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THINLY VEILED: INSTITUTIONAL MESSAGES IN THE LANGUAGE OF SECULARISM IN PUBLIC SCHOOLS IN FRANCE AND THE UNITED STATES

R. Vance Eaton

If it were only that people have diversities of taste, that is reason enough for not attempting to shape them all after one model. But different persons also require different conditions for their spiritual development; and can no more exist healthily in the same moral, than all the variety of plants can in the same physical, atmosphere and climate.¹

I. INTRODUCTION

The United States and France, despite sharing a core of legal and jurisprudential commonalities germane to most liberal democracies, diverge in treatment of religious expression. Both the United States and France have secular governments. Both ostensibly allow free exercise of religious practices. However, secularism in France does not mirror secularism in the United States. Commentators have termed French secularism “confrontational,”² “assertive,”³ and even a “civic religion”⁴ in and of itself. As a sweeping, comparative generalization, American secularism does not make neutrality demands of individuals but seeks to accommodate religious expression.

One of France’s most salient manifestations of its “confrontational” secularism came in the form of a 2004 law banning public-school students from wearing “any conspicuous sign of religious

¹ JOHN STUART MILL, ON LIBERTY 81-82 (Oxford Univ. Press 1978) (1859).

² Dominique Custos, *Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004*, 54 AM. J. COMP. L. 337, 337 (2006).

³ Ahmet T. Kuru, *Passive and Assertive Secularism: Historical Conditions, Ideological Struggles, and State Policies toward Religion*, 59 WORLD POLITICS 568 (2007).

⁴ BRONWYN WINTER, *HIJAB & THE REPUBLIC: UNCOVERING THE FRENCH HEADSCARF DEBATE* 76 (Syracuse Univ. Press 2008).

affiliation.”⁵ Observers understood France’s 2004 law as targeting the Muslim veil, a lightning rod topic within the study of Muslim integration into the West. The United States, as compared to France, has not experienced significant angst over the veil debate. The United States has its own conflicts with Muslim integration, of course. The issue of the veil in public schools brings to light parameters of secularism in France and the United States and reveals interesting differences between French and American institutional approaches to religion and the individual.

This paper seeks to compare French and American legal treatment of the Muslim headscarf in public school. First, I describe France as trying to instill, or protect, preexisting, monolithic national values. Next, I discuss the “American” approach to the veil in school, considering actual headscarf disputes and analogous cases. Finally, I consider the veiling in school debate in light of Muslim integration into Europe and America. I ultimately favor American constitutional guarantees as the best tools for approaching the veil debate. This allows for focus not on the protection of homogenous, monolithic values but rather on the potential to make public schools the locus of broad religious expression and cultural integration.

The Muslim veil,⁶ an article of clothing riddled with misunderstanding in the West,⁷ draws relentless fire in debates over the

⁵ CODE DE L’ÉDUCATION [C. ÉDUC.] art. L141-5-1 (3rd ed. Petits Codes Dalloz 2010) (Fr.).

⁶ Muslim women wear a wide variety of garments covering their heads and faces to varying degrees. The most common ones include the *hijab*—or headscarf—leaving the face exposed; the *niqab*, covering most of the face and leaving only the eyes exposed; the *jilbab*, a headscarf connected to a more complete body garment; the *chador*, a full black body garment worn primarily in Iran; and of course, the *burqa*, covering the body and the face in its entirety. Throughout this paper I will use veil, headscarf, and *hijab* interchangeably, but I acknowledge the inability of any one of these terms to apply to every form of conservative Muslim female dress.

⁷ See, e.g., FADWA EL GUINDI, VEIL: MODESTY, PRIVACY, AND RESISTANCE (Berg 1999). Unfortunately, Western perceptions of the veil suffer from deep-seated, long-standing misunderstandings. Recognizing Western misunderstandings of the veil leads to acknowledgment of the necessity of constraint in reacting, personally or institutionally, to the veil. For example, there are numerous variations of the veil, a complexity reflected in the numerous Afro-Asiatic and Indo-Iranian words for it, but “referred to by the single convenient Western term ‘veil,’ which is indiscriminate, monolithic, and ambiguous.” One of the more ubiquitous terms, the Arabic *hijab*, takes on a more figurative sense in Qu’ranic verse, “separating deity from mortals,

compatibility of Islam with Western society. Some Western feminists characterize the veil as a sign of female subordination, such that Muslim men establish property rights in women to the exclusion of other men by hiding the physical attributes of women from the sight of other men.⁸ Other Western feminists emphasize the liberty prerogative

wrongdoers from the righteous, believers from unbelievers, light from darkness, and day from night.” EL GUINDI at 154 (citations omitted). “Veil” and “headscarf” belie the subtlety of meaning surrounding the various foreign language terms to which they correspond.

Nor do notions of privacy in Western thought match with an identical concept in Arabo-Islamic culture. The Western notion of privacy implicates secretive personal space, while the Arabo-Islamic notion of privacy pertains to the female sphere and the familial sphere. *Id.* at 82. One could argue with El Guindi about the extent to which Western notions of privacy implicate “secretive personal space.” Nevertheless, Muslims and Westerners view privacy from different perspectives, which is relevant because Westerners and Muslims start the analysis of the veil from different perspectives. *Id.* at 77. El Guindi does make the interesting comparison that in both Eastern and Western culture, privacy comes with privilege. *Id.*

Islamic understanding of “sacred space” provides yet another hurdle to Western understanding of the veil. *Id.* at 78. El Guindi describes how the practice of prayer throughout the day illustrates the ability of the Muslim mind to perceive seamless continuity between “normal” space and “sacred” space. *Id.* When a Muslim prays during the day, he transforms any given space, public or private into “sacred” space. *Id.* Likewise, the sanctity of female modesty moving within otherwise “normal” public spaces poses no problem to the Muslim mind. The same concept might jar the Westerner unaccustomed to the Muslim continuity of sacred and normal.

⁸ See, e.g., John Borneman, *Veiling and Women's Intelligibility*, 30 CARDOZO L. REV. 2745, 2756 (2009). Subscribing to the domination model, this anthropologist writes that men are “both incited in their own desire to have sex with any generalized other, yet wanting to control or limit the desire of others, specifically as their sisters and daughters become its object.” *Id.* The author refers to “men” anthropologically, but his descriptions might align with an extreme modern manifestation of Islamic society such as the Taliban regime. He concludes that liberal democracy requires an individual to show her face to be intelligible, that “[v]eiling practices no longer operate within traditional, kinship-based worlds, but in a modern political environment shaped by the pressures of democratic public life.” *Id.* He cites airport security and driver's licenses as examples of democracy's requirement of exposure of the face. *Id.* His examples arguably turn on modernity more than democracy. Borneman says that “[v]eiling, which blocks recognition to a lesser or greater degree, would seem to be in tension with democratic transparency. ... [V]isuality has become central to the intelligibility of women—despite the wish of many women to be seen for qualities that are spiritual, non-visible, or just inside their

of the Muslim woman to remove herself from male objectification.⁹ While the feminist perspective on the veil brings up fascinating questions, this paper will largely avoid them and instead focus on individual religious liberty and social integration.

II. THE FRENCH EXPERIENCE

France's 2004 law required the relinquishment of Muslim headscarves, Sikh and Jewish headwear, and large crosses in public schools.¹⁰ Despite the mention of other religious symbols, onlookers understood the law as primarily targeted at the Muslim veil.¹¹ As the background of the law reveals, France does not see the veil as compatible with Frenchness. In an interview, Fadela Amara, France's Secretary of State for Urban Policies, describes the burqa as a "gangrene, the cancer of radical Islam which completely distorts the message of Islam."¹² She goes on to say that "Those who have struggled for women's rights back home in their own countries – I'm thinking particularly of Algeria – we know what it represents and what the obscurantist political project is that lies behind it, to confiscate the most fundamental liberties."¹³

Amara's no-holds-barred approach gives pause, if for nothing else, because she grew up in Algeria. Indeed, the number of references in the French National Assembly during the 2004 veil debate to Amara came in second only to Jean Jaures, giant of French socialism.¹⁴ Amara is not alone in her views among North Africans in France. Bronwyn Winter, in her book *HJAB & THE REPUBLIC*, points out that after passage of the 2004 law, one poll showed that as many as forty-two percent of French Muslims supported the law.¹⁵ Other data tends to show that as little as two percent of Muslim women in France even veil to begin with.¹⁶

heads." *Id.* The author seems to have made a tenuous connection between government processes and physical covering of the face.

⁹ *Id.* at 2756.

¹⁰ WINTER, *supra* note 4, at 222.

¹¹ JOHN R. BOWEN, WHY THE FRENCH DON'T LIKE HEADSCARVES 1 (2007).

¹² Ben Hall, *French Minister Calls for Ban on Burka*, FINANCIAL TIMES, Aug. 14, 2009, available at <http://www.ft.com/cms/s/0/9f37d5a0-88f9-11de-b50f-00144feabdc0.html>.

¹³ *Id.*

¹⁴ BOWEN, *supra* note 11, at 137.

¹⁵ WINTER, *supra* note 4, at 224.

¹⁶ *Id.* at 225.

These perplexing statistics reveal the depth of complexity of Muslim-state relations in France. The 2004 law followed decades of national angst over Muslim immigration. Immigration itself followed decades of colonialism, which in turn followed centuries of dynamic, often violent relations with the Arabo-Islamic world.¹⁷ Just as France has grappled with Muslim integration, it forged its own secular identity over centuries of tumult.

Winter describes French secularism as containing three major contradictions.¹⁸ The most pertinent of these for comparative purposes is “secularism as heir of religion.”¹⁹ Winter thus describes secularism as adopting the characteristics of a religion. In that sense, “[n]ation has replaced Church, the Declaration of the Rights of Man has replaced the Bible, the law has replaced the gospel, and secularism is the key element of the Republican catechism.”²⁰ She goes on to say that secularism is a “civil religion” and that secularism itself becomes “the faith of each citizen that makes that citizen a willing participant in the collective project.”²¹ Next, I consider some factors coming to bear on the adoption of secularism as a religion itself.

III. BACKGROUND OF FRENCH SECULARISM

A quick sketch of the development of secularism, or *laïcité*, in France will set the stage for France’s collision with the Muslim veil. The French Constitutions of 1946 and 1958 explicitly refer to *laïcité*: “France is an indivisible, secular (*laïque*), democratic and social Republic.”²² The Constitution does not define *laïcité*, a term lacking an exact English translation because of the layers of political and social

¹⁷ Winter points out that it would be “serious...error to ignore the historical shadow of precolonial or extracolonial interactions between France and the Arabo-Muslim world within the current debates.... France and the Middle Eastern and (in particular) Maghrebian Muslim worlds thus have a love-hate relationship that is almost 1,300 years old.” WINTER, *supra* note 4, at 97-99.

¹⁸ WINTER, *supra* note 4, at 69-76. The contradictions, largely self-explanatory, are “the obligation to be free,” “secularism as a ‘Republican catechism,’” and “secularism as heir of religion.”

¹⁹ *Id.* at 73.

²⁰ *Id.* at 74.

²¹ *Id.* at 76.

²² BOWEN, *supra* note 11, at 29. The Constitutions reflect the Fourth and Fifth Republics, respectively.

meaning embedded in it. One author says the term “remains one of those ‘essentially contested concepts’ that is politically useful precisely because it has no agreed-on definition.”²³ Harry Judge, in *The Muslim Headscarf and French Schools*, describes *laïcité* as “implying a rejection of any influence by organized religions upon public education (or indeed on other areas of social life).”²⁴ For purposes of this paper, I assume that Judge interprets *laïcité* accurately in the context of public schooling. *Laïcité* in France arises out of centuries of political struggles, the details of which fall beyond the scope of this paper and the complexities of which evade broad generalities. An attempt at summation follows.

France and the Roman Catholic Church swung in and out of relationships of varying degrees of estrangement throughout the 18th century. In his book *Why the French Don't Like Headscarves*, John Bowen describes the developments in post-Revolution France as following the path of a pendulum.²⁵ The Revolution itself marked the beginning of the rise of “the people” and the inception of secularism as a Republican concept.²⁶ Immediately following the Revolution, Robespierre orchestrated violent persecutions of suspected monarchists and targeted believers of all faiths.²⁷ Over the next century or so, both French Protestants²⁸ and educated elites played a role in combating the monarchy-church duo during these power swings.²⁹ It appears, therefore, that a confluence of forces helped make *laïcité* a founding principle of the Republic. Under one theory, “[t]he Revolution laid down the basic principles, the Third Republic extracted the church from the schools; the Assembly ratified *laïcité* in 1905.”³⁰

²³ *Id.* at 2.

²⁴ Harry Judge, *The Muslim Headscarf and French Schools*, 111 AM. J. EDUC. 1, 19 (2004).

²⁵ BOWEN, *supra* note 11, at 22.

²⁶ WINTER, *supra* note 4, at 63-64.

²⁷ BOWEN, *supra* note 11, at 22.

²⁸ WINTER, *supra* note 4, at 62. Winter appropriately points out the “protest” that was “Protestantism;” this would encompass protest against church-monarchy power. The Reformation came much earlier than the Third Republic, but it is fair of Winter to include the influence of Huguenots among the forces working against the church.

²⁹ *Id.*

³⁰ BOWEN, *supra* note 11, at 28 (citing JEAN BAUBEROT, *HISTOIRE DE LA LAÏCITE FRANCAISE* (Paris: Presses Universitaires de France (2000))) (identifying the “three thresholds of *laïcité*”).

The church made gains with passage of the Falloux law of 1850, which remains in effect despite the changes of 1905.³¹ The Falloux law made private Catholic school an established method of providing education to the public and allowed the state to pay for up to ten percent of Catholic school expenses.³² Notwithstanding other advances made against the entanglement of church and state in France, Catholic priests remained on the state payrolls until 1905.³³ France underwent the purification rite of secularization in 1905 by codifying the philosophy of *laïcité*.³⁴ The law said, among other things, that “the Republic assures freedom of conscience. It guarantees the free exercise of faiths under no other restrictions than those set out hereinafter in the interests of public order.”³⁵ Article 2 of the 1905 law states: “[T]he Republic does not recognize, remunerate or subsidize any faith.”³⁶ Article 28 makes illegal the public display by the state of religious symbols, with certain exceptions.³⁷

The 1905 law focused largely on extricating the Catholic Church’s property and finances from the state. Curiously, the French government retained ownership of cathedrals and gave ownership of other church property to municipal governments.³⁸ It allowed the Catholic Church, previously recognized under Napoleon, to reorganize as a private entity with tax-exempt status, giving it the right to use the properties for free.³⁹ This part of the law only applied to existing churches, so mosques created later in the century did not become subject to public ownership.⁴⁰ Formerly Catholic Church-owned property continues to benefit from government subsidy today.⁴¹

³¹ WINTER, *supra* note 4, at 66.

³² *Id.*

³³ Judge, *supra* note 24, at 4-5.

³⁴ *Id.* at 5.

³⁵ WINTER, *supra* note 4, at 54.

³⁶ *Id.*

³⁷ *Id.* Winter lists the exceptions as “religious buildings, cemeteries, funeral monuments, and museums or exhibitions.”

³⁸ BOWEN, *supra* note 11, at 27; WINTER, *supra* note 4, at 54-55.

³⁹ BOWEN, *supra* note 11, at 27; WINTER, *supra* note 4, at 54-55.

⁴⁰ BOWEN, *supra* note 11, at 27.

⁴¹ *Id.* at 27-28. Although the property must have existed in 1905, the public ownership provides a substantial benefit to the Catholic Church in France.

IV. TUMULT CONTINUES INTO THE 20TH CENTURY AND BEYOND

After the Algerian War ended, the influx of North African Muslims to France began.⁴² Charles de Gaulle attempted to reinvigorate the “real” France in 1958, in part by pumping money back into Catholic schools.⁴³ According to Judge, de Gaulle did this in part to improve the situation of education across the board.⁴⁴ Parochial schools continue to enjoy access to public funding today. In 1959 the Debré law allowed Catholic schools to continue offering religious instruction as long as students had the option to decline the religious portions of the curriculum.⁴⁵ The Catholic schools had to agree to accept students of any or no belief in order to retain access to public funds.⁴⁶

The next crucial step in setting the stage for the 2004 law came in the form of the opinion of the Council of State of 1989, following the first prominent conflict over the *hijab*.⁴⁷ The equivalent of a junior high school principal sent three girls home for wearing headscarves. Education minister Lionel Jospin sought the opinion from the Council of State as a way out of the polarized political setting resulting from the conflict. The opinion’s language set the groundwork for France’s current approach to religious symbols in school as follows:

In schools, the wearing by students of signs by which they intend to manifest their religious affiliation is not by itself incompatible with the principle of secularism, insofar as it constitutes the exercise of freedom of expression and freedom of manifestation of religious beliefs, but ... this freedom would not allow students to sport signs of religious affiliation that, due to their nature, the conditions in which they are worn individually or collectively, or their ostentatious character or display as a protest, would constitute an act of pressure, provocation, proselytism or propaganda, or would jeopardize the dignity or freedom of the student or of other members

⁴² Judge, *supra* note 24, at 6.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ BOWEN, *supra* note 11, at 27.

⁴⁶ Judge, *supra* note 24, at 6; WINTER, *supra* note 4, at 66.

⁴⁷ WINTER, *supra* note 4, at 135-38. The Council of State is France’s highest administrative court, and the opinions are binding on all courts.

of the school community, would compromise their health or safety, or would perturb the conduct of teaching activities or the educational role of the teachers, or would disturb order in the establishment or the normal operation of public service.⁴⁸

Winter points out that *ostentatoire* does not have an identical meaning to its closest English translation “ostentatious,” but rather has a more subdued meaning akin to “highly conspicuous.”⁴⁹ This distinction matters because the headscarf cases in the following fifteen years would turn on the degree to which headscarves were *ostentatoire*.⁵⁰

Following the 1989 opinion, the Council of State confirmed that schools could not make general bans on religious articles in a 1990 case, striking down a junior high school’s decision to ban “all distinctive signs, worn as clothing or otherwise, of a religious, political or philosophical nature.”⁵¹ Administrative tribunals would use the Council of State opinion to decide headscarf cases until 2004. Estimates vary as to how many headscarf expulsions occurred between 1983 and 2004, but it appears they number less than 100.⁵²

Attention to the headscarf issue fluctuated during the ‘90s, but did not reach critical mass until 2003.⁵³ Winter partly attributes increasingly tense relations between Maghrebians Muslims and the French leading up to passage of the law to the terrorist attacks of 9/11.⁵⁴ Judeo-Muslim relations also grew tense, exacerbated by the 2002 siege of Ramallah.⁵⁵ Political attention to the plight of girls in poor immigrant *banlieues*⁵⁶ grew following the high profile murder of a Muslim girl in a Parisian *banlieue* and the publication of a book exposing the prevalence of gang rapes on poor Muslim girls.⁵⁷ These

⁴⁸ CE, Nov. 27, 1989, Avis no. 246.893, 27, *quoted in* WINTER, *supra* note 4, at 138.

⁴⁹ WINTER, *supra* note 4, at 138.

⁵⁰ *Id.* at 139.

⁵¹ *Id.* at 167, 169-70. The Council similarly struck down another school’s blanket prohibition of head coverings in 1992.

⁵² *Id.* at 164-65.

⁵³ *Id.* at 206-07, 211-12.

⁵⁴ *Id.* at 206.

⁵⁵ WINTER, *supra* note 4, at 207.

⁵⁶ *Banlieue* literally means suburbs, but in reality, they are more like projects.

⁵⁷ WINTER, *supra* note 4, at 207-09.

incidents resulted in public attention and large-scale protests by Muslim girls in 2003.⁵⁸ In 2002, teachers of a large school in Lyon went on strike after the school refused to prevent a Muslim girl from wearing the headscarf.⁵⁹ The teachers viewed the removal of the headscarf as necessary to maintain “fragile” order within the school, based on what they perceived as the tendency for French Muslim youth to adopt a “combative identity, . . . according to [one writer], ‘built in great part around the Israeli-Palestinian conflict.’”⁶⁰

As the centenary of the 1905 law approached, political opposition towards the *hijab* grew.⁶¹ Prominent officials and politicians in France, including those who had previously expressed more accepting views, started making anti-*hijab* comments.⁶² President Jacques Chirac eventually initiated the Stasi Commission to investigate the plight of Muslims in France.⁶³ Winter points out that the Commission consisted mainly of “political and intellectual elite” although it did include proportional Muslim representation (but not proportional female representation).⁶⁴ The Commission heard from dozens of interested groups and academics and received some 2,000 letters expressing views on the *hijab*.⁶⁵

The Commission’s final report included recommendations designed to help Muslim integration in France.⁶⁶ Among other things, the Commission recommended the creation of the National Institute of Islamic Studies as well as an Anti-Discrimination Authority to prosecute discrimination cases in court.⁶⁷ It also suggested adding the Muslim holiday *Eid-el-Kebir* and the Jewish holiday *Yom Kippur* to

⁵⁸ *Id.* Fadela Amara, quoted *supra* note 13 as describing the *burqa* as a “cancer of radical Islam,” was president of the group organizing the protests, *Ni Putes ni Soumises*. *Id.* at 209.

⁵⁹ *Id.* at 211.

⁶⁰ *Id.* at 213, (quoting CHAUDORTT DJAVANN, *Que pense Allah de l'Europe?*, 42 (Gallimard 2004)).

⁶¹ *See id.* at 213-15.

⁶² *Id.* at 214.

⁶³ WINTER, *supra* note 4, at 215.

⁶⁴ *Id.* at 216-18. Winter states that three members were of “Muslim background,” *Id.* at 217, but Bowen says there was only one Muslim on the Commission. BOWEN, *supra* note 11, at 114. To reconcile these two statements, presumably two of the three mentioned by Winter did not actively practice Islam.

⁶⁵ WINTER, *supra* note 4, at 221.

⁶⁶ *Id.* at 220.

⁶⁷ *Id.*

public calendars.⁶⁸ As to the veil, the Commission recommended doing away with the *ostentatoire* standard from the 1989 opinion and using instead the word “*ostensible*,” which watered down the standard from “highly conspicuous” to merely “conspicuous.”⁶⁹ In so doing, the Commission “shifted the focus from degree of provocative display to degree of visibility.”⁷⁰ According to Bowen, eighteen of twenty commissioners voted in favor of the new language.⁷¹

The National Assembly passed a bill adopting the Commission’s recommendation as to conspicuous religious symbols⁷² but left out many of the other “positive” suggestions in the report, like the addition of the Muslim and Jewish holidays to the state calendar.⁷³ Bowen, who attended the hearings, reports that the National Assembly seemed to have made up its mind before starting the hearings that it would make a law banning religious symbols; nonetheless, the Assembly discussed the law for almost twenty-four hours, longer than usual.⁷⁴ Bowen’s commentary, describing and quoting the government’s opening argument during the hearing, gives a lucid picture of the considerations before the National Assembly:

Prime Minister Raffrin opened the session with the government’s case. He framed the issue as follows: “The question is our capacity to preserve our values and to transmit them to immigrants,” he said. He explained that these values included freedom of conscience, equality between men and women, the “humanistic value” of fraternity, and *laïcité*, “which we built in dialogue with the Church.” (Some Socialists later said, “It was war, not dialogue.”) The new law will “respond to those who would place their communalist affiliation above the Republic’s laws.” The veil and other religious signs “take on ipso facto a political meaning and can no longer be considered as personal signs of religious affiliation.” The law is

⁶⁸ *Id.*

⁶⁹ *Id.* at 138, 222.

⁷⁰ *Id.* at 222.

⁷¹ BOWEN, *supra* note 11, at 113.

⁷² As Bowen translates it, the law states, “In public primary and secondary schools, wearing signs or clothes by which pupils clearly display a religious affiliation is prohibited.” *Id.* at 136.

⁷³ WINTER, *supra* note 4, at 224.

⁷⁴ BOWEN, *supra* note 11, at 135.

needed to support school principals and teachers, who have, since the nineteenth century, “integrated immigrants with the children of France.”⁷⁵

The government’s opening statement leaves little to the imagination as to whether the 2004 law implicated deeper notions of integration and xenophobia.

Commission members later made comments about the National Assembly’s narrow focus on the *hijab* issue, but Bowen points out that the other more positive recommendations had arisen in previous commissions.⁷⁶ In that sense, the only new recommendation from the commission that actually passed was replacing the *ostentatoire* language.

French schools have responsibility for enforcing the 2004 law.⁷⁷ Presumably, any issue of interpretation of the 2004 law would go through the same administrative tribunals, as did the prior headscarf disputes, leaving the Council of State and ultimately the European Court of Human Rights with the right of review.⁷⁸ Muslim groups initially spoke out against the law, encouraging girls to wear headscarves.⁷⁹ They intended to argue that the headscarf was a “discreet” religious symbol, making it impliedly permitted under the law.⁸⁰ However, that plan was abandoned after a hostage situation involving French journalists in Iraq made dissent politically difficult.⁸¹

The plight of Muslim leaders in the headscarf debate contrasts with the efforts of French politicians, who try to “be secularist in the face of Islam” yet “Catholic in the face of Rome.”⁸² Winter cites examples from the last several years of political or diplomatic recognition of the Catholic Church or the Pope, as compared with the more aggressive secularism measures towards Islam, such as the ban of

⁷⁵ *Id.* at 136.

⁷⁶ *Id.* at 123.

⁷⁷ BOWEN, *supra* note 11, at 144; WINTER, *supra* note 4, at 139.

⁷⁸ BOWEN, *supra* note 11, at 138; WINTER *supra* note 4, at 137.

⁷⁹ BOWEN, *supra* note 11, at 144.

⁸⁰ *Id.*

⁸¹ BOWEN, *supra* note 11, at 145-46; Judge, *supra* note 24, at 22. The hostage takers in Iraq said they wanted the 2004 law repealed (in exchange for the lives of the hostages), so Muslim leaders in France risked giving the appearance of aligning with the terrorists if they supported resistance to the new law. *Id.*

⁸² WINTER, *supra* note 4, at 80.

the *hjiab*.⁸³ Judge also points out disparity in treatment, noting that “[n]o Muslim school in metropolitan France, and only one in its overseas territories, has yet received comparable financial or legal treatment” to that of Catholic schools.⁸⁴ Judge and Winter, in pointing out these disparities, speak to the “monolithic” character of French secularism, which Winter refers to as “catho-laïcité” or “christiano-laïcité.”⁸⁵

However, both fundamental French Catholics and Muslim leaders have similar desires in the face of aggressive secularism: both want “greater ‘flexibility’ within the secular school system,” and both seem to show “support for Islamic schools,” which, in theory, should deserve the same treatment under the law as Catholic schools.⁸⁶ The schoolgirls in the 1989 headscarf dispute received widespread but not complete support in France from Catholic, Protestant, and Jewish leaders alike.⁸⁷ Some leaders expressed lukewarm support; one bishop commented in 1996 that the *hijab* signifies ““submission”” to Catholics but is ““perhaps for those who wear it, a sign of identification and even emancipation.””⁸⁸

France’s law appears facially neutral, but ultimately, “everyone understood the law to be aimed at keeping Muslim girls from wearing headscarves in school.”⁸⁹ Susana Mancini, in *The Power of Symbols*

⁸³ *Id.* at 76-80. Among other things, she mentions the refusal of some regional leaders to remove crosses from school classrooms, the lowering of French flags to half-mast at the death of Pope Jean-Paul II, and an attempt by the Socialist Party to rename Notre Dame plaza “Place Jean Paul II.” *Id.* at 77-79.

⁸⁴ Judge, *supra* note 24, at 7. French Muslims have made several attempts at forming a political group to represent Muslim interests in France. WINTER, *supra* note 4, at 84. The Conseil Francais du Culte Musulman (CFCM) and its predecessor councils have made limited headway at achieving institutional acceptance of Islam in France. *Id.* at 85. Interestingly, secularist Muslims have attacked the CFCM because it gives allegedly fundamental Muslims the status of the only group “that has been obliged to have religious representation.” *Id.* at 87 (quoting Samia Labidi, *Demain au Bourget: Pour une identité laïque de la communauté arabo-musulmane*, Prochoix, Winter 2004, at 13.).

⁸⁵ *Id.* at 80 (citing JEAN BAUBÉROT, *Histoire de la laïcité en France* (Presses Universitaires de France 2004); *Laïcité et religion dans l’Union Européenne*, http://jeanbauberotlaicite.blogspot.com/europe_et_laicite/).

⁸⁶ *Id.* at 84.

⁸⁷ *Id.* at 140-41.

⁸⁸ *Id.* at 198 (citing LE MONDE, Dec. 16, 2006).

⁸⁹ BOWEN, *supra* note 11, at 1.

and Symbols as Power, summed up the essence of France's message to Islam, notwithstanding the overt rejection of all things religious in public life, as conveying a "dichotomous construction of the relationship between Christianity and Islam, according to which the former—to be sure in a secularized form—is projected as a central component of Western civilization, while the latter is cast as a threatening 'other.'"⁹⁰

V. RELIGIOUS LIBERTY JURISPRUDENCE IN THE EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights (ECHR) interprets the European Convention on Human Rights, of which France is a member. In *Dogru v. France*⁹¹ and *Kervanci v. France*,⁹² the ECHR upheld the expulsion of Muslim girls from public school for wearing the headscarf, relying on the margin of appreciation doctrine⁹³ and accepting the "constitutional" doctrine of secularism in France. The expulsions in both cases predated the 2004 law, but the opinions came after the law and cited the law. Both cases also cited a previous ECHR case, *Sahin v. Turkey*,⁹⁴ which upheld Turkey's ban on the veil in universities. In all three cases, the ECHR accepted the paternalistic argument that state prohibition of the veil was necessary to protect Muslim females from Muslim patriarchy and that the judgment as to the necessity of such protection fell within the margin of appreciation.⁹⁵ The French cases involved physical education class, and *Sahin* involved university students, so the ECHR has not ruled on the 2004

⁹⁰ Susanna Mancini, *The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence*, 30 CARDOZO L. REV. 2629, 2629 (2009).

⁹¹ *Dogru v. France*, App. No. 27058/05, 2008 Eur. Ct. H.R. 1579, available at <http://www.bailii.org/eu/cases/ECHR/2008/1579.html>.

⁹² *Kervanci v. France*, App. No. 31645/04, 2008 Eur. Ct. H.R., no English version available, summary available at <http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/233813e697620022c1256864005232b7/091340f7bb6af613c12575120053c15e?OpenDocument>.

⁹³ The margin of appreciation doctrine refers to the latitude the ECHR grants states based on each state's appreciation of its own unique needs. See Mancini, *supra* note 90, at 2657.

⁹⁴ *Sahin v. Turkey*, App. No. 44774/98, 44 Eur. H.R. Rep. 5 (2005), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=789023&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

⁹⁵ Mancini, *supra* note 90, at 2647-48.

law's blanket ban of the veil for elementary-aged students. The precedents do not bode well for any future challenges, even if a narrow window of opportunity remains open.

Notwithstanding the prior ECHR headscarf cases, a recent ECHR case indicates a possible shift in the court's religion jurisprudence. The dispute started in Italy, a country that, according to Mancini, focuses the rejection of the "other" (read: immigrants and Islam, particularly) in establishing a national identity.⁹⁶ In this case, Solie Lausti, an atheist mother of two school-age boys, sued to stop Italian schools from displaying the crucifix in public school.⁹⁷ Italian courts upheld the display of the crucifix in public schools, concluding that only through Christian values could the state achieve secularism.⁹⁸ In other words, the Italian courts viewed the desirable values of tolerance and non-interference as growing out of Christianity. To Italy, banning the crucifix would have been inconsistent with secularism.⁹⁹ No doubt, countless parties in Establishment Clause cases in the United States have attempted to draw our legal system into the broader cloth of Judeo-Christian values. The argument succeeded to a degree in *Van Orden v. Perry*: "[o]ur opinions, like our building, have recognized the role the Decalogue plays in America's heritage."¹⁰⁰ However, American Establishment Clause cases do not go so far as to describe "but-for" causation like the Italian courts have done.¹⁰¹

⁹⁶ See generally, Mancini, *supra* note 90.

⁹⁷ Lausti v. Italie, App. No. 30814/06, 2008 Eur. Ct. H.R. 1, available in French at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documented=857724&portal=hbkm&source=externalbydocnumber&tabl>. English summary available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=857732&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

⁹⁸ Mancini, *supra* note 90, at 2633.

⁹⁹ *Id.*

¹⁰⁰ 545 U.S. 677, 689 (2005).

¹⁰¹ As in, "but-for Christianity, we would not have tolerance and therefore, secularism." Identifying a necessary causal connection between Christianity and Western liberalism problematically ignores both the possibility of universal religious values and examples of explicit intolerance in Christianity's founding document. See Robert E. Hume et al, *A Definition of Religion: A Symposium* (Concluded), 7 J. OF RELIGION 284, 295 ("Religion is the consciousness of the highest social values."). See, e.g. *Deuteronomy* 22:20-1 ("If, however, the charge is true and no proof of the girl's virginity can be found, she shall be brought to the door of her father's house and there the men of her town shall stone her to death. She has done a disgraceful thing in Israel by being

In any event, the ECHR held in favor of Lausti.¹⁰² Lausti claimed the display violated Article 2 of Protocol 1 of the European Convention,¹⁰³ establishing her right to have her children educated in conformity with her religious convictions. She also claimed that the presence of the crucifixes violated her children's rights under Article 9,¹⁰⁴ which establishes the right to freedom of religion. Agreeing with both claims, the ECHR said that "respect for the convictions of parents should be possible in the framework of an education capable of assuring an open scholarly environment, favoring inclusion over exclusion, regardless of the social origins of the students, their religious beliefs, or their ethnic origins."¹⁰⁵ As to Italy's claims that the crucifix has acquired a non-religious meaning, the court found "the symbol of the crucifix has a plurality of meanings, among which the religious meaning predominates."¹⁰⁶ The court also stated that the symbol could have a negative influence on Lausti's children's right to free exercise:

The presence of the crucifix can easily be interpreted by students of all ages as a religious sign, and they will feel educated in a scholarly

promiscuous while still in her father's house. You must purge the evil from among you.").

¹⁰² Lausti, *supra* note 97.

¹⁰³ Convention for the Protection of Human Rights and Fundamental Freedoms Protocol 1, art. 1, Nov. 4, 1950, 213 U.N.T.S. 222 ("No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.") [hereinafter CPHRFFP].

¹⁰⁴ *Id.* art. 9 ("1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.").

¹⁰⁵ Lausti, *supra* note 97, at 11 ("Le respect des convictions des parents doit être possible dans le cadre d'une éducation capable d'assurer un environnement scolaire ouvert et favorisant l'inclusion plutôt que l'exclusion, indépendamment de l'origine sociale des élèves, des croyances religieuses ou de l'origine ethnique.") (my translation).

¹⁰⁶ *Id.* at 13 ("De l'avis de la Cour, le symbole du crucifix a une pluralité de significations parmi lesquelles la signification religieuse est prédominante") (my translation).

environment marked by a given religion. That which can encourage religious students, might disturb students of other religions, or those who do not profess any religion. This risk is especially present for students of minority religions. Negative liberty is not limited to the absence of religious services or religious instruction. It extends to practices and symbols, specific or general that express a belief, a religion, or atheism. This negative right merits protection if it is the state that is expressing a belief and if the person is placed in a situation in which he cannot get out of or only willfully with disproportionate sacrifice.¹⁰⁷

From an American perspective, the *Lausti* decision looks interesting next to the French headscarf cases. In fact, it seems incomprehensible that the presence of a crucifix violates a child's freedom to exercise religion but a ban on the veil does not. The ECHR exhibited hypersensitivity to free exercise in *Lausti* even though an American court could have easily decided the case on Establishment Clause grounds. Of course, an American jurisprudent might agree that the establishment of religion created by the display of the cross also implicates the free exercise right of students. Nevertheless, the major difficulty comes with the irreconcilability of the crucifix and *hijab* cases.

Ironically, the French Commissioner on Laws said during the 2004 hearings that France needed a legislatively enacted law because of the ECHR's statements indicating that "only the legislator is authorized

¹⁰⁷ *Id.* at 14 ("La présence du crucifix peut aisément être interprétée par des élèves de tous âges comme un signe religieux et ils se sentiront éduqués dans un environnement scolaire marqué par une religion donnée. Ce qui peut être encourageant pour certains élèves religieux, peut être perturbant émotionnellement pour des élèves d'autres religions ou ceux qui ne professent aucune religion. Ce risque est particulièrement présent chez les élèves appartenant à des minorités religieuses. La liberté négative n'est pas limitée à l'absence de services religieux ou d'enseignement religieux. Elle s'étend aux pratiques et aux symboles exprimant, en particulier ou en général, une croyance, une religion ou l'athéisme. Ce droit négatif mérite une protection particulière si c'est l'Etat qui exprime une croyance et si la personne est placée dans une situation dont elle ne peut se dégager ou seulement en consentant des efforts et un sacrifice disproportionnés.") (my translation).

to restrict the exercise of basic liberties,”¹⁰⁸ apparently alluding to the margin of appreciation doctrine. Jean-Paul Costa, President of the ECHR, testified during the 2004 hearings as to the need for legislation to make sure the veil law fell within the ECHR’s margin of appreciation.¹⁰⁹

In curtailing “free exercise” in the headscarf cases, the ECHR gives European states a margin of appreciation in establishing the values by which the State can strike an appropriate balance, tailored to national needs. In the “establishment” context, *Lausti* shows that the court does not provide as wide a margin of appreciation. The free exercise language in *Lausti* leaves an unclear picture as to whether that case also narrows the margin for free exercise. Before *Lausti*, Mancini identified animus towards Islam as the common denominator of the ECHR’s headscarf jurisprudence.¹¹⁰ Now that the court has taken one step against the monolith of Euro-Christian values, Mancini’s argument may shift. Whereas Christianity “lost” in a sense, one cannot really argue that Islam “won.” At the very least, anti-monolithism did not “lose” in the pattern Mancini perceives in disputes in Europe. *Lausti* seems to be a chink in the armor of the monolith.

VI. GROWING ANIMUS IN THE UNITED STATES

France may have a longer history than the United States with Islam, but the United States has become increasingly aware of the presence of Muslims within its borders and abroad. Muslim interaction with the West gained attention from academics in the United States long before 9/11 or the spiked growth of immigrant Muslim populations in parts of the United States.¹¹¹ Popular animus rose with

¹⁰⁸ BOWEN, *supra* note 11, at 137.

¹⁰⁹ *Id.* at 137-39.

¹¹⁰ Mancini, *supra* note 90, at 2661. Mancini points out that the ECHR allows the French government to infringe upon the free exercise prerogatives of individual Muslims in France; while in Turkey, it curtails majority rule based on beliefs that are both Islamic and contrary to Western liberalism. In other words, Mancini sees Islam as on the losing side regardless of other determinative factors in the dispute.

¹¹¹ For example, in 1993, Samuel Huntington infamously described Islam as having “bloody borders” in his post-Cold War world view. See Samuel P. Huntington, *Clash of Civilizations?*, 27:3 FOREIGN AFFAIRS 22 (1993) (later developed and published as SAMUEL P. HUNTINGTON, *CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER*, (Simon & Schuster 1993)). Eight years later, Edward Said lamented the use of 9/11 as “proof” of Huntington’s thesis

the estrangement of relations between Islam and the West beginning in the 1980s.¹¹² Since the terrorist attacks of 9/11, Islamophobia in America has reached new heights.¹¹³ Sam Harris illustrates this sentiment in his book, *End of Faith*, in a chapter titled *The Problem with Islam*, in which he writes, “[w]e are at war with Islam It is not merely that we are at war with an otherwise peaceful religion that has been ‘hijacked’ by extremists. We are at war with precisely the vision of life that is prescribed to all Muslims in the Koran”¹¹⁴ To

in Said’s article, “The Clash of Ignorance.” See Edward W. Said, *The Clash of Ignorance*, THE NATION, Oct. 22, 2001.

¹¹² See, e.g., FAEGHEH SHIRAZI, THE VEIL UNVEILED: THE HIJAB IN MODERN CULTURE 39-61 (Univ. Press of Fla. 2001). Shirazi uses an unlikely source, cartoons in pornographic magazines, to track the evolution of popular American opinion towards Islam and the veil generally before 9/11. She shows how increasing hostility depicted in the cartoons of men’s magazines paralleled U.S. foreign policy towards Muslim states. In the early 1960s, cartoon depictions of Muslim women focused on supposedly licentious and uninhibited gender relations in Muslim societies. *Id.* at 50. These early cartoons show Muslim men in “harem” scenarios, partly reflecting the American male’s tendency to “begrudge the sexual opportunities allotted to these men.” *Id.* at 52. Until the United States “started to conceive Islam, embodied by Ayatollah Khomeini, more and more as a threat to American interests,” the cartoons maintained a comical slant, and depictions of the veil usually portrayed the veil as an object of sexual curiosity and fetish. *Id.*

Following the Iranian hostage crisis of 1981, cartoons in pornographic magazines adopted a more hostile, scathing position towards Islam. *Id.* at 54. Shirazi reports that a 1986 edition of *Hustler* depicts a pregnant Muslim woman wearing a shirt with the words “Future Suicide Bomber” and an arrow pointing at her belly. *Id.* at 58. During Operation Desert Storm in 1991, the cartoons in *Hustler* frequently featured veiled women and made various negative statements about Muslim women, perverse Muslim sexuality, and terrorism. *Id.* at 58-59. She says that in these cartoons, the veil “is the badge of the supporters of terrorism, and it functions as a weapon used against women, by reducing them to body parts and by stifling their screams.” *Id.* at 59. Shirazi guesses that the “us against them” nature of the pornographic cartoons may have even helped to “boost the resolve of American troops to rally against Saddam Hussein.” *Id.*

¹¹³ See Lorraine Sheridan, *Islamophobia before and after September 11th 2001*, in CONFRONTING ISLAMOPHOBIA IN EDUCATIONAL PRACTICE 164 (Barry Van Driel ed., 2004) (citing increases in physical violence, verbal abuse, hate crimes, and Islamophobic material on the internet following 9/11 though acknowledging the questionability of the numbers due to the inadequacy of data before 9/11).

¹¹⁴ SAM HARRIS, THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON 109-10 (Norton 2004).

be fair, Harris vigorously attacks faith of all flavors. Nevertheless, he levels much of the invective in *End of Faith* at Islam. He quotes in depth the violence described and mandated by its tenets.¹¹⁵ He queries, “[w]here are the Palestinian *Christian* suicide bombers? . . . Where are the throngs of Tibetans ready to perpetrate suicidal atrocities against Chinese noncombatants?”¹¹⁶ Harris denies that violent Islamic fundamentalism derives from political or economic forces but rather blames the Qu’ran and *hadith* (the Qu’ran’s guiding narrations).¹¹⁷

Harris’s perspective on the relationship between America and Islam reveals the extent and potential of American Islamophobia post 9/11.¹¹⁸ Dissimilarly, France developed animus against Muslims over time and, of course, occupied Muslim territories well before the exponential growth of Muslim immigration into France. Compared to France’s slowly-compounding internal strife, popular American animus towards Islam escalated precipitously after 9/11.

VII. AMERICAN JURISPRUDENCE AFFECTING THE *HIJAB* IN SCHOOLS

Animus against a group can translate into a “closure strategy,” in which “dominant groups undertake social closure processes to safeguard and ensure their position in the hierarchy.”¹¹⁹ Such strategies have materialized in American schools in the past, such as when “social elites resisted school expansion for particular populations in the early 20th century in an effort to maintain existing structures of class, race,

¹¹⁵ *Id.* at 117-23.

¹¹⁶ *Id.* at 233 (emphasis in original).

¹¹⁷ *Id.* at 109-10. Harris’ characterizations of Qu’ranic verse as inherently violent and Biblical scripture as incapable of justifying violence are suspect. See *Psalms* 45:3-5 (“Gird your sword upon your side, O mighty one . . . Let your sharp arrows pierce the hearts of the king’s enemies; let the nations fall beneath your feet.”); *Matthew* 10:34 (“Do not suppose that I have come to bring peace to the earth. I did not come to bring peace, but a sword.”); *Joel* 3:9-11 (“Proclaim this among the nations: Prepare for war! Rouse the warriors! Let all the fighting men draw near and attack. Beat your plowshares into swords and your pruning hooks into spears. Let the weakling say ‘I am strong!’ Come quickly all you nations from every side, and assemble there. Bring down your warriors, O Lord!”).

¹¹⁸ HARRIS, *supra* note 114.

¹¹⁹ Sharon L. Sassler, *School Participation among Immigrant Youths: The Case of Segmented Assimilation in the Early 20th Century*, 79 SOCIOLOGY OF EDUCATION 1, 4 (2006) (citing Randall Collins, *Functional and Conflict Theories of Educational Stratification*, 36 AM. SOC. REV. 1002 (1971)).

and sex stratification.”¹²⁰ American jurisprudential recalcitrance to banning religious symbols shows sensitivity to the possibility of animus and broader social-closure strategies. Indeed, American jurisprudence embraces the concept of “overlapping consensus,” in which groups use liberal democracy to find common ground, with the goal of achieving justice in a pluralistic society.¹²¹

Consistent with the theory of overlapping consensus, the United States boasts robust anti-establishment and free exercise jurisprudence. Notably, anti-establishment principles do provide some of the foundation for French secularism. In France, as discussed, *supra* section III, two centuries of occasional bloody strife led to separation of church and state in 1905, with the conclusion that “the Republic does not recognize, remunerate or subsidize any faith.”¹²² One can debate the degree to which France embodies this principle, given the inequality of treatment towards Catholic property and schools as compared to that of other sects, but the United States agrees with the ostensible meaning of the language of the law.¹²³ Interestingly, the Establishment Clause, as America’s fundamental guideline prohibiting state religion, provides less explicit limitations than France’s 1905 law. The Establishment Clause simply provides that “Congress shall make no law respecting an establishment of religion.”¹²⁴ *Engle v. Vitale* discusses the pilgrims’ abhorrence of the state-mandated “Book of Common Prayer” in England and the importance of the pilgrim experience to both the constitutional guarantee against establishment

¹²⁰ *Id.* at 5.

¹²¹ See generally NORMAN BOWIE & ROBERT SIMON, *THE INDIVIDUAL AND THE POLITICAL ORDER: AN INTRODUCTION TO SOCIAL AND POLITICAL PHILOSOPHY* 185 (Rowman & Littlefield Publishers, 4th ed. 2008). Bowie quotes Rawls as saying, “The problem of political liberalism is: How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?” *Id.* at 185 (citing JOHN RAWLS, *POLITICAL LIBERALISM* (1993)). For a more cynical view of faith-based pluralism, see Harris, *supra* note 114, at 26. Harris describes conflicts between religious groups as “psychological experiments run amok,” as though a mad scientist decided to “give people divergent, irreconcilable, and untestable notions about what happens after death, and then oblige them to live together with limited resources.” *Id.*

¹²² WINTER, *supra* note 4, at 54.

¹²³ *Id.* at 54-55.

¹²⁴ U.S. CONST. amend. I.

and jurisprudence interpreting the Establishment Clause.¹²⁵ The backlash against state-sponsored religion gives the United States something in common with the French experience.

The *hijab* debate implicates a Free Exercise analysis more so than an Establishment Clause analysis, notwithstanding commentators' identification of a monolithic identity underlying the rejection of Islamic symbols in France. As to the similarities between the primary documents at work, the 1905 law states that "the Republic assures freedom of conscience. It guarantees the free exercise of faiths under no other restrictions than those set out hereinafter in the interest of public order."¹²⁶ The principle of the 1905 law harkens back to the Declaration of the Rights of Man and of the Citizen of 1789, stating, "No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law."¹²⁷ As discussed above, French educators cast the 2004 law as necessary to the French in the interest of public order. France's emphasis on "public order" is absent from the First Amendment to the United States Constitution, which provides that "Congress shall make no law . . . prohibiting the free exercise" of religion.¹²⁸ Except for the explicit mention of "public order," the United States and France both have primary documents that protect religious expression.

A review of American cases illustrates how the Free Exercise Clause protects the religious prerogative to wear the *hijab* to a greater extent than France, notwithstanding the similarities in the founding documents. United States courts almost certainly would not accept a blanket ban on the Muslim veil in public school. *Hearn v. Muskogee Public School District* is the one federal case brought to challenge the forced unveiling of a Muslim girl in an Oklahoma high school.¹²⁹ The school capitulated before trial and settled, consenting to a decree allowing Hearn to re-veil and agreeing to establish a new head covering policy.¹³⁰ The new policy allowed a student to request permission to

¹²⁵ *Engle v. Vitale*, 370 U.S. 421, 425-33 (1962).

¹²⁶ WINTER, *supra* note 4, at 54.

¹²⁷ See *Dogru*, App. No. 27058/05, 2008 Eur. Ct. H.R. 1579, available at <http://www.bailii.org/eu/cases/ECHR/2008/1579.html> (giving brief background of French secularism).

¹²⁸ U.S. CONST. amend. I.

¹²⁹ *Hearn v. Muskogee Pub. Sch. Dist.* 020, No. CIV 03-598-S (E.D. Okla. May 3, 2004) (consent decree), available at http://www.justice.gov/crt/religdisc/hearn_consent_decree_final.pdf.

¹³⁰ *Id.*

wear a head covering “for a bona fide religious reason.”¹³¹ The school board could deny the permit if it found the student did not have a sincerely held belief regarding the head covering or if “the exception would be likely to cause a material danger to safety and security.”¹³²

The Department of Justice (DOJ) submitted a forceful brief for summary judgment as intervenor-plaintiff in the *Hearn* case, in which it argued that Hearn had a valid hybrid free-exercise/free-expression claim.¹³³ The DOJ stated that the district supported the ban of the *hijab* on several grounds, such as “to further school safety and discipline; to promote a learning environment free of ‘unnecessary’ disruption; [and] to maintain a ‘religion-free zone’ in schools”¹³⁴

Thus, the school’s justifications for making Hearn remove the *hijab* resemble the French justifications for the 2004 law. “Unnecessary disruption” corresponds to the French teachers’ calls for removal of veils to maintain “delicate order.” The desire for a “religion-free zone” aligns with commentators’ characterizations of *laïcité* as seeking to establish a “protected, privileged, multifunctional social space within which Republican principles [can] survive and prosper”¹³⁵ or an “exclusionary” policy towards “public visibility of religion.”¹³⁶ However, the school did not actualize these goals in the *Hearn* case.

The school in *Hearn* created a set of bad facts. The school had a facially general “hat rule” but selectively applied that rule to Hearn when officials made her remove her headscarf.¹³⁷ The school allowed hats in other scenarios to include for the modesty of chemotherapy patients suffering hair loss.¹³⁸ By failing to have a generally applicable

¹³¹ *Id.* at 3.

¹³² *Id.*

¹³³ United States’ Memorandum of Law in Support of Its Cross-Motion for Summary Judgment and in Opposition to Defendants’ Motion for Summary Judgment, *Hearn v. Muskogee Pub. Sch. Dist.* 020, No. CIV 03-598-S (E.D. Okla. May 6, 2004), available at http://www.usdoj.gov/crt/religdisc/musk_memo.pdf [hereinafter United States Memorandum].

¹³⁴ *Id.* at 7 (numbering omitted).

¹³⁵ BOWEN, *supra* note 11, at 29.

¹³⁶ Kuru, *supra* note 3, at 571.

¹³⁷ United States Memorandum, *supra* note 133, at 2.

¹³⁸ *Id.* at 3.

standard, the school's prohibition could not satisfy the required rational basis review.¹³⁹

The DOJ also correctly pointed out that the school had not established facts showing a substantial threat of disruption, meaning that the prohibition most likely ran afoul of *Tinker v. Des Moines Independent Community School District*, which confirmed the free speech prerogative of students.¹⁴⁰ The DOJ compared the *hijab* to the black armband in *Tinker* and referred to the *hijab* as a "pure symbol."¹⁴¹ The political speech of the armband in *Tinker* and the religious speech embodied in the *hijab* both deserve high protection, but saying the *hijab* is a pure symbol generalizes too broadly. The *hijab* is an article of clothing in addition to being a symbol.

The DOJ also argued for strict scrutiny on the basis of the hybrid character of Hearn's claim in that it touched both her rights to free speech and religious liberty.¹⁴² The District Court did not rule on the merits in *Hearn*, but the hybrid claim seems appropriate in the *hijab* context. The hybrid rights concept has appeared in school First Amendment jurisprudence elsewhere. It applied in *Pierce v. Society of Sisters* to the extent that the combined powers of the Free Exercise Clause and parental autonomy over a child's education prevent the state from prohibiting the maintenance of private schools.¹⁴³ A similar argument arose in *Wisconsin v. Yoder*, a case in which Amish parents benefited from the hybrid right to exercise religion freely and to control the upbringing of their children.¹⁴⁴ Granted, neither *Pierce* nor *Yoder* used the word "hybrid," but the Supreme Court later recognized the rights as such.¹⁴⁵ The concept of hybrid rights fits squarely into the *hijab* debate and reflects an ideology crucial to American jurisprudence but absent from French thought.

As further support of the ideological rift illustrated by the *hijab* in *Passive and Aggressive Secularism: Historical Conditions, Ideological Struggles, and State Policies toward Religion*, Ahmett Kuru argues that differences in the ideologies of officials account for

¹³⁹ *Id.* at 11 (citing *Employment Div. v. Smith*, 494 U.S. 872, 877-79 (1990)).

¹⁴⁰ *Id.* at 21 (citing *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)).

¹⁴¹ *Id.*

¹⁴² *Id.* at 14.

¹⁴³ *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

¹⁴⁴ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹⁴⁵ *Smith*, 494 U.S. at 882.

the differences in the respective approaches to secularism in the United States and France.¹⁴⁶ He points out that even Supreme Court Justices have believed in either “accommodation” or “separation” to varying degrees.¹⁴⁷ As he points out, “separationists” have kept prayer out of school, yet “accommodationists” ultimately prevailed because religious clubs may meet in school classrooms after school hours.¹⁴⁸ The case to which Kuru refers, *Good News Club v. Milford Central School*, strikes an interesting contrast with the French experience.¹⁴⁹ In that case, the Supreme Court held that excluding a religious student group from meeting in a public school classroom after school hours violated the free speech rights of the students and that allowing such meetings would not create an establishment clause problem.¹⁵⁰ In France, the presence of conspicuously religious symbols on the part of students violates the secular nature of the public space.¹⁵¹ The presence of an after-school religious group implicates establishment at least to the extent that the wearing of the *hijab* does; consistency would require a case like *Good News* to come out the other way in France.

On the other hand, France’s continued direct support of Catholic schools reveals a paradox. The same kind of long-lasting, direct funding in the United States would probably run afoul of our school funding cases, notwithstanding the approval of Ohio’s distinguishable scheme in *Zelman v. Simmons-Harris*.¹⁵² In France, the government funds Catholic school unilaterally while in *Zelman* the parents, as private decision-makers, diverted the funds to the schools. The comparison of United States religious school funding and French

¹⁴⁶ Kuru, *supra* note 3.

¹⁴⁷ *Id.* at 580.

¹⁴⁸ *Id.*

¹⁴⁹ *Good News Club v. Milford*, 553 U.S. 98 (2001).

¹⁵⁰ *Id.*

¹⁵¹ French courts arguably perceive entanglement or even establishment by virtue of a religious symbol’s mere presence in a public space. Perhaps the difference from the view of American courts is a matter of degree. Free exercise and establishment are two sides of the same coin, after all. As stated in *Abington School District v. Schempp*, 374 U.S. 203, 256 (1963), “the Establishment Clause [is] a coguarantor, with the Free Exercise Clause, of religious liberty. The framers did not entrust the liberty of religious beliefs to either clause alone.” If the difference is one of degree, France must either equate the private expression with establishment of a religion or believe that subjecting others to the private expression violates their free exercise prerogatives.

¹⁵² *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

religious school funding does not directly bear on the *hijab* debate, but it reflects a noteworthy inconsistency in the French approach. The French allow direct funding, which the United States does not, but the French do not allow individual expression of religious belief, which the United States does allow.

Board of Education of Kiryas Joel v. Grumet also has implications for the *hijab* debate, at least from the perspective of overlapping consensus.¹⁵³ In that case, the Supreme Court rejected a scheme that insulated students of a particular religion in their own school district.¹⁵⁴ Special needs children from the Satmar Hasidic community had to attend special programs at public schools because of the community's lack of such programs but experienced "panic, fear and trauma" in the public schools on account of "leaving their own community and being with people whose ways were so different."¹⁵⁵ In response, New York created a public district for the Satmar community.¹⁵⁶ Similarly, Muslim girls might experience feelings of trauma in public schools (in France or the U.S.), either because of the veil's differentiating effect or because of forced un-veiling. With both the veil debate and the case of the Satmars, the state arbitrates between society at large and an insular group.

Kiryas Joel represented the attempt of a state to allow a community to exist insulated from the rest of American society. One could view its holding as adopting a positive principle rejecting such insulation. Calls for more Muslim schools in France, which may be justified given the ubiquity of Catholic schools, could result in the same insulating effect. If Catholic, Jewish, or atheist children would not attend Muslim schools, which seems likely, the potential homogeneity of widespread Muslim schools could magnify the insulating effect.

The United States Supreme Court ultimately held that the specially-created school district for the Satmars amounted to "an allocation of political power on a religious criterion and neither presupposes nor requires governmental impartiality toward religion" and therefore violated the Establishment Clause.¹⁵⁷ Admittedly, establishment and entanglement are not the predominate issues in the *hijab* debate, even if as in *Hearn*, schools require special permission for

¹⁵³ Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 692.

¹⁵⁶ *Id.* at 693.

¹⁵⁷ *Id.* at 690.

a Muslim girl to wear the *hijab* in the face of an otherwise generally applicable ban on hats, which might come close to entanglement.¹⁵⁸ Special permission to veil does not amount to “a government’s purposeful delegation on the basis of religion,” as with the school district in *Kiryas Joel*.¹⁵⁹ *Kiryas Joel* does not provide a perfect analogue to the *hijab* debate but does give context to its integration and overlapping consensus implications.

Chalifoux v. New Caney Independent School District bolsters the likelihood that a United States court would reject a broad prohibition of the *hijab*.¹⁶⁰ The school in *Chalifoux* cited gang affiliation as grounds for prohibiting rosaries.¹⁶¹ The court held that the rosaries were “pure speech” and thus did not fall within *United States v. O’Brien*, which allows the state to regulate conduct if the conduct has only incidental implications for expression.¹⁶² Nor did the prohibition of rosaries fall exactly within *Tinker* because the school did not intend to “restrict Plaintiffs’ religious message.”¹⁶³ Nevertheless, the court chose to use *Tinker*’s substantial disruption standard.¹⁶⁴ The court found that the school had not presented sufficient evidence to show disruption or threat of disruption resulting from the rosaries.¹⁶⁵ The plaintiffs had no gang ties, and the school told them to remove the rosaries largely to protect the plaintiffs themselves.¹⁶⁶ The school did have evidence of some gang members wearing rosaries for affiliation in and out of school, but the court saw the incidents as too speculative and insufficient to show a threat of disruption.¹⁶⁷

The threat of disruption from potential gang affiliation in *Chalifoux* probably surpasses any threat of disruption stemming from the *hijab*. The school in *Hearn* did cite concerns about gang activity and the disruptive aspect of some student complaints, but it did not seem to have any evidence to support the gang argument, and mere

¹⁵⁸ I am referring to the terms of the settlement in *Hearn*, not the initial order to *Hearn* to unveil.

¹⁵⁹ *Kiryas Joel*, 512 U.S. at 699.

¹⁶⁰ *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F.Supp. 659 (S.D. Tex. 1997).

¹⁶¹ *Id.* at 663.

¹⁶² *Id.* at 666 (citing *United States v. O’Brien*, 391 U.S. 367 (1968)).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 667.

¹⁶⁶ *Chalifoux*, 976 F.Supp. at 663.

¹⁶⁷ *Id.* at 667.

student complaints almost certainly would not have carried the day. The amount of evidence necessary to show disruption, given *Chalifoux's* disregard for the evidence of gang activity, overshadows the claim by French school administrators that protecting the "delicate" balance of order required prohibiting the veil. Of course, the French administrators' claim referred to a national prohibition to protect a national balance, but national disorder in the United States could hardly constitute reliable evidence of a threat of disruption in any individual school.¹⁶⁸ And more generally, the potential for hybrid claims¹⁶⁹ would probably outweigh claims of disruption in all but the most extreme circumstances in the United States.

Cases outside the school context have also dealt with religious head coverings. These cases, while dealing with adults, help define the parameters of the *hijab's* potential protection and deserve at least a brief examination. The Third Circuit upheld the prohibition on the *hijab* for a Philadelphia police officer in *Webb v. City of Philadelphia*, citing the importance of "a disciplined rank and file for efficient conduct of [police department] affairs."¹⁷⁰ The need for discipline in the police setting can therefore overcome the free exercise prerogative of the officer. The need for identification in jails, courts, and other government institutions similarly overcomes the prerogatives of visitors.

In *Ishmawiyl v. Vaughn*,¹⁷¹ a district court denied a preliminary injunction sought by a Muslim woman who had to wait until a female prison worker became available to watch her remove her veil before she could enter for visitation with her incarcerated son. The court found that the state had a compelling interest in identifying visitors by face and that the practice of using a female officer when available was

¹⁶⁸ Bowen points out that French teachers were divided on the ban, but administrators supported it in hopes of a "definitive solution." BOWEN, *supra* note 11, at 121.

¹⁶⁹ While different circuits treat hybrid claims differently, a more detailed examination is beyond the scope of this paper. Overall, hybrid claim arguments would still benefit a *hijab* wearer.

¹⁷⁰ *Webb v. City of Phila.*, 562 F.3d 256, 262 (3d Cir. 2009). The same court previously held that the department must allow religious beards for Muslim officers because of the exception offered to officers who could not shave for medical reasons. See *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999).

¹⁷¹ *Ishmawiyl v. Vaughn*, No.94-7040, 1995 WL 461949, (E.D.Pa. Aug. 1, 1995).

narrowly tailored to achieve that interest.¹⁷² Using a similar approach, the Attorney General of Maryland opined that in conducting courthouse security, “it would be useful if security details were comprised of both male and female officers and if a private space were available at the entrance of the courthouse for those individuals whose religion discourages removal of a head covering in public.”¹⁷³

A Florida court found no substantial burdening of a Muslim woman’s sincerely held religious beliefs when the state denied her a driver’s license because of her refusal to unveil for the picture.¹⁷⁴ The court relied heavily on an expert Muslim witness for the state who “testified that Islamic law accommodates exceptions to the practice of veiling because of ‘necessity.’”¹⁷⁵ The expert also pointed out that “even in Saudi Arabia, women are required to have fullface photographs for their passports and for exam taking.”¹⁷⁶

Returning to the public school setting, at least three states have laws prohibiting teachers from wearing religious garb. Oregon’s law says that “[n]o teacher in any public school shall wear any religious dress while engaged in the performance of duties as a teacher.”¹⁷⁷ Pennsylvania’s law says “[t]hat no teacher in any public school shall wear in said school or while engaged in the performance of his duty as such teacher any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination.”¹⁷⁸ Finally, Nebraska makes it illegal for a teacher to wear “in such school or while engaged in the performance of his or her duty, any dress or garb indicating the fact that such teacher is a member or an adherent of any religious order, sect, or denomination.”¹⁷⁹ These statutes have survived constitutional attack. For example, in 1990, the Third Circuit upheld the Pennsylvania law on the grounds that the state has a compelling interest in maintaining a teacher’s appearance of religious neutrality and that Pennsylvania narrowly tailored the law to

¹⁷² *Id.*

¹⁷³ 94 Md. Op. Atty. Gen. 81 (2009).

¹⁷⁴ *Freeman v. Dept. of Highway Safety and Motor Vehicles*, 924 So.2d 48 (Fla. Dist. Ct. App. 2006).

¹⁷⁵ *Id.* at 52.

¹⁷⁶ *Id.*

¹⁷⁷ OR. REV. STAT. § 342.650 (2009).

¹⁷⁸ 24 PA. CONS. STAT. ANN. § 11-1112 (2009).

¹⁷⁹ NEB. REV. STAT. § 79-898 (2009).

meet that interest.¹⁸⁰ The validity of these laws, as compared to a hypothetical (and invalid) ban on the *hijab* for students, delineates one distinction between a religious-garb establishment issue and a religious-garb free expression issue for American courts.

The American cases discussed illustrate the tolerance inherent in a theory of justice in which liberal democracy seeks overlapping consensus. Even in the case of forced integration, like *Kiryas Joel*, groups must find common ground to avoid constant friction. At least, American jurisprudence suggests this is the case.

VIII. INTEGRATION IN FRANCE AND THE UNITED STATES

The United States jurisprudence shows a higher institutional tolerance for religious expression in schools than that of France. I posit that the American approach has the potential to facilitate social integration to a greater degree than the French approach. The last section of this paper discusses integration trends in the United States and France with an emphasis on public school.

Trica Keaton integrated herself into a Muslim *banlieue* to survey school age Muslim girls in search of information about French assimilationism. In her article on the experience, she says that "...arrogant assimilationism, buttressed by a common culture ideology, inheres in French society" and is an "expectation" within the *banlieues*.¹⁸¹ Keaton unsurprisingly finds that France's militant approach to assimilation "is not only reflected in national identity politics but also mediated by educational structures."¹⁸² "[T]he school, as an extension of the state, is a primary site for the imposition and elaboration of the dominant culture and its categories of perception," says Keaton.¹⁸³ Public school becomes like a fulcrum, the point of convergence of immigrant cultures and the monolith of the state. Banning headscarves thus drives a wedge between immigrant communities and the rest of France. Keaton describes the "other France," consisting of Muslim *banlieues* filled with individuals that,

¹⁸⁰ *United States v. Bd. of Educ. for Sch. Dist. of Phila.*, 911 F.2d 882 (3d Cir. 1990).

¹⁸¹ Trica Keaton, *Arrogant Assimilationism: National Identity Politics and African-Origin Muslim Girls in the Other France*, 36 *ANTHROPOLOGY & ED. Q.* 405, 406 (2005).

¹⁸² *Id.*

¹⁸³ *Id.* at 407 (citing PIERRE BOURDIEU & LOÏC WACQUANT, *AN INVITATION TO REFLEXIVE SOCIOLOGY* (1992)).

despite their self-identification as natives of France, are “*les autres*” in the eyes of France.¹⁸⁴ To summarize the plight of the immigrant youth in France, “[a]s youth from the other France, they have been constituted as delinquents—an identified social problem. As youth of color, they are racialized, and as Muslim girls, they are viewed as the antithesis of French national identity.”¹⁸⁵ Adding to the identity crisis is the fact that youth who return to their countries of origin may face stigmatization for having “defected” to French culture.¹⁸⁶ Females in particular may face the challenge of having people “back home” assume they lost their sexual virginity in the “sexually liberal France.”¹⁸⁷

Keaton is not alone in her analysis. The literature is replete with stories of alienation of Muslims in France and its neighboring states.¹⁸⁸ Hostile generalizations grouping violence with Islam have become increasingly commonplace throughout Europe and the United States. One educator describes the nature of the slurs she heard in high schools with an example from a 16-year-old American student: “If they are not terrorists themselves, they are probably related to one!”¹⁸⁹

Public school can play a powerful role in addressing this cultural dissonance, setting the stage for peaceful coexistence consistent with the principle of overlapping consensus. Public school, as uniformly available and pedagogical in nature can “prepare children for our pluralistic society.”¹⁹⁰ Indeed, one author points out that “not only do young people experience the greatest part of their social learning within the new society and through its institutions, but they also represent the future of the family and the ethnic or religious community in the

¹⁸⁴ *Id.* at 406. “*Les autres*” means “the others,” and encompasses “outsiders” or “non-French” in this context.

¹⁸⁵ Keaton, *supra* note 181, at 406.

¹⁸⁶ *Id.* at 410.

¹⁸⁷ *Id.*

¹⁸⁸ For example, in his introduction to *CONFRONTING ISLAMOPHOBIA IN EDUCATIONAL PRACTICE*, Van Driel describes a poster promulgated by the Dutch government depicting a woman in a *hijab* with the caption, “how can we liberate them?” Barry van Driel, *Introduction* to *CONFRONTING ISLAMOPHOBIA IN EDUCATIONAL PRACTICE*, at ix (Barry van Driel ed., Trentham Books, 2004).

¹⁸⁹ J’Lein Liese, *The Subtleties of Prejudice: How Schools Unwittingly Facilitate Islamophobia and How to Remedy This*, in *CONFRONTING ISLAMOPHOBIA IN EDUCATIONAL PRACTICE* 66 (Barry van Driel ed., 2004).

¹⁹⁰ Beth Finkelstein, *Practical Educational Programming that Confronts Islamophobia*, in *CONFRONTING ISLAMOPHOBIA IN EDUCATIONAL PRACTICE* 77 (Barry van Driel ed., 2004).

country of residence.”¹⁹¹ A proponent of a religious education curriculum explains the importance of instilling proper skills in a multicultural society at a young age:

To thrive in a diverse society and to be prepared to combat prejudice, one needs to be able to understand one’s own identity, ask important and respectful questions about others, and find enrichment, not threat, in diversity. These are basic, social-emotional skills, which can be built into the classroom setting.

....

The time to begin teaching these civic, social-emotional skills and to prepare children to learn about the religions of the world is at the very start of formal education, for both developmental and academic reasons. Prejudice and bias do not afflict only adolescents and adults. Research indicates that children can exhibit racist attitudes as early as preschool. Even toddlers can form negative prejudices in an environment that displays ‘clear ethnic friction.’¹⁹²

The public school, as a dominant influence in a child’s formative years, can play a part in preempting future racism in an increasingly connected, pluralistic America. In that sense, public school “must prepare pupils for citizenship in the Republic It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.”¹⁹³

Among the potential benefits to using public school as a vehicle to facilitate assimilation is the opportunity to prevent social backlash of Muslim families in America. Keaton reports that some 60,000 Muslim students have left schools in France in the last ten years “without any meaningful certifications or diplomas, only to join the ranks of the

¹⁹¹ Patricia Kelly Spurles, *Coding Dress: Gender and the Articulation of Identity in a Canadian Muslim School*, in *THE MUSLIM VEIL IN NORTH AMERICA: ISSUES AND DEBATES* 46 (Sajida Sultana Alvi et al. eds., Women’s Press, 2003).

¹⁹² Finkelstien, *supra* note 190, at 82 (internal citations omitted).

¹⁹³ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

unemployed.”¹⁹⁴ Alienation of racial groups mirrors alienation of individuals within those groups. “People who feel under attack retreat further into their own communities, which is exactly what we do not want to happen,” argues a columnist in the *Irish Times*.¹⁹⁵ The downslide into an insulated subgroup can lead not only to economic failure but also to alignment with extreme groups. Individual identity crisis and the solace of extreme social groups can have synergistic momentum during the formative years of an immigrant searching for identity.¹⁹⁶

Why should the veil play such a crucial role in the integration of immigrants or the continued well-being of more established families in France or the United States? Rejection of the veil alone does not lead to immediate alignments with terrorist organizations. However, assuming the veil plays an unimportant or innocuous role in Muslim culture improperly minimizes a profoundly complex article of clothing. Evidence shows French Muslims with the means to do so flocked to private Catholic schools as tension surrounding the headscarf debate rose because the Catholic schools allowed girls to wear headscarves.¹⁹⁷ To put the potential gravity of the reaction of some Muslims in perspective, “[f]orced unveiling of women in Iran is comparable to the shock that Westerners would experience if women of all ages were forced to go topless in public.”¹⁹⁸ Not every Muslim’s reaction would

¹⁹⁴ Keaton, *supra* note 181, at 406.

¹⁹⁵ Breda O’Brien, Editorial, *It Is Better to Avoid Making the Hijab a Major Issue*, THE IRISH TIMES, May 31, 2008, at 14.

¹⁹⁶ For one story of such a downslide into terrorism, see Sara Wajid, *Extremism and Back*, TIMES EDUCATIONAL SUPPLEMENT, Nov. 16, 2007, at 8. The following is excerpted from Wajid’s interview with a Bangladeshi former terrorist in England: “‘I’ve never identified myself as Bangladeshi - I was born here, raised here and didn’t visit Bangladesh till [sic] I was 19 and that was only to see my grandparents,’ he says. In his isolation, he turned to religion, and befriended another pupil who led him towards extremism.” *Id.* at 7. In the case of the interviewee, “[b]y 16, he says he had no white friends at all and had to make a choice between Asian street gangs and well-dressed Islamists. He chose the Islamists.” *Id.* In his words, “‘Hizb ut-Tahrir gave me that social network and sense of belonging that Britain didn’t - and still doesn’t - offer the young children of immigrants. What are we supposed to sign up for? Identity is a huge problem.’” *Id.*

¹⁹⁷ Judge, *supra* note 24, at 15.

¹⁹⁸ EL GUINDI, *supra* note 7, at 130 (quoting J. Norton, *Faith and Fashion in Turkey*, in *LANGUAGES OF DRESS IN THE MIDDLE EAST* 149-77 (N. Lindisfarne-Tapper et al. eds., Curzon with The Centre of Near and Middle Eastern Studies, SOAS, 1997)).

be this grave, but it is a potential reaction nonetheless.

Muslim women in the United States often adopt the veil during a unilateral search for identity having nothing to do with suppressive influence of men. One researcher conducted numerous interviews with Muslim girls growing up in Muslim families that had recently relocated to Canada from other countries.¹⁹⁹ The interviews reveal identity issues as the girls try to cope with conflicting spheres of reality influencing their lives, particularly at the middle school and high school ages when other girls start dating, going out, and generally exploring social life as young adults.²⁰⁰ The researcher reports, perhaps curiously, that the young Muslim immigrants increasingly attend mosque and increasingly seek “discussion groups, youth camps, and Internet sites where women can participate in discussion and debate, particularly younger women.”²⁰¹ Also particularly important for immigrant Muslim females is that symbols such as the veil give meaning to the social solidarity of cultural groups. As one anthropologist puts it, “dress survives destabilized geography and borders to communicate messages about identity and to serve as an embodiment of a group’s memory.”²⁰²

The trends revealed in the research tend to show that Muslim girls in Muslim families in Canada adopt the veil for various reasons. While the influence of restrictive parents comes into play for many girls, the author does not describe involuntary veiling for any of the

¹⁹⁹ Homa Hoodfar, *More Than Clothing: Veiling as an Adaptive Strategy*, in *THE MUSLIM VEIL IN NORTH AMERICA: ISSUES AND DEBATES* 3-40 (Sajida Sultana Alvi et al. eds., Women’s Press, 2003).

²⁰⁰ *Id.* A recurring theme throughout the study is that many girls adopt the veil unilaterally (without any demand from the family), sometimes accompanied by unilateral study of Islam. *Id.* at 23-24. The girls seemed to value the respect earned from their families resulting from the embracement of Islam and the cultural traditions of “home.” *Id.* One young woman even says, “I would never have taken up the veil if I lived in Egypt.” *Id.* at 30. The motivation for her to veil derived from a desire to identify with Islamic values and assert that identity while surrounded by Western society. *Id.* at 31. Often the girls in the study chose to veil for the sole purpose of getting more freedom in an otherwise strict household. *Id.* at 18. The parents believe the girls are growing up as “good” Muslim girls, as evidenced by the veil, and become more likely to give the girls freedom to do the things less-restricted (non-Muslim) young adults do. *Id.* The girls get a better chance to succeed at socialization. *Id.* The same researcher mentions the tendency of career Muslim women in North America who completely “Westernize” to return to Islam and re-adopt Islamic values, often seeking Muslim males as marriage partners. *Id.* at 34-37.

²⁰¹ *Id.* at 17.

²⁰² EL GUINDI, *supra* note 7, at 58.

girls. The interviews illuminate struggles to integrate into Canadian society. The prevalence of identity issues among young Canadian Muslim females likely applies equally to Muslim females in the United States. Mancini referred to human identity as necessarily plural.²⁰³ Her truism applies with full force in the context of veiling in public schools.

IX. CONCLUSION

“Not taking into account ‘their inescapably plural identities’ ends up trapping human beings within monolithical, non-negotiable identities, anchored to their history and unsusceptible of transformation, and therefore structurally meant to clash, rather than to dialogue, with ‘other’ identities.”²⁰⁴ Public school, an institution specially situated at the intersection of the nuclear family and the state, has the potential to enable integration unlike any other public institution in modern society. The average American spends the bulk of her formative years in a public school classroom, bringing home a multitude of experiences, good and bad, enlightening and disabling, offered by its teachers and students.

Additionally, a culturally insulated family may have its closest contact with the larger American culture by way of the child’s attendance at public school. Whether the child is met with curiosity, disdain, hostility, or acceptance can shape the entire family’s integration experience. Institutional reactions, bearing the imprimatur of the state and therefore of the people, can assault or assuage the sensibilities of the “other” depending on the content of those reactions. This is true of state institutional reactions even more profoundly than it is of the collective reactions of individuals in the state. Acceptance of the veil is not a panacea for integration struggles. However, American constitutional guarantees may offer capable tools for arbitrating the struggle of groups and individuals to find commonalities in a shrinking, plural, and complex world.

²⁰³ Mancini, *supra* note 90, at 2667.

²⁰⁴ *Id.*

