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TOO MUCH TO BARE? A COMPARATIVE ANALYSIS OF THE HEADSCARF IN FRANCE, TURKEY, AND THE UNITED STATES

BY HERA HASHMI*

INTRODUCTION

In July 2009, a man stabbed and killed a pregnant woman wearing a headscarf in a German courtroom during an appellate trial for his Islamophobic remarks against her.¹ Her death led to outrage around the world, and she became known as the “martyr of the veil,” a woman killed for her religious belief.² Yet it was just a simple piece of cloth that evoked this violent reaction. Such Islamophobic sentiments seem to be spreading throughout various parts of the world. In 2004, France banned headscarves and all conspicuous religious symbols from public classrooms.³ In 2005, the European Court of Human Rights (ECtHR)⁴ upheld Turkey’s headscarf ban barring thousands of headscarf-wearing women from attending schools, universities, and entering government buildings in a country where a majority of the population is Muslim.⁵ In 2008, a Muslim woman was jailed in a courthouse in Atlanta, Georgia after refusing to remove her headscarf

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1. *Egyptians Angry Over German Court Slaying*, CNN.COM (July 7, 2009), <http://www.cnn.com/2009/WORLD/europe/07/06/egypt.woman.killed/index.html>.

2. *Id.*

3. Elaine Sciolino, *The Reach of War: Religious Symbols; Ban on Headscarves Takes Effect in a United France*, N.Y. TIMES, Sept. 3, 2004, at A8.

4. The ECtHR supervises the European Convention on Human Rights and Fundamental Freedoms (ECHR). The Court considers complaints alleging violations of rights set forth in the Convention by States contractually bound to follow it. Isabelle Rorive, *Religious Symbols in the Public Space: In Search of a European Answer*, 30 CARDOZO L. REV. 2669, 2671 (2009). In France, decisions by the ECtHR are binding, and sometimes even supersede domestic law. EUR. COURT OF HUMAN RIGHTS, THE ECHR IN 50 QUESTIONS para. 38, at 9 (2009), available at http://echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ_ENG_A4.pdf.

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

in court.⁶ Bans on the headscarf have attracted media coverage and heated debate.⁷ What is it about this piece of cloth that makes the wearer subject to violent attacks and the target of legislation?

In Islam, women wear hijab⁸ as a form of modesty and respectability.⁹ However, the headscarf existed for centuries before Islam.¹⁰ In monotheistic religions, the headscarf symbolized freedom and virtue for women, and noble women covered their hair.¹¹ Although a Christian nun wearing a headscarf is viewed as an image of sincere religious piety, a Muslim woman wearing a headscarf is often viewed as a symbol of oppression.¹² She evokes anger from feminists for betraying the struggle for women's rights and succumbing to her oppressor.¹³ She can even be perceived as dangerous or as a supporter of terrorism.¹⁴ The headscarf stands out starkly as a testament of belief, tying the wearer to a religious group, and this visibility has created tension in Western society for several decades.¹⁵

Legally, countries vary greatly in their approach to the headscarf. This comment compares the treatment of the headscarf in France, Turkey, and the United States. What are the justifications for banning the headscarf in democracies where autonomy and individual freedoms are valued above all? This comment focuses on women in these democracies who choose to wear the headscarf as a manifestation of their religious belief.¹⁶ In order to examine these women's choices, it is important to begin by dispelling the notion that women only cover their heads in submission to men. This stereotypical oversimplification limits the understanding of why some women choose to cover their heads. Therefore, this comment begins with an

6. John Blake, *Muslim Women Uncover Myths About the Hijab*, CNN.COM (Aug. 12, 2009), <http://www.cnn.com/2009/US/08/12/generation.islam.hijab/index.html>.

7. See, e.g., *supra* notes 1, 3 and *infra* notes 12, 57, 63.

8. Hijab, an Arabic word, stems from the root-word Hajaba which means to cover, conceal or hide. *Id.* It represents not just physically covering but also modest behavior. *Id.* Today hijab is the common term used to describe the headscarf that Muslim women wear. *Id.* Headscarf and hijab are used interchangeably in this comment.

9. MALEK CHEBEL, *SYMBOLS OF ISLAM* 111 (1997).

10. Blake, *supra* note 5.

11. Metin Toprak & Nasuh Uslu, *The Headscarf Controversy in Turkey*, 11 J. ECON. & SOC. RES. 43, 44 (2009).

12. ANNE SOFIE ROALD, *WOMEN IN ISLAM: THE WESTERN EXPERIENCE* 254 (2001).

13. *Id.*

14. *Id.*

15. Toprak & Uslu, *supra* note 11, at 44–45.

16. Haleh Afshar, *Can I See Your Hair? Choice, Agency and Attitudes: the Dilemma of Faith and Feminism for Muslim Women Who Cover*, 31:2 ETHNIC & RACIAL STUDIES. 411, 412 (2008).

overview of the reasons why women wear the headscarf.¹⁷ Headscarf and hijab in this comment signify the way Muslim women cover their hair, neck, and chest with a piece of cloth out of religious belief.

In Part I, this comment briefly contextualizes this issue; Part I, section A discusses the religious text used to justify the headscarf as a religious obligation and Part I, section B discusses women's motives for wearing it. Part II analyzes the treatment of the headscarf in France, Turkey, and the United States with an emphasis on the history, legal text, and major cases in each country.

I. CONTEXT: FRAMING THE ISSUE

A. What is the importance of Hijab in Islam?

Islam is an Arabic word which means "submission," and is derived from the word "salam," meaning peace.¹⁸ A follower of Islam is called a Muslim, meaning one who has submitted to the way of God.¹⁹ Islamic teachings constitute a complete way of life, governing everything from dress to economics.²⁰ The most important tools for determining how to live one's life in Islam are the Quran (the holy book) and the Sunnah (the life and sayings of Prophet Muhammad, *sallahu alahi wasalaam*).²¹

Islam focuses on modesty in dress and behavior.²² The Quran is the Islamic holy book believed to be the direct word of God. A verse in the Quran says, "Children of Adam, We have given you garments to cover your nakedness and as adornment for you; the garment of God-

17. *Id.*

18. ABUL A'LA MAWDUDI, *TOWARDS UNDERSTANDING ISLAM* 1 (1997).

19. *Id.* at 17 (1997). There are 1.3 billion Muslims in the world; thus, nearly one in every five people is Muslim. Aliah Abdo, *The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf*, 5 HASTINGS RACE & POVERTY L.J. 441, 445 (2008).

20. CHRIS HORRIE & PETER CHIPPINDALE, *WHAT IS ISLAM?* 3 (1991). There are five pillars of Islam: (1) Shahada: the declaration of faith in the Oneness of God: There is no God but Allah and that Muhammad is God's messenger; (2) Salah: five daily prayers; (3) Zakat: charity; (4) Fasting in the month of Ramadan from sunrise to sunset which includes abstaining from food, drink, and sex; and (5) Hajj: pilgrimage to the Ka'ba in Mecca at least once in your life if you can physically and financially afford it. FEISAL ABDUL RAUF, *ISLAM: A SEARCH FOR MEANING* 79-80 (1996).

21. *Sallahu alahi wasalaam* is an Arabic phrase meaning "peace and blessings of God be upon him." It is written or spoken out of respect for Prophet Muhammad every time his name is mentioned.

22. *See supra* note 20 and accompanying text.

consciousness is the best of all garments – this is one of God’s signs, so that people may take heed.”²³ The mandate for hijab comes from the Quran and Sunnah.²⁴ Muslims are sensitive to arguments based on Quranic sources because they are bound by the verses to obey God’s will.²⁵ There are two main verses²⁶ in the Quran that discuss hijab:

And tell the believing women that they should lower their eyes, guard their private parts, and not display their charms beyond what [is acceptable] to reveal; they should draw their coverings over their necklines and not reveal their charms except to their husbands, their fathers, their husband’s fathers, their sons, their husband’s sons, their brothers, their brothers’ sons, their sisters’ sons, their womenfolk, their slaves, such men as attend them who have no desire, or children who are not yet aware of women’s nakedness; they should not stamp their feet so as to draw attention to any hidden charms. Believers, all of you, turn to God so that you may prosper.²⁷

Prophet, tell your wives, your daughters, and women believers to make their outer garments hang low over them so as to be recognized and not insulted. God is most forgiving, most merciful.²⁸

The word “Khumur,” translated as “coverings” in the first verse, is defined in classical Arabic dictionaries as meaning a head covering.²⁹ At the time this verse was revealed, women wore their head coverings tied back behind their necks exposing their necks and part of their chest.³⁰ The verse added that the head covering should

23. *Quran* 7:26 (M. A. S. Abdel Haleem trans., Oxford University Press 2010).

24. Most of the rules of conduct and behaviors are given to Muslims directly in the Quran. FEISAL ABDUL RAUF, *ISLAM: A SEARCH FOR MEANING* 6 (1996). The Arabic word Quran means recitation, or something that is read aloud. *Id.* at 8.

25. *Id.* at 6.

26. Additional Quran verses discuss covering. One verse deals only with hijab for the Prophet Muhammad’s wives. See *Quran* 33:53 (M. A. S. Abdel Haleem trans., Oxford University Press 2010). Another verse gives elderly women permission to uncover. See *id.* at 24:60.

27. *Id.* at 24:30–31.

28. *Id.* at 33:59.

29. Shaykh Nu Ha Mim Keller, *Why Hijab?*, SUNNIPATH (July, 3 2005), http://qa.sunnipath.com/issue_view.asp?HD=10&ID=4813&CATE=128.

30. *Id.*

conceal the neck and chest.³¹ This verse, which Muslims believe is directly revealed from God, gives the mandate to Muslim women to cover their hair, neck and chest; today, this is known as hijab.

The Sunnah (Prophet's life) is comprised of a collection of hadith (reports of the Prophet's words and actions).³² The hadith elaborate on and supplement the Quran.³³ Surprisingly, with all of the emphasis on how women should dress in current writing and debate, there are not many hadith on female dress.³⁴ In addition to the above Quranic verses, the authentic hadith which further elaborate on hijab are:

It is related that 'A'isha said, "May Allah have mercy on the women of the first Muhajirun. When Allah revealed, '*That they should draw their head-coverings across their breasts*' (24:31), they tore their mantles and veiled themselves with them." (Bukhari 4480, 4481).³⁵

When the Quranic verse (the jilbab verse 33:59) was revealed, the women of al-ansar tribe [in Medina] went out [of their houses] with a black cloth on their heads. (Abu Dawud 3578).³⁶

Aisha narrated that the Messenger of God (peace be upon him) used to pray the morning prayer and with him were believing women who were shrouded in sheets (murut). Then they went back to their houses and nobody knew them. (Bukhari, 359).³⁷

These hadith confirm that the above Quranic verses were meant to ask women to cover themselves and detail the manner of covering. Islamic legal opinions state that hijab is an obligation on Muslim female adults as established in the Holy Quran, the hadith, as

31. *Id.*

32. A. Kevin Reinhart, *Islamic Law as Islamic Ethics*, 11 J. RELIGIOUS ETHICS 186, 190 (1983). The hadith reports contain a record of Prophet's acts, non-acts, and sayings; they demonstrate the Quranic as lived in this world. *Id.*

33. *Id.* There are six major authentic collections of hadith which are believed to lay out the accurate reports of the Prophet's sayings and actions. *Id.*

34. ROALD, *supra* note 12, at 264–65.

35. Imam Bukhari, *The Sahih Collection of al Bukhari* SunniPath (November 14, 2010) <http://www.sunnipath.com/library/Hadith/H0002P0068a.aspx>.

36. ROALD, *supra* note 12, at 266.

37. *Id.*

well as unanimously agreed upon by Muslim scholars.³⁸ The hijab is not a symbol of Islam, but rather Muslim women wear hijab to fulfill a religious practice.³⁹ Although the justifications for this obligation are sometimes debated between feminists and scholars,⁴⁰ the above is a brief overview, based on this author's understanding, of the religious text on which women who choose to wear the headscarf base their practice.

B. Why do women wear hijab?

More and more women in France and the United States are wearing hijab.⁴¹ But what are some other reasons for women choosing to wear hijab? Despite the governing religious doctrine, which mandates the wearing of hijab in Islam, it is difficult to ascribe motives to all women. This section strives to provide an overview of the reasons women may choose to cover in Western societies.⁴² In addressing bans on head coverings, the ECtHR, Turkish, and French courts have failed to analyze the importance of the headscarf to the women who wear it.⁴³ Instead, the courts have relied on oversimplified stereotypes of the women who cover to justify the bans.⁴⁴ It is important, therefore, to analyze the meaning of the headscarf to Muslim women who cover in order to understand the true impact of the ban. Women who cover come from various familial and societal situations. Some come from families where their mother does not cover, some come from families that strongly oppose the religious dress, and some come from families where most women wear the headscarf.⁴⁵ Women can, simultaneously, have several reasons for

38. Keller, *supra* note 29. In December of 2003 the Grand Mufti of Egypt, Sheikh Ali Jumua of the Egyptian Fatwa Authority, gave the Islamic legal ruling on hijab as an obligation for Muslim women. *Id.*

39. *Id.*

40. See Blake, *supra* note 6.

41. DOMINIC MCGOLDRICK, HUMAN RIGHTS AND RELIGION: THE ISLAMIC HEADSCARF DEBATE IN EUROPE 61 (2006). A study of the views of young French Muslim women by Gaspard and Khosrokhavar found that they perceive the hijab as an autonomous expression of their identity, not as a form of domination. *Id.* at 61.

42. See KATHERINE BULLOCK, RETHINKING MUSLIM WOMEN AND THE HEADSCARF: CHALLENGING HISTORICAL AND MODERN STEREOTYPES 41-49 (2002), for a detailed discussion on this topic including interviews with women describing their motives for wearing hijab.

43. See *infra* Part III.

44. Oppression cannot be generalized to Islam or the meaning of the headscarf. See BULLOCK, *supra* note 42, at xv-xli.

45. Rhys H. Williams & Gira Vashi, *Hijab and American Muslim Women: Creating the Space for Autonomous Selves*, 68 SOC. RELIGION 269, 282-83. (2007).

wearing hijab. Belief, piety, and worship of God are the most general reasons for covering.⁴⁶

Another reason most women mention is that hijab preserves their modesty—without it, they feel naked.⁴⁷ The scarf covers the body, but there is also appropriate behavior, manners, speech, and appearance in public that accompany the scarf.⁴⁸ For some women, the hijab reinforces the proper Islamic separation of women from men.⁴⁹ These women say they monitor their own behavior more when wearing hijab because they openly and visibly represent Islam to others and to themselves.⁵⁰

Women also wear hijab out of respect for themselves. Instead of potentially being treated as a sexual object, wearing the hijab allows people to judge a woman according to her character and personality rather than physical appearance.⁵¹ Wearing hijab helps discourage unwelcome flirting or sexual attention.⁵² Covering creates a sign of piety so the covered woman does not have to say “I am Muslim.” Instead, the scarf is an outward indication of her belief and expectation to be treated with respect.⁵³

Some women wear the headscarf in an effort to become better Muslims. Many young daughters of immigrants in both the United States and France try to replace the cultural practices of their parents with a more conscious effort at living a religious Islamic lifestyle.⁵⁴ Ironically, at least one woman felt that living in a secular country helped her learn more about her religion; she therefore, wore hijab as a manifestation of her religious dedication.⁵⁵ Thus, the hijab is a central part of some women’s personal identity and autonomy.⁵⁶ As second generation Muslims, the hijab helps these women negotiate their dual

46. ROALD, *supra* note 12, at 294.

47. MCGOLDRICK, *supra* note 41, at 61–62.

48. ROALD, *supra* note 11, at 289. Female covering has an aspect of belief; it is belief that creates the feeling of modesty. *Id.* at 291.

49. MCGOLDRICK, *supra* note 41, at 62.

50. Williams & Vashi, *supra* note 43, at 282.

51. ROALD, *supra* note 12, at 294 (2001). One interview subject reported, “Islamic female dress is for me a sign of distinction (tamiiz). A woman with the headscarf (hijab) represents respectfulness A woman with the headscarf is a woman who is respected and is treated as a human being not a sexual object.” *Id.* at 289.

52. Williams & Vashi, *supra* note 45, at 282.

53. *Id.*

54. JOHN RICHARD BOWEN, WHY THE FRENCH DON’T LIKE HEADSCARVES: ISLAM, THE STATE AND PUBLIC SPACE 71–72 (2007).

55. *Id.* at 72.

56. MCGOLDRICK, *supra* note 41, at 62–63.

identities of religion and nationality, and allows them to be part of both worlds.⁵⁷

Wearing the hijab is also a reflection of Islam's treatment of women and sexuality. The West interprets covering as a sign of the suppression of female sexuality.⁵⁸ However Muslim attitudes toward women's appearance and sexuality are rooted in separating the public sphere from the private.⁵⁹ To cover is not to deny a woman's sexuality, but rather is to preserve and channel it into the private life. It is also important to address the stereotype that the headscarf oppresses all women. The contention of the book *Rethinking Muslim Women and the Headscarf: Challenging Historical and Modern Stereotypes* by Katherine Bullock challenges the notion that the headscarf oppresses women. The author states that where the headscarf is linked to oppressive practices against women (such as under the Taliban's regime in Afghanistan where women were also denied education, confined to the home, and barred from any role in public life) it may be seen as a symbol of women's oppression in that community. But oppression cannot be generalized to Islam or the meaning of the headscarf.⁶⁰

The dichotomy remains between people's perception of the headscarf and the reasons women choose to wear it. As a New Jersey teenager said, "[i]t's not oppression; it's not that I'm accepting degradation [-]it's about self-respect."⁶¹ Yet she experiences tense public encounters where people give her angry looks and feel sorry for her.⁶² Another young woman who wears the headscarf in Michigan said "[w]hen you actually wear it, it opens your eyes. . . It gave me a sense of identity. . . I really like the purpose behind the hijab[-]a woman covering herself so that a man should know her for her mind, not her body."⁶³ Yet, pressure on these young women is strong – how to fit in when they so starkly stand out? One young author, Randa Abdel-Fattah, who has written two novels on Muslim women's experience wearing headscarves in the West, writes, "[y]ou can sometimes feel like you're in a zoo: locked in the cage of other people's stereotypes, prejudices and judgments, on parade to be

57. Williams & Vashi, *supra* note 45, at 272.

58. Naomi Wolfe, *Behind the Veil Lives a Thriving Muslim Sexuality*, SYDNEY MORNING HERALD (Aug. 30, 2008), <http://www.smh.com.au/news/opinion/behind-the-headscarf-lives-a-thriving-muslim-sexuality/2008/08/29/1219516734637.html>.

59. *Id.*

60. See BULLOCK, *supra* note 42, at xxv-xxvi.

61. Blake, *supra* note 6.

62. *Id.*

63. *Id.*

analyzed, deconstructed and reconstructed.”⁶⁴ And for young Muslim women this experience can be frustrating and exhausting;⁶⁵ they often wish people would drop their prejudices and see them as more than the headscarves they wear.⁶⁶

II. COUNTRY COMPARISON: FRANCE, TURKEY, AND THE UNITED STATES

France’s ban on the Islamic headscarf and other “conspicuous” religious symbols in public classrooms passed in 2004 with overwhelming public and political support as a testament to secularism.⁶⁷ Why did France expend resources legislating a ban affecting only a few hundred school girls? Turkey also banned headscarves not only from classrooms, but from all government buildings and universities, despite the fact that ninety-nine percent of the population is Muslim, and sixty-five percent of the women wear headscarves.⁶⁸ How can Turkey impose a ban that debilitates more than half of the women in its country?⁶⁹ In the United States, there is no official ban on the headscarf, but women have still faced problems wearing headscarves in schools, in airlines, and at motor vehicle agencies.⁷⁰ How does America’s understanding of religious freedom affect its approach to the headscarf? How can three secular democracies have such different approaches to the hijab?

64. *Id.*

65. *See id.*

66. *See* Sarah Rainsford, *Turkey Divided Over Headscarf Ban*, BBCNEWS.COM, <http://news.bbc.co.uk/2/hi/europe/7239330.stm> (last updated Feb. 11, 2008 5:47 PM).

67. *The Islamic Veil Across Europe*, BBCNEWS.COM, <http://news.bbc.co.uk/2/hi/europe/5414098.stm> (last updated June 15, 2010 10:30 AM).

68. Rainsford, *supra* note 66; Tabitha Morgan, *Scarf Conundrum Grips Turkey*, BBC.COM (Nov. 14, 2010) <http://news.bbc.co.uk/2/hi/europe/3513259.stm>.

69. In Turkey, international treaties take precedence over domestic legislation. THE CONSTITUTION OF THE REPUBLIC OF TURKEY art. 90. Turkey is a signatory of the European Convention on Human Rights, which guarantees freedom of religion and expression. Convention for the Protection of Human Rights and Fundamental Freedoms arts. 9, 10, *opened for signature* Nov. 4, 1950, 213 U.N.T.S 221. The Turkish Constitution also guarantees freedom of expression. THE CONSTITUTION OF THE REPUBLIC OF TURKEY art. 26.

70. MCGOLDRICK, *supra* note 41, at 225. *See* Marisol Bello, *Controversy Shrouds Muslim Women’s Head Coverings* USA Today.com (April 15 2010) http://www.usatoday.com/news/nation/2010-04-14-headscarves-muslim_N.htm

A. France

“Estimates of the number of Muslims in Europe range from thirty to fifty million.”⁷¹ France has the largest Muslim population in Western Europe, and “[i]n 2004 it was estimated that there were approximately five million Muslims in France.”⁷² Islam is the second largest religion in France; Muslims make up eight to nine percent of the population.⁷³ Half of French Muslims are born in France, and the other half are naturalized citizens mainly from former North African French colonies.⁷⁴ “Fifty thousand [French Muslims] are converts to Islam.”⁷⁵ Why did the headscarf create such controversy in France? The clash of civilizations between Islam and the West is often used to justify the conflict; however, historian Joan Wallach Scott attributes the conflict to racism stemming from France’s colonial past.⁷⁶ What about France’s history puts it at odds with the headscarf?

1. History

France derived its national principles from the French Revolution of 1789, which tried to eradicate all differences and privileges based on birth and wealth.⁷⁷ France insists on assimilation to a single culture and promotes a shared language.⁷⁸ French secularism is called *laïcité*, which means the separation of church and state through the state’s protection of individuals from religion.⁷⁹ Religion must not be displayed ‘conspicuously’ in public places, like school, where republican ideals are taught.⁸⁰ In banning the headscarf, the legislators attempted to keep France unified. France continues to deny that their goals of assimilation might also constitute racism.⁸¹ In French history, two main events have shaped the headscarf ban, (a) the history of *laïcité*, and (b) France’s colonial past, particularly in Algeria.

71. MCGOLDRICK, *supra* note 41, at 52.

72. *Id.* at 52–53.

73. *Id.* at 53. The largest religious group in France is Roman Catholic. *The World Factbook*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/fr.html> (last updated Sept. 29, 2010).

74. MCGOLDRICK, *supra* note 41, at 53.

75. *Id.*

76. *See generally* JOAN WALLACH SCOTT, *THE POLITICS OF THE VEIL* 3–11 (2007).

77. *Id.* at 12.

78. *Id.*

79. *Id.* at 15.

80. *Id.*

81. *Id.* at 15–16.

a. French Secularism: Laïcité

In France, religious conflict was rife from 1562-1598.⁸² The French Revolution of 1789 lessened the power of the Roman Catholic Church, which had controlled much of the country prior to the Revolution.⁸³ The Constitution of 1795 allowed the State to derive its authority from the people instead of divine authority, introducing the State's first partial separation of church and state.⁸⁴ In 1905, the "Law of Separation" created true separation of church and state.⁸⁵ The state began actively controlling religion to maintain public order and protect individuals from proselytism.⁸⁶ Laïcité translates to English as secularism, but it also means the proper place and function of religion within the state.⁸⁷ Secularization in France assumed the gradual disappearance of religion from the public sphere.⁸⁸ The visibility of Islam has led to increased debate about whether French laïcité hinders the integration of immigrants generally, and Muslims in particular.⁸⁹ The classroom was also secularized in France in 1882 and 1886 to lessen the influence of the Church.⁹⁰ Teachers see the presence of Islam in the classroom as a threat, preventing students from maintaining a common French identity.⁹¹

b. Colonialism and the Algerian war: France's treatment of Muslims

The French arrived in Algeria in 1830.⁹² France justified ruling Algeria to civilize the Algerians and bring them secular values.⁹³ France depicted Arabs, Muslims, and North Africans in racist ways to legitimize its colonial rule.⁹⁴ Algerian movements of resistance led to

82. MCGOLDRICK, *supra* note 41, at 34.

83. *Id.*

84. *Id.* at 35. The separation of Church and state was in the sphere of marriage, health, and education. *Id.*

85. *Id.* See also Ellen Wiles, *Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality*, 41:3 LAW & SOC'Y REV. 699, 701 (2007).

86. BOWEN, *supra* note 54, at 18-19.

87. MCGOLDRICK, *supra* note 41, at 38.

88. *Id.* at 40.

89. *Id.* at 41.

90. BOWEN, *supra* note 54, at 25.

91. *Id.* at 31-32.

92. SCOTT, *supra* note 76, at 44-45.

93. *Id.* at 45-46.

94. *Id.* at 46-47. French studies on how to subdue colonial subjects showed Arabs as inferior, one stating that the French should "tear off the veil which still hides the mores, customs and ideas of Arab society." *Id.* at 49.

war in 1954.⁹⁵ During this bloody, seven year war, the headscarf acquired political significance.⁹⁶ The French tried to “liberate” Muslims in Algeria, and banning the headscarf became the symbol to show this liberation.⁹⁷ The wife of a Brigadier General, who led the women’s emancipation movement said, “[n]ourish the mind and the veil will wither by itself.”⁹⁸

By 1958, France saw the veil as a way of resisting colonial domination, claiming its removal was necessary for security.⁹⁹ The French saw the headscarf as representing the backwardness of Algeria, but the headscarf also represented the French frustration and humiliation with their failed civilizing mission.¹⁰⁰ For the Algerians, the veil represented a refusal to give in to Western values and the integrity of Algerian history and religion.¹⁰¹ The war concluded, but the meaning of the headscarf was still unresolved. This tension arising from a simple piece of cloth carried into the present day.¹⁰²

After the war, millions of immigrants arrived in France from former colonies including Algeria, Tunisia, and Morocco.¹⁰³ The stereotypes of Muslims stemming from colonialism remained when dealing with the “immigrant problem.”¹⁰⁴ The immigrants did not assimilate and thus became a constant reminder of the failed civilizing missions.¹⁰⁵ The media portrayed the “dangers of Islam” and elevated the fears of the French.¹⁰⁶ After the September 11th attacks, French political discourse focused on the “clash of civilizations.”¹⁰⁷

How did all of this history and tension erupt on unsuspecting school girls wearing headscarves? The issue of banning headscarves

95. *Id.* at 61.

96. *Id.*

97. SCOTT, *supra* note 76, at 61–62.

98. *Id.* at 63.

99. *Id.* at 64. Franz Fanon, a National Liberation Front supporter, wrote, “In the beginning, the veil was a mechanism of resistance, but its value for the social group remained very strong. The veil was worn . . . because the occupier *was bent on unveiling Algeria.*” *Id.* (emphasis added).

100. *Id.* at 66.

101. *Id.* at 67.

102. *Id.*

103. *Id.* at 68.

104. *Id.* at 69.

105. *Id.*

106. The media focused on the Iranian Revolution and the danger of Islam, portraying Muslim women as victims of patriarchy, in contrast to the individualism and equality of the French Republic. *Id.* at 71. The Iranian Revolution returned the headscarf to French attention. *Id.* at 70. The Gulf War in Iraq, and the bombings in France “by Islamists” from 1992 to 1995, only escalated France’s tension with Islam. *Id.* at 72.

107. *Id.* at 74.

arose in France at three separate periods of time: 1989,¹⁰⁸ 1994,¹⁰⁹ and 2003.¹¹⁰ The 2004 ban currently in effect is a result of these historical events and debates. As a result of the hardening of the government's position, there was no longer any room for compromise.¹¹¹ In March 2004, the headscarf ban became law and in October, enforcement of the law began.¹¹² The headscarf wearing girls were now forced to choose between education and religion.¹¹³

2. Legal text

The actual text of the ban from the French Education Code provides: "In state primary and secondary schools, the wearing of signs or dress by which pupils overtly manifest a religious affiliation is prohibited."¹¹⁴ Prior to the enactment of the ban, Bernard Stasi led a commission to analyze the plausibility of a headscarf ban.¹¹⁵ So little attention was given to women who veil that only one headscarf wearing woman was invited to testify at the commission hearings and she was not taken seriously.¹¹⁶ The commission did not hear testimony from any young women who were expelled due to the ban, or from the

108. See SCOTT, *supra* note 76, at 21. In October of 1989 in the "affaires des foulards," three Muslim girls were expelled from middle school in the town of Creil for refusing to remove their headscarves. *Id.* at 21–22. The Conseil d'Etat reached a compromise, ruling that wearing a religious sign is not incompatible with secularism as long as it constitutes the exercise of freedom of expression and demonstration of religious belief. *Id.* at 24–25. However, the Conseil placed limits on students' exercise of this freedom. This ruling allowed for a case-by-case approach to decide whether to allow the hijab or not. *Id.* at 25. Some principals did not object to the hijab while others expelled girls who wore it.

109. In 1994, a bill to ban all "ostentatious" signs of religious affiliation was put forward. *Id.* at 26. The minister of education decreed on September 20, 1994 that "ostentatious" signs of religious affiliation were prohibited in all schools. *Id.* at 27. This pronouncement led to the expulsion of sixty-nine girls wearing hijab. *Id.* The Conseil d'Etat overturned the decree, affirming its 1989 ruling, when a group of expelled girls challenged the decree. The ruling again left it to school officials to interpret the actions of their students. *Id.* at 28.

110. In 2003, the debate arose because of the September 11th attacks and concerns over "Muslim fundamentalism." MCGOLDRICK, *supra* note 41, at 82. Nicolas Sarkozy insisted Muslim women pose bare-headed for official identity photographs because of concerns about security. SCOTT, *supra* note 76, at 30. Jack Lang presented a bill to the National Assembly that would outlaw signs of any religious affiliation in public schools in the name of laïcité. *Id.* A commission was appointed to explore the possibility of enacting the law. *Id.* at 32.

111. SCOTT, *supra* note 76, at 34.

112. *Id.* at 35.

113. *Id.* This law also applied to Jewish Yarmulkes and Sikh turbans but it was still referred to in the press as the headscarf law. *Id.*

114. Wiles, *supra* note 85, at 699 (quoting CODE EDUCATION [C. EDUC.] ART. 141-151 (Fr.)).

115. MCGOLDRICK, *supra* note 41, at 84.

116. See BOWEN, *supra* note 54, at 118.

sociologists who studied their choice of dress.¹¹⁷ The commission saw the headscarf as a denial of freedom.¹¹⁸ Stasi concluded, “Objectively, the veil stands for the alienation of women.”¹¹⁹ The commission concluded that the decision to wear the veil could never be a reasonable choice, and while some girls consider the veil emancipation, many more find it oppressive.¹²⁰ Yet, the commission offered no statistics to support this conclusion.¹²¹ Teachers claimed that families pressured girls, usually inferring the pressure from their age.¹²² In fact, there were cases that proved the opposite, where girls wore headscarves with no family pressure, or even with family opposition, but these possibilities were ignored.¹²³

On January 17, 2004, hundreds of thousands of Muslims in France and around the world demonstrated against the ban, chanting and carrying signs.¹²⁴ Some Muslim women protestors wore the red, white, and blue of the French national flag to symbolize that they were claiming rights as French citizens.¹²⁵ Major international human rights organizations like Human Rights Watch stated that the French ban violated international human rights law.¹²⁶ However, the ban received support from seventy percent of French citizens.¹²⁷ The new law came into effect at the beginning of the 2004 school year, leaving young Muslim girls torn on what to do.¹²⁸ On the first day of school in 2004, 240 girls came to school wearing hijab.¹²⁹ That day, 170 of those girls were forced to remove the scarf, and fifty to sixty were expelled.¹³⁰

117. *Id.* at 117.

118. SCOTT, *supra* note 76, at 129.

119. *Id.*

120. *Id.*

121. *Id.*

122. BOWEN, *supra* note 54, at 121.

123. See SCOTT, *supra* note 76, at 30–32. In 2003, the case of the Lévy girls challenged proponents of the headscarf ban who claimed that the ban was in place to free women from Islamist men, since the girls in question were not immigrants but rather French converts and daughters of non-Muslims. *Id.*

124. *Id.* at 98. See also *Muslims Protest Headscarf Ban*, CNN.com (Jan. 17, 2004 11:55 PM) <http://www.cnn.com/2004/WORLD/europe/01/17/france.headscarves/index.html?iref=allsearch>.

125. MCGOLDRICK, *supra* note 41, at 97.

126. *France: Headscarf Ban Violates Religious Freedom*, HUM. RTS. WATCH (Feb. 26, 2004), <http://hrw.org/en/news/2004/02/26/france-headscarf-ban-violates-religious-freedom>.

127. Caroline Wyatt, *French Headscarf Ban Opens Rift*, BBCNEWS.COM, <http://news.bbc.co.uk/2/hi/3478895.stm> (last updated Feb. 11, 2004 10:26 AM).

128. BOWEN, *supra* note 54, at 146.

129. MCGOLDRICK, *supra* note 41, at 92.

130. *Id.*

Those who were expelled had to leave school and turn to distance learning, private schools, or in some cases leave the country altogether and go to school abroad.¹³¹ The enactment of the ban had a devastating effect on the number of school girls who freely wore a headscarf in school. During the first full year of implementation, 626 girls came to lessons wearing the hijab; this, compared with the 1,465 over the previous year and more than 5,000 at the start of the decade,¹³² shows the impact of the law on school girls. The implementation of the law led to abuse and provoked feelings of humiliation among young Muslim girls.¹³³ The stigmatization of the headscarf resulted in religious intolerance that went beyond the classroom.¹³⁴

3. Major case: *Dogru v. France*

In 2008, the ECtHR made a significant ruling on the headscarf issue. In the case of *Dogru v. France*, the Court unanimously held that there was no Article 9 (Freedom of Religion) violation to the European Convention on Human Rights when Ms. Dogru was expelled from school for refusing to remove her headscarf in physical education class.¹³⁵ In reaching this decision, the Court relied on its previous ruling in *Şahin v. Turkey* from 2005 which upheld Turkey's headscarf ban.¹³⁶

In 1999, Ms. Dogru went to physical education class wearing a headscarf and refused to remove it on seven occasions.¹³⁷ The school's disciplinary committee expelled her for failing to participate in the physical education classes.¹³⁸ Eventually, Ms. Dogru compromised and said she would wear a hat, but this offer was refused.¹³⁹ The teacher claimed to have refused her participation in class for her safety, but when asked at the disciplinary expulsion hearing how wearing a headscarf or hat during class would endanger her safety, he refused to answer the question.¹⁴⁰ The Government also failed to provide proof that this regulation was necessary for safety or public

131. *Id.* at 92–93.

132. *Id.* at 92.

133. *Id.* at 101.

134. *Id.*

135. *Dogru v. France*, 27058 Eur. Ct. H.R. App. para. 7–8 (2008), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (database search form).

136. See *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173.

137. *Dogru*, 27058 Eur. Ct. H.R. App. para. 7–8, available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (database search form).

138. *Id.* para. 8.

139. *Id.* para. 44.

140. *Id.*

order. Ms. Dogru's parents appealed this decision, but the expulsion was upheld.¹⁴¹

In reaching its decision, the Court conducted a three-part analysis to see whether the interference was "prescribed by law," directed towards "legitimate aims," and was "necessary in a democratic society" to achieve the aims concerned.¹⁴² Although there was no headscarf ban in place when Ms. Dogru was expelled, the Court held her expulsion suitably founded in domestic law based on non-binding ministerial circulars.¹⁴³ The Court also found that the interference was based on legitimate aims of protecting the rights and freedoms of others and protecting public order.¹⁴⁴ Lastly the court found that the interference was "necessary in a democratic society" because the authorities feared that the student's behavior would interfere with order in the school.¹⁴⁵

The Court's ruling in this case incorrectly restricted Ms. Dogru's religious freedom.¹⁴⁶ The Court never clarified how her headscarf created a threat to the public order or the freedoms of others.¹⁴⁷ The Court never explained why, if the issue was about proselytism, Ms. Dogru was not allowed to wear a hat.¹⁴⁸ The Court also never stated how such an invasive restriction on religious freedom was necessary in order to preserve order within the school. Instead, the court relied on the protection of secularism as its main justification, never explaining how the headscarf violates secularism.¹⁴⁹ The ECtHR failed to protect essential religious freedoms on the basis of non-binding circulars.¹⁵⁰ This ECtHR decision sets a negative precedent for future challenges to France's headscarf ban, or any other such ban in the European Union.¹⁵¹

141. *Id.* para. 10.

142. *Id.* paras. 49, 60–62.

143. *Id.* para. 56; the author uses the term "non-binding ministerial circular" to refer to a decree issued by ministries that clarify rules, give definitions, or explain how rules should be applied.

144. *Id.* para. 60.

145. *Id.*

146. *Id.* para. 45.

147. *Id.* para. 72.

148. *Id.* para. 44.

149. *Id.* paras. 69–72.

150. *Id.* para. 43.

151. The United Sikh lawyers filed a challenge to France's headscarf ban on May 30, 2008 before the European Court of Human Rights for the expulsion of six Sikh boys in 2006 for wearing the "keski" (an under-turban to school). A previous ruling in 2007 by the Conseil d'Etat upheld the ban and ruled that the "keski" was an ostensible religious sign. Preceding these motions was a December 2007 French Conseil d'Etat ruling that upheld the legal ban on

B. Turkey

1. History

In Turkey, ninety-nine percent of the nation's seventy million people are Muslim.¹⁵² At least one woman wears a headscarf in 77.2 percent of families, and 64.2 percent of women age eighteen and above wear headscarves.¹⁵³ Turkey, once center of the Islamic world, experienced extreme secularism after the fall of the Ottoman Empire and eradication of the headscarf was once again chosen to symbolize modernization.¹⁵⁴ Turkey's headscarf ban is more sweeping than France's, barring women not only from entering classrooms and universities but also from state employment, holding elected posts in parliament, entering courtrooms as lawyers, working as teachers, and even entering government buildings while wearing a headscarf.¹⁵⁵ Recent attempts to end the ban in 2008 failed,¹⁵⁶ and the headscarf remains a topic of extreme sensitivity in Turkey. There have been recent attempts in 2010 to move towards lifting the ban by allowing women to wear headscarves in universities,¹⁵⁷ and hopes are that these attempts may be more successful than those of 2008. Until this issue is resolved, women remain caught in the tug of war between the Islamists who want to end the ban, and the secularists who are afraid that lifting the ban will lead down the slippery slope towards reinstating Islamic law.¹⁵⁸ In order to understand Turkey's headscarf ban, it is important

wearing ostensible religious signs. These legal challenges by United Sikhs lawyers relate to the expulsion in 2004 of six Sikh boys for wearing the "keski" (an under-turban) to school. The Conseil d'Etat in its 2007 ruling maintained that the "keski" was not a discreet sign but an ostensible religious symbol which can be prohibited to maintain secularism and permanent expulsion as a punishment does not violate freedom of religion. It remains to be seen how the European Court of Human Rights will rule on this issue. *France: International Religious Freedom Report 2009* 10 Bureau of Democracy Human Rights and Labor (October 26, 2009) <http://www.state.gov/drl/rls/irf/2009/127310.htm>

152. MCGOLDRICK, *supra* note 41, at 132.

153. Toprak & Uslu, *supra* note 11, 44 n.1. This data comes from research that Tarhan Erdem conducted in 2003 and published in the *Daily Milliyet* between May 27–31, 2003.

154. Alvec Cinar, *Subversion and Subjugation in the Public Sphere: Secularism and the Islamic Headscarf*, 33 SIGNS: J. WOMEN CULTURE & SOC'Y 891, 897–99 (2008).

155. *Turkey: Headscarf Ruling Denies Women Education and Career*, HUM. RTS. WATCH (Nov. 15, 2005), <http://www.hrw.org/english/docs/2005/11/16/turkey12038.htm>.

156. *Turkey: Constitutional Court Ruling Upholds Headscarf Ban*, HUM. RTS. WATCH (June 6, 2008), <http://www.unhcr.org/refworld/docid/484cee95c.html>.

157. See David Keane, *The End of the Headscarf Ban in Turkish Universities?* Human Rights in Ireland (Oct. 26, 2010) <http://www.humanrights.ie/index.php/2010/10/26/the-end-of-the-headscarf-ban-in-turkish-universities/>

158. See Rainsford, *supra* note 66.

to look at Turkish secularism and Turkey's turbulent history with the headscarf.

a. Turkish Secularism: Laik

The Republic of Turkey was established in 1923, on the remnants of the Ottoman Empire after World War I.¹⁵⁹ Turkey's new identity was envisioned as modern and secular.¹⁶⁰ The founding elite wanted to distance Turkey from its "backward" and "uncivilized" Ottoman past.¹⁶¹ Mustafa Kemal Atatürk, founder of modern Turkey, implemented extreme reforms.¹⁶² Islam was repealed as the state religion in 1928.¹⁶³ The Swiss civil code was transplanted, and in 1937, a constitutional amendment was adopted to establish secularism in Turkey.¹⁶⁴

Atatürk chose secularism because his regime blamed Islam for the collapse of the Ottoman Empire.¹⁶⁵ Laik is based on laïcité because in laïcité the government actively determines the place of religion in public life.¹⁶⁶ The military enforced secularism among conservative Turks, and the military remains active in maintaining secularism, sometimes through coups.¹⁶⁷ Turkey does not have complete secularism because the state controls religion and is not neutral towards all religions.¹⁶⁸ The perceived threat to Turkey's secularism is a major justification of the headscarf ban; however, only twenty percent of the population responded that the headscarf threatens secularism, while an overwhelming seventy-three percent responded that it does not.¹⁶⁹ Yet Turkey's ruling elite, the Constitutional Court, and the military, continue justifying the headscarf ban as protecting

159. MCGOLDRICK, *supra* note 41, at 133.

160. Cinar, *supra* note 154, at 897.

161. *Id.*

162. MCGOLDRICK, *supra* 41, at 133.

163. *Id.*

164. *Id.*

165. See Ali Ulusoy, *The Islamic Headscarf Problem before Secular Legal Systems: Factual and Legal Developments in Turkish, French and European Human Rights Law*, 9 EUR. J. MIGRATION & L. 419, 420 (2007).

166. *Id.*

167. *Id.* at 421.

168. IHSAN DAGI, *TURKEY BETWEEN DEMOCRACY AND MILITARISM: POST KEMALIST PERSPECTIVES* 88–89 (2008). The Religious Directorate does not serve or represent non-Islamic religions. *Id.* The state is organized to serve only Sunni-Hanafi Islam and keep it under surveillance, which goes against the principles of a secular state. *Id.* at 89. The state claims total control over religious activities, and does not recognize a space for independent religious organizations. *Id.*

169. *Id.* at 86. An Istanbul based think tank called TESEV conducted the study in November of 2006.

secularism.¹⁷⁰ Policies which restrict the rights of citizens should not be made on unsubstantiated fears.

b. Turkish History and the Headscarf

Dress reform was a major feature in the modernization of Turkey. The Hat Law of 1925 banned the fez, and made western hat wearing mandatory.¹⁷¹ Atatürk did not directly initiate dress reforms for women; however, women were strategically used to convince Europe of Turkey's modern secular identity.¹⁷² The founders knew that Europeans viewed Turkey and Islam as backwards and veiled women as oppressed.¹⁷³ This mentality had led many countries to justify their colonial endeavors.¹⁷⁴ Consequently, Turkey made an exaggerated effort to distance itself from this image by showing women as freed from the veil.¹⁷⁵

In 1934, the Dress Regulations Act imposed a ban on wearing religious clothes other than in places of worship, targeting the headscarf as outdated.¹⁷⁶ After the violent military coup in 1980, the headscarf became a bigger problem in high schools and universities.¹⁷⁷ A "Dress and Appearance" law was introduced that explicitly banned the headscarf in public offices, schools, universities, and hospitals.¹⁷⁸ In 1981, the Turkish cabinet issued regulations which required female students to wear "modern dress" in state institutions and banned headscarves.¹⁷⁹ In 1982, the Higher-Education Authority specifically banned headscarves in lecture halls.¹⁸⁰ However, a countrywide ban was still not implemented.¹⁸¹ As the number of students wearing

170. See, e.g., Rainsford, *supra* note 66.

171. Cinar, *supra* note 154, at 898.

172. *Id.* at 898–99. The new civilizing mission included having women attend balls wearing elegant European dresses like Atatürk's own daughters and wife. Women were also encouraged to join the public sphere by taking on occupations generally held by men such as taking positions in the military, legal field, political realm, and in aviation. *Id.* at 899.

173. *Id.* at 899–900.

174. *Id.* at 900.

175. Cinar, *supra* note 154, at 900.

176. MCGOLDRICK, *supra* note 41, at 134.

177. Toprak & Uslu, *supra* note 11, at 46.

178. Bruce H. Rankin and Isik A. Aytac, *Religiosity, the Headscarf, and Education in Turkey: an Analysis of 1988 Data and current Implications*, 29 BRITISH J. SOC. EDUC. 273, 276 (2008).

179. C.D. Lovejoy, *A Glimpse into the Future: What Şahin v. Turkey means to France's Ban on Ostensibly Religious Symbols in Public Schools*, 24 WIS. INT'L L.J. 661, 665 (2006).

180. See *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173, 187 para. 37.

181. Toprak & Uslu, *supra* note 11, at 47.

headscarves increased, secularists decided to ban the headscarf for good to show their determination to fight against rising Islam.¹⁸²

A law enacted in 1989 actually permitted the headscarf in colleges on the basis of religious liberty, but the Constitutional Court struck it down stating that wearing headscarves in public areas violated Constitutional secularism.¹⁸³ In its decision, the Constitutional Court admitted that wearing the headscarf could have a religious motive.¹⁸⁴ However, the Court incorrectly reasoned that passing a law allowing religious freedom was legislating on the basis of religion, which secularism prohibits.¹⁸⁵ This reasoning is inconsistent with practice because the Turkish government controls religion through the Directorate of Religious Affairs, yet it claims it does not want to legislate on religion.¹⁸⁶

The Turkish government enacted another law in 1991 allowing for freedom of dress in universities as long as it did not contradict the laws in force.¹⁸⁷ The Constitutional Court did not overrule this law when the law was challenged in 1991 because the court interpreted this freedom of choice as not applying to headscarves.¹⁸⁸ This decision was criticized as excessively judicially active, but courts and universities have used this ruling as a statutory basis to ban headscarves in schools.¹⁸⁹

In 1997, in a post-modern coup d'état the military overthrew the Islamic Refah Party.¹⁹⁰ In light of ensuing tensions, the Constitutional Court saw the headscarf as symbolic of the larger problem between Islamists and secularists. The Court viewed the headscarf as a menace to the Republic of Turkey and as radical Islamist symbol worn to challenge the secular nature of the Turkish Republic, while ignoring how the headscarf was traditionally worn for religious beliefs.¹⁹¹

2. Legal text

Currently, there is no national law banning headscarves in Turkey. Instead the bans are based on the interpretation of the 1989

182. Ulusoy, *supra* note 165, at 421.

183. *Id.*

184. *Id.* at 422.

185. *Id.*

186. *Id.*

187. *Id.* at 421.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 422-23.

and 1991 decisions of the Constitutional Court which upheld the headscarf ban on the basis of secularism.¹⁹² The Court's decisions generalized headscarf wearing women as anti-secular militants and the headscarf as a symbol of radical Islam, but these assumptions were unfounded.¹⁹³ The Court neglected to consider the religious significance of the headscarf.¹⁹⁴ It was assumed that permitting the headscarf would be coercive to female students who do not wear it, creating disputes on campus about religious beliefs and threatening public order.¹⁹⁵ The Constitutional Court found that freedom of religion did not include the right to wear religious attire.¹⁹⁶ The decision of the ECtHR in *Şahin v. Turkey* solidified the headscarf ban in Turkey.

3. Major case: *Leyla Şahin v. Turkey*

The most notable case challenging the Turkish headscarf ban is *Leyla Şahin v. Turkey*.¹⁹⁷ After exhausting State remedies, a young medical student, Leyla Şahin, took her case to the European Court of Human Rights, arguing that the headscarf ban violates Article 9 (Freedom of Religion) of the European Convention on Human Rights.¹⁹⁸ The court ruled that the headscarf ban did not violate Article 9, because the ban was foundational to Turkey's secularism.¹⁹⁹ On November 10, 2005, the ECtHR's Grand Chamber upheld the Chamber's ruling.²⁰⁰

In 1997, Şahin enrolled in the University of Istanbul's Medical School.²⁰¹ Six months after she enrolled, the University issued a circular banning students with headscarves from entering

192. *Id.* at 421.

193. *Id.* at 423.

194. *Id.*

195. *Id.*

196. *Şahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173, 188 para. 35.

197. *Id.* at 173.

198. Adrien Katherine Wing, *International Law Secularism, and the Islamic World*, 24 AM. U. INT'L L. REV. 407, 421-22 (2009).

199. *Id.* at 422.

200. Lovejoy, *supra* note 179, at 662. A Chamber is formed of seven judges that first hear a case. EUR. COURT OF HUMAN RIGHTS, THE ECHR IN 50 QUESTIONS para. 14, at 7 (2009), available at http://echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ_ENG_A4.pdf. The Grand Chamber can sometimes hear cases on appeal from the Chamber. *Id.* para 15 at 7. The Grand Chamber takes cases through referral and relinquishment but only on very rare circumstances, through the request of the parties once a judgment of the Chamber has been delivered. *Id.* A panel of judges from the Grand Chamber considers whether to hear the case, and when a case is heard on referral none of the original judges who heard the case sit on the panel. *Id.*

201. *Id.* at 663.

classrooms.²⁰² As a result, Şahin was not admitted to two exams and a lecture.²⁰³ “Students defying this circular were subject to discipline.”²⁰⁴ Şahin challenged the circular, but was unsuccessful.²⁰⁵ She continued to wear her headscarf and was suspended for a semester.²⁰⁶ She petitioned the Istanbul Administrative Court to set aside her suspension, but her application was dismissed.²⁰⁷ In 1999, Şahin left Turkey, and enrolled at Vienna University to finish her education.²⁰⁸ She filed an application with the ECtHR alleging that the Turkish government had violated her freedoms under the ECHR, most notably her freedom of religion by preventing her from wearing her headscarf in school.²⁰⁹

The ECtHR reviewed the history of religious dress and secularism in Turkey, and upheld the ban.²¹⁰ The Court said that Article 9 “does not protect every act motivated or inspired by a religion or belief.”²¹¹ The Court based its decision on many unfounded assumptions. It stated that the headscarf is a symbol contrary to the freedom of women, and symbolizes the imposition of a tenant of Islam.²¹² The Court further found the ban justified because it allows women’s freedom of expression while religion only forces women to obey.²¹³ The Court claimed that wearing the headscarf has an inherently coercive effect, even if women wear it out of free will.²¹⁴

Judge Tulkens was the only dissenting opinion in *Şahin*. Tulkens questioned the general appeal to secularism and the proportionality and necessity of the headscarf ban.²¹⁵ Her dissent expressed concern with the Court’s characterization of the headscarf and Islam.²¹⁶ She stated that without concrete examples showing gender inequality, the state cannot act on paternalism contravening

202. Şahin v. Turkey, 2005-XI Eur. Ct. H.R. 173, 181 para. 16, *quoted in* MCGOLDRICK, *supra* note 41, at 141–42.

203. *Id.*

204. Rachel Rebouche, *The Substance of Substantive Equality: Gender Equality and Turkey’s Headscarf Debate*, 24 AM. U. INT’L L. REV. 711, 717 (2009).

205. *Id.* at 717–18.

206. *Id.* at 718.

207. *Id.*

208. *Id.*

209. Lovejoy, *supra* note 179, at 662.

210. MCGOLDRICK, *supra* note 41, at 143.

211. *Id.*

212. Rebouche, *supra* note 204, at 720.

213. *Id.* at 721.

214. *Id.*

215. *Turkey: Headscarf Ruling Denies Women Education and Career*, *supra* note 153.

216. *Id.*

past Court decisions which respect personal autonomy.²¹⁷ Tulkens rejected the assumption that the headscarf clashes with equality, and further noted that the majority ignored the significance the headscarf has for the women who wear it.²¹⁸

By upholding Turkey's headscarf ban, the ECtHR denied thousands of women access to education and careers in Turkey.²¹⁹ The ban violates freedom of religion, expression, and equal treatment.²²⁰ As a result, the ECtHR missed an opportunity to extend basic freedoms to women in Turkey.

As recently as October of 2010, Istanbul University, the place where the headscarf ban started twelve years earlier with the banning of *Şahin* received another complaint from a student who was kicked out of class for wearing a hatin—her attempt to abide by school rules while still upholding her religious belief.²²¹ Following the complaint, the Higher Education Board decreed that Professor's cannot kick out students because of their outfits, which has put an effective end to the longstanding headscarf ban, in Istanbul University.²²² Following suit, an estimated half of the Universities in the country have opened their doors to veiled students, who are thrilled at being able to attend class more comfortably while being able to express themselves.²²³ This loosening of Turkey's headscarf ban has been met with both joy and disapproval.²²⁴ As the debate continues, it remains to be seen what resolution is agreed upon.

C. America

There are seven to eight million Muslims in the United States, and Islam is the second largest religion.²²⁵ However, Islam is still largely misunderstood in America.²²⁶ In 2006, approximately one in four Americans believed Islam was a religion of hatred and

217. Rebouche, *supra* note 204, at 723.

218. *Id.*

219. *Turkey: Headscarf Ruling Denies Women Education and Career*, *supra* note 153.

220. *Id.*

221. See Headscarf ban relaxed in Turkey but Row Rages On France24.com (October 26, 2010) <http://www.france24.com/en/20101026-headscarf-ban-relaxed-turkey-but-row-rages>

222. *Id.*

223. *Id.*

224. *Id.*

225. See PETER W. WILLIAMS, AMERICA'S RELIGIONS: FROM THEIR ORIGINS TO THE TWENTY-FIRST CENTURY 454 (2002).

226. See *id.* at 448.

violence.²²⁷ After 9/11, Islamophobia became prevalent, bringing a negative backlash towards Muslims.²²⁸ This negativity has led to Muslim youth re-embracing Islam, and many young American Muslim women wearing hijab.²²⁹ The hijab has become a symbol of their American-Muslim identity.²³⁰ However, misconceptions about Islam and its increased visibility after 9/11 have led to many situations of tension and some Muslim women have been forced to remove their headscarves in schools,²³¹ airports, Motor Vehicle Associations,²³² in prison,²³³ in courts,²³⁴ and at their workplace.²³⁵ How well is the headscarf protected in the United States? Is America any more tolerant of religious dress than Europe?

1. History

In the United States, the role of religion in the public sphere is evolving.²³⁶ After 9/11, Americans also saw the removal of the headscarf as a symbol of liberating oppressed woman.²³⁷ As President

227. COUNCIL ON AMERICAN-ISLAMIC RELATIONS, AMERICAN PUBLIC OPINION ABOUT ISLAM AND MUSLIMS 1 (2006), available at http://www.cair.com/Portals/0/pdf/american_public_opinion_on_muslims_2006.pdf.

228. Yvonne Yazbeck Haddad, *The Post 9/11 Hijab as Icon*, 68:3 SOC. RELIGION 253, 253–54 (2007).

229. *Id.* at 254.

230. *Id.*

231. See e.g. *Muslim Girl Suspended for Headscarf*, CNN.COM (Oct. 11, 2003, 5:17 PM), <http://www.cnn.com/2003/EDUCATION/10/11/scarf.reut/index.html>.

232. See e.g. *Freeman v. Dep't of Highway Safety & Motor Vehicles*, 924 So.2d 48, 56–57 (Fla. Dist. Ct. App. 2006) (holding that requirement to remove scarf was not a substantial burden to a Muslim woman who was unable to take a drivers license photo without its removal).

233. See e.g. *Khatib v. County of Orange*, SACV 07-1012, slip op. at 2–3 (C.D. Cal. Mar. 26, 2008) (forcing a Muslim woman to remove her headscarf in a holding facility and banning her from wearing it in a California court).

234. *Id.*

235. See e.g. *Webb v. City of Philadelphia*, 562 F.3d 256, 258 (3d Cir. 2009) (holding that a police officer could not wear her headscarf with her uniform without putting an undue burden on the city). See also Raja Abdulrahim, *Disney Restaurant Hostess Sues for Permission to Wear Hijab* LosAngelesTimes.com (August 19, 2010) <http://articles.latimes.com/2010/aug/19/local/la-me-0819-disney-hijab-20100819>. (hostess not allowed to work on several occasions wearing her headscarf in a visible position because Disney claimed headscarf violated dress code); see also Sarah Netter, *Lawsuit: Muslim Scarf Not Part of the Abercrombie & Fitch 'Look'*, ABCNEWS.com (Sept. 18, 2009) <http://abcnews.go.com/Business/muslim-teen-denied-bercrombie-job-hijab/story?id=8608173> (teenage girl not hired by Abercrombie & Fitch because her Islamic headscarf does not go with their 'look policy.' The Equal Employment Opportunity Commission filed suit on behalf of the girl).

236. Haddad, *supra* note 228, at 254.

237. *Id.* at 255.

Bush waged war in Afghanistan, the need to liberate women from their “degrading situation” partly justified the military action.²³⁸ As First Lady Laura Bush said in November 2001 on a radio address, “the fight against terrorism is also a fight for the rights and dignity of women.”²³⁹ The American public began to see the veil as a sign of Islamic extremism and oppression of women.²⁴⁰ After the fall of the Taliban, the removal of the burkha (full outer covering worn by women) was widely publicized as a sign of liberation.²⁴¹ How does America’s view of secularism, its history, and experience with Muslim Americans shape its approach to the headscarf, particularly post 9/11?

a. American Secularism and the First Amendment

American secularism means the government must protect all persons in the enjoyment of their civil and religious rights.²⁴² However, religious discrimination, violations, and restrictions on religious freedoms do occur.²⁴³ American secularism differs from French *laïcité* because in France, the state protects individuals from religion whereas in America, religions are protected from the state.²⁴⁴ American secularism also differs from Turkish secularism because in American secularism the state must be neutral towards all religions and cannot control religion.²⁴⁵ But in all three countries, politics is meant to be free from religion.

America was founded as a nation of immigrants escaping religious persecution.²⁴⁶ The founders intended secularism to protect religion from unwarranted government intrusion.²⁴⁷ They designed the First Amendment of the Constitution to prevent any single religion from dominating the affairs of the state.²⁴⁸ The First Amendment states: “Congress shall make no law respecting an establishment of

238. *Id.*

239. *Id.*

240. *Id.* The media contributed to this perception with commentary such as by Chris Matthews on MSNBC, “They hate us because our culture teaches us to respect women.”*Id.*

241. *See id.*

242. ALVIN W. JOHNSON & FRANK H. YOST, SEPARATION OF CHURCH AND STATE IN THE UNITED STATES 262 (1948); *See also* U.S. CONST. amend. I.

243. *See generally* Marisol Bello, *Controversy Shrouds Muslim Women’s Head Coverings* USA Today.com (April 15 2010) http://www.usatoday.com/news/nation/2010-04-14-headscarves-muslim_N.htm

244. SCOTT, *supra* note 76, at 92.

245. *See supra* note 165; *see also* SCOTT, *supra* note 76, at 91.

246. JOHNSON & YOST, *supra* note 242, at 256.

247. *Id.*

248. SCOTT, *supra* note 76, at 91.

religion, or prohibiting the free exercise thereof.”²⁴⁹ There are two clauses in the First Amendment: the Establishment Clause and the Free Exercise Clause.²⁵⁰

“The Establishment Clause prevents the government from establishing or endorsing. . . state religion,”²⁵¹ and “the Free Exercise Clause prevents the government from interfering with a person’s” practice of “religious beliefs.”²⁵² “Under the Free Exercise Clause, the government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious dogma.”²⁵³ The United States Senate has remarked that it is not the place of the legislature to decide which religion is true.²⁵⁴ The Constitution recognizes every person’s right to choose his or her own religion and to enjoy it freely without persecution.²⁵⁵

b. American Muslims

America has had a different experience with its Muslim population than both France and Turkey. Although Islam came to the forefront of negative media attention following 9/11, it has been part of American history since its founding.²⁵⁶ John Adams and Thomas Jefferson both owned copies of the Quran in their libraries,²⁵⁷ and they as well as other American founders referenced Muslims in their debates on the foundation of this country.²⁵⁸

American Muslims are the most racially diverse religious group in the United States.²⁵⁹ They include naturalized immigrants, U.S. born Muslims, as well as converts. Only one in eight American

249. U.S. CONST. amend. I.

250. Abdo, *supra* note 19, at 450.

251. *Id.*

252. *Id.*

253. *Id.* at 450–51.

254. JOHNSON & YOST, *supra* note 242, at 261–62.

255. *Id.* at 262.

256. See *An Introduction to Muslim America* Muslim Public Affairs Council (November 14, 2010) <http://www.mpac.org/assets/docs/publications/mpac-intro-to-muslim-america.pdf>

257. *Id.*

258. Ted Widmer, *People of the Book*, Boston Globe (September 12, 2010) http://www.boston.com/bostonglobe/ideas/articles/2010/09/12/the_true_history_of_the_koran_in_america/?page=3

259. Mohamed Younis, *Muslim Americans Exemplify Diversity Potential* GALLUP.com (March 2, 2009) <http://www.gallup.com/poll/116260/muslim-americans-exemplify-diversity-potential.aspx>.

Muslims are Arab.²⁶⁰ According to a 2009 Gallup poll survey, thirty-five percent of American Muslims are African American, while twenty-eight percent are white, eighteen percent are Asian, and eighteen percent consider themselves other.²⁶¹ About thirty-six percent of American Muslims were born in the United States, and sixty-four percent were born in over eighty different countries around the world.²⁶² The American Muslim community is one of the most diverse, with many different cultures and religious schools of thought.²⁶³

In the report *Muslim Americans: A National Portrait*, Dr. Suleyman Nyng describes America's experience with Islam in six stages, starting with pre-Columbian time up until the tragedy of 9/11.²⁶⁴ Briefly summarized, the United States experienced Islam with the influx of Muslims who arrived in the United States as African slaves.²⁶⁵ Although it is unknown how many millions of slaves were captured, scholars say that at least ten percent of them were Muslims.²⁶⁶ Their lack of freedom left them unable to maintain their identity and over time their offspring lost Islam.²⁶⁷ African Americans constitute at least one third of the American Muslim community,²⁶⁸ making them the largest racial group of American Muslims. They were born in the United States and either converted to Islam or reverted to mainstream Islam from the Nation of Islam.²⁶⁹

There was also an influx of Muslim immigrants to the United States after the Civil War mostly from Arab countries, who came as laborers and established the oldest mosque in America in the late 19th

260. WILLIAMS, *supra* note 217, at 449.

261. Mohamed Younis, *Muslim Americans Exemplify Diversity Potential* GALLUP.com (March 2, 2009) <http://www.gallup.com/poll/116260/muslim-americans-exemplify-diversity-potential.aspx>.

262. COUNCIL ON AMERICAN-ISLAMIC RELATIONS, POLICY BULLETIN, WESTERN MUSLIM MINORITIES: INTEGRATION AND DISENFRANCHISEMENT 2 (2006), *available at* http://www.cair.com/Portals/0/pdf/policy_bulletin_Integration_in_the_West.pdf.

263. *Id.*

264. *See Muslim Americans: A National Portrait* GALLUP The Muslim West Facts Project 19 (November 14, 2010) <http://www.muslimwestfacts.com/mwf/116074/Muslim-Americans-National-Portrait.aspx>

265. *Id.*

266. *Id.*

267. ARSHAD KHAN, ISLAM, MUSLIMS, AND AMERICA: UNDERSTANDING THE BASIS OF THEIR CONFLICT 27 (2003).

268. *Muslim Americans: A National Portrait* GALLUP The Muslim West Facts Project 19 (November 14, 2010) <http://www.muslimwestfacts.com/mwf/116074/Muslim-Americans-National-Portrait.aspx>

269. *Id.* In the 1960s and 1970s the Black Muslim movement called the Nation of Islam attracted many African American converts, but they later joined mainstream Islam following Malcolm X. Many African Americans also converted from Christianity to Islam. *Id.*

century.²⁷⁰ They were followed by South Asian migration mostly from India who settled on the West Coast, as these immigrants entered mainstream America, they became scientists, doctors and engineers.²⁷¹ Next during the Cold War era, thousands of Muslim university students were brought as part of the U.S. strategy against the Soviet Union, many of these immigrants established the first American Islamic institutions and organizations.²⁷² But America's most recognizable awareness of American Muslims follows the tragic events of 9/11.²⁷³

Although American discourse has also been dotted with stereotypical references depicting Muslim women as oppressed and viewing the headscarf as something that women need to be freed from (tied to past colonial discourse on the headscarf like in France), American Muslim scholars have been making efforts at countering these stereotypes since the 1970s.²⁷⁴ However as one Muslim American woman noted, throughout the decades although the stereotypes shift, Muslim women are still seen as the "other."²⁷⁵ As one commenter succinctly summarized these stereotypes, "isn't it sad that those women are suffering under illiteracy (1960s), that they are subject to polygamy and divorce (1970s), that they are forced into seclusion (1980s), that they cannot drive (1990s), that they are stoned and beaten in the streets (2000)."²⁷⁶ And after 2001 hijab became seen by some Americans as "the standard of the enemy. . . the flaunting of an identity associated with those who have declared war on the United States."²⁷⁷ Muslim women who wore the headscarf became the recognizable face of Islam, and had to bare stereotyping, pity, and harassment, sometimes enduring statements like "Go home," and "Death to Muslims."²⁷⁸ Despite these stereotypes however, American Muslim women are among the most highly educated female religious groups in the United States today.²⁷⁹

270. *Muslim Americans: A National Portrait* GALLUP The Muslim West Facts Project 19 (November 14, 2010) <http://www.muslimwestfacts.com/mwf/116074/Muslim-Americans-National-Portrait.aspx>

271. *Id.*

272. *Id.*

273. *Id.*

274. See Haddad, *supra* note 228, at 255–59.

275. *Id.* at 259.

276. *Id.*

277. *Id.*

278. *Id.*

279. Mohamed Younis, *Muslim Americans Exemplify Diversity Potential* GALLUP.com (March 2, 2009) <http://www.gallup.com/poll/116260/muslim-americans-exemplify-diversity-potential.aspx>.

The American Muslim community differs from the French Muslim community in a few key ways in terms of education and acceptance. Muslim immigrants in France come from former colonies, are largely working class, and are relegated to living in ghettos where they feel alienated.²⁸⁰ Muslims in the United States live all around the country and are not grouped into cultural or religious neighborhoods or ghettoized.²⁸¹ Muslims in the United States chose to immigrate and become American, and feel like they have opportunity and can strive for equality, while many Muslims in France feel forced to stay in France because of economic need.²⁸² A majority of Muslims in America are college graduates and many are professionals.²⁸³ American Muslims overwhelmingly support political activism.²⁸⁴ Eighty percent of American Muslims say that religion plays an important part of their daily lives.²⁸⁵ Yet the multiculturalism in the United States does not protect all religious practices. Despite the criticism from many United States based human rights groups over France's headscarf ban, individual instances of headscarf bans have also cropped up in the United States.

2. Legal text

There is no national law in the United States banning the headscarf or other religious symbols. However, there are state statutes called "religious garb statutes" meant to preserve religious neutrality.²⁸⁶ There are also school dress codes that ban the wearing of hats, bandanas, and hoods which are in place to curb gang activity.²⁸⁷ Both these statutes and codes have been used to prevent Muslim

280. COUNCIL ON AMERICAN-ISLAMIC RELATIONS, POLICY BULLETIN, WESTERN MUSLIM MINORITIES: INTEGRATION AND DISENFRANCHISEMENT, *supra* note 247, at 5–6.

281. *Id.* at 6.

282. *Id.*

283. See KHAN, *supra* note 267, at 28. More than 61% of American Muslims are college graduates, compared with 43.7% of all Americans. *Id.* See also COUNCIL ON AMERICAN-ISLAMIC RELATIONS, POLICY BULLETIN, WESTERN MUSLIM MINORITIES: INTEGRATION AND DISENFRANCHISEMENT, *supra* note 247, at 3 ("44% describe their occupation as professional/technical, medical or managerial").

284. COUNCIL ON AMERICAN-ISLAMIC RELATIONS, POLICY BULLETIN, WESTERN MUSLIM MINORITIES: INTEGRATION AND DISENFRANCHISEMENT, *supra* note 247, at 3 (reporting that ninety-three percent of Muslims support participation in the American political process).

285. Mohamed Younis, *Muslim Americans Exemplify Diversity Potential* GALLUP.com (March 2, 2009) <http://www.gallup.com/poll/116260/muslim-americans-exemplify-diversity-potential.aspx>. This number is second only to Mormons, eighty five percent of whom say religion is an important part in their daily lives. *Id.*

286. See Abdo, *supra* note 19, at 470–71.

287. See, e.g., *id.* at 466.

women from wearing headscarves in the classroom, and have resulted in the suspension, expulsion, and firing of women who fail to comply.

An example of a religious garb statute is Oregon's Revised Statute Section 342.650 which states: "No teacher in any public school shall wear any religious dress while engaged in the performance of duties as a teacher."²⁸⁸ These laws are comparable to the hijab ban in both France and Turkey, and are justified on the basis of preserving religious neutrality as a compelling state interest.²⁸⁹ However it is interesting to note that these laws were passed in 1895 under severe anti-Catholic sentiment meant to keep Catholic dress out of the classrooms, and were not passed to ban headscarves, although courts chose not to consider this in their analysis.²⁹⁰

The process of dealing with state laws that target religious practice has undergone change. Until 1990, the First Amendment Free Exercise Clause meant no law was allowed to infringe on the freedom of religion.²⁹¹ Religious freedom was protected by the "compelling interest" test from *Sherbert v. Verner*²⁹² which stated that if the state or federal government sought to restrict religious practice it had to show a compelling interest.²⁹³ The Supreme Court would only limit religious practice if it was "beyond the pale of civil society" such as polygamy or child labor.²⁹⁴ This "compelling interest" test is similar to the ECtHRRight's test which limits restrictions on religious freedoms unless they are "necessary" for a legitimate government aim.²⁹⁵

This decision was overturned in *Employment Division of Oregon, v. Smith*.²⁹⁶ *Smith* states that if a law conflicts with religious freedom it has to undergo strict scrutiny analysis. Furthermore, if the law is not narrowly tailored to achieve a compelling state interest, then there must be a religious exemption for believers.²⁹⁷ If a law is neutral,

288. 30 OR. REV. STAT. § 342.650 (2009). See also 24 PA. STAT. ANN. § 11-1112(a); *United States v. Board of Education*, 911 F.2d 882, 889 (3d Cir. 1990).

289. *Board of Education*, 911 F.2d at 889 (ruling on the validity of the Pennsylvania garb statute).

290. *Id.* at 894.

291. Elliot Taubman, *Headscarves, Skullcaps and Crosses: Does Banning Religious Symbols in Public Schools Deny Human Rights?*, 53:6 R.I. BAR J. 9 (2005).

292. 374 U.S. 398 (1963).

293. Taubman, *supra* note 291.

294. *Id.*

295. 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, 332 (2009).

296. 494 U.S. 872 (1990).

297. Mazza, *supra* note 295, at 333.

then the state does not need to show a compelling interest.²⁹⁸ It is very difficult for plaintiffs to show that a neutrally worded law targets religion.²⁹⁹ *Smith* thus created a loophole allowing religiously neutral statutes to escape strict scrutiny.

There is no federal protection in place for students who would like to exercise their freedom of religion.³⁰⁰ Eleven out of fifty states have tried to restore the protection of religious freedom through Religious Freedom Restoration Acts, but many more are still vulnerable to the loophole *Smith* created.³⁰¹ The United States Department of Education revised its guidelines for schools stating: “Students generally have no federal right to be exempt from religiously neutral and generally applicable school dress rules based on their religious beliefs or practices.”³⁰² The lack of protection leaves it up to school districts to come up with a compromise or change their dress codes.³⁰³ Sometimes peaceful and tolerant resolutions can be reached,³⁰⁴ but instances where students are singled out and humiliated exemplify mishandling of this issue.³⁰⁵

3. Major cases

The United States Supreme Court has never ruled on the constitutionality of hijab bans in public schools. However, there have been several incidents where Muslim women have been suspended from school, or fired from employment because of their refusal to remove their headscarf. In 2009 alone, 425 Muslim women filed

298. *Id.*

299. *Id.* at 335 n.194 (citing Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999) (applying strict scrutiny to a police department policy requiring men to shave their beards with medical exemptions but no religious exemptions to Muslim officers who wore beards as a religious belief)).

300. Congress attempted to restore the “compelling-interest test” by passing the Religious Freedom Restoration Act (RFRA) but the Supreme Court ruled that the RFRA gives more free-exercise protection than required by *Smith*. Charles C. Haynes, *Dress Codes vs. Religious Practice: What Kind of Nation Are We?*, FIRSTAMENDMENTCENTER.ORG (Oct. 19, 2003), <http://www.firstamendmentcenter.org/commentary.aspx?id=12080>.

301. *Id.*

302. *Id.*

303. Mazza, *supra* note 295, at 336.

304. See generally e.g. of compromise *CAIR Thanks Penn. Retailer for Backing Worker's Religious Rights*, CAIR.com (October 21, 2010) <http://www.cair.com/ArticleDetails.aspx?ArticleID=26668&&name=n&&currPage=1&&Active=1>

305. *Id.* at 337–38. See Associated Press, *Calif. School Apologizes for Ordering Muslim Girl to Remove Scarf*, FIRSTAMENDMENTCENTER.ORG (June 27, 2007), <http://www.firstamendmentcenter.org/news.aspx?id=18726>; See also, Associated Press, *Tennessee High School OKs Muslim Head Scarf*, FIRSTAMENDMENTCENTER.ORG (Jan. 16, 2005), <http://www.firstamendmentcenter.org/news.aspx?id=14697>.

workplace discrimination complaints with the Equal Employment Opportunity Commission.³⁰⁶ With increasing Islamophobia, and the spread of hijab bans across Europe,³⁰⁷ it is interesting to analyze how the United States addresses the headscarf. While at first glance it appears that banning the headscarf is not prevalent, a closer look shows that women have been made to remove their headscarves in many instances in the United States.

Some pre-9/11 cases show that problems with religious dress existed even before heightened tension with Islam.³⁰⁸ In *United States v. Board of Education of Philadelphia* a teacher who converted to Islam was not allowed to wear her headscarf to teach in a public school because it violated the “religious garb statute” of that state.³⁰⁹ In this case the Court of Appeals for the Third Circuit ruled that the teacher did not have a Free Exercise Clause challenge when she was fired from school for wearing her headscarf because the state could not accommodate her without endorsing religion, which is an undue burden on the state.³¹⁰ In 2002, however another Third Circuit case, *Tenaflly Eruv Ass’n, Inc. v. Borough of Tenaflly*, called the reasoning of this case into doubt.³¹¹ *Tenaflly* stated that the holding in *Board of Education of Philadelphia* was inconsistent with Supreme Court precedent in *Widmar v. Vincent*;³¹² relying on *Widmar*, the Third Circuit stated “that an interest in more separation between church and state than the Establishment Clause requires cannot justify restricting rights shielded by the Free Exercise Clause.”³¹³

The Supreme Court chose not to hear a case on religious dress in 1987.³¹⁴ However, because of the controversy surrounding this issue the Court may be more likely to hear a case on this issue if it arose today. How would the Supreme Court rule? Proponents of the Free Exercise Clause hope that the Court would adhere to its precedent in *Widmar* and the reasoning in *Tenaflly*, thereby rejecting the idea that

306. Marisol Bello, *Controversy Shrouds Muslim Women’s Head Coverings* USA Today.com (April 15 2010) http://www.usatoday.com/news/nation/2010-04-14-headscarves-muslim_N.htm.

307. Abdo, *supra* note 19, at 466.

308. Taubman, *supra* note 291.

309. *United States v. Bd. of Educ.*, 911 F.2d 882, 894 (3d Cir. 1990). The reasoning in this case was later called into doubt by *Tenaflly Eruv Ass’n, Inc. v. Borough of Tenaflly*, 309 F.3d 144 (3d Cir. 2002).

310. *Bd. of Educ.*, 911 F.2d at 894.

311. *Tenaflly*, 309 F.3d at 144.

312. 454 U.S. 263 (1981).

313. *Tenaflly*, 309 F.3d at 173 n.33.

314. *Order Dismissing the Appeal, Cooper v. Eugene Sch. Dist. No. 4*, 480 U.S. 942 (1987).

states cannot accommodate a teacher based on endorsing religion or that an exaggerated idea of secularism can be a compelling interest allowing a state to impede on religious freedoms.³¹⁵ Note the variation in this stance on not using secularism as an excuse to violate religious freedom as contrasted with the French and Turkish position.

There is little case law in circuit courts on the issue of religious dress; however, there have been several post-9/11 instances where Muslim women have been singled out, fired, expelled or suspended because of their headscarves.³¹⁶ Most of these instances have reached resolution outside of court.³¹⁷ A prominent example includes the case of an eleven-year-old girl who was suspended from school in Muskogee, Oklahoma in 2003 because she refused to remove her headscarf, stating that to do so would violate her religious belief.³¹⁸ The suspension was based on the school's dress code banning hats and other head coverings indoors, intended to stem gang activity.³¹⁹

The school attorney, D.D. Hayes, stated, "[y]ou treat religious items the same as you would any other item, no better, no worse. Our dress code prohibits headgear, period."³²⁰ The Department of Justice intervened in the case to protect the sixth grader's right to wear a headscarf to school.³²¹ Assistant Attorney General R. Alexander Acosta said, "No student should be forced to choose between following her faith and enjoying the benefits of a public education. We certainly respect local school systems' authority to set dress standards, and otherwise regulate their students, but such rules cannot come at the cost of constitutional liberties. Religious discrimination has no place in American schools."³²²

After lengthy negotiations the case settled outside of court.³²³ The student was allowed to wear the headscarf to school, and the

315. See *Widmar v. Vincent*, 454 U.S. 263 (1981); *Tenafly*, 309 F.3d at 144.

316. Mazza, *supra* note 295, at 336–38.

317. See *id.* at 337.

318. Abdo, *supra* note 19, at 466.

319. *Muslim Girl Suspended for Headscarf*, CNN.COM (Oct. 11, 2003, 5:17 PM), <http://www.cnn.com/2003/EDUCATION/10/11/scarf.reut/index.html>.

320. *Id.*

321. Press Release, U.S. Dep't of Justice, Justice Department Files Complaint Against Oklahoma School District Seeking To Protect Student's Right To Wear Headscarf To Public School (Mar. 30, 2004), http://www.justice.gov/opa/pr/2004/March/04_crt_195.htm.

322. *Id.*

323. See Associated Press, *Muslim Student, Oklahoma District Settle Hijab Lawsuit*, FIRSTAMENDMENTCENTER.ORG (May 20, 2004), <http://www.firstamendmentcenter.org/news.aspx?id=13379>. The settlement also requires the district to implement a training program for teachers and administrators about the new dress code, and publicize the change. *Id.*

school instituted a dress code policy change allowing students to wear religious headgear starting in 2004.³²⁴ Interestingly this reform came at the same time as the headscarf ban was passed in France,³²⁵ and the *Şahin* case was under consideration in Turkey. These parallel cases highlight the difference in the treatment of religious freedom in France and Turkey as opposed to the United States.³²⁶ The ECtHR ignored the religious significance of the headscarf and what it means to the women who wear it.

In the United States however, the courts in current headscarf cases are making an effort to take its importance into consideration. For example, in 2008, in *Khatib v. County of Orange*, a Muslim woman was forced to remove her headscarf in a holding facility and banned from wearing it in a California court.³²⁷ She brought a claim that this violated her First Amendment right.³²⁸ The Court began its consideration of her claim by stating in its first paragraph:

Plaintiff. . .has practiced the Islamic faith since birth. Her religious beliefs compel her to wear a hijab. . .Whenever Plaintiff is in public, she covers her hair and neck with a hijab. Appearing in the presence of male non-family members without a hijab “is a serious breach of faith and a deeply humiliating and defiling experience.”³²⁹

The Court in this case makes an effort to understand the significance of the headscarf to the plaintiff and the meaning of its removal. This case also uses a “sincerity test” which considers if a belief was sincerely held and rooted in religion and is meant to analyze the importance a religious act has in an individual’s life.³³⁰ This sincerity test shows a depth of consideration lacking in the analysis of the ECtHR, the French, and the Turkish courts where the expelled students’ rights and the importance of their religious beliefs were not considered.

324. *Id.* The settlement also requires the district to implement a training program for teachers and administrators about the new dress code, and publicize the change. *Id.*

325. Lovejoy, *supra* note 179, at 661–62.

326. *Id.*

327. *Khatib v. County of Orange*, SACV 07-1012, slip op. at 2–3 (C.D. Cal. Mar. 26, 2008).

328. *Id.* at 12.

329. *Id.* at 2.

330. *Id.* at 13 (citing *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994)).

Despite this consideration however, women still suffer repercussions for choosing to wear a headscarf in the United States.³³¹ As recently as April 2009, an appellate court found that a police officer could not wear her Islamic headscarf with her uniform because the city would suffer undue hardship if forced to permit religious clothing with police uniforms.³³² The state's justification of wishing to maintain religious neutrality was deemed sufficient to violate this police officers religious freedom, and she was forced to remove her headscarf.³³³ Such examples demonstrate that cases in the United States may parallel those in Turkey, where women are forced to choose between their religious beliefs and their careers.

III. CONCLUSIONS

Since the women the ban affects most are least consulted, it is important to ask, what do these women want? Women who wear headscarves want to enjoy their freedom of religion without giving up their ability to gain an education or the jobs of their choice.³³⁴ The headscarf does not limit a woman's ability to think or her ability to participate in public life and as an active member of her community. Their desire is not to contradict secularism and democracy, but rather to be able to enjoy the freedoms that democracy offers. Instead, the headscarf ban violates a woman's autonomy, choice, privacy, self expression, and ability to work and study.³³⁵

Attempts to ban the headscarf are often linked to liberation of the oppressed. However as discussed in Part I of this paper, women who elect to cover out of sincere religious belief and for modesty³³⁶ are not being liberated by the headscarf ban. Instead, they feel

331. See, e.g., Associated Press, *Muslim Woman Hani Khan alleges Abercrombie fired her for Wearing Headscarf*, NY DAILY NEWS (March 1st 2010) http://www.nydailynews.com/money/2010/03/01/2010-03-01_abcrombie_fitch_co_fires_muslim_employee_for_refusing_to_remove_headscarf.html (Muslim teenager fired from Abercrombie & Fitch for refusing to remove her headscarf after wearing her headscarf to work without incident for six months).

332. *Webb v. Philadelphia*, 562 F.3d 256, 258 (3d Cir. 2009). The appellate court upheld that allowing Webb and other officers to wear religious clothing or ornamentation with their uniforms would impose undue hardship on the City. *Id.* at 258–59. The undue burden would be the violation of the police department's religious neutrality. *Id.* at 261.

333. *Webb*, 562 F.3d at 261.

334. See, e.g., *Webb*, 562 F.3d at 258. See also Rainsford, *supra* note 66.

335. *Discrimination in the Name of Neutrality: Headscarf Bans for Teachers and Civil Servants in Germany*, HUM. RTS. WATCH, 2-3 (Feb. 26, 2009), http://www.hrw.org/sites/default/files/reports/germany0209_web.pdf.

336. See *supra* Part I.II.

humiliated when they are singled out and banned from entering a classroom, courtroom or building, fired from their jobs or suspended from school, and feel deeply violated when asked to remove their clothing.³³⁷

Turkey, France, and the ECtHR failed to consider the meaning of the headscarf as a religious practice and its importance in women's lives before imposing severe restrictions on their fundamental rights.³³⁸ Instead, these courts held that the headscarf is incompatible with secularism, relying on unsubstantiated excuses like public health and order which disguise the racism and paternalism behind the bans.³³⁹ The reasons given for banning the headscarf do not meet the requirements for restricting fundamental religious rights.³⁴⁰ Since religious rights are so crucial, and the impact of the bans so severe, courts must look beyond stereotypes and overgeneralizations.

The ban's on the headscarf are spreading and encompassing many aspects of life, from education and work, to sports, and even recreation.³⁴¹ In April of 2010, FIFA banned the Irani women soccer players (after first inviting them) from the Inaugural Youth Olympic Games, because of their headscarves, despite a request from the President of Iran's Football Federation to consider the players religious belief to wear Islamic dress.³⁴² In the United States, Disney is currently involved in resolving a dispute after asking an employee to either remove her headscarf or take a "backstage role."³⁴³ In Germany teachers have been banned from teaching with their headscarves in half of German states.³⁴⁴ In Turkey, women are even banned from walking their children to school wearing a headscarf.³⁴⁵ The invasive

337. See, e.g., Rainsford, *supra* note 66 ("But for some students [the headscarf ban] translates into a daily humiliation").

338. See, e.g., *supra* Parts II.I.C, II.II.C.

339. Rebouche, *supra* note 204, at 719.

340. See *supra* Part II.II.C.

341. See, e.g., Associated Press, *Muslim Basketball Player Sura Al-Shawk Fails to Overturn Headscarf Ban at Swiss Court*, SPORTSNEWS (Jan. 27, 2010), <http://blog.taragana.com/sports/2010/01/27/muslim-basketball-player-sura-al-shawk-fails-to-overturn-headscarf-ban-at-swiss-court-69866/>.

342. *FIFA Ban Iranian Women Footballers from Wearing Hijab in YOG* TEHRAN TIMES INTERNATIONAL DAILY, 13 (April 4, 2010) available at: <http://www.tehrantimes.com/PDF/10836/10836-13.pdf>.

343. Raja Abdulrahim, *Disney Restaurant Hostess Sues for Permission to Wear Hijab* LOSANGELESTIMES.COM (August 19, 2010) <http://articles.latimes.com/2010/aug/19/local/lame-0819-disney-hijab-20100819>.

344. *Discrimination in the Name of Neutrality*, *supra* note 335, at 1.

345. *Turkey: Headscarf Ruling Denies Women Education and Career*, *supra* note 155.

effects of the headscarf ban have gone far beyond the public classroom.³⁴⁶

In France one young girl reacted against the ban by shaving off her hair.³⁴⁷ This act of desperation to abide by both French law and religious belief shows the extreme pressure and negative impact this ban is having on young women.³⁴⁸ As the young girl said upon returning to class with a shaved head, “I respect the law but the law doesn’t respect me.”³⁴⁹ While the headscarf ban remains in place, the law does not respect these women. It continues to violate their rights, forcing them to choose between two worlds – between religion and education. Western society must stop measuring freedom by the amount of exposed skin. Instead freedom should be extended to all women to make their own choice in what to believe and how to dress.

346. In August 2010, the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) asked Turkey to end their discriminatory headscarf ban. *UN's CEDAW Asks Turkey to End Headscarf Ban*, *WORLD BULLETIN.NET* (Aug. 17, 2010, 5:57 AM), http://www.worldbulletin.net/news_detail.php?id=62678. CEDAW found that the ban negatively impacted not only women’s participation in education, but also work, health and the political and public spheres. *Id.* In Turkey, the ban affects people working in the public sector as well as university students, and women wearing headscarves are banned from entering military facilities, including hospitals and recreational areas. *Id.* CEDAW also said that Turkey has failed to conduct a statistical analysis to determine the number of women the headscarf ban has denied higher education. *Id.*

347. *Muslim Girl Shaves Head Over Ban*, *BBC NEWS.COM*, <http://news.bbc.co.uk/2/hi/europe/3708444.stm> (last updated Oct. 1, 2004, 5:20 PM).

348. *Id.*

349. *Id.*

