

UNVEILING THE TRUTH BEHIND THE FRENCH BURQA BAN: THE UNWARRANTED RESTRICTION OF THE RIGHT TO FREEDOM OF RELIGION AND THE EUROPEAN COURT OF HUMAN RIGHTS

Jennifer Heider*

I. INTRODUCTION: THE BURQA DEBATE

The traditional Muslim religious garment, the burqa, is the subject of controversy around the world. Some detractors of the burqa view it as a form of discrimination against women and argue that the garment should be banned in order to achieve gender equality and to ensure women's dignity.¹ Others view the burqa as a public interest concern, arguing that its prohibition, in some instances, is necessary to ensure public safety, security, health, order, and morals.² The primary counter-view in the burqa debate is that a public burqa ban violates human rights by eliminating the rights to individual liberty and freedom of religion.³ In addition, some burqa supporters view a ban itself as a form of discrimination,⁴ as such bans tend to be tailored specifically to Muslims and reflective of anti-Islamic sentiments.⁵

Action has been taken against the burqa in some areas of the world.⁶ This Note focuses on France, which recently implemented a law banning full-face Islamic veils in public.⁷ This law's potential impact on other countries is a cause for concern. Because the Muslim population has become more prominent throughout Europe,⁸ laws such as France's may be implemented discriminatorily, resulting in a large-scale restriction on the right to freedom of

* J.D. Candidate, 2012, Indiana University Robert H. McKinney School of Law; B.S., 2007, Purdue University.

1. *Bans on Full Face Veils Would Violate International Human Rights Law*, AMNESTY INT'L (Apr. 21, 2010), <http://www.amnesty.org/en/library/asset/POL30/005/2010/en/e0ad88e1-4e5a-4120-a624-b2a6c70ed174/pol300052010eng.html> [hereinafter *Bans on Full Face Veils*].

2. *Id.*

3. *Id.*

4. *Id.*

5. Editorial, *Government-Enforced Bigotry in France*, N.Y. TIMES, Apr. 12, 2011, at A24.

6. See *infra* Parts II, VI.C.4.

7. Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 prohibiting the concealment of the face in public spaces], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 11, 2010, p. 18344 [hereinafter Law 2010-1192]; *French 'Burqa' Ban Passes Last Legal Hurdle*, FR. 24 (Oct. 7, 2010), <http://www.france24.com/en/20101007-french-burqa-ban-passes-last-legal-hurdle-constitutional-council-veil> [hereinafter *French Burqa Ban*].

8. See *infra* Parts III.B, VI.C.1.b.

religion.⁹

Part II of this Note provides an overview of the 2004 French Religious Symbols Law and the recent French law that bans the burqa.¹⁰ Part III examines the principle of secularism in France and its effect on France's minority populations;¹¹ it also discusses the current environment specifically facing French-Muslims.¹² Part IV of this Note considers the French burqa ban as it relates to human rights.¹³ First, this Note looks at France's human rights obligations, focusing on the European Convention on Human Rights (European Convention) and the body responsible for enforcing this treaty, the European Court of Human Rights (ECHR).¹⁴ Second, this Note discusses Article 9 of the European Convention, which guarantees the right to freedom of religion.¹⁵ Part V examines ECHR case law pertaining to Article 9, including cases that have specifically dealt with bans of Islamic garments.¹⁶

Part VI of this Note offers reasons why the French burqa ban, if brought before the ECHR, should be found to violate Article 9 of the European Convention.¹⁷ This Note first explains how the new French law is distinguishable from prior Article 9 cases.¹⁸ It then argues that the law is disproportionate to any legitimate French concerns, which requires that the ECHR strike it down.¹⁹ Finally, this Note emphasizes the ECHR's duty to uphold human rights²⁰ and argues that, in light of the present day conditions in France as well as Europe in general, the only way for the ECHR to uphold the right to freedom of religion for Muslim women is to declare the French burqa ban an unlawful interference with Article 9.²¹ This Note opines that the French burqa ban presents the perfect opportunity for the ECHR to set a strong precedent in favor of the freedom of religion under the European Convention.²²

II. RELIGION LAWS IN FRANCE

The burqa ban is not the first French law to place limitations on public displays of religious expression. On March 15, 2004, France passed Law No.

9. See *Bans on Full Face Veils*, *supra* note 1.

10. See *infra* Part II.

11. See *infra* Part III.A.

12. See *infra* Part III.B.

13. See *infra* Part IV.

14. See *infra* Part IV.A.

15. See *infra* Part IV.B.

16. See *infra* Part V.

17. See *infra* Part VI.

18. See *infra* Part VI.A.

19. See *infra* Part VI.B.

20. See *infra* Part VI.C.

21. See *infra* Parts VI.C.1.a, VI.C.1.b.

22. See *infra* Parts VI.C.2, VI.C.3, VI.C.4.

2004-228,²³ which provides that “in public elementary schools, junior high schools and high schools, students are prohibited from wearing signs or clothing through which they exhibit conspicuously a religious affiliation.”²⁴ On its face, this law affects all religions equally.²⁵ In practice, however, this law has most severely impacted Muslim students because it prohibits Muslim schoolgirls from wearing headscarves to school.²⁶

On October 8, 2004, the *Conseil d’État* (French Supreme Court on Administrative Matters) upheld the constitutionality of Law No. 2004-228,²⁷ finding that, although it infringed on the “freedom of thought, conscience, and religion,” the restriction “was proportionate to the general interest pursued[—] respect for the principle of secularism in public schools.”²⁸ Prior to this decision, an investigative commission²⁹ examined the necessity of the law and determined that France needed to take action against religious symbols in public schools for three reasons: (1) “wearing an ostensibly religious symbol . . . suffices to disrupt the tranquility of the life of the school”;³⁰ (2) headscarves threaten public order as it is too difficult for teachers and local officials to distinguish “illicit ostentatious symbols” from “licit non-ostentatious ones”;³¹ and (3) headscarves threaten public order due to their association with communitarianism.³²

Five years later, French President Nicolas Sarkozy began campaigning for

23. Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law No. 2004-228 of March 15, 2004 concerning, as an application of the principle of the separation of church and state, the wearing of symbols or garb which show religious affiliation in public primary and secondary schools], art. 1, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2004, p. 5190 [hereinafter Law No. 2004-228]; Nicole Atwill, *France – Implementation of Law Prohibiting Religious Clothing in Public Schools*, 12 WORLD L. BULL. 2004, at 15, 15, available at <http://www.fas.org/sgp/othergov/wlb/200412.pdf>.

24. Atwill, *supra* note 23, at 15 (translating Law No. 2004-228 of March 15, 2004, art. 1 (Fr.)).

25. *Id.*

26. *Id.*

27. *Conseil d’État* [CE Sect.] [highest administrative court], Oct. 8, 2004, Rec. Lebon 2004, 367 (Fr.).

28. Atwill, *supra* note 23, at 16 (discussing CE Sect., Rec. Lebon 2004, 367 (Fr.)).

29. In 2003 French President Chirac created a committee that issued a report, based on interviews with political and religious leaders, school principals, and social and civil rights groups, that led to the adoption of Law No. 2004-228. Susanna Mancini, *The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence*, 30 CARDOZO L. REV. 2629, 2645 (2009); See Commission de reflexion sur l’application du principe de laïcité dans la République, Rapport au Président de la République (Dec. 11, 2003) (Fr.) [hereinafter Commission Report], available at <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/034000725/0000.pdf>.

30. Mancini, *supra* note 29, at 2646 (quoting Commission Report, *supra* note 29, at 41).

31. *Id.* (citing Commission Report, *supra* note 29, at 31).

32. *Id.* (citing Commission Report, *supra* note 29, at 45-46).

a stricter law on religious expression.³³ He argued that such a law is necessary to uphold France's values and secular ways, viewing the burqa as a sign of subservience rather than an expression of religious beliefs.³⁴ Advocating for the new law, President Sarkozy bluntly stated: "[The burqa] will not be welcome on the territory of the French republic."³⁵ Similarly, French Immigration Minister Eric Besson stated that he wanted "the wearing of the full veil to be systematically considered as proof of insufficient integration into French society, creating an obstacle to gaining (French) nationality."³⁶ These desires were realized in 2010, when the prohibition created by Law No. 2004-228³⁷ was broadened by a law that banned the burqa and other full-face veils in all public places.³⁸ Both the French Assembly and the French Senate overwhelmingly passed the ban,³⁹ which was ultimately approved by the Constitutional Council, France's top legal authority, on October 7, 2010.⁴⁰ The law went into effect on April 11, 2011.⁴¹

Unlike Law No. 2004-228, which restricts religious garments only in public schools,⁴² the new French law bans full-face veils in nearly all public places, including streets, markets, private businesses, entertainment venues, government buildings, and public transportation, but excluding public places of worship.⁴³ Any woman caught wearing a face-covering veil is subject to a 150

33. *Nicholas Sarkozy: Burqa Not Welcome in France*, TELEGRAPH (June 22, 2009), <http://www.telegraph.co.uk/news/worldnews/europe/france/5603070/Nicolas-Sarkozy-burqa-not-welcome-in-France.html> [hereinafter *Burqa Not Welcome*].

34. Angelique Chrisafis, *Nicholas Sarkozy Says Islamic Veils Are Not Welcome in France*, GUARDIAN (June 22, 2009), <http://www.guardian.co.uk/world/2009/jun/22/islamic-veils-sarkozy-speech-france>; *French Senate Passes Ban on Full Muslim Veils*, USA TODAY (Sept. 15, 2010), http://www.usatoday.com/news/religion/2010-09-16-veil15_ST_N.htm [hereinafter *French Senate Passes Ban*].

35. *Burqa Not Welcome*, *supra* note 33.

36. Elaine Ganley, *Minister Says Burqa-Style Veils Impede Citizenship*, SEATTLE TIMES (Dec. 16, 2009), http://seattletimes.nwsourc.com/html/nationworld/2010522907_apeufrancemuslimveil.html.

37. *France's Ban on the Burqa: The War of French Dressing*, ECONOMIST (Jan. 14, 2010), <http://www.economist.com/node/15270861>.

38. Law 2010-1192, *supra* note 7.

39. The French Assembly voted 336 to 1 in favor of the law. Liz Leslie, *French National Assembly Approves Burqa Ban*, MUSLIM VOICES (July 13, 2010), <http://muslimvoices.org/french-national-assembly-approves-burqa-ban/>. Similarly, the French Senate passed the law by a vote of 246 to 1. *French Senate Approves Burqa Ban*, CNN (Sept. 15, 2010), <http://www.cnn.com/2010/WORLD/europe/09/14/france.burqa.ban/index.html> [hereinafter *French Senate Approves Burqa Ban*].

40. *French Burqa Ban*, *supra* note 7.

41. Steven Erlanger, *France Enforces Ban on Full-Face Veils in Public*, N.Y. TIMES (Apr. 11, 2011), http://www.nytimes.com/2011/04/12/world/europe/12france.html?_r=3&hp.

42. *See supra* note 24 and accompanying text.

43. *French Burqa Ban*, *supra* note 7.

euro fine or a mandatory French citizenship course.⁴⁴ Additionally, anyone who forces a woman to wear a religious garment is punishable by a 30,000 euro fine and a year in prison; 60,000 euro and two years in prison if the forced individual is a minor.⁴⁵

Although the new law does not single out Islam on its face, in practice, the burqa ban is tailored to affect the Muslim population. The law constitutes a “restriction of a practice adopted only by women associated with a particular religion with the effect of impairing their enjoyment of fundamental rights.”⁴⁶ It is estimated that only 2,000 women in France actually wear the burqa⁴⁷—an insignificant number given France has an estimated Muslim population of five to six million.⁴⁸ Thus, the law is more symbolic than practical;⁴⁹ it “exploits a non-problem . . . and panders to anti-Muslim sentiment”⁵⁰

The French government has justified the law’s effect on the free exercise of religion by stating: “Given the damage [the full-face veil] produces on those rules which allow the life in community, ensure the dignity of the person and equality between sexes, this practice, even if it is voluntary, cannot be tolerated in any public place.”⁵¹ But it appears that France’s discriminatory tendencies underlie the new burqa ban. The law suggests that “one cannot be [both] a pious Muslim and a good French citizen, or even that Muslims are not welcome in France.”⁵²

Already France has encountered difficulties enforcing its burqa ban. On the day the law went into effect, at least three burqa-clad women were arrested while attending a demonstration against the new law outside the Notre Dame Cathedral in Paris.⁵³ Surprisingly, police arrested these women for staging an

44. *French Senate Passes Ban*, *supra* note 34; *France’s Burqa Ban in Effect Next Month*, CNN (Mar. 4, 2011), <http://edition.cnn.com/2011/WORLD/europe/03/04/france.burqa.ban/> [hereinafter *Ban in Effect*].

45. *French Senate Passes Ban*, *supra* note 34; *Ban in Effect*, *supra* note 44.

46. *Human Rights Watch Submission to the National Assembly Information Committee on the Full Muslim Veil on National Territory*, HUM. RTS. WATCH (Nov. 20, 2009), <http://www.hrw.org/en/news/2009/11/20/human-rights-watch-submission-national-assembly-information-committee-full-muslim-ve> [hereinafter *Human Rights Watch*].

47. *Id.*

48. Houssain Kettani, *2010 World Muslim Population*, PROC. 8TH HAW. INT’L CONF. ON ARTS & HUMAN., § 4.2.2 (2010), available at <http://www.pupr.edu/hkettani/papers/HICAH2010.pdf>.

49. *Defiance on First Day of Burqa Ban*, TIMES LIVE (Apr. 16, 2011), <http://www.timeslive.co.za/africa/article1024131.ece/Defiance-on-first-day-of-burka-ban> [hereinafter *Defiance*].

50. *French Burqa Ban*, *supra* note 7.

51. *French Senate Approves Burqa Ban*, *supra* note 39.

52. *Human Rights Watch*, *supra* note 46.

53. *Defiance*, *supra* note 49; see generally Colin Randall, *Is France Dithering over Burqa Ban?*, GUARDIAN (May 5, 2011), <http://www.guardian.co.uk/commentisfree/2011/may/05/france-burqa-ban-rachid-nekkaz>. French-Algerian businessman Rachid Nekkaz has created a lobby group, “Hands off my Constitution,” and a one million euro fund to pay any fines and

unauthorized demonstration rather than for wearing the burqa.⁵⁴ Regarding this incident, the Deputy General-Secretary of the Union of Senior Police Officers admitted, "The law is going to be immensely difficult to apply and will be applied in a small way."⁵⁵ In a separate incident, a French woman due in court for violating the burqa ban was denied entry into her hearing because she refused to remove her burqa.⁵⁶ Because police are prohibited from removing the veils themselves,⁵⁷ the woman was told to leave the court, and her court appearance was abandoned.⁵⁸ Another woman due in court for the same reason simply stayed home, having been told she would be unable to gain entry into the court.⁵⁹ The burqa ban's implementation challenges continue as on December 13, 2011, a woman was again denied entry into court for her hearing because she was wearing a burqa; however, the court sentenced her to fifteen days of "citizen service" and ruled that failure to comply will result in up to a two year prison sentence and a 30,000 euro fine.⁶⁰

III. BACKGROUND

A. Secularism in France

The French concept of secularism (*laïcité*)⁶¹ has been the law in France since 1905 and requires the separation of church and state.⁶² It arose during the French Revolution and is based on the belief that France should promote a

court fees incurred by women wearing the burqa. *Id.* Nekkaz challenges the French government's assertion that the burqa ban is being implemented and that burqa-clad women are being fined. *Id.*

54. *Defiance*, *supra* note 49.

55. *Id.*

56. Peter Allen, *French Burka Ban Descends into Farce*, TELEGRAPH (June 17, 2011), <http://www.telegraph.co.uk/news/worldnews/europe/france/8581980/French-burka-ban-descends-into-farce.html>. The woman stated, "The law forbids me from expressing myself, and indeed from defending myself. It forces me to dress a certain way, when all I want to do is live according to my religion." *Id.*

57. *Id.*; Angélique Chrisafis, *Muslim Women Protest on First Day of France's Face Veil Ban*, GUARDIAN (Apr. 11, 2011), <http://www.guardian.co.uk/world/2011/apr/11/france-bans-burqa-and-niqab>.

58. Allen, *supra* note 56.

59. *Id.*

60. *Woman Risks Jail for Wearing Full Veil in France*, THE LOCAL (Dec. 13, 2011), <http://www.thelocal.fr/2008/20111213/>.

61. Pew Res. Ctr., *100th Anniversary of Secularism in France*, PEW F. ON RELIG. & PUB. LIFE (Dec. 9, 2005), <http://pewforum.org/Government/100th-Anniversary-of-Secularism-in-France.aspx>.

62. Embassy of France in Washington, *Freedom of Religions and Sects*, FR. U.S. (Mar. 13, 2008), <http://ambafrance-us.org/spip.php?article642>.

unified national identity and ignore religious and ethnic differences.⁶³ France does not recognize or promote any specific religion;⁶⁴ the government requires only that French citizens show loyalty to France.⁶⁵ Therefore, the people of France may freely practice their religion of choice, subject only to security concerns, public laws, and a showing of respect for fellow citizens.⁶⁶

France legally requires separation of church and state,⁶⁷ and “it does so more militantly than any other [country].”⁶⁸ France expects those living within its borders, including immigrants, to embrace French identity.⁶⁹ This was emphasized by President Sarkozy when he spoke out against multiculturalism during a live, on-air interview in March 2011:

I do not want a society where communities coexist side by side . . . France will not welcome people who do not agree to melt into a single community. We have been too busy with the identity of those who arrived and not enough with the identity of the country that accepted them.⁷⁰

This complete assimilation into French society can be problematic for many French-Muslim immigrants and citizens because Islam “permeates every aspect of Muslim life.”⁷¹ Consequently, the French often perceive the burqa and other Islamic head coverings as signs of opposition to the “French model for integration and cultural homogeneity” and thus, as a refusal to become “French.”⁷²

The burqa ban is just one example of France’s extensive commitment to assimilation. In 2008 France denied citizenship to a woman, Moroccan-born Faiza Mabchour, reasoning that she had failed to integrate into French society.⁷³

63. Sarah Bienkowski, Note, *Has France Taken Assimilation Too Far? Muslim Beliefs, French National Values, and the June 27, 2008 Conseil d’État Decision on Mme M.*, 11 RUTGERS J.L. & RELIGION 437, 439-40 (2010).

64. *Id.*

65. Henri Astier, *The Deep Roots of French Secularism*, BBC NEWS (Sept. 1, 2004), <http://news.bbc.co.uk/2/hi/europe/3325285.stm>.

66. Embassy of France in Washington, *supra* note 62.

67. Cynthia DeBula Baines, Note, *L’affaire des Foulards – Discrimination, or the Price of a Secular Public Education System?*, 29 VAND. J. TRANSNAT’L L. 303, 311 (1996). Along with France, India, Japan, Mexico, and Turkey also legally require separation of church and state. *Id.* n.50.

68. Astier, *supra* note 65.

69. Baines, *supra* note 67, at 311-12.

70. Soeren Kern, *Debate Heats up over Muslims in France*, HUDSON N.Y. (Mar. 17, 2011), <http://www.hudson-ny.org/1969/muslims-in-france>.

71. Baines, *supra* note 67, at 311.

72. *Id.* at 312.

73. Conseil d’État [CE Sect.] [highest administrative court], June 27, 2008, No. 286798, available at <http://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=>

Ms. Mabchour had lived in France with her husband and three children since 2000.⁷⁴ Although she regularly wore the Muslim headscarf, Ms. Mabchour indicated that she began the practice at her husband's insistence and continued it due to habit rather than overlying conviction.⁷⁵ But the French authorities viewed this religious practice as her insistence not to assimilate.⁷⁶ The *Conseil d'État* upheld the decision to deny Ms. Machbour citizenship, finding the ruling necessary because she had "adopted a radical practice of her religion, incompatible with the essential values of the French community, and particularly with the principle of sexual equality."⁷⁷ Ms. Machbour's case shows not only the French view on Islamic garments but also France's willingness, in the name of *laïcité*, to require assimilation to the point of refusing citizenship because of religious expression.⁷⁸

B. The French Muslim Population

Muslim immigration to France began to increase during the period following World War II.⁷⁹ Faced with a labor shortage, France looked to its former colonies of Algeria, Morocco, and Tunisia for a supply of workers.⁸⁰ Although France's secular laws prevent the government from keeping statistics on the religious affiliation of the French population,⁸¹ the current Muslim population in France is estimated at five to six million.⁸² Notably, France is home to Europe's largest Muslim population, and following Catholicism, Islam is the country's second largest religion.⁸³

Despite France's relatively large Muslim population, a majority of which are French citizens, French Muslims face extreme discrimination in the areas of housing, employment, education, and political participation.⁸⁴ The French-

CETATEXT000019081221; Yael Barbibay, Note, *Citizenship Privilege or the Right to Religious Freedom: The Blackmailing of France's Islamic Women*, 18 CARDOZO J. INT'L & COMP. L. 159, 165 (2010).

74. Barbibay, *supra* note 73, at 165.

75. *Id.*

76. *Id.* at 166.

77. *France and Islam: A Burqa Barrier*, ECONOMIST (July 17, 2008), <http://www.economist.com/node/11751650>.

78. Barbibay, *supra* note 73, at 166.

79. *Id.* at 167

80. *Id.*

81. *French Burqa Ban Clears Last Legal Obstacle*, CNN (Oct. 7, 2010), <http://www.cnn.com/2010/WORLD/europe/10/07/france.burqa.ban/index.html>.

82. Kettani, *supra* note 48, § 4.2.2.

83. See Embassy of France in Washington, *supra* note 62; Bureau of Eur. & Eurasian Affairs, *Background Note: France*, U.S. DEP'T STATE, <http://www.state.gov/r/pa/ei/bgn/3842.htm> (last updated May 27, 2011).

84. U.N. Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development: Rep. of the Independent Expert on Minority Issues*, add., p. 2, Sept. 19-28, 2007, U.N. Doc. A/HRC/7/23/Add.2 (Mar. 4, 2008) (prepared by Gay McDougall).

Muslim community has been characterized as “vulnerable” and a “target group.”⁸⁵ Upon their arrival in France, poor immigrants of certain ethnic or religious backgrounds are segregated from the general French population by consistently being “allocated the poorest housing in specific neighbourhoods.”⁸⁶ These neighborhoods are located outside of major cities and mainly consist of run-down, economically depressed high-rise apartment blocks.⁸⁷ It is estimated that one-third of France’s Muslim population lives in such suppressed housing.⁸⁸

Employment discrimination is another obstacle facing French-Muslims. A survey measuring employment discrimination found that “four out of five employers preferred ancestral French workers” over those with minority backgrounds and that only 11% of French employers satisfied equal treatment standards during the employee recruitment process.⁸⁹ Another study, specifically investigating Muslim employment discrimination, sent fictitious résumés to a French employment agency and found that résumés with white French names received a 25% to 30% positive response rate while that of the same résumés sent using Arab-sounding names was only 5%.⁹⁰

Employment discrimination fuels high unemployment rates for Muslims and other minority groups,⁹¹ making it hard for these groups to leave the poor neighborhoods.⁹² Further, the inability to leave such housing tends to unite Muslims, primarily through religion, instead of facilitating their assimilation into French culture.⁹³ This cycle may also account in part for the fact that Muslims made up 50% to 80% of the French prison population in 2004.⁹⁴

The disparate impact on ethnic minorities in France has created tension between France and its Muslim population.⁹⁵ Discontent boiled over in 2005, when two young African immigrants died while fleeing police;⁹⁶ the public

85. Eur. Comm’n Against Racism & Intolerance, *ECRI Report on France*, at 29, CRI (2010) 16 (June 15, 2010), available at <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/France/FRA-CbC-IV-2010-016-ENG.pdf>.

86. U.N. Human Rights Council, *supra* note 84, para. 45.

87. *Id.*

88. Barbibay, *supra* note 73, at 169.

89. U.N. Human Rights Council, *supra* note 84, para. 54.

90. *Id.* para. 58.

91. Ellen Wiles, *Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality*, 41 L. & SOC’Y REV. 699, 702 (2007). In 2003 French North African immigrants were unemployed at a rate of four to five times the national average. *Id.*

92. *Ghettos Shackle French Muslims*, BBC NEWS (Oct. 31, 2005), <http://news.bbc.co.uk/2/hi/4375910.stm>.

93. 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, 314 (2009).

94. Wiles, *supra* note 91, at 702.

95. *Ghettos Shackle French Muslims*, *supra* note 92.

96. Barbibay, *supra* note 73, at 169.

blamed the state for the teens' deaths, and major civil unrest followed.⁹⁷ Violent riots raged for three weeks in areas largely populated by Muslim immigrants.⁹⁸ In response, then-Interior Minister Nicolas Sarkozy vowed to "clean the [cities]" and "get rid of the rabble," causing even more outrage throughout the Muslim community.⁹⁹ France thereafter issued a national state of emergency.¹⁰⁰ It is estimated that, as a result of the riots, 10,000 cars were burned, 300 buildings were damaged, 220 police officers were injured, and over 6,000 people were arrested.¹⁰¹ Commenting on the riots, then-French President Jacques Chirac emphasized that "discrimination must be fought, but order must be restored, as well."¹⁰²

Although the deaths of the two teens triggered the riots, "nobody doubts that the real roots of the trouble [lay] in the social and economic alienation of the largely Muslim population"¹⁰³ In 2007 riots further plagued French neighborhoods after two teens were killed in a motorcycle accident involving a police car.¹⁰⁴ Again, racial and cultural tensions were instigating factors, showing that the French government's promises¹⁰⁵ to decrease discrimination after the 2005 riots had fallen short.¹⁰⁶

Compounding Muslim discrimination in France, the terrorist attacks on September 11, 2001,¹⁰⁷ and the 2007 London bombings,¹⁰⁸ along with other recent terrorist activity,¹⁰⁹ have fueled a fear of extreme Islam in France.¹¹⁰ The

97. *Id.* at 169-70.

98. *Id.* at 170.

99. *Id.*

100. *Id.*

101. Jeffrey Stinson, *Fear of Replay of '05 Riots Has French on Edge*, USA TODAY (Oct. 27, 2006), http://www.usatoday.com/news/world/2006-10-26-france-riot-anniversary_x.htm.

102. *France Riots: Understanding the Violence*, CBC NEWS, http://www.cbc.ca/news/background/paris_riots/timeline.html (last updated Nov. 28, 2007) [hereinafter *France Riots*].

103. *France's Failure: The Biggest Lesson of the French Riots Is that More Jobs Are Needed*, ECONOMIST (Nov. 10, 2005), <http://www.economist.com/node/5136305>.

104. *France Riots*, *supra* note 102.

105. *Id.*

106. Emilie Boyer King, *Sarkozy Promises Inquiry into Teenage Deaths that Sparked Riots*, GUARDIAN (Nov. 28, 2007), <http://www.guardian.co.uk/world/2007/nov/29/france.international>.

107. Eur. Monitoring Ctr. on Racism & Xenophobia [EUMC], *Summary Report on Islamophobia in the EU after 11 September 2001*, at 18 (May 2002), available at http://fra.europa.eu/fraWebsite/attachments/Synthesis-report_en.pdf; EUMC, *Anti-Islamic Reactions in the EU after the Terrorist Attacks against the USA: France*, (May 23, 2002), available at <http://fra.europa.eu/fraWebsite/attachments/France.pdf>.

108. See EUMC, *The Impact of 7 July 2005 London Bomb Attacks on Muslim Communities in the EU*, at 33-35, 37-38 (Nov. 2005), available at <http://fra.europa.eu/fraWebsite/attachments/London-Bomb-attacks-EN.pdf> (discussing incident reports made by several EU countries and the French government's reaction to the attacks).

109. Perwez Abdullah, *France Integrating Muslims into Society to Promote Harmony*, INT'L NEWS (Mar. 10, 2011), <http://www.thenews.com.pk/>

prevalence of Islamophobia undoubtedly impacts how Muslims are treated,¹¹¹ which begs the question as to whether France's burqa ban is motivated by an unease regarding Islam rather than an effort to uphold secularism.

It is also worth noting France's recent treatment of another unpopular minority population, the Roma, commonly referred to as "gypsies."¹¹² In the summer of 2010, France expelled over 1,000 Roma from the camps where they lived.¹¹³ France denies any discriminatory motivations for these deportations;¹¹⁴ however, the European Union (EU) called the expulsions a "disgrace," and EU Justice Commissioner Viviane Reding stated that the expulsions "gave that impression that the people are being removed . . . just because they belong to an ethnic minority."¹¹⁵ She added, "[This] is a situation that I had thought that Europe would not have to witness again after the Second World War."¹¹⁶ The recent Roma expulsions further exemplify the difficult environment facing French minorities.

IV. FRANCE'S HUMAN RIGHTS OBLIGATIONS

Human rights are equally inherent to all individuals regardless of "nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status."¹¹⁷ They are also "interrelated, interdependent and indivisible."¹¹⁸ Nations are bound to uphold human rights obligations by various sources of international law, including treaties, customary international

Today'sPrintDetail.aspx?ID=35301&Cat=4&dt=3/10/2011. "France has received threats from Al Qaeda, and it is not a theoretical threat. French citizens have been killed in some Muslim countries in the Maghreb (West)." *Id.*

110. The French Ambassador to Pakistan conceded, "It is quite true that France has Islamophobia." *Id.*

111. EUMC, *Muslims in the European Union: Discrimination and Islamophobia*, at 73-75 (Dec. 2006), available at http://www.fra.europa.eu/fraWebsite/attachments/Manifestations_EN.pdf.

112. *EU Threatens Action over France's Roma Expulsions*, NPR (Sept. 14, 2010), <http://www.npr.org/templates/story/story.php?storyId=129852033> [hereinafter *Roma Expulsions*].

113. *Id.*; see generally *EU Nations and Roma Repatriation*, BBC NEWS (Sept. 17, 2010), <http://www.bbc.co.uk/news/world-europe-11344313> (discussing how EU Member States are responding to the French Roma expulsions); see generally *France Gets EU Reprieve on Roma*, BBC NEWS (Oct. 19, 2010), <http://www.bbc.co.uk/news/world-europe-11572646> (explaining that France vowed to implement an EU directive on the freedom of movement, and that the European Commission will not, for the time being, seek legal action against France regarding the Roma expulsions).

114. *Roma Expulsions*, *supra* note 112.

115. *Id.*

116. *Id.*

117. Office of the High Comm'r for Human Rights, *What Are Human Rights?*, U.N. HUM. RTS., <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (last visited Nov. 12, 2011).

118. *Id.*

law, and general principles.¹¹⁹ The main relevant sources of France's human rights obligations include the Universal Declaration of Human Rights (Universal Declaration), the European Convention, the International Covenant on Civil and Political Rights, and the Convention for Elimination of All Forms of Discrimination Against Women.¹²⁰

The Universal Declaration¹²¹ was established by the United Nations (UN) in 1948.¹²² This declaration lists fundamental human rights and freedoms and divides them into six categories: (1) security rights, (2) due process rights, (3) liberty rights, (4) political rights, (5) quality rights, and (6) social rights.¹²³ The French burqa ban affects liberty rights, specifically the right to freedom of religion.¹²⁴ Article 18 of the Universal Declaration provides that "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."¹²⁵ However, the exercise of this and other Universal Declaration rights are limited by Article 29: "[E]veryone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."¹²⁶ Although the Universal Declaration is a General Assembly resolution and, consequently, does not impose binding legal obligations,¹²⁷ it is viewed as the "principal basis for global human rights standards"¹²⁸ and has greatly influenced the European Convention.¹²⁹ And because the ECHR is responsible for ensuring that member states uphold the European Convention,¹³⁰ this Note proceeds with a focus on

119. *Id.*

120. *Id.*; *Multilateral Treaties Deposited with the Secretary-General: Chapter IV – Human Rights*, United Nations, <http://treaties.un.org/Pages/ParticipationStatus.aspx> (last visited Nov. 12, 2011).

121. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration].

122. *Id.*

123. James Nickel, *Human Rights*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/entries/rights-human/> (last updated Aug. 24, 2010).

124. See *id.*; Henry Samuel, *So Whose Liberty, Equality, Fraternity Is Really at Stake?*, TELEGRAPH (Apr. 15, 2011), <http://www.telegraph.co.uk/journalists/henry-samuel/8454833/So-whose-liberty-equality-fraternity-is-really-at-stake.html>.

125. Universal Declaration, *supra* note 121, art. 18.

126. *Id.* art. 29.

127. Kendal Davis, Note, *The Veil that Covered France's Eye: The Right to Freedom of Religion and Equal Treatment in Immigration and Naturalization Proceedings*, 10 NEV. L.J. 732, 753 (2010).

128. *Id.*

129. Convention for the Protection of Human Rights and Fundamental Freedoms pmbl., Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

130. *Id.* art. 19.

France's obligation to uphold the right of freedom of religion in the context of the European Convention and the ECHR.

A. The European Convention and the European Court of Human Rights

The European Convention was enacted,¹³¹ in part, to unite European countries through the realization and enforcement of certain fundamental freedoms and human rights.¹³² France is one of forty-six Member States of the European Convention,¹³³ and all Member States are held to the Convention's principles.¹³⁴ The ECHR was established by the European Convention¹³⁵ in 1959 for the purpose of interpreting and enforcing human rights.¹³⁶ Therefore, the ECHR will ultimately decide a validity challenge to the French burqa ban.¹³⁷

The ECHR is not bound by the principle of *stare decisis* and therefore is not required to follow its own precedent.¹³⁸ Yet, the Court gives weight to its prior decisions and normally follows them in order to ensure "legal certainty and the orderly development of the Convention case-law."¹³⁹ The ECHR, however, will stray from precedent if it has a "cogent reason" for doing so, such as to "ensure that the interpretation of the Convention reflects societal changes and remains in line with present day conditions."¹⁴⁰ In this sense, the ECHR views the European Convention as a "living instrument" which must constantly be re-interpreted.¹⁴¹

When deciding a case, the ECHR also looks for standards common throughout Europe based on domestic law, domestic practice, and other international or European instruments.¹⁴² Because the ECHR functions to uphold the human rights enumerated in the European Convention, the Court

131. *Id.* pmb1.

132. *Id.*

133. Christopher D. Belelieu, Note, *The Headscarf as a Symbolic Enemy of the European Court of Human Rights' Democratic Jurisprudence: Viewing Islam Through a European Legal Prism in Light of the Şahin Judgment*, 12 COLUM. J. EUR. L. 573, 588 (2006).

134. *Id.*

135. European Convention, *supra* note 129, art. 19.

136. Thomas A. O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, 4 HUM. RTS. Q. 474, 474 (1982).

137. Angeliqne Chrisafis, *France's Burqa Ban: Women Are 'Effectively Under House Arrest'*, GUARDIAN (Sept. 19, 2011), <http://www.guardian.co.uk/world/2011/sep/19/battle-for-the-burqa>.

138. *Cossey v. United Kingdom*, App. No. 10843/84, 13 Eur. H.R. Rep. 622, para. 35 (1990).

139. *Id.*

140. *Id.*

141. *Tyrer v. United Kingdom*, App. No. 5856/72, 2 Eur. H.R. Rep. 1, para. 31 (1978).

142. Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT'L L. 95, 126 (2003).

must “narrowly interpret” any interference with these rights.¹⁴³ Such interpretation is necessary for the existence of religious pluralism, which is a characteristic inherent to a democratic society.¹⁴⁴ Understanding the ECHR’s method of deciding cases is important because, although it has upheld bans on Islamic headscarves in the past, the cultural landscape in Europe has since changed.¹⁴⁵ For this reason, the ECHR should interpret the European Convention differently with regard to new cases dealing with religious freedom and Islamic headscarves.

B. Freedom of Religion under Article 9 of the European Convention

An ECHR determination on the validity of the French burqa ban will likely be based on the Court’s application and interpretation of Article 9 of the European Convention¹⁴⁶ Article 9 provides:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.¹⁴⁷
2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.¹⁴⁸

Thus, citizens of Member States have the right to freedom of religion under Article 9, but the right to manifest religious beliefs may be restricted under certain circumstances.¹⁴⁹

Because the status and treatment of the European Convention within a state’s legal system may differ from state to state, the ECHR established the “margin of appreciation” doctrine as a tool to help determine whether an infringement on the rights guaranteed under Article 9 is warranted.¹⁵⁰ The

143. *Sunday Times v. United Kingdom*, App. No. 6538/74, 2 Eur. H.R. Rep. 245, para. 65 (1979).

144. *Kokkinakis v. Greece*, App. No. 14307/88, 260 Eur. Ct. H.R. (ser. A) para. 31 (1993).

145. See *infra* Parts III.B, VI.C.1.b.

146. See Joshua Rozenberg, *Would the Burqa Ban Stand up at the European Court?*, GUARDIAN (Apr. 13, 2011), <http://www.guardian.co.uk/law/2011/apr/13/law-burqa-ban-european-court>.

147. European Convention, *supra* note 129, art. 9.

148. *Id.*

149. See *id.*

150. See *The Margin of Appreciation*, COUNCIL OF EUROPE, http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/ECHR/Paper2_en.asp (last visited Nov. 12, 2011).

margin of appreciation doctrine refers to the latitude the ECHR is “willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights”¹⁵¹ Accordingly, the Court considers the cultural background of the country at issue and gives a degree of deference to that state’s decision as to whether a state law or practice is in compliance with the European Convention.¹⁵² The ECHR determines whether to closely scrutinize a state’s decision or to create a strong presumption in favor of the state decision on a case-by-case basis,¹⁵³ thus, the determination for one state may not be appropriate for another.¹⁵⁴ The Court, however, tends to narrow its deference if there is a consensus among the states regarding the right or law at issue.¹⁵⁵ Also, the Court often applies a narrow margin of appreciation if a right is deemed “fundamental.”¹⁵⁶ To justify infringement upon a fundamental right, a state must “‘convincingly establish’ the necessity of the restriction.”¹⁵⁷

Some commentators criticize the margin of appreciation doctrine as a way for the ECHR to avoid its responsibility to enforce the European Convention.¹⁵⁸ Others argue that the extent to which the Court relies on the doctrine is no longer necessary, as Member States today are much more uniform with regard to democracy and civil liberties than they were when the margin of appreciation doctrine was created.¹⁵⁹ Regardless, the ECHR will apply some margin of appreciation to France if the Court rules on the French burqa ban. This Note argues that, because the burqa ban implicates the fundamental human right to freedom of religion, France’s margin of appreciation should be narrow.¹⁶⁰

As set forth above, the right to manifest religious expression is not absolute and may be restricted under Article 9(2) if that restriction is (1) “prescribed by law,” (2) corresponds to a legitimate state aim, and (3) is “necessary in a democratic society.”¹⁶¹ This Note concedes that the first two elements pose no obstacle to the French burqa ban. A restriction is “prescribed by law” if the state law in question is simply “accessible to the individual and expressed with sufficient detail to enable the petitioner to adjust his conduct

151. *Id.*

152. *Human Rights Act: How It Works*, BBC NEWS (Sept. 29, 2000), http://news.bbc.co.uk/2/hi/uk_news/946390.stm.

153. O’Donnell, *supra* note 136, at 475.

154. *Id.*

155. *Id.* at 495.

156. *Id.*

157. Belelieu, *supra* note 133, at 592.

158. *Id.* at 590. “The problem with the margin of appreciation is that it is an ill-defined judicial principle [And] the very notion of a margin of appreciation implies some type of infringement of an individual right which raises the question whether such a jurisprudential concept is compatible with a serious commitment to protecting human rights.” *Id.*

159. Javier Martínez-Torrón, *Limitations on Religious Freedom in the Case Law of the European Court of Human Rights*, 19 EMORY INT’L L. REV. 587, 601-02 (2005).

160. *See* O’Donnell, *supra* note 136, at 495.

161. European Convention, *supra* note 129, art. 9.

accordingly.”¹⁶² Additionally, countries generally show a legitimate state aim by “re-contextualizing the interference within their idiosyncratic historical, political, and demographic contexts.”¹⁶³ France will likely justify the burqa ban’s human rights interference by re-contextualizing it within the legitimate state aim of upholding secularism.

The third element under Article 9(2) presents a greater challenge. In order for a limitation of an individual right to be “necessary in a democratic society,” the limitation must relate to a “pressing social need” and be “proportionate to the legitimate aim pursued.”¹⁶⁴ In this regard, the ECHR balances “the severity of the restriction placed upon the individual against the public interest in question”¹⁶⁵ However, problems arise in the application of this balancing test because it is vague¹⁶⁶ and because the Court has not determined an ideal standard for deciding whether the interests at issue in a given case are equitably balanced.¹⁶⁷ At times, the Court has required that the limitation on the right be the least restrictive means by which the countervailing public interest can be accomplished.¹⁶⁸ At other times, the Court has required that the limitation only meet a rational basis test, meaning that the limitation need only have a reasonable relationship to the legitimate public interest objectives.¹⁶⁹ Nonetheless, the Court’s goal in balancing these interests is to protect individual rights and prevent disproportionate state action against these rights in the name of public policy.¹⁷⁰ Therefore, this balancing test may be seen as a mechanism to prevent abuse of the margin of appreciation doctrine.¹⁷¹

V. ECHR CASE LAW

A. ECHR Cases that Have Found Article 9 Interference

The ECHR did not hear its first Article 9 case, *Kokkinakis v. Greece*, until 1993.¹⁷² In *Kokkinakis*, a Jehovah’s Witness couple called on the home of a neighbor to have a religious discussion¹⁷³ and was prosecuted for and found guilty of violating a Greek law that prohibited proselytism, the act of soliciting

162. Davis, *supra* note 127, at 749.

163. Barbibay, *supra* note 73, at 188-89.

164. Silver v. United Kingdom, App. No. 5947/72, 5 Eur. H.R. Rep. 347, para. 97(c) (1983).

165. Belelieu, *supra* note 133, at 592.

166. *Id.* at 590, 594.

167. *Id.* at 592, 594.

168. *Id.* at 593.

169. *Id.* at 593-94.

170. *Human Rights Act: How It Works*, *supra* note 152.

171. *Id.*

172. *Kokkinakis v. Greece*, App. No. 14307/88, 260 Eur. Ct. H.R. (ser. A) (1993).

173. *Id.* paras. 6-7.

religious conversion.¹⁷⁴ The Greek courts reasoned that the couple had attempted to change the neighbor's religious beliefs "by taking advantage of her inexperience, her low intellect and her naïvety."¹⁷⁵

On application to the ECHR, the Court held that the Greek law violated Article 9 of the European Convention, finding it to be not proportionate to the legitimate aim of protecting the rights and freedoms of others and not "necessary in a democratic society."¹⁷⁶ In so holding, the Court expressed for the first time that the right of freedom to manifest one's religion can be exercised "in public," with those sharing the same faith, as well as in private.¹⁷⁷ The Court also recognized, however, that it may be necessary to limit this right in order to "reconcile the interests of . . . various groups and ensure that everyone's beliefs are respected" in contexts where the population maintains a variety of religious beliefs.¹⁷⁸

The ECHR similarly found an Article 9 violation in the 2010 case of *Ahmet Arslan v. Turkey*.¹⁷⁹ There, members of a religious group, the Aczimendi tarikaty, had gathered at a mosque for worship, and in accordance with the group's religious beliefs, walked in public wearing turbans and other distinctive religious garments.¹⁸⁰ The members were arrested and convicted for breaching Turkey's headgear law as well as Turkey's law that prohibited the wearing of religious garments in public.¹⁸¹ The ECHR recognized there was a legitimate aim for interfering with the right of freedom to manifest one's religion, especially given that Turkey is a secular nation.¹⁸² However, the Court found that the interest of secularism was not furthered by interfering with this group's religious dress and practices because the members were merely wearing their religious clothing in public.¹⁸³ The Court reasoned that the manifestation of religious beliefs in public rather than in state institutions does not garner the concern that the religious manifestation will influence others and violate state neutrality.¹⁸⁴

174. *Id.* paras. 8-9.

175. *Id.* para. 10.

176. *Id.* paras. 49-50.

177. *Id.* para. 31.

178. *Id.* para. 33.

179. *Ahmet Arslan v. Turkey*, App. No. 41135/98, Eur. Ct. H.R. (Feb. 23, 2010).

180. *Id.* paras. 6-7.

181. *Id.* para. 3; *Ahmet Arslan and Others v. Turkey*, Summary, NETH. INST. HUM. RTS. (Feb. 23, 2010), <http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/233813e697620022c1256864005232b7/7ac3c865131b054cc12576d3004f2955?OpenDocument> [hereinafter Summary].

182. *Ahmet Arslan*, App. No. 41135/98, para. 47; Summary, *supra* note 181.

183. *Ahmet Arslan*, App. No. 41135/98, paras. 51-52; Summary, *supra* note 181.

184. *Ahmet Arslan*, App. No. 41135/98, para. 49; Summary, *supra* note 181.

B. ECHR Cases that Have Dealt with the Islamic Garment Issue under Article 9

1. Dahlab v. Switzerland

The ECHR case of *Dahlab v. Switzerland* dealt specifically with the use of the Islamic headscarf under Article 9 of the European Convention.¹⁸⁵ This case concerned a Swiss primary school teacher, Lucia Dahlab, who wore the Islamic headscarf while teaching.¹⁸⁶ Ms. Dahlab was forced to stop wearing the garment while at work because the practice was incompatible with Switzerland's Public Education Act requiring that "the political and religious beliefs of pupils and parents are respected."¹⁸⁷ The Court found no Article 9 violation, reasoning that the interference with Ms. Dahlab's Article 9 right was "necessary in a democratic society" and proportionate to the legitimate aim of "protecting the rights and freedoms of others, public order and public safety."¹⁸⁸ Specifically, the Court concluded that Ms. Dahlab's right to manifest her religion was outweighed by the need to protect students.¹⁸⁹ The ECHR emphasized that Ms. Dahlab was in a position of influence over her students, which presented a particular concern for the impact "a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children."¹⁹⁰ The Court also expressed concern over the Islamic headscarf's impact on the principle of gender equality.¹⁹¹ Noting that the garment is often imposed on women, the Court reasoned it was "difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils."¹⁹²

2. Şahin v. Turkey

*Şahin v. Turkey*¹⁹³ may be the most well-known Article 9 case,¹⁹⁴ and it is

185. *Dahlab v. Switzerland*, App. No. 42393/98, 2001-V Eur. Ct. H.R. (2001).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*; see also *Dogru v. France*, App. No. 27058/05, 49 Eur. H.R. Rep. 179 (2008). In *Dogru* an eleven-year-old French-Muslim student refused to remove her Islamic headscarf during gym class and was expelled from school. *Id.* The ECHR held that the religious restriction was justified under Article 9(2) as it was necessary in a democratic society and directed towards a legitimate aim—furthering secularism in state schools. *Id.*

193. *Şahin v. Turkey*, App. No. 44774/98, 44 Eur. H.R. Rep. 5 (2005).

extremely relevant to understanding why the ECHR would be justified in striking down the French burqa ban. *Şahin* involved a Turkish ban on the Islamic headscarf in institutions of higher education.¹⁹⁵ Leyla Şahin, a Muslim student at one such educational institution, wore the Islamic headscarf because she considered it her religious duty.¹⁹⁶ Şahin was banned from taking an exam and from attending lectures pursuant to the Turkish headscarf ban,¹⁹⁷ and she brought suit alleging that the ban violated her right to “manifest her religion” under Article 9 of the European Convention.¹⁹⁸ After taking into consideration Turkey’s margin of appreciation in the matter,¹⁹⁹ the ECHR held that, although the ban interfered with Şahin’s Article 9 rights, the interference was “justified in principle and proportionate to the aim pursued.”²⁰⁰ Specifically, the ECHR found that the Turkish ban pursued the legitimate aim of “protecting the rights and freedoms of others and of protecting public order.”²⁰¹

The *Şahin* Court focused most of its analysis on the issue of whether the ban was “necessary in a democratic society.”²⁰² In making its determination, the ECHR considered that the Article 9 values represented of freedom of thought, conscience, and religion help make up the foundation of a “democratic society.”²⁰³ In addition, the Court acknowledged that the right of freedom to manifest one’s religion can be exercised individually, in public, and in community with others, but that the right is not absolute under Article 9(2).²⁰⁴ The ECHR concluded that limitations of this right are especially relevant when a country has a diverse political demographic because such restrictions help to ensure that all religious interests are considered and respected.²⁰⁵ But the Court added that “democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position.”²⁰⁶

Regarding the headscarf issue in *Şahin*, the ECHR reasoned that because the Islamic headscarf is treated differently across Europe, the Court must give a relatively wide margin of appreciation to a state when such issues are being reviewed.²⁰⁷ Context will determine the meaning or impact of an expression of

194. Isabelle Rorive, *Religious Symbols in the Public Space: In Search of a European Answer*, 30 CARDOZO L. REV. 2669, 2677-78 (2009).

195. *Şahin*, App. No. 44774/98, para. 19.

196. *Id.* para. 14.

197. *Id.* para. 17.

198. *Id.* para. 18.

199. *Id.* paras. 112-26.

200. *Id.* para. 122.

201. *Id.* para. 99.

202. *Id.* paras. 100-22.

203. *Id.* para. 104.

204. *Id.* para. 105.

205. *Id.* para. 106.

206. *Id.* para. 108.

207. *Id.* para. 109.

religious belief, whether it be the wearing of an Islamic garment or some other form of religious expression.²⁰⁸ Therefore, rules regarding Article 9 will differ from state to state according to the respective state customs and way of life.²⁰⁹ The rules will also depend on the requirements necessary for a state to protect its citizens' rights and freedoms and to maintain public order.²¹⁰

The ECHR justified the Islamic headscarf ban in *Şahin* on grounds of secularism and equality,²¹¹ emphasizing that Turkey is a secular and predominantly Muslim state.²¹² Because of Turkey's demographic, the Islamic headscarf is a highly influential symbol that the Court feared could be "presented or perceived as a compulsory religious duty," thereby pressuring those not wearing a headscarf into doing so.²¹³ In addition, the Court emphasized that the headscarf is a symbol that has gained political significance in Turkey over the years, which does not coincide with the principle of secularism.²¹⁴ The Court recognized Turkey's concern about extreme political movements looking to "impose on society as a whole their religious symbols and conception of a society founded on religious precepts."²¹⁵ Thus, the Court acknowledged that Turkey views the Islamic headscarf as a symbol of political Islam, not just that of individual liberty.²¹⁶ Also, given the law's educational context, the Court found that the Islamic headscarf did not coincide with the values of "pluralism, respect for the rights of others and, in particular, equality before the law of men and women."²¹⁷

A dissenting opinion was issued in *Şahin* by Judge Tulkens, who viewed the Islamic headscarf not only as a "local" issue but also as an issue facing Europe as a whole.²¹⁸ Consequently, the ECHR cannot rely on the margin of appreciation doctrine to ensure that the states are upholding the European Convention.²¹⁹ Instead of weighing the principles of secularism, equality, and liberty against one another, the majority opinion should have harmonized those principles.²²⁰ The Court should have concentrated on the fact that *Şahin* did not wear her headscarf in an "ostentatious or aggressive" manner or use it to "provoke a reaction, to proselytise or to spread propaganda and undermine . . . the convictions of others."²²¹ Therefore, the dissent concluded, there was no

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* para. 116.

212. *Id.* paras. 39, 114.

213. *Id.* para. 115.

214. *Id.*

215. *Id.*

216. *Id.* para. 55.

217. *Id.* para. 116.

218. *Id.* para. 3 (Tulkens, J., dissenting).

219. *Id.*

220. *Id.* 4.

221. *Id.* para. 8.

“pressing social need” for the Court to restrict Şahin’s right to manifest her religion through wearing a headscarf.²²² The Court had never before allowed a limitation of Article 9 rights because the religious sentiments at issue belonged to a minority or may be viewed as offensive to some.²²³

The dissent also addressed the concern of Islamophobia and how such discrimination can adversely affect the human rights of Muslims.²²⁴ The Muslim headscarf is not an indicator of radical Islam, and one who wears a Muslim garment is not automatically one who seeks to impose such a religious symbol on the public in general.²²⁵ Further, there was no reason to categorize Şahin as an extremist.²²⁶ The practice of wearing an Islamic garment is one that is utilized for various reasons—it does not carry with it a single meaning.²²⁷

Further, the dissent did not view the headscarf as an automatic representation of a woman’s submission to a man. Instead, the dissent emphasized that, because Muslim women, often wear an Islamic garment as a freely chosen expression of their religious beliefs,²²⁸ the headscarf at times can “be a means of emancipating women.”²²⁹ Thus, the majority’s gender equality justification for the law was ironic because the implementation of the ban meant that Şahin was prevented from participating in a practice she freely adopted.²³⁰ Moreover, it is beyond the role of the Court to make a “unilateral and negative” depiction of a religion or religious practice, to “determine in a general and abstract way” the significance of the Muslim headscarf, or to impose its viewpoint on Şahin.²³¹ Summarily, in arguing that the Turkish ban was not “necessary in a democratic society,” the dissent considered the opinions of Muslim women and showed that there is another side to the burqa debate, a side that the *Şahin* majority ignored.²³²

VI. THE ECHR SHOULD STRIKE DOWN THE FRENCH BURQA BAN

Law 2010-1192 infringes on a Muslim woman’s Article 9 right by preventing her from wearing the burqa in manifestation of her religious beliefs.²³³ In a validity challenge based on this infringement, the ECHR will determine whether the limitation is warranted under Article 9(2).²³⁴ This Note

222. *Id.* para. 9.

223. *Id.*

224. *Id.* para. 10.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* para. 12.

229. *Id.* para. 11.

230. *Id.*

231. *Id.* para 12.

232. *Id.* para. 11.

233. *See supra* Parts II, V.

234. *Id.*

concedes that the burqa ban is “prescribed by law” and pursues France’s “legitimate aim” of upholding its secular identity;²³⁵ however, the ECHR should strike down the burqa ban on the ground that it is not “necessary in a democratic society.”²³⁶ While the Court, rightly or wrongly, has upheld restrictions on the wearing of Muslim headscarves because the laws were found “necessary,”²³⁷ there are several reasons that will require the ECHR to treat the French burqa ban differently.

A. The French Burqa Ban is Distinguishable from Prior ECHR Case-Law

The French burqa ban is distinguishable from cases where the ECHR has held that an Article 9 limitation was “necessary in a democratic society.” Therefore, much of the Court’s reasoning in prior Article 9 cases is inapplicable to the current situation in France. First, and rather importantly, the French burqa ban and the Turkish headscarf ban in *Şahin* take place in notably different political and social contexts.²³⁸ Islam is the predominant religion in Turkey; 99.8% of the Turkish population is Muslim.²³⁹ Also, Islamic extremism is a legitimate concern in Turkey, where the government fears that such movements have the potential to interfere with the country’s recent democratic progression.²⁴⁰ In contrast, only a minority of France’s population is Muslim, and according to the French ambassador to Pakistan, “there is no home-grown terrorism in France.”²⁴¹ Unlike Turkey, France is not concerned with “striving to maintain a democratic system and guarding against the constant menace of insurrectionary Islamic political parties.”²⁴² Moreover, the French political sphere lacks Muslim representation; therefore, “Islamic attire lacks the political [symbolism] that it has in the Turkish context.”²⁴³ The ECHR, therefore, should distinguish the current environment in France from that of Turkey, where a burqa ban may be necessary.²⁴⁴

The ECHR should also treat the French burqa ban differently from prior Article 9 cases because the ban’s social context renders its practical effect highly discriminatory. The burqa ban is blatantly designed to affect Muslims, a minority population in France.²⁴⁵ In France, women wearing headscarves are

235. See *supra* Parts III.A, V.

236. See *Şahin*, App. No. 44774/98 (Tulkens, J., dissenting).

237. See *supra* Part V.B.

238. *Religious Expression*, EUR. CT. HUM. RTS., <http://ecohr.wordpress.com/2010/04/16/religious-expression/> (last visited Nov. 12, 2011).

239. *The World Factbook: Turkey*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html> (last updated Sept. 27, 2011).

240. *Religious Expression*, *supra* note 238.

241. Abdullah, *supra* note 109.

242. Barbibay, *supra* note 73, at 192.

243. *Id.*

244. *Id.*

245. *Id.* at 192, 204.

often viewed as outsiders.²⁴⁶ And because an insignificant number of French Muslims actually wear the burqa, there is no concern that those who wear it will unduly influence Muslim women who do not.²⁴⁷ Although the Turkish ban on headscarves in *Şahin* was also tailored to affect Muslims, that ban did not discriminate against minorities. “In Turkey, Muslim women wearing headscarves are not ‘others.’ They are perhaps the wives, mothers, and daughters of the legislators”²⁴⁸ Because most of Turkey’s population is Muslim, there was a legitimate concern that allowing the headscarf in schools may pressure women who do not wear the garment into doing so.²⁴⁹

The ECHR has stated that, under its case law, “the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.”²⁵⁰ However, considering that French Muslims have historically faced discrimination, especially in the areas of housing and employment,²⁵¹ it appears that France is using the burqa ban to do just that. France is exploiting its discretion against a minority population in order to dictate that Islam is neither a legitimate nor a welcome religion in France.²⁵² According to the ECHR, the French government may not abuse its dominant position; rather, it must guarantee the “fair and proper treatment of people from minorities.”²⁵³ Instead of treating the Muslim population of France fairly and properly, the French burqa adversely affects this population by imposing on them the state’s beliefs. The ECHR has not allowed a restriction of human rights merely because some may find a religion and its practices offensive.²⁵⁴ While the Muslim headscarf ban in *Şahin* does not discriminate against a minority, the burqa ban in France does, and this minority population relies on the ECHR to protect its human rights.

Additionally, the French burqa ban is distinguishable from prior ECHR case law because the scope of the law is, for the first time, all encompassing.²⁵⁵ In *Şahin* and *Dahlab* the headscarf was banned only in certain education institutions.²⁵⁶ In contrast, the new French law prevents women from exercising their right to wear the garment in nearly all public spaces; it restricts teachers and students as well as women who wish merely to take a walk outside.²⁵⁷

246. Mazza, *supra* note 93, at 318.

247. *Religious Expression*, *supra* note 238.

248. Mazza, *supra* note 93, at 318.

249. *Id.*

250. *Moscow Branch of the Salvation Army v. Russia*, App. No. 72881/01, 44 Eur. H.R. Rep. 912, para. 92 (2006).

251. *See supra* Part III.B.

252. *See supra* Part III.A.

253. *Şahin v. Turkey*, App. No. 44774/98, 44 Eur. H.R. Rep. 5, para. 108 (2005).

254. *See supra* note 223 and accompanying text.

255. *See supra* notes 42-45 and accompanying text.

256. *See supra* Part V.B.

257. *See supra* notes 42-45 and accompanying text.

Thus, the burqa ban is a more serious infringement on the right to religious freedom under Article 9 than the ECHR has previously considered.

Further, in *Dahlab* and *Şahin*, the potential impact of the burqa on students was a cause for concern and a factor that led the ECHR to uphold the Article 9 infringements.²⁵⁸ This factor was of particular importance in *Dahlab*, where the headscarf was worn by a teacher who held a position of influence over her young students and was responsible for instilling democratic values in the children.²⁵⁹ The French burqa ban does not invoke comparably specific concerns.

The ECHR's holding in *Ahmet Arslan*, that the religious group members' Article 9 rights were violated because the group did not interfere with Turkey's secular interests by merely wearing their religious clothing in public,²⁶⁰ hints that the ECHR may generally oppose broad public bans on religious clothing.²⁶¹ Indeed, since its decision in *Kokkinakis*, the ECHR has stated that Article 9 rights are exercisable "in public."²⁶² The French law's all encompassing ban of the burqa "constitutes an even more far reaching interference with religious freedom . . . since it amounts to a state-imposed dress code applicable at all times."²⁶³ Overall, the French law is sufficiently different from all prior Islamic garment laws ruled on by the ECHR, rendering the Court's rationale for finding Article 9 limitations "necessary in a democratic society" in those cases unpersuasive and the French burqa ban unnecessary.

B. The French Burqa Ban is Disproportionate to Legitimate French Concerns

In addition to not being "necessary in a democratic society," the French burqa ban is not "proportionate" to France's legitimate state concerns.²⁶⁴ Consequently, the law does not satisfy the "requirements for permissible interference with qualified rights" as established by the ECHR.²⁶⁵ There are "less restrictive and potentially far more effective alternatives" to achieving France's goal behind the burqa ban,²⁶⁶ whether that goal is to "promote gender equality, defend secular neutrality of the state (*laïcité*) or ensure security, or any combination of the three."²⁶⁷

258. See *supra* Part V.B.

259. See *supra* notes 185-92 and accompanying text.

260. See *supra* notes 179-84 and accompanying text.

261. Malcolm D. Evans, *From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression before the European Court of Human Rights*, 26 J.L. & RELIGION 345, 367 (2010).

262. *Kokkinakis v. Greece*, App. No. 14307/88, Eur. Ct. H.R. (ser. A) para. 31 (1993).

263. *Human Rights Watch*, *supra* note 46.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

France's goal of promoting gender equality by protecting those women who are forced to wear the burqa does not legitimize the law's restriction on the right freedom of religion.²⁶⁸ While many Muslim women are forced to wear a headscarf or burqa unwillingly "because of social pressure by family or even harassment by their peer group . . . others choose to wear it either on religious grounds, as an assertion of Muslim identity or as a culturally defined display of modesty."²⁶⁹ By completely banning the burqa in public, France wrongly assumes that all women are forced to wear the garment.²⁷⁰ Therefore the law is overbroad and will "inevitably conflict with the rights of those who make a conscious choice to veil themselves."²⁷¹

Moreover, the French burqa ban will likely have an adverse effect on gender equality because it puts women who wear the burqa in a no-win situation: either go out in public and risk state punishment or be restricted to their homes.²⁷² Such confinement denies these women access to many "services essential to the enjoyment of social and economic rights."²⁷³ This is especially true for women who are forced to wear the burqa; confinement reduces their ability to seek advice on and refuge from their controlled situation. Thus, the burqa ban, promoted as a "measure designed to protect women against harassment and oppression[,] may well result in even greater confinement."²⁷⁴ To deny women the right to wear a burqa under the guise of promoting gender equality when women themselves often choose to do so is ironic and ineffective.²⁷⁵ "Equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them."²⁷⁶

Unlike gender equality, French secularism and the protection of public morals are legitimate French concerns. But they are driven by public dissent to the burqa, which alone does not legitimize a full ban.²⁷⁷ The ECHR has repeatedly found that "the right to freedom of expression includes forms of expression 'that offend, shock or disturb the state or any section of the population.'"²⁷⁸ Further, human rights law has clearly established that "the disquiet of one person cannot be used to justify a restriction on the freedom of

268. *Bans on Full Face Veils*, *supra* note 1.

269. EUMC *supra* note 107, at 10.

270. *See supra* notes 228-32 and accompanying text.

271. *Human Rights Watch*, *supra* note 46.

272. *French Politicians Urged to Reject Ban on Full Face Veils*, AMNESTY INT'L (May 19, 2010), <http://www.amnesty.org/en/news-and-updates/french-politicians-urged-reject-ban-full-face-veils-2010-05-19> [hereinafter *French Politicians*].

273. *Bans on Full Face Veils*, *supra* note 1.

274. *Id.*

275. *Şahin v. Turkey*, App. No. 44774/98, 44 Eur. H.R. Rep. 5, para. 12 (2005) (Tulkens, J., dissenting).

276. *Id.*

277. *See supra* note 221 and accompanying text.

278. *Bans on Full Face Veils*, *supra* note 1.

expression of another.”²⁷⁹ France may believe the burqa ban is necessary to defend its values, but “such important values as liberty, equality and fraternity can[not] be advanced by such a discriminatory restriction.”²⁸⁰

Security is another legitimate French concern, especially in situations where individuals must be identified, such as in airports, schools, and government buildings and proceedings.²⁸¹ But instead of completely banning the burqa to rectify these security concerns, the government could simply require that a woman be taken aside in order to show her face to a female employee.²⁸² This protocol is one way to “satisfy both the individual’s right to manifest her religious beliefs and the duty to identify oneself.”²⁸³

Preventing radical behavior and terrorism is another legitimate security concern because the burqa is often associated with radical Islam in a world where radical Islam often invokes a fear of terrorism. However, “[e]quating conservative religious beliefs with violent radicalism is a mistake.”²⁸⁴ Women often wear the burqa for reasons not associated with radical Islam.²⁸⁵

While France does have legitimate state concerns regarding the burqa, the burqa ban disproportionately addresses these concerns by completely curtailing Muslim women’s right to freedom of religion, specifically the freedom to manifest one’s religion. Because this freedom is a fundamental right, the burqa ban’s interference must be “narrowly interpreted[.]”²⁸⁶ The ECHR should find that the severity of the burqa ban’s restriction outweighs its public interest justifications. While legitimate and important to some extent, France can combat its concerns in a manner that is less burdensome than a public ban on the garment. Thus, the ECHR should rule that the French burqa ban is disproportionate to the legitimate state concerns and constitutes a violation of Article 9.

C. The ECHR is Obligated to Uphold Human Rights

The burqa ban constitutes France’s failure to uphold its human rights obligations under Article 9 of the European Convention.²⁸⁷ While the Universal

279. *French Politicians*, *supra* note 272.

280. *Id.*

281. *Human Rights Watch*, *supra* note 46.

282. *Id.*

283. *Id.*

284. *Id.*

285. See Martin Asser, *Why Muslim Women Wear the Veil*, BBC NEWS (Oct. 5, 2006), http://news.bbc.co.uk/2/hi/middle_east/5411320.stm. The Koran, the holy book of Islam, asks both women and men to dress modestly; therefore, many women wear the burqa out of respect for their religion, as a way to display modesty and as a means to express their religion. *Id.*

286. *Sunday Times v. United Kingdom*, App. No. 6538/74, 2 Eur. H.R. Rep. 245, para. 65 (1979).

287. See *supra* Part IV.

Declaration is a very influential human rights treaty,²⁸⁸ it does not bind a Member State to its human rights provisions.²⁸⁹ This lack of enforcement power is precisely why the ECHR is among the most powerful treaty-based courts,²⁹⁰ having the duty and ability to enforce the human rights obligations of the European Convention upon Member States.²⁹¹ This is also why the ECHR must fulfill its human rights obligations; States must in some way be held responsible for the human rights obligations they undertake.

1. The ECHR Must Interpret the European Convention as a Living Document

The ECHR has a duty to treat the European Convention as a “living instrument.”²⁹² Therefore, in determining whether the French burqa ban interferes with human rights, the ECHR must interpret the European Convention in light of the present day conditions in France as well as across Europe.²⁹³

a. Present Day Conditions in France

Current conditions in France require that the ECHR strike down the French burqa ban. The recent *Mabchour* citizenship case,²⁹⁴ burqa ban, and Roma expulsions²⁹⁵ are unfortunate examples of France’s commitment to assimilation at the expense of human rights. Considering that the burqa ban interferes with the fundamental right to freedom of religion,²⁹⁶ and in light of the ban’s social and cultural context,²⁹⁷ the ECHR should apply a narrow margin of appreciation to France’s ruling that the burqa ban does not infringe upon Article 9 rights.²⁹⁸ Because French-Muslims are a discrete minority population,²⁹⁹ and because the French burqa ban subjects this group to further discrimination,³⁰⁰ current conditions in France provide the ECHR with a

288. See *supra* notes 121-29 and accompanying text.

289. *Id.*

290. Andreas Follesdal, *The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights*, 40 J. SOC. PHIL. 595, 595 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1652238.

291. See *supra* Part IV.A.

292. *Tyrer v. United Kingdom*, App. No. 5856/72, 2 Eur. H.R. Rep. 1, para. 31 (1978); see *supra* notes 138-41.

293. *Tyrer*, 2 Eur. H.R. Rep. 1, para. 31; see *supra* notes 138-41.

294. See *supra* notes 73-78 and accompanying text.

295. See *supra* notes 112-16 and accompanying text.

296. See *supra* Parts II, V.

297. See *supra* Part III.

298. See *supra* Part IV.B.

299. See *supra* Part III.

300. See *supra* Part II.

“cogent reason” to stray from its previous decisions “to ensure that the interpretation of the Convention reflects societal changes.”³⁰¹

b. Present Day Conditions in Europe

Current conditions in Europe in general also require that the ECHR strike down the French burqa ban. Because many EU countries do not collect population data regarding religion, data regarding the Muslim population in Europe is often speculative.³⁰² It is clear, however, that the Muslim population in Europe is rapidly increasing, having more than doubled over the past thirty years.³⁰³ Islam is the second largest religion in Europe,³⁰⁴ with estimates that there are at least fifteen million and up to as many as twenty-three million Muslims in the EU.³⁰⁵ Indicative of this trend, “Mohammed,” a common Muslim name, was the most popular name for males born in the United Kingdom in 2009.³⁰⁶ It is further estimated that 20% of the EU’s population will be of the Muslim faith by the year 2050, and this population percentage already exists in many European cities.³⁰⁷ One study forecasts that “Muslims could outnumber non-Muslims in France and perhaps in all of Western Europe by mid century.”³⁰⁸ A common theme among these different studies is that Europe’s landscape is clearly changing, which is sure to bring about social changes and requires greater discussion of minority integration in Europe.

Despite their growing population throughout Europe, the tide is turning against European Muslims.³⁰⁹ Key findings from the European Monitoring Centre on Racism and Xenophobia declare that:

Muslims are often disproportionately represented in areas with poor housing conditions, while their educational achievement

301. Cossey, App. No. 10843/84, 13 Eur. H.R. Rep. 622, para. 35 (1990).

302. *French Senate Approves Burqa Ban*, *supra* note 39.

303. Adrian Michaels, *Muslim Europe: The Demographic Time Bomb Transforming Our Continent*, TELEGRAPH (Aug. 8, 2009), <http://www.telegraph.co.uk/news/worldnews/europe/5994047/Muslim-Europe-the-demographic-time-bomb-transforming-our-continent.html>.

304. *See supra* note 83 and accompany text.

305. Michaels, *supra* note 303.

306. Richard Allen Greene, *Mohammed Tops List of English Baby Names*, CNN (Oct. 28, 2010), http://articles.cnn.com/2010-10-28/world/uk.mohammed_1_mohammed-islam-imam-abdullah?_s=PM:WORLD.

307. Michaels, *supra* note 303.

308. *Id.*

309. Peter Wilkinson, *Tide Turning Against Europe’s Immigrants*, CNN (Nov. 20, 2010), <http://www.cnn.com/2010/WORLD/europe/11/17/migrants.victims/index.html?iref=allsearch>. Wilkinson argues that migrants are often used as scapegoats in difficult economic and political times such as the situation currently in Europe. *Id.* Because the media often portrays immigrants poorly, when in fact most are “economic, are working and paying taxes,” it is argued that it is easy for migration easily can to become an “excuse for xenophobia and racism” and easy for the public to “confuse migrants with settled ethnic minorities.” *Id.*

falls below average and their unemployment rates are higher than average;

Muslims are often employed in jobs that require lower qualifications and as a group they are over-represented in low-paying sectors of the economy . . . [which] is a particular cause for concern given that unemployment is a key factor affecting integration; and

Muslims are often victims of negative stereotyping, at times reinforced through negative or selective reporting in the media.³¹⁰

It is clear that Islamophobia is increasingly affecting the Muslim population throughout Europe and the rest of the world, especially in light of recent acts of terrorism.³¹¹

Undoubtedly, the burqa debate is extremely controversial, and all too often, those who do not understand the debate associate the burqa with radical Islam.³¹² This misunderstanding is a byproduct of the actions of Islamic extremists, whose militant responses to the burqa ban fuel stereotypes and discrimination toward the entire Muslim of a population. In 2009 several Islamic websites published messages stating that “a radical North-African Islamic group affiliated with al Qaeda, threatened to retaliate against France if the country banned the burqa.”³¹³ In September 2010 officials stated that a bomb threat at the Eiffel Tower was taken seriously because the threat came soon after the anniversary of the September 11 attacks and minutes after the French Senate approved the burqa ban bill.³¹⁴ Further, in October 2010 the Al-Jazeera television station released an audiotape in which an individual believed to be al-Qaeda leader, Osama Bin Laden, referenced the French burqa ban and

310. EUMC, *supra* note 107, at 8. This report argues that the main issues facing Europe’s Muslim population is “how to avoid stereotypical generalisations, how to reduce fear, and how to strengthen cohesion in . . . diverse European societies while countering marginalisation and discrimination on the basis of race, ethnicity, religion or belief.” *Id.* at 3. The study also includes findings from interviews with Muslims from ten EU Member States. *Id.* These participants believed that through that assimilation, whereby Muslims would lose their religious identity, is the key for Muslims to feel accepted in current society, especially in light of the September 11 attacks which have made Muslims feel like they are “under a general suspicion of terrorism.” *Id.*

311. *Id.*

312. *Human Rights Watch, supra* note 46.

313. David Gauthier-Villars & Charles Forelle, *French Parliament Passes Law Banning Burqas*, WSJ (Sept. 15, 2010), <http://online.wsj.com/article/SB10001424052748703376504575492011925494780.html>.

314. *Id.*

threatened to kill French citizens.³¹⁵ The message stated: "If you want to tyrannize and think that it is your right to ban the free women from wearing the burqa, isn't it our right to expel your occupying forces, your men from our lands by striking them by the neck?"³¹⁶

Fear of extreme behavior and backlash from the burqa ban prompted France to raise its national terror alert to its second highest level after the French Senate passed the public burqa ban.³¹⁷ Similarly, terror threat information led the U.S. State Department to issue a travel alert to Americans in Europe in the fall of 2010, warning U.S. citizens "to be aware of their surroundings and protect themselves when traveling."³¹⁸ A security source stated that "[a] possible backlash from the French burqa ban [was] considered a factor in the . . . warning."³¹⁹ The various responses to the burqa ban show how controversial the law is and how the perception of the Muslim population can be negatively skewed by the actions of a small number of extremists. Overall, "views on the scarf ban [are] closely tied to overall attitudes toward Muslims, with those with negative views of Muslims far more inclined to embrace the ban than those with more positive views."³²⁰

Europe's Muslim population is rapidly increasing,³²¹ and with it, Islam is becoming a more prevalent religion throughout Europe.³²² If the ECHR allows France to continue its burqa ban, it will be setting a dangerous precedent during this critical time in Europe. This could potentially lead to other European countries adopting similar bans, which in turn, would result in widespread human rights violations across Europe. The burqa ban's discriminatory and potentially precedential impact provide the ECHR with a "cogent reason" for straying away from its previous decisions.³²³

315. *French Politics Will Not Be Swayed by Bin Laden Tape, Sarkozy Says*, CNN (Oct. 29, 2010), http://articles.cnn.com/2010-10-29/world/france.bin.laden_1_french-legislation-french-president-nicolas-sarkozy-french-politics?_s=PM:WORLD.

316. *Id.*

317. David Knowles, *New Eiffel Tower Bomb Threat but One of Many in Paris Lately*, AOL NEWS (Sept. 28, 2010), <http://www.aolnews.com/surge-desk/article/new-eiffel-tower-bomb-threat-but-one-of-many-in-paris-lately/19652139>.

318. *U.S. Issues Alert for Americans in Europe*, CNN (Oct. 3, 2010), <http://www.cnn.com/2010/US/10/03/europe.terror.advisory/index.html>.

319. *Id.*

320. Richard Morin & Juliana Menasce Horowitz, *Europeans Debate the Scarf and the Veil*, PEW RES. CENTER (Nov. 20, 2006), <http://pewresearch.org/pubs/95/europeans-debate-the-scarf-and-the-veil>.

321. Kettani, *supra* note 48, § 4.

322. *Id.*

323. *Cossey v. United Kingdom*, App. No. 10843/84, 13 Eur. H.R. Rep. 622, para. 35 (1990).

2. *The ECHR's Treatment of Islam is Suspect*

The ECHR has often been criticized for its treatment of religious minorities—notably Muslims—and their Article 9 right to freedom of religion.³²⁴ Although the ECHR was established in 1959, the Court did not accept an Article 9 case dealing with “new,” “minority,” or “nontraditional” religions until the 1993 *Kokkinakis* case.³²⁵ And while the Court found an interference with religious freedom under Article 9 in that case, it failed to elaborate or define the scope of its decision or its obligations under Article 9.³²⁶ From this inaction it has been inferred that the ECHR does not view the right to freedom of religion as one of utmost importance.³²⁷

Further, the Court suggested in *Kokkinakis* that a witness lobbying for a Christian religion would be treated more favorably than a witness lobbying for a minority religion.³²⁸ Because of this distinction, it has been argued that the ECHR favors mainstream over non-mainstream religions.³²⁹ Additionally, it appears that the ECHR tends to downplay the influential impact of mainstream religious symbols (e.g., the crucifix) by interpreting them as representations of national culture and identity.³³⁰ In contrast, the ECHR has consistently viewed minority religious symbols, in particular the Islamic headscarf and burqa, as symbols that are inconsistent with fundamental democratic values.³³¹ Even in *Şahin*, where Islam was the majority religion, the Court applied the “margin of appreciation” doctrine to protect the non-Muslim minority.³³² Considering that the Court does not often rule for the protection of the minority religion, which is often Islam, this application of the doctrine is interesting.³³³

Critics also argue that *Şahin* exemplifies the ECHR's failure to objectively analyze the Islamic headscarf issue; rather, the Court “portray[s] all uses of the headscarf as symbolic of a larger Islamic fundamentalist movement

324. See generally Peter G. Danchin, *Islam in the Secular Nomos of the European Court of Human Rights*, 32 MICH. J. INT'L L. 663 (2011) (exploring why the ECHR has held that it is not discriminatory for a state to recognize and protect Article 9 rights for Christianity but not for Islam).

325. Keturah A. Dunne, Comment, *Addressing Religious Intolerance in Europe: The Limited Application of Article 9 of the European Convention of Human Rights and Fundamental Freedoms in Germany*, 30 CAL. W. INT'L L.J. 117, 138 (1999).

326. *Id.* at 138-39.

327. *Id.*

328. *Id.* at 138.

329. *Id.* Dunne argues that such a distinction reflects the Court's favoritism towards “state-established religions and general unwillingness to analyze laws that benefit religions favored by the State.” *Id.* Dunne further notes the European Commission's statement that “a State Church system cannot in itself be considered to violate Article 9 of the Convention [because] such a system . . . existed there . . . already when the Convention was drafted.” *Id.*

330. Mancini, *supra* note 29, at 2631.

331. *Id.*

332. *Id.* at 2659.

333. See Belelieu, *supra* note 133, at 621.

intent on disrupting the democratic values of . . . all of Europe.”³³⁴ Such considerations beg the question as to whether the ECHR decisions regarding religious freedom reflect the anti-Islam bias that is present throughout Europe.³³⁵

The ongoing question of whether Turkey will join the EU provides further insight into Europe’s view of Islam. If Turkey is to be admitted as a Member State, it must show that it fits the mold of the West,³³⁶ having the “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.”³³⁷ Significantly, the West views the Islamic headscarf and burqa as a sign of radical Islam.³³⁸ And as noted earlier, the ECHR’s decision to uphold the headscarf ban in *Şahin* was justified in part on the ground that Turkey needed to prevent an uprising of radical Islam.³³⁹ Turkey’s mission against the Islamic headscarf may be viewed as an effort to reduce “Europe’s distrust of Turkey’s ability to ‘control’ its Muslim roots” and to create the perception of satisfying EU membership criteria.³⁴⁰ But these efforts simultaneously restrict the human right to freedom of religion in an ironic violation of the EU membership requirement to uphold human rights.³⁴¹ Islamic garments have been viewed as a “symbolic enemy” of the EU, which was founded “on a common Christian heritage.”³⁴² Further, while the EU has a motto of “unity in diversity,” the EU’s view on Islam, exemplified by the treatment of Islamic garments and Turkey’s willingness to go to lengths to downplay its Muslim roots, can be said to show that the EU may be selective in what kind of diversity it chooses to accept.³⁴³ This current political and religious background in Europe must be kept in mind as it may have some underlying impact on the ECHR’s decisions regarding the right to freedom of religion.

In determining the validity of the French burqa ban, the ECHR should

334. *Id.* at 622.

335. Danchin, *supra* note 324.

336. Belelieu, *supra* note 133, at 586-87.

337. *Accession Criteria*, EUR. COMMISSION http://ec.europa.eu/enlargement/enlargement_process/accession_process/criteria/index_en.htm (last updated Oct. 30, 2010). An EU candidate country must also satisfy the following membership requirements: “the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union” and “the ability to take on the obligations of membership including adherence to the aims of political, economic & monetary union.” *Id.*

338. Belelieu, *supra* note 133, at 586.

339. *Şahin v. Turkey*, App. No. 44774/98, 44 Eur. H.R. Rep. 5, para. 10 (2005).

340. Belelieu, *supra* note 133, at 618.

341. *Id.* at 617-18.

342. *Id.* at 621.

343. *Id.* For more on this topic, see BARRY RUBIN ET AL., *TURKEY AND THE EUROPEAN UNION: DOMESTIC POLITICS, ECONOMIC INTEGRATION, AND INTERNATIONAL DYNAMICS* (Barry Rubin & Ali Carkoglu eds., 2003).

strongly consider the reasoning of the *Şahin* dissent.³⁴⁴ That approach considers the burqa ban in light of present-day conditions and better serves the Court's obligation to uphold human rights.³⁴⁵ Unlike the *Şahin* majority, the dissent recognized that Islamic garments are an issue throughout Europe and not merely local to Switzerland.³⁴⁶ The dissent also acknowledged that European Islamophobia feeds a stereotypical view of Islamic garments and negatively impacts the treatment of Muslims.³⁴⁷ Further, the dissent emphasized that Islamic garments do not carry a single meaning, and because some women voluntarily wear a headscarf or burqa, bans on such garments may in some ways diminish gender equality.³⁴⁸ Additionally, the dissent reiterated the importance of protecting the Article 9 rights of minorities, even though their beliefs may be offensive to some.³⁴⁹

The ECHR is obligated to overcome the anti-Islam bias that is present in Europe and to take action in order to protect the human rights of all European Convention member citizens—whether they be of a mainstream or minority religion. “Above all, the message that needs to be repeated over and over again is that the best means of preventing and combating fanaticism and extremism is to uphold human rights.”³⁵⁰

3. Europe's View on the Burqa

Europe's stance on the burqa coincides with its general stance on Islam. In 2010 the Pew Research Center surveyed France, Germany, Great Britain, Spain, and the United States regarding a ban on the full Islamic veil.³⁵¹ The results show that the French public has the most widespread support for the ban, with 82% of those polled in approval.³⁵² A majority of the people polled in the other Western European countries also supported the idea of a ban in their own countries, with 71% approval in Germany, 62% in Britain, and 59% in

344. See *supra* notes 218-32.

345. *Id.*

346. *Id.*

347. *Id.*; see generally COMM'N ON BRITISH MUSLIMS & ISLAMOPHOBIA, ISLAMOPHOBIA: ISSUES, CHALLENGES AND ACTION (Robin Richardson ed., 2004), available at <http://www.insted.co.uk/islambook.pdf> (addressing attitudes, the international context, and employment issues arising from Islamophobia, as well as the need to educate, deal with the media, and change race relations in order to overcome discrimination).

348. See *supra* notes 218-32.

349. *Id.*

350. *Şahin v. Turkey*, App. No. 44774/98, 44 Eur. H.R. Rep. 5, para. 20 (2005) (Tulkens, J., dissenting).

351. *Widespread Support for Banning Full Islamic Veil in Western Europe*, PEW RES. CENTER (July 8, 2010), <http://www.pewglobal.org/2010/07/08/widespread-support-for-banning-full-islamic-veil-in-western-europe/> [hereinafter PEW RES. CENTER].

352. *Id.*

Spain.³⁵³ In contrast, only 28% of those polled in the U.S. approved of a burqa ban.³⁵⁴

A similar Pew Institute study, conducted in 2005, regarding bans on Muslim headscarves reflected lower approval ratings.³⁵⁵ Seventy-eight percent of those polled in France approved, with 54% in Germany, only 29% in Britain, and 43% in Spain.³⁵⁶ This study also found that a majority of the Muslim women polled in Britain and Spain, and just under half of those in Germany, wear a headscarf or other garment that covers their heads every day or almost every day.³⁵⁷ In contrast, 73% of Muslim women polled in France reported that they do not wear a Muslim head covering.³⁵⁸ As noted above, it is estimated that only around two thousand women in France wear the burqa.³⁵⁹

The burqa ban approval ratings listed above dangerously correlate with the dramatically increasing Muslim population throughout Europe. And because Muslim head coverings appear to be more prevalent in European countries other than France, it stands to reason that burqa bans in other European countries would result in the widespread denial of Muslim women's

353. *Id.*

354. *Id.*; see Bobby Ghosh, *Islamophobia: Does America Have a Muslim Problem?*, TIME (Aug. 30, 2010), <http://www.time.com/time/nation/article/0,8599,2011798,00.html>. Currently there is a controversy in the U.S. surrounding the proposed plans to build an Islamic mosque on the site of Ground Zero. *Id.* New York City Mayor Michael Bloomberg put into perspective the U.S. First Amendment constitutional right to freedom of religion, stating: "Everything the United States stands for and New York stands for is tolerance and openness, and I think it's a great message for the world that unlike in other places where they might actually ban people from wearing a burqa or they might actually keep people from building a building, that's not what America was founded on, nor is it what America should become." Michael Howard Saul, *Bloomberg, Palin Agree to Disagree on Ground Zero Mosque Plans*, WSJ (July 21, 2010), <http://blogs.wsj.com/metropolis/2010/07/21/bloomberg-palin-agree-to-disagree-on-ground-zero-mosque-plans/>; see Ron Elving, 'Ground Zero Mosque': Latest in a Litany of Killer Phrases, NPR (Aug. 20, 2010), <http://www.npr.org/blogs/watchingwashington/2010/08/20/129319446/>. It appears that the U.S. would treat a headscarf or burqa ban differently under the First Amendment than the ECHR has done in the past under Article 9. See generally Christina A. Baker, Note, *French Headscarves and the U.S. Constitution: Parents, Children, and Free Exercise of Religion*, 13 CARDOZO J.L. & GENDER 341 (2007) (discussing the freedom to religion under U.S. law, and how a headscarf ban in the U.S. would potentially be treated under the U.S. Constitution).

355. *Islamic Extremism: Common Concern for Muslim and Western Publics*, PEW RES. CENTER (July 14, 2005), <http://www.pewglobal.org/2005/07/14/islamic-extremism-common-concern-for-muslim-and-western-publics/>. The increase in approval of Muslim veil bans since the 2005 study may be explained in part by Muslim acts of violence in 2005 and 2006, including an unsuccessful terrorist plot by British Muslims to blow up U.S.-bound airplanes and the French riots. See Morin & Horowitz, *supra* note 320.

356. Morin & Horowitz, *supra* note 320.

357. *Id.*

358. *Id.*

359. *Human Rights Watch*, *supra* note 46.

right to freedom of religion.³⁶⁰

4. European Countries Considering Burqa Bans

Several European countries are debating whether to follow in France's footsteps and ban the burqa in public. A public ban similar to France's was enacted in Belgium on July 23, 2011, shortly after the French burqa ban went into effect.³⁶¹ In fact, Belgium was the first European country to propose a law banning full-face veils, with Belgium's lower house of parliament passing the bill in April 2010.³⁶² The Belgium law, which imposes a 30 euro fine and a penalty of up to seven days in jail, is justified by security concerns.³⁶³ But like the French law, the Belgian ban is more symbolic than practical because very few Belgian women actually wear the burqa.³⁶⁴

In August 2011 an Italian parliamentary commission approved a draft law banning the public burqa, similar to that in France and Belgium.³⁶⁵ The proposed law would fine women wearing the burqa in public as well as those who force women to wear the garment.³⁶⁶ Proponents argue that the law is necessary to combat security concerns and to help Muslim women assimilate into Italian society, but only a relatively small number of women in Italy actually wear the garment.³⁶⁷

In Spain, a proposal was made for a full ban on the Islamic veil, but it was rejected by the Spanish parliament.³⁶⁸ Barcelona, however, has implemented a ban on such garments in certain public places, such as "municipal offices, public markets and libraries."³⁶⁹ The conservative Popular Party has since called to extend the ban to all public places.³⁷⁰

Half of the states in Germany have passed laws that restrict "the wearing of religious clothing and symbols, including the burqa and hijab (headscarf), in

360. Morin & Horowitz, *supra* note 320; PEW RES. CENTER, *supra* note 351.

361. *Belgian Ban on Full Veils Comes into Force*, BBC NEWS (July 23, 2011), <http://www.bbc.co.uk/news/world-europe-14261921>.

362. Kayvan Farzaneh, *Europe's Burqa Wars*, FOREIGN POL'Y (May 11, 2010), http://www.foreignpolicy.com/articles/2010/05/11/europe_s_burqa_wars.

363. *Id.*

364. *Id.*

365. *Italy Approves Draft Law to Ban Burqa*, GUARDIAN (Aug. 3, 2011), <http://www.guardian.co.uk/world/2011/aug/03/italy-draft-law-burqa>.

366. *Id.*

367. *Italy: Burqa Ban Provision Approved by Parliamentary Committee*, LIBR. CONGRESS (Aug. 11, 2011), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1205402773_text; see generally Stephan Faris, *In the Burqa Ban, Italy's Left and Right Find Something to Agree on*, TIME (Aug. 4, 2011), <http://www.time.com/time/world/article/0,8599,2086879,00.html>.

368. *The Islamic Veil Across Europe*, BBC NEWS (June 15, 2010), <http://news.bbc.co.uk/2/hi/5414098.stm>.

369. *Id.*

370. *Id.*

schools.”³⁷¹ And recently, a German representative in the European Parliament called for a “Europe-wide ban on face-covering veils,” citing gender equality as a justification.³⁷²

The Netherlands considered implementing an all-encompassing burqa ban similar to the French law, but the Dutch Cabinet prevented the law from going into effect due to “concerns over freedom of religion and offending the country’s growing Muslim community.”³⁷³ The government, however, has suggested it will seek a ban on “face-covering veils in schools and state departments.”³⁷⁴

Britain does not have a law that restricts Islamic dress, but schools do have the power to implement their own dress codes.³⁷⁵ The UK Independence Party is the first British party to support a complete burqa ban, and discussion as to whether such a ban should be implemented has recently increased.³⁷⁶

The fact that several European countries have either taken measures limiting the burqa or are considering a burqa ban similar to the French law “shows the depth of concern over the rise of Muslim culture in Europe.”³⁷⁷ If the ECHR allows the French burqa ban to stand, other European countries may be more inclined to take legal action against the burqa, posing a significant and widespread threat to religious freedom.

VII. CONCLUSION

At times it appears France is willing to justify any treatment of its minority populations in the name of secularism and assimilation. That is indeed the case with the French burqa ban. However, with an understanding of the history of French-Muslims and the current environment facing them as France’s largest minority population, it appears that discrimination underlies the French burqa ban. The ban specifically prevents women of the Islamic faith from wearing the burqa, despite the fact that the practice is a manifestation of religious beliefs. This prohibition contravenes France’s obligation under the European Convention to uphold the human rights guaranteed by Article 9.

The ECHR should condemn France for its failure under the European Convention. With its expansive scope, the French burqa ban is the first law of its kind, and the Court should treat it as such. The ECHR should consider the French burqa ban in light of the changing demographic both in France and in Europe as a whole. If the Court were to consider such factors, it would recognize that upholding the French burqa ban may encourage other European

371. Farzaneh, *supra* note 362.

372. *Id.*

373. *Id.*

374. *The Islamic Veil Across Europe*, *supra* note 368.

375. *Id.*

376. *Id.*

377. Gauthier-Villars & Forelle, *supra* note 313.

countries to follow suit. Such a result could potentially affect the human rights of a large portion of the European population.

The European Court of Human Rights should find that the French burqa ban is an unwarranted restriction of the right to religious freedom under Article 9 of the European Convention. In doing so, the ECHR would emphasize the importance of the right to freedom of religion and set a strong precedent against religious discrimination.

