 53.

citizenship again.<sup>129</sup> The Council of State explained that she was denied citizenship because she “adopted a radical practice of her religion, incompatible with the essential values of the French community, and particularly with the principle of sexual equality.”<sup>130</sup> The case of Faiza Silmi was not an isolated incident, as the Council of State has recognized France’s ability to deny citizenship based on the niqab’s perceived incompatibility with gender equality.<sup>131</sup> Specifically, the Council of State explained that it is legally justified for the Minister of the Interior to deny French citizenship to someone who wears the full veil, based on a finding that the full veil “is incompatible with the fundamental values of the French community, and notably with the principle of sexual equality.”<sup>132</sup>

The burqa ban “comes at a time of increased European antagonism toward Muslim immigrants in their midst.”<sup>133</sup> The French feel threatened by the growing Muslim population in France “openly practicing their way of life” and “feel that they need to restore ‘Frenchness’ to their streets.”<sup>134</sup> They are doing this, in part, by targeting Muslim women, the group of people that most conspicuously does not conform to traditional French ideals of dress.<sup>135</sup> Muslim leaders have warned that the burqa ban “will stigmatize the French Muslim population” even further,<sup>136</sup> but increased stigmatization may be exactly what France would like to achieve.

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<sup>129</sup> *A Burqa Barrier*, *supra* note 127.

<sup>130</sup> *Id.* (internal quotation marks omitted).

<sup>131</sup> COUNCIL OF STATE REPORT, *supra* note 75, at 11.

<sup>132</sup> *Id.*

<sup>133</sup> Mohammed Ayoob, Op-Ed., *Veil Ban a Symbol of Hypocrisy, Fear*, CNN (July 15, 2010, 11:51 PM), <http://www.cnn.com/2010/OPINION/07/15/ayoob.veil.muslim.france/index.html>.

<sup>134</sup> Sandeep Gopalan, *Behind the Burqa*, INT’L HERALD TRIB., Jan. 28, 2010, <http://www.nytimes.com/2010/01/28/opinion/28iht-edgopalan.html>. Further, Muslim women face antagonism from French citizens on a daily basis. This antagonism is well demonstrated by an incident where a woman in Paris engaged in aggravated violence against a woman who was wearing a face-covering veil because she wanted to pull off her veil, which the attacker described as a “muzzle.” Associated Press, *Paris Court Hands Woman Suspended Sentence for Veil Attack*, GUARDIAN (Nov. 4, 2010), <http://www.guardian.co.uk/world/2010/nov/04/woman-suspended-sentence-veil-attack>.

<sup>135</sup> See Gopalan, *supra* note 134. France’s Muslim men also encounter discrimination based on stereotypes. For example, in 2006, France withdrew security clearance from seventy-two Muslim men who were working at the Roissy Charles de Gaulle Airport in Paris. Lara Marlowe, *72 Muslim Staff at Paris Airport Seen As ‘Danger’*, IRISH TIMES, Nov. 3, 2006, at 12. Jacques Lebrot, the deputy prefect in charge of security, attributed the withdrawals to “vulnerability or danger.” *Id.* (internal quotation marks omitted). He explained that the airport had “to wonder about someone who goes several times on holiday to Pakistan.” *Id.* (internal quotation mark omitted). French officials, however, refused to give any support for terrorist allegations against the men who lost their clearance. *Id.*

<sup>136</sup> Souchard, *supra* note 18.

## II. THE ECHR FRAMEWORK

This Part outlines the Article 9 guidelines that this Comment uses to analyze the ban. First, however, this Part summarizes the procedural steps that must be taken before a case enters the jurisdiction of the ECHR.

### A. *ECHR Procedure*

For a petition to be heard by the ECHR, an individual “claiming to be the victim of a violation” of the European Convention would have to file an application with the ECHR after exhausting all domestic remedies.<sup>137</sup> In other words, the applicant must have already sought relief, to no avail, through the French legal system.<sup>138</sup> At the time of this writing, no case has yet been filed in the French courts challenging the constitutionality of the burqa ban under applicable provisions of the constitution, but the Constitutional Council has issued an advisory opinion stating that the ban is constitutional.<sup>139</sup> The applicant would also have to demonstrate that the complaint is not ill-founded, and that she has “suffered a significant disadvantage.”<sup>140</sup>

These requirements—that the applicant must have exhausted all domestic remedies and suffered a significant disadvantage—are significant hurdles that would need to be overcome before the ECHR could hear a challenge to the burqa ban. However, this Comment assumes that an applicant will successfully satisfy all procedural requirements, and that the ECHR will accept jurisdiction over the case.<sup>141</sup> If the ECHR found that the burqa ban does, in fact, violate Article 9, it can issue an award, which is “normally . . . a sum of money to be paid by the respondent Government to the victim or victims of the violations

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<sup>137</sup> European Convention, *supra* note 14, arts. 34–35.

<sup>138</sup> *See id.* art. 35.

<sup>139</sup> Souhard, *supra* note 18. The Institutional Act on the Constitutional Council allows the council to give advisory opinions on the constitutionality of bills, even when there is not a live case or controversy. *See* Ordonnance 58-1067 du 7 novembre 1958 portant loi organique sur le Conseil constitutionnel [Ordonnance 58-1067 of Nov. 7, 1958, Institutional Act on the Constitutional Council], J.O., Nov. 9, 1958, p. 10129.

<sup>140</sup> European Convention, *supra* note 14, art. 35.

<sup>141</sup> A challenge to the burqa ban can likely overcome ECHR jurisdictional hurdles. Amnesty International is a likely candidate to file a petition with the ECHR; the organization has publicly condemned the burqa ban, characterizing the law as a “violat[ion of] the rights to freedom of expression and religion of those women who wear the burqa or the niqab as an expression of their identity or beliefs.” *France Votes To Ban Full-Face Veils*, *supra* note 5 (internal quotation mark omitted). Additionally, the Constitutional Council has ruled that the burqa ban is in accordance with the French Constitution, therefore making the possibility of a domestic remedy for this violation of religious freedom unlikely. Souhard, *supra* note 18.

found.”<sup>142</sup> The ECHR can also issue an order aimed at ending the violating practice, but it only does this in rare circumstances.<sup>143</sup>

### B. Article 9 Analysis

Once a petition regarding the burqa ban reaches the ECHR, the court will assess the law in accordance with Article 9 of the European Convention, which grants freedom of religion to citizens of the European Union while also allowing for restrictions to be placed on this freedom.<sup>144</sup> The first clause of Article 9 grants freedom of religion, stating, “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.”<sup>145</sup> However, the second clause of Article 9, known as the limitations clause, expressly attaches a limitation to this fundamental freedom:

Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.<sup>146</sup>

This clause sets out three requirements that, if satisfied, allow a government to limit someone’s freedom to manifest religion: the restriction must be (1) prescribed by law; (2) in pursuit of legitimate aims; and (3) necessary in a democratic society.<sup>147</sup>

Although the ECHR did not decide a case under the limitations clause until 1993,<sup>148</sup> the court has since recognized that one’s freedom of religion can be limited. The ECHR has explained, “Article 9 does not protect every act

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<sup>142</sup> RULES OF COURT: PRACTICE DIRECTIONS: JUST SATISFACTION CLAIMS para. 23 (Registry of the Court, Eur. Court of Human Rights 2009).

<sup>143</sup> *Id.*

<sup>144</sup> European Convention, *supra* note 14, art. 9.

<sup>145</sup> *Id.* art. 9(1).

<sup>146</sup> *Id.* art. 9(2).

<sup>147</sup> *Id.* The International Covenant on Civil and Political Rights also recognizes the fundamental freedom of religion, and the concurrent limitation on the freedom, in language that is nearly identical to that in Article 9 of the European Convention. International Covenant on Civil and Political Rights art. 18, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

<sup>148</sup> Kamal, *supra* note 24, at 672.

motivated or inspired by a religion or belief.”<sup>149</sup> Rather, “it may be necessary to place restrictions on freedom to manifest one’s religion or belief in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected.”<sup>150</sup>

The ECHR has made three notable decisions limiting Muslim women’s freedom to wear religious garb under Article 9: *Şahin v. Turkey*, *Dahlab v. Switzerland*, and *Dogru v. France*. In *Şahin*, the ECHR found justified under the European Convention an Istanbul University resolution that banned the donning of headscarves on campus, even though the policy “constituted an interference with the applicant’s right to manifest her religion.”<sup>151</sup> Similarly, in *Dahlab*, the ECHR upheld a policy that prohibited a teacher from wearing a headscarf while performing teaching duties.<sup>152</sup> Finally, in *Dogru*, the ECHR found that a French school’s expulsion of a student who refused to remove her headscarf during a gym class did not violate Article 9 because the action was “justified as a matter of principle and proportionate to the aim pursued.”<sup>153</sup>

In deciding *Şahin*, *Dahlab*, and *Dogru*, the ECHR engaged in a three-step analysis.<sup>154</sup> The court first concluded that the respective restrictions constituted interferences with religious freedom<sup>155</sup> and were “prescribed by law.”<sup>156</sup> Next, the ECHR assessed whether the interferences pursued “legitimate aims.”<sup>157</sup> The ECHR finally considered whether, in light of the legitimate aims, the interference with religious freedom was “necessary in a democratic society,” or proportional to the aims pursued.<sup>158</sup> Throughout its analyses, the ECHR referred to the margin of appreciation, or the extent of deference, that it granted to the nation states; the larger the margin of appreciation that the ECHR

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<sup>149</sup> *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173, 202.

<sup>150</sup> *Id.* at 203.

<sup>151</sup> *Id.* at 197 (internal quotation mark omitted).

<sup>152</sup> *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447, 462, 464.

<sup>153</sup> *Dogru v. France*, Eur. Ct. H.R. at 21 (2008), [http://www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN) (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Dogru” in the “Case Title” box and “France” in the “Respondent State” box).

<sup>154</sup> See BEDERMAN, *supra* note 99, at 46 (noting that international tribunals almost invariably follow their precedents).

<sup>155</sup> *Dogru*, Eur. Ct. H.R. at 13–14; *Şahin*, 2005-XI Eur. Ct. H.R. at 196–97; *Dahlab*, 2001-V Eur. Ct. H.R. at 460.

<sup>156</sup> *Dogru*, Eur. Ct. H.R. at 14–16; *Şahin*, 2005-XI Eur. Ct. H.R. at 197–201; *Dahlab*, 2001-V Eur. Ct. H.R. at 458, 461.

<sup>157</sup> *Dogru*, Eur. Ct. H.R. at 16; *Şahin*, 2005-XI Eur. Ct. H.R. at 201; *Dahlab*, 2001-V Eur. Ct. H.R. at 459.

<sup>158</sup> *Dogru*, 2008 Eur. Ct. H.R. at 16–21; *Şahin*, 2005-XI Eur. Ct. H.R. at 202–206; *Dahlab*, 2001-V Eur. Ct. H.R. at 462.

granted to the state, the more discretion the state had to restrict religious practices.<sup>159</sup> In each case, the ECHR found that the restrictions satisfied the aforementioned conditions and characterized the interferences as justifiable limits on the freedom of religion.<sup>160</sup>

Two of the main inquiries undertaken by the ECHR in these cases, whether the restriction is prescribed by law and whether it is in pursuit of legitimate aims, are rarely decisive in Article 9 cases.<sup>161</sup> Thus, this Comment does not heavily focus on either of these two requirements in its analysis of the burqa ban. Rather, this Comment assesses whether the ban interferes with religious freedom and whether it is necessary in a democratic society.

The necessity analysis involves two inquiries. First, in deciding whether a measure is “necessary in a democratic society” and thus is a justifiable limitation, the ECHR has stressed that limitations placed on freedom of religion should be proportionate to the legitimate aims pursued.<sup>162</sup> Proportionality, which “implies the need to strike a proper balance between various competing interests,”<sup>163</sup> is not expressly included in the European Convention, but has “become ‘one of the central principles’ or an ‘essential component’ in rights analysis.”<sup>164</sup> Though the ECHR has explained that a measure is proportional so long as there is “a reasonable relationship of proportionality between the means employed and the legitimate objectives pursued by the interference,” it has not provided any clear guidelines with which to assess proportionality.<sup>165</sup> In fact, the proportionality principle is

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<sup>159</sup> *Dogru*, 2008 Eur. Ct. H.R. at 19–20; *Şahin*, 2005-XI Eur. Ct. H.R. at 204; *Dahlab*, 2001-V Eur. Ct. H.R. at 462–63. The term “margin of appreciation” describes “the amount of discretion the Court gives national authorities in fulfilling their obligations under the Convention.” Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113, 115 (2005). It is comparable to the U.S. courts’ use of a standard of review. *Id.*; see also discussion *infra* Part III.B.3.

<sup>160</sup> Notably, however, *Şahin*, *Dahlab*, and *Dogru* are distinct from the burqa ban, in that each of these cases involved limitations within a public school setting, while the burqa ban applies to all public spaces generally.

<sup>161</sup> Kamal, *supra* note 24, at 679 (noting that the ECHR had never decided a case based on the failure to pursue a legitimate aim and had only relied on the “prescribed by law” requirement in two cases).

<sup>162</sup> Gunn, *supra* note 22, at 468; Martínez-Torrón, *supra* note 66, at 599.

<sup>163</sup> Gunn, *supra* note 22, at 469 (quoting P. VAN DIJK ET AL., THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 80 (3d ed. 1998)).

<sup>164</sup> *Id.* (quoting Jeremy McBride, *Proportionality and the European Convention on Human Rights*, in THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 23, 23, 27 (Evelyn Ellis ed., 1999)).

<sup>165</sup> *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173, 207. The dissenting opinion of *Şahin*, written by Judge Tulkens, attempted to provide some guidelines; it explained that the proportional inquiry “entails a balancing

“heavy with uncertainty”<sup>166</sup> and the test “has not been applied in a uniform manner.”<sup>167</sup>

This Comment suggests that the ECHR analyze the proportionality principle using three criteria articulated by Dr. T. Jeremy Gunn.<sup>168</sup> This tripartite test is “the most widely accepted explanation[] of proportionality in the European context,” because it seeks to assess proportionality based on the Constitutions of many members of the European Convention.<sup>169</sup> While the ECHR has not previously mechanically applied the tripartite test in Article 9 cases,<sup>170</sup> it should do so going forward, because the tripartite test articulates the understanding of proportionality throughout much of Europe and provides predictability and clarity in an inquiry that has few guidelines.<sup>171</sup>

The tripartite test is as follows. “[T]he measure must [first] be appropriate . . . for attaining its objective,” meaning that the measure should have “theoretical capacity to accomplish its aim.”<sup>172</sup> Second, “the measure must be necessary . . . to achieve its intended purposes,” rather than merely suitable.<sup>173</sup> A measure is likely unnecessary if a less restrictive alternative is available.<sup>174</sup> Finally, “the measure must be proportionate to the objective,” meaning that “[t]he burden must not be excessive relative to the objective.”<sup>175</sup>

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of the competing interests.” *Id.* at 221 (Tulkens, J., dissenting). Unfortunately, neither the majority nor the dissenting opinion fully explored which factors should be employed in this balancing.

<sup>166</sup> Gunn, *supra* note 22, at 470 (quoting D.J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 291 (1995)) (internal quotation marks omitted).

<sup>167</sup> *Id.* (quoting VAN DIJK ET AL., *supra* note 163, at 81).

<sup>168</sup> Dr. T. Jeremy Gunn is a former Director of the American Civil Liberties Union Program on Freedom of Religion and Belief, a Senior Fellow in Religion and Human Rights in Emory University’s Center for the Study of Law and Religion, and current law professor in Morocco. *Id.* at 465 n.\*; Dr. Jeremy Gunn, AL AKHAWAYN UNIV., [http://citi.aui.ma/shss/Jeremy\\_Gunn](http://citi.aui.ma/shss/Jeremy_Gunn) (last visited Oct. 3, 2011).

<sup>169</sup> Gunn, *supra* note 22, at 467; accord Takis Tridimas, *Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny*, in THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 65, 68 (Evelyn Ellis ed., 1999).

<sup>170</sup> See Gunn, *supra* note 22, at 468. However, the principle of proportionality in the ECHR was derived from the use of the tripartite test. Lord Hoffman, *The Influence of the European Principle of Proportionality upon UK Law*, in THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE, *supra* note 169, at 107, 107.

<sup>171</sup> See generally Tridimas, *supra* note 169; Walter van Gerven, *The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe*, in THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE, *supra* note 169, at 37.

<sup>172</sup> Gunn, *supra* note 22, at 467 (emphasis omitted).

<sup>173</sup> *Id.* (emphasis omitted).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 468 (emphasis omitted).

The second necessity inquiry is the extent of deference that the ECHR should grant to nation-states involved.<sup>176</sup> The deference granted is referred to as a margin of appreciation, and a margin of appreciation analysis is implicated in each case with a proportionality inquiry.<sup>177</sup> In fact, the margin of appreciation granted to the nation-state likely will play a greater role in the ECHR decision-making process than the proportionality inquiry.<sup>178</sup>

The doctrine of margin of appreciation operates to give “the role of the national decision-making body . . . special importance.”<sup>179</sup> The ECHR either grants the relevant nation-state a wide margin of appreciation, which gives the state more latitude in restricting individuals’ rights, or a narrow margin of appreciation, which means the state’s limitation faces stricter scrutiny.<sup>180</sup> Unfortunately, ECHR decisions that refer to the margin of appreciation fail to articulate clear standards for its application, resulting in decisions that are “likely to become mere ratifications of national action.”<sup>181</sup> This Comment also analyzes the margin of appreciation that the ECHR should give to France, based upon the limited guidance that the ECHR has provided in this area of inquiry.

### III. THE BURQA BAN DOES NOT COMPLY WITH ARTICLE 9’S LIMITATIONS CLAUSE

This Part applies the ECHR analysis to the burqa ban, and assesses whether the burqa ban complies with the limitations clause of Article 9 of the European Convention. To comply with the limitations clause, the burqa ban must be (1) prescribed by law; (2) in pursuit of legitimate aims; and (3) necessary in a

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<sup>176</sup> See *id.* at 485–87.

<sup>177</sup> *Id.* at 486–87.

<sup>178</sup> See *id.* at 468.

<sup>179</sup> *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173, 204.

<sup>180</sup> Compare *Lautsi v. Italy*, Eur. Ct. H.R. (2009), [http://www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN) (follow “Case Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Lautsi” in the “Case Title” box and “Italy” in the “Respondent State” box) (rejecting Italy’s claim that it should be able to display crucifixes in classrooms because the practice was part of Italian culture) *overruled by Lautsi v. Italy*, Eur. Ct. H.R. (2011), [http://www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN) (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “2011” in the “Text” box, “Lautsi” in the “Case Title” box, and “Italy” in the “Respondent State” box), *with Şahin*, 2005-XI Eur. Ct. H.R. (condoning a resolution that banned the donning of headscarves on campus).

<sup>181</sup> Gunn, *supra* note 22, at 487 (quoting Thomas A. O’Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, 4 HUM. RTS. Q. 474, 476 (1982) (internal quotation marks omitted)).

democratic society.<sup>182</sup> Because the burqa ban has a basis in France's domestic law and is accessible to French citizens, the ECHR will likely find that the ban is prescribed by law.<sup>183</sup> Thus, this Part provides no further discussion of this requirement.

Rather, this Part focuses on the remaining Article 9 requirements. It briefly discusses whether the ban's stated aims are legitimate, and then analyzes whether, in light of these aims, the ban is necessary in a democratic society. First, however, this Part argues that the burqa ban constitutes an interference with freedom of religion and thus meets the threshold Article 9 requirement.

#### A. *The Burqa Ban Interferes with Freedom of Religion*

First, the "threshold inquiry [is] whether the state action actually infringes on an individual's right."<sup>184</sup> To even fall under Article 9 analysis, the burqa ban must constitute an interference with the right of religious freedom.<sup>185</sup> The ECHR has acknowledged the extreme importance of one's freedom of religion, stating that:

As enshrined in Article 9 [of the European Convention], freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.<sup>186</sup>

Cutting against the argument that the burqa ban interferes with one's religious freedom is the fact that the burqa ban is a neutral provision that calls for the universal prohibition of all face-covering clothing in public spaces, rather than

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<sup>182</sup> European Convention, *supra* note 14, art. 9(2).

<sup>183</sup> In *Dogru*, the ECHR explained that "prescribed by law" requires that a restriction has a basis in domestic law and is accessible. Eur. Ct. H.R. at 14 (2008), [http://www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN) (follow "Case Law" hyperlink; then follow "HUDOC" hyperlink; then search by placing "Dogru" in the "Case Title" box and "France" in the "Respondent State" box). The burqa ban undisputedly has a basis in domestic law because it was passed by the French Parliament. See Souchard, *supra* note 18.

<sup>184</sup> Kamal, *supra* note 24, at 676.

<sup>185</sup> See *id.*; Martínez-Torrón, *supra* note 66, at 593.

<sup>186</sup> *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) 3, 17 (1993); see also *Gunn*, *supra* note 22, at 492.

specifically prohibiting full veils.<sup>187</sup> Also cutting against the argument that the burqa ban interferes with freedom of religion is that the Quran does not specifically mandate that women wear face-concealing garments.<sup>188</sup> The Parliamentary Commission's Report clearly indicates that the practice of wearing face-covering veils is based upon an interpretation of the Quran, rather than on the text of the Quran itself.<sup>189</sup> The former rector of the Paris Grand Mosque, Dalil Boubakeur, explained that the burqa has nothing to do with Islam, and that the niqab was originally used as protection against sun, wind, and sand.<sup>190</sup> Notably, some Muslim women would argue the same. In an interview conducted by the *Kuwait Times*, a woman who chooses to go out in public unveiled explained that she believes that wearing a veil is an outdated tradition that is not called for by Islam: "I don't think God will put me in hell for not wearing a niqab, hijab or burqa. What matters most is how clean and sincere your heart is, not how much you cover your body. . . . [M]oreover it is not even in the Holy Quran."<sup>191</sup>

Although the French ban does not refer to religion and the Quran does not mention the burqa, niqab, or sitar,<sup>192</sup> according to Article 9 of the European Convention and ECHR precedent, the burqa ban is still an interference with religious freedom. It would be insensible to conclude that the burqa ban does not interfere with religion, based solely upon its neutral pretense. Though the bill does not mention Islam, the burqa, the niqab, or sitar explicitly, it is "common knowledge" that the burqa ban is "primarily aimed at the Muslim full body and face-concealing garments."<sup>193</sup> In other words, the "legislators . . . carefully draft[ed] a statute so that it appears to be neutral, but in fact it unfairly targets a particular religious group."<sup>194</sup> French President Sarkozy said as much in calling for parliament to pass the ban.<sup>195</sup>

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<sup>187</sup> Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of Oct. 11, 2010 Banning the Concealment of the Face in the Public Space] arts. 1-4, J.O., Oct. 12, 2010, p. 1.

<sup>188</sup> QURAN 24:31.

<sup>189</sup> *Highlights of Parliamentary Report*, *supra* note 8.

<sup>190</sup> *Id.*

<sup>191</sup> Emmanuel, *supra* note 33 (internal quotation mark omitted).

<sup>192</sup> *Highlights of Parliamentary Report*, *supra* note 8.

<sup>193</sup> Ismail, *supra* note 8, at 47.

<sup>194</sup> Gunn, *supra* note 22, at 487-88.

<sup>195</sup> See *Burqas 'Not Welcome,' supra* note 67. The ban's targeting of the Muslim population is demonstrated by French President Nicolas Sarkozy's remarks from June 22, 2009, before parliament even drafted the burqa ban. President Sarkozy explicitly stated that the burqa is not welcome in France. *Id.* A parliamentary commission was then formed to explore ways to prohibit face-covering veils. See *Highlights of Parliamentary Report*, *supra* note 8.

Further, wearing the veil can still be a religious practice, even though the Quran does not explicitly require it. Many religious practices—in Islam, Judaism, Christianity, and other faiths—are products of tradition, rather than of explicit religious canons or texts.<sup>196</sup> While some Muslim women argue that the Quran does not mandate the practice of veiling, others argue the opposite; Silmi, for example, stated in an interview, “[a] woman must cover herself. It’s written in the Quran.”<sup>197</sup> Moreover, even the ECHR has acknowledged that the wearing of veils is a religious practice. In *Dahlab*, the ECHR supported the national court’s characterization of the headscarf as a “powerful religious symbol” and noted that the practice of wearing the headscarf “indicates allegiance to a particular faith and a desire to behave in accordance with the precepts laid down by that faith.”<sup>198</sup> The ECHR has also explicitly held that a restriction placed on the right to wear the headscarf constitutes an interference with religious freedom, according to Article 9 of the European Convention. In *Şahin*, the ECHR adopted a finding that:

[B]y wearing the headscarf, [the applicant] was obeying a religious precept and thereby manifesting her desire to comply strictly with the duties imposed by the Islamic faith. Accordingly, her decision to wear the headscarf may be regarded as motivated or inspired by a religion or belief and . . . the Court proceeds on the assumption that the regulations in issue, which placed restrictions of place and manner on the right to wear the Islamic headscarf . . . constituted an interference with the applicant’s right to manifest her religion.<sup>199</sup>

Like the headscarf, the burqa, the niqab, and the sitar serve as powerful religious symbols for the women who wear them as manifestations of their beliefs.<sup>200</sup> Thus, regardless of the burqa ban’s neutral language and the absence

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<sup>196</sup> For example, the celebration of Ash Wednesday in the Christian religion is not mentioned in the Bible, but is still regarded as a religious practice. See, e.g., Lawrence E. Mick, *Ash Wednesday: Our Shifting Understanding of Lent*, CATH. UPDATE, Feb. 2004, available at <http://www.americancatholic.org/newsletters/cu/ac0204.asp>. Similarly, the Jewish practice of wearing the yarmulke is a religious practice, despite the fact that the practice is not explicitly mandated in the Torah. See, e.g., *Kippah/Yarmulke*, BBC, <http://www.bbc.co.uk/religion/religions/judaism/customs/yarmulke.shtml> (last updated June 23, 2009).

<sup>197</sup> Associated Press, *France Moves Closer to Banning Full Muslim Veil: Critics Argue Proposed Move Would Be Violation of Basic Rights*, MSNBC, [http://www.msnbc.msn.com/id/34874754/ns/world\\_news-europe/#france-moves-closer-banning-full-muslim-veil](http://www.msnbc.msn.com/id/34874754/ns/world_news-europe/#france-moves-closer-banning-full-muslim-veil) (last updated Jan. 15, 2010, 7:54 AM) [hereinafter *France Closer to Banning Full Veil*].

<sup>198</sup> *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447, 452 (internal quotation marks omitted).

<sup>199</sup> *Şahin v. Turkey*, 2005-XI Eur.Ct. H.R. 173, 197.

<sup>200</sup> For the women who wear veils for other reasons, including the desire to avoid harassment or looks by men, veiling is not a manifestation of belief. See discussion *supra* Part I.A. However, France has not presented statistics to show that the French women who wear niqabs are doing so for non-religious reasons. See

of the explicit mandate in the Quran, the practice of wearing the full veil is a religious practice for some women, and the burqa ban is an interference with their religious freedom. This characterization has been confirmed by the ECHR in the context of the headscarf.<sup>201</sup>

### *B. The Burqa Ban: An Unnecessary Law in a Democratic Society*

After the ECHR finds that the burqa ban passes the threshold requirement of interfering with freedom of religion, the ECHR will assess whether the measure is necessary in a democratic society.<sup>202</sup> This necessity analysis involves two steps. First, the ECHR will assess whether the ban is proportional to its stated aims of promoting gender equality and public safety.<sup>203</sup> This Comment suggests that the ECHR adopt the tripartite test articulated by Dr. Gunn to objectively analyze the ban's proportionality to these aims.<sup>204</sup> Second, the ECHR will decide whether to widen or narrow the margin of appreciation granted to France, which is a decision that heavily influences the final determination of whether the infringement is necessary in a democratic society.<sup>205</sup>

#### *1. The Burqa Ban Is Not Proportional to the Aim of Promoting Gender Equality*

If a petition were to be heard by the ECHR, France would likely cite the promotion of gender equality as a legitimate aim of the ban, as the French government has cited this defense on several occasions. In the introduction to the Parliamentary Commission's Report, André Gerin, president of the commission, wrote:

[T]he wearing of the full veil infringes upon three principles that are included in the motto of the Republic: liberty, equality and fraternity. The full veil is an intolerable infringement on the freedom and the dignity of women. It is the denial of gender equality and of a mixed

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*Highlights of Parliamentary Report*, *supra* note 8 (relying on expert testimony for statistics). This Comment, thus, assumes that women in France wear niqabs as a manifestation of religion.

<sup>201</sup> See *Şahin*, 2005-XI Eur. Ct. H.R. at 196–97.

<sup>202</sup> *Id.* at 201–08.

<sup>203</sup> Martínez-Torrón, *supra* note 66, at 599; see also *Highlights of Parliamentary Report*, *supra* note 8. The ECHR will likely also analyze whether the burqa ban is proportional to its aim of eliminating a hindrance upon social interactions. This Comment, however, does not analyze this aim.

<sup>204</sup> See discussion *supra* Part II.B.

<sup>205</sup> See Gunn, *supra* note 22, at 468.

society. Finally, it is the will to exclude women from social life and the rejection of our common will to live together.<sup>206</sup>

Additionally, in an op-ed in *The New York Times*, Jean François Copé, the majority leader of the French National Assembly, defended the ban by characterizing the veil as “a blow against the dignity of women,”<sup>207</sup> and President Sarkozy, during his June 2009 address to parliament, characterized the veil as “a sign of subservience.”<sup>208</sup>

If France were to cite this justification—that the veil is representative of the unequal treatment of women—it is likely that the ECHR will find that the promotion of gender equality is a legitimate aim.<sup>209</sup> In *Dahlab*, the ECHR characterized the wearing of the headscarf as “hard to square with the principle of gender equality,” and thus found that a Swiss measure restricting the wearing of the headscarf was justified.<sup>210</sup> Additionally, France has shown its commitment to the promotion of gender equality by undergoing two constitutional reviews on this basis: one on the equal access of both genders to electoral mandates and offices, and one on professional and social responsibility.<sup>211</sup> Perhaps most significantly, the ECHR has never struck down legislation based upon its belief that a limitation does not pursue legitimate aims.<sup>212</sup>

While it is likely that the ECHR will find that France’s purported aim of promoting gender equality is legitimate, the burqa ban is not proportional to the aim pursued. The lack of proportionality is apparent when applying the tripartite proportionality requirements to the ban. The ban does not satisfy any of the three articulated criteria: it does not have the theoretical capacity to reach its goal of promoting gender equality, it is not necessary to promote equality, and the burden is excessive compared to the aim.

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<sup>206</sup> *Highlights of Parliamentary Report*, *supra* note 8 (translating Rapport No. 2262, *supra* note 69, at 13).

<sup>207</sup> Copé, *supra* note 7.

<sup>208</sup> *Burqas ‘Not Welcome,’ supra* note 67.

<sup>209</sup> See *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447, 456 (noting that “the principle of gender equality . . . is a fundamental value”).

<sup>210</sup> *Id.* at 463.

<sup>211</sup> COUNCIL OF STATE REPORT, *supra* note 75, at 22.

<sup>212</sup> Kamal, *supra* note 24, at 679.

a. *The Burqa Ban Does Not Have Theoretical Capacity To Promote Gender Equality*

According to the tripartite proportionality criteria, the burqa ban must have the potential to promote equality between genders.<sup>213</sup> The burqa ban, however, cannot satisfy this criterion. The French government passed the law under the assumption that the burqa, niqab, and sitar represent inequality and are worn as a result of oppression,<sup>214</sup> but France's judgment on this issue may not be correct. This argument is based on speculation; France has not gathered data regarding how many women are forced to wear the veil and how many women choose to wear the veil. Without these statistics, it cannot be assumed that removing the veil from the public sphere will promote equality for anyone because, for all France knows, each woman who wears a full veil may do so out of choice.

Further, banning the burqa, niqab, and sitar may remove a perceived symbol of gender inequality from the public sphere, but the burqa ban is a superficial measure that does little to assist the women who wear full veils. Some French women choose to wear a face-covering veil, whether based on religious beliefs or a desire to comply with Muslim tradition; for these women, the burqa ban restricts their freedom of religion while doing nothing to promote their well-being.

The burqa ban's potential to restrict freedom is well demonstrated by the story of Faiza Silmi, who was denied French citizenship after a government commissioner reported to the Counsel of State that Silmi wore the niqab at her husband's request and that "[s]he lives in total submission to her male relatives."<sup>215</sup> The report further stated that Silmi "seems to find this [treatment] normal, and the idea of challenging it has never crossed her mind."<sup>216</sup> Contrary to the official's report, Silmi wears the niqab out of religious conviction.<sup>217</sup> Apart from choosing to wear a niqab for religious reasons, Silmi also wears the niqab because she wants to dress modestly; she does not find the traditional Moroccan *djelaba* to be modest enough, and decided to wear the niqab instead

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<sup>213</sup> See Gunn, *supra* note 22, at 467 (explaining that a restrictive measure is proportional according to ECHR analysis only if it has the theoretical capacity to accomplish its goal).

<sup>214</sup> French Burqa Ban Clears Last Legal Obstacle, *supra* note 86.

<sup>215</sup> Bennhold, *supra* note 53 (internal quotation mark omitted); *accord France and Islam: A Burqa Barrier*, *supra* note 127 (recounting the same facts, using "Faiza M." to identify Silmi).

<sup>216</sup> Bennhold, *supra* note 53 (internal quotation mark omitted).

<sup>217</sup> *France Closer to Banning Full Veil*, *supra* note 197 (noting that Silmi began to wear the veil after she "discovered a deepening of [her] faith").

so that she could avoid “men’s looks.”<sup>218</sup> Before France passed the burqa ban, Silmi was free to leave her house wearing the garment of her choice: the niqab. With the passage of the ban, her freedom to wear the niqab, and to manifest her religion in the manner of her choosing, is gone. In other words, for those women in France who, like Silmi, choose to wear the niqab based on their own personal choice, the burqa ban operates as a paternalist measure that, ironically, suppresses their freedom instead of vindicating their rights.

For those women in France who do not choose to wear the veil but are forced to do so, there is no evidence pointing to the fact that their condition will actually improve because of the burqa ban. Islam, in a traditional sense, condones “[s]ocial inequality and the obedience of women.”<sup>219</sup> Those men who are traditional enough to force their wife to wear a burqa or niqab are also more likely to be violent: “The more traditional the gender roles and male dominance over women, the more likely violence against women is observed and condoned . . . [C]ultures with more traditional, patriarchal attitudes and more extreme conditions of subordination of women generate more severe and frequent violence against women.”<sup>220</sup> Logically, men who previously forced women to cover themselves in public because of traditional views could respond to their wives’ inability to wear a veil with violence or, in the alternative, could now force their wives to stay at home; rather than being confined in the “prison” of their niqabs,<sup>221</sup> women could effectively be confined in the prison of their homes.<sup>222</sup>

Notably, banning the wearing of the burqa, niqab, and sitar in the public sphere does not have the same effect upon public opinion regarding gender roles as did the banning of the headscarf in *Şahin*, *Dahlab*, and *Dogru*. Each of these cases involved restrictions within a public school setting, rather than in all public spaces generally. In these decisions, the ECHR emphasized that the wearing of the headscarf in public schools had the potential to considerably influence young minds. In *Dahlab*, the applicant who wanted to wear the headscarf was a public school teacher, and the ECHR explained that:

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<sup>218</sup> Bennhold, *supra* note 53 (internal quotation mark omitted).

<sup>219</sup> DAVID GHANIM, GENDER AND VIOLENCE IN THE MIDDLE EAST 55 (2009).

<sup>220</sup> ANDREA PARROT & NINA CUMMINGS, FORSAKEN FEMALES: THE GLOBAL BRUTALIZATION OF WOMEN 19 (2006) (citations omitted).

<sup>221</sup> Bennhold, *supra* note 53 (“Fadela Amara, the French minister for urban affairs, called Ms. Silmi’s niqab ‘a prison’ and a ‘straitjacket.’”); *France Votes To Ban Full-Face Veils*, *supra* note 5.

<sup>222</sup> *France Closer to Banning Full Veil*, *supra* note 197 (discussing a nineteen-year-old convert who expressed fear that she would not be able to leave the house after the passage of the burqa ban).

The applicant's pupils were aged between four and eight, a period during which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect . . . . It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.<sup>223</sup>

In contrast, the burqa ban does not address a situation where the people prohibited from manifesting their beliefs are in positions of exerting strong influence on children. Rather, the ban prohibits regular citizens from wearing religious garb in virtually any public forum.<sup>224</sup> This distinction is important; it is unlikely that one could argue as successfully, as was done in ECHR precedent, that the ban has the theoretical capacity to promote gender equality due to the garb's influence on third-person views of appropriate gender roles. In sum, the ban fails in satisfying the tripartite test's first proportionality criteria; it does not improve the status of the women wearing the veil and is unlikely to affect people's views regarding the status of women.

*b. The Burqa Ban Is Not Necessary To Promote Gender Equality*

According to the proportionality criteria articulated by Dr. Gunn, the burqa ban must also be more than merely suitable for promoting gender equality—it must be necessary.<sup>225</sup> To be necessary, the burqa ban should be the least restrictive alternative to promote gender equality.<sup>226</sup> Similar to the ban's failure to satisfy the first criterion, the burqa ban is not the least restrictive alternative means to promote gender equality among France's Muslim population, and thus fails to meet the second criterion as well.

The Parliamentary Commission's Report suggested less restrictive alternatives that could have been implemented to promote gender equality in France instead of the burqa ban.<sup>227</sup> These recommendations include the following:

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<sup>223</sup> Dahlab v. Switzerland, 2001-V Eur. Ct. H.R. 447, 463.

<sup>224</sup> See *Highlights of Parliamentary Report*, *supra* note 8.

<sup>225</sup> See Gunn, *supra* note 22, at 467 (explaining that a restrictive measure may not be proportional if there are less restrictive alternatives to achieving the aim).

<sup>226</sup> See *id.*

<sup>227</sup> *Highlights of Parliamentary Report*, *supra* note 8.

conducting mediation with women wearing the veil and their families to better understand their motivations;

notifying the competent authorities of any minor wearing the full veil, within the framework of the protection of minors in danger;

reinforcing civic education, in particular the teaching of gender equality . . . [and]

introducing legislation that would make psychological violence between a couple a criminal offense.<sup>228</sup>

Each of these recommendations constitutes a lesser infringement upon freedom of religion, and arguably more directly addresses the gender inequality problems associated with the veil. If, in place of instituting a burqa ban, France began to conduct mediations with women who wear the veil, French authorities could better assess whether an individual was wearing the veil as a result of her personal religious conviction or as a result of pressure from her husband, father, or religious leader. If the authorities found that a woman was wearing a veil because of oppression, France could offer counseling to the woman forced into second-class gender status. Counseling and mediation could help oppressed women without infringing upon the religious freedom of women who choose to wear the veil.

Similarly, notifying authorities of minors who wear the veil, along with emphasizing gender equality in schools, helps ensure that children are not forced to wear a full veil before they are old enough to understand its significance. Finally, if France introduced legislation that criminalized psychological violence between couples, men would theoretically be less inclined to force their wives to wear the veil, or to engage in other practices associated with Islam that degrade women. Because each of these alternatives qualifies as a less restrictive means to promote gender equality in France, the burqa ban is unnecessary, and thus fails the second proportionality criterion as well.

*c. The Burden Is Arguably Excessive Relative to the Aim of Promoting Gender Equality*

Finally, the tripartite proportionality test requires that “the measure . . . [is] proportionate to the objective,” meaning that “[t]he burden must not be

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<sup>228</sup> *Id.*

excessive relative to the objective.”<sup>229</sup> Several factors suggest that the infringement upon women’s right to manifest religion is quite limited. First, the ban prevents a seemingly small proportion of France’s Muslim population from wearing the niqab—approximately 2,000 women in a population of six million Muslims.<sup>230</sup> Second, the women who previously wore the niqab or burqa could wear alternate forms of religious garb, such as the headscarf and the chador, while out in public. In other words, like the applicant in *Şahin*, French Muslims are free to observe other aspects of their religion, despite being prohibited from wearing full veils.<sup>231</sup> Though these factors weigh in favor of the ECHR finding that the burqa ban is not excessive relative to its aim, the ban is over-inclusive and does not address gender equality enough to warrant a complete ban on a type of religious garb. Thus, the burden imposed by the burqa ban is excessive in relation to the aim of promoting gender equality.

Before banning women from wearing face-covering veils, the French government did not assess how many women wear the niqab out of their own personal choice or how many women wear it as a result of patriarchal pressure. However, a study cited by the Parliamentary Commission’s Report states that one-fourth of the women who wear the niqab are converts to Islam,<sup>232</sup> which suggests that these women chose the Muslim religion and the practices associated with it. Thus, at least one-fourth of the women who wear the niqab likely do so out of choice. The ban prevents these women, and others who choose to wear the full veil, from manifesting their religion in the way they choose. Therefore, the ban is over-inclusive; it infringes upon the freedom of women who choose to wear the veil without assisting them. In fact, the burqa ban may worsen their condition; it replaces the choice that these women were previously allowed to exercise with oppression from the French government.

Additionally, a comparison between the burqa ban’s doubtful effect on the gender status of women<sup>233</sup> and the significant infringement on freedom of religion highlights the excessiveness of the burden. The ban lacks the theoretical capacity to improve gender equality of the women who wear full veils, regardless of whether they do so out of choice or pressure, but the

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<sup>229</sup> Gunn, *supra* note 22, at 468 (emphasis omitted).

<sup>230</sup> Erlanger, *supra* note 6.

<sup>231</sup> In deciding that the infringement was proportionate in *Şahin*, the ECHR stressed that Muslim students were still free to observe their religion. *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173, 207.

<sup>232</sup> *Highlights of Parliamentary Report*, *supra* note 8.

<sup>233</sup> See discussion *supra* Part III.B.1.c.

government is imposing criminal sanctions for wearing full veils in any public space anyway. The burden of an infringement is clearly excessive in cases where the measure does not even address the legitimate aim.

By claiming that the burqa ban promotes gender equality, France is using speculation to justify a significant infringement upon religious freedom. France defends the ban by stating that women wear face-covering veils because they are oppressed, but it has not gathered the necessary data as support. Applying the tripartite criteria to the burqa ban's aim of promoting gender equality clearly demonstrates that the ban is not proportionate to its stated aim. Thus, the ban is unnecessary, based upon its gender equality goal.

## 2. *The Burqa Ban Is Not Proportional to the Aim of Promoting Public Safety*

The French government has also defended the burqa ban by asserting that the elimination of face-covering veils from French streets contributes to public safety. The public safety argument asserted most often is that the wearing of the burqa, niqab, or sitar hinders identification of the individual wearing it, easily allowing someone wearing a face-covering veil to anonymously commit a criminal act.<sup>234</sup> This justification was proffered by Jean Francis Copé, who compared women in veils to criminals in ski masks. Copé described the burqa as “a mask worn at all times, making identification . . . virtually impossible.”<sup>235</sup> As “confirmation” of the safety problems caused by the burqa, Copé pointed to a recent armed robbery committed in a Parisian suburb by criminals dressed in burqas.<sup>236</sup>

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<sup>234</sup> See, e.g., Copé, *supra* note 7. A second proffered public safety defense that is not analyzed in this Comment is that the long flowing robes worn along with face-covering veils can potentially serve as hiding places for weapons or bombs. See Aidan Radnedge, *Woman Threatens France with Suicide Bomb Attack After Burka Ban*, METRO (Sept. 20, 2010), <http://www.metro.co.uk/news/841510-woman-threatens-france-with-suicide-bomb-attack-after-burka-ban>. People dressed in burqas have carried out suicide bombings in several countries where face-covering veils are prevalent, including Pakistan and Afghanistan. See, e.g., Isambard Wilkinson & Emal Khan, *Taliban Suicide Bombers Dressed in Burkas Hit Cities*, TELEGRAPH (July 21, 2009, 3:19 PM), <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/5878787/Taliban-suicide-bombers-dressed-in-burkas-hit-cities.html>. While several of these suicide bombers have been males disguised in burqas, women have begun to carry out attacks as well. For example, on December 25, 2010, a Pakistani woman, dressed in a head-to-toe burqa, carried out a suicide bombing in Pakistan after being challenged at a police checkpoint. Associated Press, *Burqa-Clad Suicide Bomber Kills Dozens at Food Aid Center*, FRANCE 24, <http://www.france24.com/en/20101225-burqa-clad-suicide-bomber-kills-dozens-pakistani-aid-center> (last updated Dec. 25, 2010). The attack, which killed forty-five people and left more than 100 wounded, marked Pakistan's first suicide bombing by a female. *Id.*

<sup>235</sup> Copé, *supra* note 7.

<sup>236</sup> *Id.*

If France does proffer public safety as an aim of the ban, it is likely that the ECHR will find that this aim is legitimate. The ECHR has never struck down legislation based upon the belief that an aim of the restriction is illegitimate.<sup>237</sup> Further, the ECHR has recognized public safety as an important concern of nation-states and is hesitant to interfere in public safety areas.<sup>238</sup> While the aim of promoting national security is likely legitimate, the ECHR should recognize that the means employed, the burqa ban, is not proportionate to the aim pursued. The lack of proportionality is apparent when applying the tripartite test articulated by Dr. Gunn to the public safety defense; while the ban has the theoretical capacity to achieve its safety aim, it is not necessary to achieve its intended purpose and the burden caused by the ban is excessive relative to its objective. Because the ban satisfies only one of the three requirements, the ban lacks proportionality and is not necessary in a democratic society, based upon the public safety justification.

*a. The Burqa Ban Has the Theoretical Capacity to Improve Identity Control*

The burqa ban would prohibit women from wearing face-covering veils while in public spaces.<sup>239</sup> Logically, this prohibition has the theoretical capacity to improve France's ability to identify the individuals who wear the veil on a daily basis. The burqa ban thus satisfies Dr. Gunn's first proportionality criterion. However, it fails to satisfy the other two requirements.

*b. The Burqa Ban Is Not Necessary To Achieve Identity Control in France*

The burqa ban is not necessary to achieve its intended purpose because less restrictive alternatives exist to improve means of identification in France, many of which have already been instituted.<sup>240</sup> The Council of State emphasized this point in its report, where it noted that "[t]he wearing of the full veil . . . is already prohibited or provided for under certain provisions."<sup>241</sup>

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<sup>237</sup> Kamal, *supra* note 24, at 679.

<sup>238</sup> Brauch, *supra* note 159, at 116.

<sup>239</sup> Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of Oct. 11, 2010 Banning the Concealment of the Face in the Public Space] art. 1, J.O., Oct. 12, 2010, p. 1.

<sup>240</sup> See COUNCIL OF STATE REPORT, *supra* note 75, at 10–15.

<sup>241</sup> *Id.* at 10.

The Council of State's report highlights Articles 78-1 and 78-2 of France's Code of Criminal Procedure, which, together, serve as means of identity control in France.<sup>242</sup> Article 78-1 states that any person in the country must submit to an identity check at the request of the proper authorities under a given set of circumstances.<sup>243</sup> Article 78-2 then describes several scenarios where women wearing face-covering veils would be forced to remove them.<sup>244</sup> For example, a police officer may ask any person to verify his identity by any means where there is reason to suspect that the person has committed or has attempted to commit an offence, misdemeanor, or felony or where the person can give information regarding a crime committed by another.<sup>245</sup> Additionally, someone's identity can be checked to prevent a breach of public order or to investigate and prosecute terrorist acts.<sup>246</sup>

The Council of State Report noted the existence of several other scenarios where identity control measures have been adequately addressed in France.<sup>247</sup> For example, a woman could be forced to remove her burqa or niqab as a condition of entrance when entering a consulate, when going through airport security, or when using a non-transferable public transportation ticket.<sup>248</sup> A woman could also be forced to remove a garment concealing the face to prove age if the wearer is trying to enter a drinking establishment or a movie that is not authorized for all ages.<sup>249</sup> Finally, a woman may be asked to remove a veil for authentication purposes, such as when receiving registered mail from the post office, obtaining a marriage certification, or voting.<sup>250</sup>

These measures are adequate. As acknowledged by the Council of State Report, the identity control measures already in place in France address most, if not all, identification issues that may come up in the public sphere.<sup>251</sup> The laws in place in France, without the burqa ban, operate to create an environment where:

in principle a person cannot conceal his face when he/she needs to be identified in order to guarantee the safety of goods and persons,

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<sup>242</sup> *Id.* at 12.

<sup>243</sup> CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 78-1.

<sup>244</sup> *Id.* art. 78-2.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* arts. 78-2, 78-2-2.

<sup>247</sup> COUNCIL OF STATE REPORT, *supra* note 75, at 12–13.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *See id.*

prevent or prosecute infringements of the law, and more generally ensure respect for legal and regulatory provisions that make access to goods and services dependent upon personal attributes.<sup>252</sup>

Because people are already legally required to remove face-covering veils in such an array of circumstances, it is difficult to accept the argument that the burqa ban is necessary to improve identification control in France.

*c. The Burqa Ban's Burden Is Excessive Relative to its Objective*

Finally, the burqa ban is disproportionate to its identification goal because it applies to *all* public spaces, which is a term that the bill defines broadly.<sup>253</sup> While it is sometimes necessary to identify an individual for security purposes, prohibiting a woman from wearing the religious garb of her choice in scenarios apart from those already addressed by existing French legislation is an excessive burden compared to the speculative, marginal improvement in security that may result.

In an effort to show that the institution of the ban would improve security, Jean Francis Copé pointed to an armed robbery committed by criminals disguised in burqas.<sup>254</sup> Copé asserted that the ban was a means of addressing such situations “without waiting for the phenomenon to spread.”<sup>255</sup> However, any fear of the “phenomenon” spreading is largely speculative; the armed robbery that Copé mentioned was the first of its kind in France and, as of the date of this writing, no other burqa-disguised criminals have followed suit.<sup>256</sup> The possible danger caused by allowing face-covering veils to be worn in a public sphere is unproven and “restrictions on rights and liberties must be justified by an actual threat . . . or the sufficiently strong likelihood of one.”<sup>257</sup> Even the Council of State noted an unwillingness “to accept that a virtual or unproven risk . . . might justify a prohibition.”<sup>258</sup>

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<sup>252</sup> *Id.*

<sup>253</sup> Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of Oct. 11, 2010 Banning the Concealment of the Face in the Public Space] art. 1, J.O., Oct. 12, 2010, p. 1.

<sup>254</sup> Copé, *supra* note 7.

<sup>255</sup> *Id.*

<sup>256</sup> Barry Duke, *Villains Find Burqas the Perfect Disguise*, FREETHINKER (Feb. 7, 2010), <http://freethinker.co.uk/2010/02/07/villians-find-burqas-the-perfect-disguise>.

<sup>257</sup> COUNCIL OF STATE REPORT, *supra* note 75, at 33.

<sup>258</sup> *Id.*

Notably, the burden that accompanies the burqa ban is more excessive than those imposed in ECHR precedent. The Article 9 cases, *Şahin*, *Dahlab*, and *Dogru*, were all much narrower in their application. In *Şahin*, the restriction applied in a university setting; students were prohibited from “wear[ing] clothes that symbolise or manifest any religion, faith, race, or political or ideological persuasion in any institution or department of the university, or on any of its premises.”<sup>259</sup> Even narrower, in *Dahlab*, the interference with religious freedom restricted a public school teacher from “wearing a headscarf in the performance of her [professional] duties.”<sup>260</sup> Finally, the restriction in *Dogru* was narrowest: it applied to a physical education class in a secondary school.<sup>261</sup> In stark contrast, this ban applies to all public spaces, apart from places of worship, regardless of whether the place has a connection to any possible safety problem.

If one weighs the identification interest in the limitation versus the interference with religion, the result is clear: the danger that the burqa ban addresses is both minimal and speculative, while the burden imposed on people who would like to observe their religion by wearing face-covering veils is large. The scale tips very heavily toward the burqa ban being disproportionate to its public safety goal.

### 3. *Margin of Appreciation*

While the tripartite test indicates that the burqa ban is not proportional to its two main justifications, ECHR decisions are based less on proportionality than they are on “how far [the court] is prepared to defer to the choices of the authority that has adopted the measure at issue.”<sup>262</sup> In other words, the ECHR’s decision regarding the necessity of the ban will be heavily influenced by its determination regarding the margin of appreciation, or the extent of deference, that should be granted to France.<sup>263</sup> The ECHR can either choose to narrow the margin of appreciation, which means France will face stricter scrutiny, or widen it, which would likely lead to a ratification of the state action.<sup>264</sup> It is

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<sup>259</sup> *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173, 190.

<sup>260</sup> *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 448, 457.

<sup>261</sup> *Dogru v. France*, Eur. Ct. H.R. at 2 (2008), [http://www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN) (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Dogru” in the “Case Title” box and “France” in the “Respondent State” box).

<sup>262</sup> *Gunn*, *supra* note 22, at 468 (internal quotations marks omitted).

<sup>263</sup> *See id.* at 468, 487.

<sup>264</sup> *Brauch*, *supra* note 159, at 126–28; *Gunn*, *supra* note 22, at 486.

difficult to predict the extent of deference that the ECHR will grant France because the ECHR has had “widely varying approaches” and has “provide[d] only limited guidance on this issue.”<sup>265</sup>

While ECHR precedent has done little to articulate guidelines, the ECHR has engaged in two telling practices when determining the extent of deference it should grant.<sup>266</sup> First, the ECHR has employed interest balancing, where it weighs the right infringed upon against the importance of the restriction.<sup>267</sup> This interest weighing has led to several trends,<sup>268</sup> most of which are unhelpful in the context of the burqa ban. Second, the ECHR has taken into account the “existence of a European consensus on the matter before the Court.”<sup>269</sup> This Comment applies both of these ECHR practices to the burqa ban to analyze the margin of appreciation that France should receive.

#### *a. Interest Weighing and the Trends That Result*

In weighing interests, the ECHR has identified several trends that can either widen or narrow the margin of appreciation. One trend is that the ECHR traditionally adjusts the margin of appreciation granted to nation-states to condone state actions that promote secular ideals.<sup>270</sup>

*Şahin*, *Dahlab*, and *Dogru* are examples of cases where the ECHR granted wide margins of appreciation to promote secularism.<sup>271</sup> In *Şahin*, the ECHR determined that Turkey should receive a wide margin of appreciation and placed heavy importance on Turkey’s cultural and constitutional norm of secularism in doing so.<sup>272</sup> The court emphasized that “[t]he Turkish Republic

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<sup>265</sup> Gunn, *supra* note 22, at 485–86. Because of the ECHR’s widely varying approaches, some critique the court’s application of the margin of appreciation and call for its abolishment. As ECHR Judge De Meyer put it: “The empty phrases concerning the State’s margin of appreciation—repeated in the Court’s judgments for too long already—are unnecessary circumlocutions, serving only to indicate abstrusely that the States may do anything the Court does not consider incompatible with human rights.” Brauch, *supra* note 159, at 148 (quoting *Z v. Finland*, 1997-I Eur. Ct. H.R. 323, 358 (De Meyer, J., dissenting)).

<sup>266</sup> Brauch, *supra* note 159, at 126–29.

<sup>267</sup> *Id.* at 127–28.

<sup>268</sup> *See id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Dogru v. France*, Eur. Ct. H.R. at 3–5 (2008) [http://www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN) (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “Dogru” in the “Case Title” box and “France” in the “Respondent State” box); *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173, 185–86; *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 448, 461.

<sup>271</sup> *Dogru*, Eur. Ct. H.R. at 3–5; *Şahin*, 2005-XI Eur. Ct. H.R. at 185–86; *Dahlab*, 2001-V Eur. Ct. H.R. at 460–62.

<sup>272</sup> *Şahin*, 2005-XI Eur. Ct. H.R. at 185–86.

was founded on the principle that the State should be secular” and that wearing the Islamic headscarf to school was only a “recent phenomenon” that the “supporters of secularism . . . see . . . as a symbol of political Islam.”<sup>273</sup> The *Şahin* court also noted that securing “true religious pluralism . . . is vital to the survival of a democratic society.”<sup>274</sup> Similarly, in *Dogru*, the ECHR stressed the French constitutional principle of secularism in its decision, explaining that the protection of secularism is of “prime importance” and that “[h]aving regard to the margin of appreciation . . . religious freedom thus recognised and restricted by the requirements of secularism appears legitimate in the light of the values underpinning the Convention.”<sup>275</sup> Finally, in *Dahlab*, the ECHR explained, “it may be necessary to place restrictions on [religious] freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected.”<sup>276</sup>

Because the burqa ban is similar to the state actions in *Şahin*, *Dahlab*, and *Dogru*, in that the ban originated as a mode of promoting secular ideals in France,<sup>277</sup> one could easily assume that the ECHR would adjust the margin of appreciation to condone the ban, meaning that the ECHR would widen France’s margin of appreciation. However, the ECHR trend of adjusting the margin of appreciation to promote secularism will likely not apply in the context of the burqa ban for three reasons.

First, the Grand Chamber of the ECHR recently moved away from the trend of adjusting the margin of appreciation in favor of secularism, indicating that secularism may not warrant as wide of a margin of appreciation as it once did.<sup>278</sup> *Lautsi v. Italy* involved Italy’s policy of hanging crucifixes in public schools.<sup>279</sup> The lower court originally narrowed the margin of appreciation granted to Italy, a nation-state with a religious establishment, so as not to impose Christianity upon non-believers.<sup>280</sup> However, on March 18, 2011, the

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<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 204.

<sup>275</sup> *Dogru*, Eur. Ct. H.R. at 19–20.

<sup>276</sup> *Dahlab*, 2001-V Eur. Ct. H.R. at 461.

<sup>277</sup> See *Burqas ‘Not Welcome,’ supra* note 67; Crumley, *supra* note 108.

<sup>278</sup> See generally *Lautsi v. Italy*, Eur. Ct. H.R. (2011), [http://www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN) (follow “Case-Law” hyperlink; then follow “HUDOC” hyperlink; then search by placing “2011” in the “Text” box, “Lautsi” in the “Case Title” box, and “Italy” in the “Respondent State” box). However, it is important to note that *Lautsi* is distinguishable because it involves Italy, a nation with a traditional religious establishment, *see id.* at 28, while France is historically secular, *see* discussion *supra* Part I.C.

<sup>279</sup> *Lautsi*, Eur. Ct. H.R. at 3–4.

<sup>280</sup> *See id.* at 15.

Grand Chamber overruled the lower court's decision; it widened the margin of appreciation granted to Italy<sup>281</sup> and held that the display of crucifixes in public schools does not violate Article 9.<sup>282</sup> Specifically, the *Lautsi* court explained that, while crucifixes are associated with Christianity,<sup>283</sup> displaying such a religious symbol does not amount to indoctrination and "could not in itself be viewed as a departure from the principles of pluralism and objectivity."<sup>284</sup> The court emphasized that a crucifix is a "passive" religious symbol that could not "be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities."<sup>285</sup> Thus, the display of crucifixes was compatible with ideals of secularism.

Second, the burqa ban is distinct from the state actions in *Şahin*, *Dahlab*, and *Dogru* because the burqa ban is far more expansive. *Şahin*, *Dahlab*, and *Dogru* applied strictly in school settings, and it is widely acknowledged that the state has more freedom to restrict freedom of religion within public institutions than in public spaces generally.<sup>286</sup> In *Dahlab*, for example, the ECHR accepted the Swiss government's argument that it should be granted a wide margin of appreciation in restricting the petitioner's religious freedom because the petitioner was a teacher, and was thus "bound to the State by a special status."<sup>287</sup> The Council of State also acknowledged the difference between bans in public institutions and general bans, noting that secularism "mainly applies in relations between the public authorities and religions or persons who subscribe to them. It is directly binding on public institutions, thereby justifying the neutrality requirement imposed."<sup>288</sup> Secularism, however, accords less authority on a nation to restrict religious freedom outside of public institutions.<sup>289</sup> Because France has prohibited veiling in all public spaces generally, rather than in schools or public offices, the ECHR

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<sup>281</sup> *See id.* at 29.

<sup>282</sup> *Id.* at 31.

<sup>283</sup> *Id.* at 29.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 29.

<sup>286</sup> *See, e.g., Dogru v. France*, Eur. Ct. H.R. at 17 (2008), [http://www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN) (follow "Case-Law" hyperlink; then follow "HUDOC" hyperlink; then search by placing "Dogru" in the "Case Title" box and "France" in the "Respondent State" box); COUNCIL OF STATE REPORT, *supra* note 75, at 20.

<sup>287</sup> *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447, 459.

<sup>288</sup> COUNCIL OF STATE REPORT, *supra* note 75, at 20.

<sup>289</sup> *See id.* In France specifically, the State has more latitude to promote secularism in public offices and in schools than elsewhere. *See id.* This greater grant of power in the public sphere complies with the original purpose of *laïcité*, which was to limit the influence of the Catholic Church in public schools. Crumley, *supra* note 108.

should not automatically grant France a wide margin of appreciation in observance of the nation's secular culture.

Third, it is unlikely that France would even defend the burqa ban by articulating its secular philosophy; thus, the ECHR would have no reason to adjust the margin granted based on secular ideals. Before the French Parliament passed the burqa ban, the Council of State warned French legislators that secularism was a shaky ground on which to base a general prohibition on the veil: "secularism could not provide the basis for a general restriction on the expression of religious convictions in the public space . . . and could therefore not be a ground for imposing a total ban on the full veil throughout the public space."<sup>290</sup> Notably, the Council of State also noted that, in *Arslan v. Turkey*,<sup>291</sup> the ECHR had already acknowledged that secularism could not form a basis for a general ban.<sup>292</sup> Due to these three reasons, the secular origin of the burqa ban reveals little about how the ECHR would adjust the margin of appreciation granted to France.

Another margin of appreciation trend that may be helpful in analyzing the ban is that the ECHR has generally granted European nations wide margins of appreciation where the nation's restriction pursues the aim of public safety or promoting morality.<sup>293</sup> Because two of the burqa ban's main defenses are that the ban promotes public safety and equality of women, it is possible that the ECHR will assign a wide margin of appreciation to France and thus condone the burqa ban regardless of its proportionality flaws. However, the ECHR has also generally applied a narrow margin of appreciation in cases that restrict citizens' core freedoms.<sup>294</sup> The ECHR has acknowledged the importance of one's religious freedom,<sup>295</sup> and thus it is also possible that the ECHR will grant a narrow margin of appreciation to France and find that the ban falls outside of the narrow margin. In other words, the burqa ban implicates competing interests, which, again, reveals little about the extent of the margin that the ECHR is likely to grant.<sup>296</sup>

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<sup>290</sup> COUNCIL OF STATE REPORT, *supra* note 75, at 20.

<sup>291</sup> *Arslan v. Turkey*, Eur. Ct. H.R. (2010), [http://www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN) (follow "Case-Law" hyperlink; then follow "HUDOC" hyperlink; then search by placing "Arslan" in the "Case Title" box, "Turkey" in the "Respondent State" box, and "41135" in the "Application Number" box).

<sup>292</sup> COUNCIL OF STATE REPORT, *supra* note 75, at 20.

<sup>293</sup> Brauch, *supra* note 159, at 127.

<sup>294</sup> *See id.* (noting the court narrowed the margin of appreciation in the *Dudgeon Case*, 45 Eur. Ct. H.R. (ser. A) (1982), which dealt with personal autonomy, and in another case dealing with freedom of speech).

<sup>295</sup> *See Gunn*, *supra* note 22, at 492 (citing *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) 3, 17 (1993)).

<sup>296</sup> Brauch, *supra* note 159, at 133.

*b. The European Consensus*

In cases where interest-weighting reveals little, “the key factor for [ECHR] analysis is likely to be the existence of a European consensus. . . . ‘This factor [is] an essential standard which anchors the scope of supervision.’”<sup>297</sup> As of the date of this writing, Belgium is the only European country that has instituted a general burqa ban as extensive as that of France.<sup>298</sup> As the Council of State report notes, a few countries that are not comparable to France, such as Singapore and Tunisia, have instituted general bans on the full veil.<sup>299</sup> In addition, several countries, such as Italy and Denmark, considered general bans and condemned the practice of wearing veils, but have not adopted a resolution; Denmark, specifically, did not adopt its resolution “notably for legal reasons.”<sup>300</sup> The lack of similar legislation in other European countries should lead the ECHR to grant a narrower margin of appreciation for France. The ECHR, however, may consider the public debate surrounding the practice of wearing veils, as well as other European countries’ considerations of passing a general ban, as evidence of a European consensus, and thus widen the margin accordingly.

*c. A Difficult Margin To Predict*

Interest-weighting and accounting for a European consensus are the two most identifiable factors used to predict the margin of appreciation, and both can be easily skewed to change the margin of appreciation granted to France; “the margin of appreciation varies not only in relation to different exceptions, but in relation to the same exception in different contexts.”<sup>301</sup> All in all, the margin of appreciation serves as a mode to allow states to “do anything the Court does not consider incompatible with human rights.”<sup>302</sup> One could hope that the ECHR notes the burqa ban’s extreme incompatibility with human rights—the burqa ban is objectively disproportionate to its aim, discriminates against Muslims, and severely infringes upon religious freedom. If the ECHR

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<sup>297</sup> *Id.* at 138 (quoting HOWARD CHARLES YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* 195 (1996)).

<sup>298</sup> *Belgian Burqa Ban Comes into Force*, RIA NOVOSTI (July 23, 2011), <http://en.rian.ru/news/20110723/165346750.html>.

<sup>299</sup> COUNCIL OF STATE REPORT, *supra* note 75, at 17.

<sup>300</sup> *Id.*

<sup>301</sup> Brauch, *supra* note 159, at 129 (emphasis omitted) (quoting Aileen McHarg, *Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, 62 *MOD. L. REV.* 671, 688 (1999)) (internal quotation mark omitted).

<sup>302</sup> *Id.* at 126 (quoting *Z v. Finland*, 1997-1 *Eur. Ct. H.R.* 323, 358 (De Meyer, J., dissenting)).

chooses to acknowledge the obvious incompatibility of the burqa ban with human rights, it will likely narrow the margin of appreciation accordingly.<sup>303</sup>

### CONCLUSION

When a case challenging the burqa ban is brought to the ECHR, the ECHR will first conclude that the ban is an interference with freedom of religion. It will then analyze whether the ban is necessary in a democratic society and thus complies with Article 9 of the European Convention by assessing: (1) whether the ban is proportional to its stated aims,<sup>304</sup> and (2) how wide the margin of appreciation granted to France should be.<sup>305</sup> While this analysis will surely occur, the result of the analysis is unpredictable, as the ECHR has not provided clear guidelines on proportionality or the margin of appreciation.<sup>306</sup>

This Comment suggests that the ECHR adopt a widely accepted, tripartite proportionality test to provide clarity and predictability to the proportionality inquiry. Applying the tripartite test demonstrates that, when analyzed with objective criteria, the burqa ban is disproportionate to both of its stated aims of promoting gender equality and promoting public safety. France's parliamentary report put forth data in support of the ban but, even with the data, France's assertion that the ban is necessary to promote either of these aims is largely speculative.<sup>307</sup> At most, the burqa ban can *possibly* help women who wear the veil as a result of oppression and can *possibly* lead to a marginal improvement in public safety. However, these possibilities are not enough to justify the ban's excessive infringement upon freedom of religion.

The ECHR should recognize that the burqa ban is not proportional to the promotion of women's rights: the ban does not improve women's status in society, it is an overly restrictive measure, and the burden imposed is excessive compared to its aim.<sup>308</sup> By instituting the burqa ban, France has not helped the women who wear the veil, regardless of whether women wear the veil out of choice or oppression. Prohibiting face-covering veils in the public sphere does not get to the root of gender inequality in Islam. Rather, it superficially addresses the problem by removing a symbol of inequality from French streets.

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<sup>303</sup> See *id.* at 127.

<sup>304</sup> See Martínez-Torrón, *supra* note 66, at 599.

<sup>305</sup> See Gunn, *supra* note 22, at 485–86.

<sup>306</sup> *Id.* at 486–87; Şahin v. Turkey, 2005-XI Eur. Ct. H.R. 173, 207.

<sup>307</sup> See *Highlights of Parliamentary Report*, *supra* note 8.

<sup>308</sup> See discussion *supra* Part III.B.1.

Though several less restrictive alternatives exist that could address the gender issues associated with veiling, France adopted a measure that severely infringes upon religious freedom without solving any problems.<sup>309</sup>

The ECHR should further recognize that the burqa ban is disproportionate to France's second goal of improving public safety; the danger associated with the inability to identify people wearing full veils has been addressed largely through existing legislation, and any additional risk that results from allowing veils in public spaces is unproven.<sup>310</sup> Copé, in his defense of the ban, pointed to a single crime committed by a burglar disguised in a burqa.<sup>311</sup> One crime, however, is insignificant when compared to the excessive burden imposed on all of the women who wear the veil as a manifestation of religion. Even the Council of State acknowledged that "a virtual or unproven risk" was not enough to warrant a prohibition.<sup>312</sup>

In adjusting the margin of appreciation granted to France, the ECHR should acknowledge the burqa ban's extreme flaws in proportionality, as well as its overall incompatibility with human rights. If the ECHR ignores the burqa ban's significant failings and grants a wide margin of appreciation, as it did in *Şahin*, *Dahlab*, and *Dogru*, the ECHR risks allowing the margin of appreciation to swallow the fundamental right of freedom of religion, guaranteed by Article 9 of the European Convention. In past efforts to be deferential to the member states of the European Convention, the ECHR condoned significant infringements on freedom of religion. But, at some point, the court should draw the line. The burqa ban, with its extensive application within France and potential influence on other nation-states planning to ban full veils, is an ideal line-drawing opportunity for the ECHR.

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<sup>309</sup> See discussion *supra* Part III.B.1.

<sup>310</sup> See discussion *supra* Part III.B.2.

<sup>311</sup> Copé, *supra* note 7.

<sup>312</sup> COUNCIL OF STATE REPORT, *supra* note 75, at 33.

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