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Are Muslims the New Catholics? Europe's Headscarf Laws in Comparative Historical Perspective

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Are Muslims the New Catholics?  
Europe’s Headscarf Laws in Comparative Historical Perspective

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ABSTRACT: Many European opponents of the headscarf view themselves as engaged in a “struggle against totalitarianism.” This article explores an alternative framing: What if Muslims—rather than Nazis or Communists in training—are the more like nineteenth century Catholics, who were seen as a religious threat to European (and U.S.) liberalism? To explore this idea, this article looks at the headscarf debate through the lens of the German Kulturkampf (1871-1887) and nineteenth century U.S. laws that banned public school teachers from wearing clerical garb. It reaches two tentative conclusions. First, many of the claims made against European Muslims—especially about the “backward” nature of the religion—were also made against Catholics. Second, just as the Kulturkampf (and US clerical garb laws) failed to create a new “modern” Catholic, headscarf laws will not create Islamic moderates. However, the successful incorporation of Catholics into public life in Germany and the United States after 1945 suggests a more hopeful future—one that will come quicker if there is less legal repression.

Table of Contents

I. MUSLIMS, TOTALITARIANS AND CATHOLICS............................1
II. THE KULTURKAMPF, CLERICAL GARB LAWS, AND ANTI-CATHOLIC STEREOTYPES .........................................................5
III. RETURN OF THE KULTURKAMPF? LIBERAL FEARS OF ISLAM........11
IV. THE KULTURKAMPF AND CLERICAL GARB LAWS IN PRACTICE ....15
V. FOUR QUESTIONS ABOUT TODAY’S HEADSCARF LAWS ..............21
VI. CONCLUSION: LOOKING TOWARDS THE FUTURE....................23

I. MUSLIMS, TOTALITARIANS AND CATHOLICS

A popular movement is sweeping across Europe aimed at restricting the public expression of European Muslim identity. Perhaps

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1 The author wishes to thank Jacqueline Baronian, Douglas Dow, Mitchell Gordon, Tom Berg and David Patton. An earlier version of this paper was presented at the 2008 joint meeting of the Canadian and United States Law and Society Associations held in Montreal, Canada.

2 According to a Pew Research Poll in April and May 2010 bans on facial veils are supported by large majorities of British, French and German voters. See Steven Erlanger,
the best known example is the 2004 French law banning students, parents and teachers from wearing hijabs (and other “ostentatious” religious symbols) in public schools. Meanwhile, several German states have made it illegal for school teachers to wear headscarves, and the city of Maaseik in Belgium banned the wearing of the burqa. More recently, the French are considering a ban on full-face veils, while laws targeting the burqa are under consideration in Belgium, Quebec, and the canton of Aargau in Switzerland.

Nor is the anti-Muslim sentiment limited to clothing. Germany and Denmark have used citizenship examinations to force Muslims to swear allegiance to European values. In addition, there have been efforts to prevent the construction of mosques in central cities. Finally, the Danish


As of 2006 eight German states placed at least some restrictions on the wearing of the headscarf by public officials—including Bavaria and Baden-Württemberg, the two major Catholic states in Germany. See Ländersache: Der ewige Streit um das Kopftuch, ZEIT ONLINE, Oct. 31, 2006 (available at www.zeit.de/news). In 2006 a Belgian court upheld a burqa ban enforced by the city of Masseik, Burqa ban in Belgium upheld, ISLAM IN EUROPE, Jun. 15, 2006 (available at www.islamineurope(blog)). Around the same time the Dutch proposed and then backed off from a broad ban on the burqa before settling on a narrower French-style ban on the wearing of burqas in public schools. See Dutch government proposes a ban on wearing burqas in public, USA TODAY, Nov. 17, 2006; The Netherlands: Government Said to Back Off Burqa Ban, NEW YORK TIMES, Jan. 24, 2008; Burqa ban extended to universities, DUTCH NEWS, Nov. 26, 2008 (available at www.dutchnews.nl/news).

The proposed law, recently approved by a 335-1 vote (with abstentions) in the French National Assembly, would ban garments “designed to hide the face” in a wide variety of “public” places, including streets, markets, private businesses and public transportation. Moreover, the ban will cover tourists as well as French residents. Proposed burqa ban will also be imposed on tourists, FRANCE24, Apr. 22, 2010.

See Belgium’s Burqa Ban: Divided Country Finds Consensus on Islamic Veils, SPIEGEL ONLINE, Apr. 30, 2010 (available at www.spiegelonline.de) (describing burqa ban as the only issue of the Flemish and Walloon linguistic groups in the country agree on); Michèle Laird, Burqa ban debate enflames Switzerland, SWISSTER, May 17, 2010 (available at www.swisster.ch/news(describing proposed ban in Aargau); Marion Scott, Most Canadians agree with Quebec’s ban on burqa, MONTREAL GAZETTE, Mar. 27,2010 (describing Quebec’s proposed burqa ban). On the other hand, a proposal for a ban on veils was recently rejected by the Premier of New South Wales, Australia. NSW Premier rejects burqa ban bill, SYDNEY MORNING HERALD, Jun. 23, 2010.

Robert A. Kahn, The Danish Cartoon Controversy and the Exclusivist Turn in Danish Civic Nationalism, 8 STUDIES IN ETHNICITY AND NATIONALISM 524, 529 (2008); AMIKAN NACHMANI, EUROPE AND ITS MUSLIM MINORITIES: ASPECTS OF CONFLICT, ATTEMPTS AT ACCORD, 140 (2009).

Anna Triandafyllidou, Religious diversity and multiculturalism in Southern Europe: the Italian mosque debate in (Modood, Tariq, Triandafyllidou, Anna, and Zapata-Barrero, Ricard eds). MULTICULTURALISM, MUSLIMS AND CITIZENSHIP: A EUROPEAN APPROACH, 117-42 (2006). In late 2009 Switzerland voted by referendum to ban the construction of
newspaper, *Jyllands Posten*, published twelve cartoons depicting the Prophet Mohammed (including one showing a bomb in his turban). According to Flemming Rose, then the *Jyllands Posten*’s culture page editor, the cartoons were an attempt to introduce Muslims to the Danish “tradition” of satire.9

Supporters of anti-Muslim laws and policies often portray them as a necessary defense against an Islamic threat, a threat that draws from a post-1945 Cold War perspective.10 Muslim religious leaders are branded as “fascists” and the Muslim headscarf becomes a symbol of totalitarianism; meanwhile, those who oppose publishing the Mohammed cartoons are decried as “appeasers.”11 On one level, this framing makes sense, since it reflects the historical experience of Europeans over the last hundred years. But it also has problems of its own. For one thing, the demands made by Muslims are religious as well as political. Furthermore, equating Islam with Europe’s greatest inner demons overstates whatever challenges Muslims may pose to European liberalism while making compromise less likely.12

This paper proposes an alternate frame. What if Muslims—rather than being Soviets or Nazis in training—are the new Catholics? During the second half of the nineteenth century, a struggle erupted between Catholics and liberals over schools, civil marriage, and burial— the same issues at the center of the current debates in Europe. The key event of this struggle was the German *Kulturkampf* (1871-1887), during which Otto von Bismarck, at the head of a coalition of German liberals and nationalists, led a campaign to separate German Catholics from the “reactionary” influences of the Papacy. The means included restrictions on

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11 For more on how totalitarian imagery plays into debates about Islam in Europe, see Robert A. Kahn, *Flemming Rose, the Danish Cartoon Controversy, and the New European Freedom of Speech*, *CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL* (forthcoming 2010).
12 When, however, Muslims turn the analogy around and present themselves as victims of Nazi style polices, there are often sharp complaints. For example, Fereshta Ludin, the Afghani-born schoolteacher and litigant in the Ludin case—which held that German states could ban teachers wearing headscarves—compared her situation to that of Jews “just before the Holocaust.” In response, local Christian Democrat politicians wanted to prosecute her for Holocaust denial. Kahn, *supra* note 10, at 433 For more background on the argument that Muslims are going to be the next victims of the Holocaust, see NACHMANI, *supra* note 7, at 132-40. Interestingly, the German citizenship test contains no questions about the Holocaust, *Id.* at 140.
13 For a brief overview, see Christopher Clark and Wolfram Kaiser, *The European Culture Wars*, in *CULTURE WARS: SECULAR-CATHOLIC CONFLICT IN NINETEENTH CENTURY EUROPE* I (Christopher Clark and Wolfram Kaiser eds. 2003).
religious speech, the banning of the Jesuits, state assumption of civil marriage, and the requirement that new priests swear an oath of loyalty to the German state. Meanwhile, in the United States state governments were busy passing laws banning the wearing of clerical garb by public-school teachers.

Looking at current European developments through the lens of Kulturkampf has several advantages. First, it reinforces the idea that Islam—like Catholicism—is a religion, rather than simply a political ideology. While there is a downside to viewing Islam—or any other faith—as devoid of politics, the focus on “political Islam” obscures the complex reasons Muslims engage in religious practices. A more religiously sensitive approach will help explain why banning the wearing of the headscarf is more complicated than simply banning Islamist ideology.

Second, a focus on European and U.S. anti-Catholicism helps raise the possibility that anti-Muslim policies depend on more than simply a politically neutral defense of the “open society” against its enemies. This was certainly true of the nineteenth century German liberal who combined concerns about the specifically religious content of Catholicism with unease about high Catholic birth rates and Catholic cultural practices that

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16 I am not the only one making this comparison. In a recent blog entry, Ates Altinordu links the anti-Catholic stereotypes of the Kulturkampf to the current stereotypes directed at Muslims. He concludes that European Muslims must work hard to make sure they do not become “the Catholics of tomorrow.” Ates Altinordu, The Varieties of Anti-Religious Imagination, THE IMMANENT FRAME: SECULARISM, RELIGION, AND THE PUBLIC SPHERE, Apr. 30, 2008, http://www.ssrc.org/blogs/immanent_frame (blog post). For a similar claim about anti-Catholic and anti-Muslim discourse from the perspective of the literature on democratization, see José Casanova, Catholic and Muslim Politics in Comparative Perspective, TAIWAN JOURNAL OF DEMOCRACY 89 (2005)(noting similarities between “the old discourse on Catholicism that prevailed in Anglo-Protestant societies” and “[t]he contemporary global discourse on Islam as a fundamentalist, antimodern and undemocratic religion”).
17 To call radical Islam “fundamentalist”—just like labeling ultramontane Catholicism “reactionary”—undermines the modernist elements in both movements. This modernism is most apparent in the way both movements brought new voices into the political system. For an interesting series of essays making this point in the Islamic context, see MODERNIZING ISLAM: RELIGION AND THE PUBLIC SPHERE IN EUROPE AND THE MIDDLE EAST (John L. Esposito and François Burgat eds. 2003).
18 In his Washington Post op-ed piece defending his decision to publish the cartoons, Flemming Rose invoked Karl Popper’s THE OPEN SOCIETY AND ITS ENEMIES (1945)—a classic text of Cold War liberalism—to the importance of not tolerating the intolerant. Rose, supra note 9.
differed from those favored by Protestants. As we shall see, some of the concerns raised about European Muslims are quite similar.

Finally, to strike a prescriptive note, the anti-Catholic laws ultimately failed. For one thing, the laws often did not achieve their stated goals. Bismarck’s laws failed to separate German Catholics from a “reactionary” Rome, while in the United States the clerical garb laws did not prevent Catholics from teaching in the public schools. Nor did the anti-Catholic laws and policies succeed in isolating Catholics from the rest of society. Here lies a hope for the future—if the United States and Germany could come to terms with Catholicism in the nineteenth and twentieth centuries, the same ought to be true of Europeans learning how to live with Muslims today.

The rest of this article explores the Catholic/Muslim comparison in greater depth. Part II looks at how supporters of the Kulturkampf and clerical garb laws in the United States viewed the “threat” posed by Catholics. Part III turns to contemporary Europe and argues that many of the arguments used in today’s debates over Islam are similar to the anti-Catholic discourse of the Kulturkampf. Part IV switches the focus to the law in action and recounts the practical difficulties that arose when the Kulturkampf and bans on clerical garb were enforced. Part V uses these practical difficulties of past clothing bans to raise a series of questions about the current European bans on the headscarf and burqa. Finally, the article closes on a hopeful note—the successful integration of Catholics in present day Germany and the United States today suggests that the fears behind the anti-Muslim laws and policies are overstated.

II. THE KULTURKAMPF, CLERICAL GARB LAWS, AND ANTI-CATHOLIC STEREOTYPES

Often writers on the conflicts over Islam use the term Kulturkampf—which, literally translated, means “struggle between cultures.” Typically, the term refers to Samuel Huntington’s thesis that the current world is divided into discrete cultures and the current age is dominated by a “clash of cultures,” including one between the Western civilization of Europe and North America and Islam. When, however,

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19 For more, see infra notes 37-48 and accompanying text.
20 For more, see infra notes 71-84 and accompanying text.
21 This is the main thesis of Ross’s book. See Ross, supra note 13, at 12-14 (arguing that the Kulturkampf demonstrates the limits of the power of the German state and national liberals to make policy).
22 For example, Timothy Garton Ash, criticizing the Swiss minaret ban spoke of “the danger of sliding into a culture war, Kulturkampf[].” Timothy Garton Ash, Sarkozy is half right: All Europeans must understand the Swiss mistake, GUARDIAN, DEC. 9, 2009.
23 Samuel P. Huntington, The Clash of Civilizations, FOREIGN AFFAIRS (1993). The use of the term Kulturkampf is not limited to Germans. For example, William Rees-Mogg,
one looks at the historical events the term describes, one finds a struggle within Europe—one between “modern” liberals on the one hand, and a resurgent Catholic church on the other.

Conflicts between Catholics and liberals took place in a wide variety of countries. However, the greatest conflict occurred in Germany, where Chancellor Otto von Bismarck, at the head of a coalition of nationalists and liberals, enacted a series of laws designed to separate German Catholics from the Pope. The arrests, prison sentences, and expulsions ruined lives of individual Catholics without, in the end, advancing Bismarck’s long term goal of reducing Catholic influence in German social and political life. Small wonder other European liberals saw the Kulturkampf as an example of what to avoid.

To understand why despite its unpopularity the Kulturkampf came about, some historical background is necessary. During most of the 18th and 19th centuries the area currently known as Germany was made up of a loose confederation of small states, a few larger ones such as Bavaria, and Prussia, which by the mid 18th century was already a major European power. To the southeast stood the Habsburg Empire, a Catholic state that occupied many territories including present day Austria and the Czech Republic, both of which had large German speaking populations. As the idea of nationalism spread across Europe in the nineteenth century, Germans debated between a “large” Germany that would include the

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4 Calling for new anti-terrorism referred to the struggle against terrorism as “a Kulturkampf in Bismarck’s terms” William Rees-Mogg, This time we were lucky. This time, THE TIMES (London), July, 2, 2007.

24 During the last quarter of the nineteenth century there were major conflicts between Catholics and secular liberals in France, Belgium and Switzerland. See Clark and Kaiser, supra note 32, at 1-2.

25 ROSS, supra note, 14 at 4-8.

26 Id. at 7. According to Ross by 1880 “more than half of Prussia’s Catholic episcopate was in exile or prison, nearly a quarter of all parish priest were without pastors, and a third or more of all religious houses and congregations had been suppressed.” In addition Catholic civil servants were demoted or lost their jobs and rank and file Catholics found it hard to find priests to administer the sacraments. Id.

27 CLARK AND KAISER, supra note 13, at 4.

28 Until 1806 this confederation took the form of the Holy Roman Empire, nominally governed by a Habsburg prince who was also the Emperor of Austria and always a Catholic. E.J. PASSANT, A SHORT HISTORY OF GERMANY 1-2 (1969). After the defeat of Napoleon in 1815, this took the form of the German Confederation. Id. at 15-18. While dominated by Austria in its early years, the Confederation was no longer an explicitly Catholic body. Id. at 19-21 (describing 1815-58 as a period of Austrian dominance over the German Confederation). Meanwhile, Prussia—while religiously diverse—saw its mission as protecting the rights of Calvinists in the Holy Roman Empire. Id. at 3; see also MARY FULBROOK, A CONCISE HISTORY OF GERMANY 76 (1990)(describing Prussia as a “composite” state made up of Catholics and Lutherans as well as Calvinists).

29 The Habsburg Empire also included a large number of non-German minorities which weakened its claim to speak as a defender of German power. PASSANT, supra note 28, at 8-9.
German lands of the Habsburg Empire and a “small” Germany that would leave them out. In the 1860s matters came to a head and by 1871 a new German Empire had arisen, one that excluded the Habsburg lands and was dominated by Prussia.

The unification process saw the new German state fight wars with Austria (1866) and France (1870-71)—both Catholic powers. Catholics now made up 36% of the German population. Moreover, while its supporters believed they were fighting against “reactionary” Catholicism, the Kulturkampf itself was a reaction to a reinvigorated Catholic Church. The mid-nineteenth century saw a considerable Catholic popular mobilization, including increases in the membership in Catholic institutions, as well as a new popular piety involving relics, plaster saints, and public rituals that made Protestants and some middle-class Catholics uncomfortable.

Meanwhile, Catholics were able to use the new democratic institutions established in the wake of the liberal revolution of 1848 that swept across the German states to gain a measure of political power. In 1870—the year before Bismarck began instituting anti-Catholic laws—the Catholic-based Center Party won a massive electoral victory in the Prussian parliament. Added to this was the new assertiveness of the Papacy—as seen by the Syllabus of Errors (1864), which indicted liberal society, and the Decree on Papal Infallibility (1870), which suggested that the ultimate authority for German Catholics lay not in Berlin, but Rome.

While the renewed Catholic assertiveness of the mid-nineteenth century might have justified some response, German liberals exaggerated the threat and stereotyped Catholics in ways followers of the current European debates over Islam will find familiar. First, German liberals cast the concern about Catholics in demographic terms. For example, they

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31 For an overview, see Fulbrook, supra note 28 at 125-31. The new German Empire was federal—the Emperor ruled over foreign and military affairs, while the individual states retained control over domestic issues. ARNOLD J. HEIDENHEIMER, THE GOVERNMENT OF GERMANY 9-11 (3rd ed. 1970).
32 Marjule Anne Drury, Anti-Catholicism in Germany, Britain, and the United States: A Review and Critique of Recent Scholarship, 70 CHURCH HISTORY 98 (2001).
33 Clark and Kaiser, supra note 13, at 3; ROSS, supra note 14, at 23; Drury, supra note 32, at 111, 117.
34 Martin Spahn, entry on “Kulturkampf,” CATHOLIC ENCYCLOPEDIA VOL. VIII (1908).
35 The Center Party increased its representation in the Prussian Parliament from 5% to around 20%. See Margaret Lavinia Anderson, The Kulturkampf and the Course of German History, 19 CENTRAL EUROPEAN HISTORY 82, 88-89 (2008).
36 ROSS, supra note 14, at 5.
worried about high Catholic birthrates and conversions through mixed-marriages.\textsuperscript{37} These concerns remained robust even though Prussian authorities acknowledged that the Catholic population was not increasing and, in fact, most of the offspring of Catholic-Protestant marriages were being raised as Protestants.\textsuperscript{38}

Added to the demographic concerns were ethno-racial ones. During the nineteenth century the German Empire included several provinces with large Polish minorities including West Prussia and Silesia. Meanwhile, in Posen the Poles made up 60\% of the population.\textsuperscript{39} The Poles were almost entirely Catholic, and there concerns that German Poles would revolt, as they had in Russian Poland a few years earlier.\textsuperscript{40} Because the Poles were overwhelmingly Catholic, German nationalists viewed Catholicism with suspicion. For example, when a celebration of the Papal Jubilee in 1871 was held in the Polish language, nationalists worried about “the Polish tendencies of the Catholic hierarchy.”\textsuperscript{41}

A third set of arguments involved categorizing the Church as anti-modern. One argument focused on the growth of popular rituals. As noted, these rituals—which Drury\textsuperscript{42} refers to as “devotional kitsch”—made Protestants and middle class Catholics uncomfortable. This was largely for class reasons. German middle class culture shied away from the culture of display typical of ultramontane Catholics.\textsuperscript{43} This was especially true of liberal Protestants—who were moving in the direction of a more secular, cultural view of religion.\textsuperscript{44} So, while Protestants began to view Sunday as

\begin{itemize}
\item \textsuperscript{37} \textit{Id.}
\item \textsuperscript{38} \textit{Id.}
\item The rebellion took place in 1863. \textit{See Norman Davies, Heart of Europe: A Short History of Poland} 166-68 (1985). Meanwhile, on the Russian side of the imperial frontier, Catholic Poles were subject to a Tsarist Russification campaign that, like its German counterpart, had a religious aspect to it. \textit{See Theodore R. Weeks, Russification: Word and Practice}, 148 \textit{Proceedings of the American Philosophical Society} 471, 478-79 (2004) (describing how during the 1860s the Tsarist governor general of Russian Poland worried about the “polonizing” influence of Catholic and Uniate clergy). There are differences, however. The “modernization” theme—present in both the anti-Catholic and anti-Muslim discourses under discussion here—was not a major part of the Russian discourse about Catholics (although it was to a limited extent present in the discourse about Jews, who were seen as a having a medieval, Asian religion). \textit{Id.} at 472. Instead, Catholics—while respected as having a high culture—were seen as getting in the way of a larger project of connecting people living in Lithuania and Poland with their true Russian identity. \textit{Id.}
\item ROSS, \textit{supra} note 13, at 22. According to Ross, the Poles “[l]ike the communists of a later era…aroused the hostility and suspicion of the public…because of their alleged revolutionary potential, especially in the kingdom’s Polish provinces.” \textit{Id.}
\item Drury, \textit{supra} note 31, at 111.
\item \textit{Id.} at 116.
\item \textit{Id.} at 117.
\end{itemize}
a day for Beethoven and museums, Catholics spent their leisure time on numerous feast days as well as on “drunken and riotous” trips to pilgrimage sites.\textsuperscript{45}

In addition, there was a broader complaint that Catholics were superstitious and believed in miracles.\textsuperscript{46} The presence of such “backward” views among a large segment of the population confounded the claim that Germany was a modern nation. Added to this were economic claims—Catholics were underrepresented in schools, had low incomes, worked in marginal areas of the economy, and were generally excluded from the elites of society.\textsuperscript{47} While one might think that such arguments would lay the basis for egalitarian reform, the response in Germany of the 1870s was to combat “Catholic backwardness, provincialism and cultural inferiority.”\textsuperscript{48}

In this atmosphere, anti-Catholic horror stories flourished. Catholicism was associated with Jesuit conspiracies (including one supposedly responsible for the death of a lion at the Berlin zoo), wild stories of nuns and priests disregarding their vows of celibacy, and cruelty toward school children.\textsuperscript{49} These stories could lead to violence as occurred during the 1869 Moabit riots in which a mob of thousands attacked a Dominican chapel in Berlin after the priest was accused of sexual misconduct.\textsuperscript{50} Anti-Catholic sentiment also found expression in the cartoons of Wilhelm Busch, whose book-length comic strip, \textit{Pater Filucius}, satirized an avaricious Jesuit.\textsuperscript{51} Withheld for two years by German authorities because of fears it might offend Catholics, \textit{Pater Filucius} was a best seller on its release in 1872.\textsuperscript{52}

A final strand of support for the \textit{Kulturkampf} came from those who saw Catholics as agents of the Pope. The \textit{Catholic Encyclopedia}, explaining this aspect of anti-Catholic thought, blamed it in part on Bismarck’s jealousy—at the very moment Bismarck’s Prussia succeeded in “restor[ing] to Germany its former imperial grandeur” Rome declared

\textsuperscript{45} \textit{Id.} at 118-19.
\textsuperscript{46} ROSS, \textit{supra} note 14, at 18.
\textsuperscript{47} \textit{Id.} at 23-24. The socio-economic claims of \textit{Kulturkampf} supporters sparked a debate in the late nineteenth century and played a formative role in Max Weber’s thought. For a summary of the debate, \textit{see} Drury, \textit{supra} note 32, at 121-35.
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{Id.} at 19-20.
\textsuperscript{50} \textit{Id.} at 26.
\textsuperscript{51} Busch is much better known as the author of \textit{Max and Moritz}, a pioneering work in the world of comics. For more, \textit{see} Françoise Forster-Hahn, \textit{A Hero for All Seasons? Illustrations for Goethe’s “Faust” and the Course of Modern German History} 53, \textit{Zeitschrift für Kulturgeschichte} 511 (1990).
the infallibility of the Pope. But other liberals shared Bismarck’s concerns, including historian Hans Delbrück who in 1897—a full decade after the end of the Kulturkampf—could still say that the threat “social democracy” posed to the German Empire paled before that posed by ultramontane Catholicism. Inspired by fears that the Pope would use the infallibility decree to restore the Papacy’s medieval temporal powers, German liberals saw the Kulturkampf as part of a larger power struggle between the Papacy and the Empire. In this struggle German Catholics were either pawns, who were encouraged to break from the ultramontane policies of Pius IX, or a “foreign element” in the German body politic.

The same forces that inspired the Kulturkampf also were present in the United States, a country that, like Germany, combined Protestant dominance with a large Catholic minority. While organized anti-Catholicism was present in American public life from the arrival of German and Irish Catholics in the 1830s until well into the twentieth century, the passage of clerical garb laws in the late nineteenth century casts an interesting light on the current debate over Muslim teachers wearing headscarves.

As in the German example, part of the pressure for anti-Catholic laws was party-political. This can be seen in the debate during the mid-1870s over the Blaine Amendment which, had it passed, would have amended the Religion Clause of the First Amendment to ban public

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53 Spahn, supra note 34.
54 Drury, supra note 32, at 114.
55 Id.
56 In his March 10, 1873 speech to the German House of Lords, Bismarck argued that the struggle with the Catholic Church was not “confessional,” but “political.” As such, it was part of “the age-old struggle between kingship and priesthood” one that “shaped the German history in the Middle Ages ...in the form of the conflict between emperors and popes.” Otto von Bismarck, Speech to the Prussian House of Lords, http://www.zum.de/psm/imperialismus/bismarck3e.php (1873). Bismarck made the same point the previous year when he announced to the Reichstag that “we shall not go to Canossa” –a reference to German Emperor Henry IV, who in 1077 went to the Italian town and stood for three days bareheaded in the snow to submit to Papal authority. Ross, supra note 14, at 24-25.
57 Drury, supra note 32, at 113.
58 For a discussion of the position of Protestantism in the United States during the 19th century, see Robert T. Handy, The Protestant Quest for a Christian America, 22 CHURCH HISTORY 8, (1953). Meanwhile, as in Germany, Protestant dominance was accompanied by demographic growth of Catholics—the percentage of Catholics in the United States grew from 5% in 1850 to 175 by 1906. Julie Byrne, Roman Catholics and Immigration in Nineteenth Century America, National Humanities Center (Nov. 2000)(available at http://nationalhumanitiescenter.org/tserve/nineteen/nkeyinfo/nromcath.htm).
59 For a classic overview of the structures of White Anglo-Saxon Protestant dominance in the United State during the late nineteenth and early twentieth-centuries, see E. Digby Baltzell, THE PROTESTANT ESTABLISHMENT: ARISTOCRACY & CASTE IN AMERICA (1964)
support for parochial education. The amendment was the creature of James Blaine, who sought the Republican nomination for President in 1876 and believed that taking a stand against “sectarian” (i.e. Catholic) education would cement a relationship between Protestantism and the Republican Party. This was not an isolated example—then Ohio Governor Rutherford B. Hayes won re-election in 1874 by linking the Democrats to Catholic plotters. In the 1876 election the Republicans tried to tar the Democrats nominee, New York Governor Samuel Tilden, as too closely linked with the New York Catholic hierarchy. Meanwhile, Rhode Island considered legislation that would make it illegal to “dissuade” a parent from sending children to a public school.

While the Blaine Amendment ultimately failed, the several states, including New York, Pennsylvania, Missouri and Indiana, passed laws making it illegal for teachers to wear clerical clothing while teaching schools. The authors of these laws shared many of the same stereotyped views of Catholics as the supporters of the Kulturkampf—concerns that, in turn, parallel arguments European liberals and secularists use against hijab-wearers. For example, supporters argued that nuns, a major target of the clerical garb laws, by taking an oath of poverty lacked the moral independence necessary to teach children. There was also a debate over whether nuns wore their clothing as a matter of choice and whether a ban on the nun’s habit was necessary to preserve the state. Finally, there were debates over what message the wearer of clerical clothing conveyed—was it a factual statement that the wearer was Catholic, or part of a scheme for teaching Catholic beliefs?

III. RETURN OF THE KULTURKAMPF? LIBERAL FEARS OF ISLAM

While supporters of the Kulturkampf and clerical garb laws made their points decades before anyone took much notice of European Muslims, their arguments parallel those made by opponents of the hijab and burqa. This similarity suggests that the Muslim “threat” facing Europe is far from unique and that the best parallel to the current debate over the

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61 Id. at 54.
62 Id. at 49.
63 Id. at 57.
64 Id. at 49.
65 Once Blaine lost the battle for the 1876 Republican Presidential nomination to Hayes, his interest in the school funding issue waned and the bill failed in the Senate by four votes. Id. at 67.
66 Blum, supra note 15, at 875.
67 Id. at 877.
68 Id. at 879.
69 Id. at 881.
70 Id. at 884-86.
Muslim headscarf is not the failure of the European democracies to fight totalitarians in the years before and after World War II, but rather Europe’s long history of intolerance toward outsiders, including—for Protestant Europe of the 1870s—Catholics. What follows is an overview of the key similarities between the anti-Catholic prejudices of the Kulturkampf and the anti-Muslim bias that informs today’s debate.

Like their nineteenth century predecessors, supporters of the twenty-first century “culture war” express alarm at the “demographic surge” of Muslims, which—they claim—will result in the creation of “Eurabia.”71 And, as in the Kulturkampf, Europe’s “defenders” tend to overstate the number of European Muslims. So, although Muslims are no more than 10% of the population in any European country, opponents warn that one day—sooner rather than later—Europe will have a majority Muslim population.72

Niall Ferguson, echoing similar fears about demographics, added that when he sees a minaret in Europe, the image it conjures up is one of “decline and fall.”73 Of course, these concerns about demographics—even if true—only make sense if one assumes a fortiori that Muslim migrants are not Europeans (otherwise, why should an increase in Muslims suggest a decline?). This is similar to the view of the German liberals for whom Catholics are irredeemably foreign.

Nor is there any lack of ethno-racism among today’s culture warriors. Just as Bismarck and his supporters worried about the “revolutionary” potential of the Poles, opponents of the headscarf laws worry about the impact of Muslims on to disrupt European society.74 Just as Bismarck and the German nationalists feared revolution and a Polish take over, opponents of the hijab and burqa associate it with a rejection of assimilation.75 Here is liberal Dutch MP Geert Wilders’s explanation of the Dutch proposal to ban the burqa:

72 According to Pipes because of low European and high Muslim birth rates Amsterdam and Rotterdam will be Muslim majority cities by 2015 and by 2050 Russia could become the first Muslim majority European country. Id. For a discussion of how demographics plays into fears of a Muslim dominated Europe, see Nachmani, supra note at 7, 130-32.
74 The clearest parallel is the equation of Islam with terrorist acts such as the subway bombings in Madrid and London. For example, writing on the fifth anniversary of the 7/7 subway bombing, Stuart Reid wrote in the Catholic Herald that “[w]ithout a strong Islamic element in our nation, there would have been no 7/7.” Stuart Reid, The lessons of 7/7: Islam, tolerance and American wars, CATHOLIC HERALD, Jul. 7, 2010 (available at CatholicHerald.co.uk). Reid then praised the French, Belgians and Swiss for “showing the way” by restricting minarets and burqas. Id.
75 This often is expressed in terms of fear that European Muslims will create parallel societies. See, e.g., Andrea Brandt and Cordula Meyer, A Parallel Muslim Universe,
We don’t want women to be ashamed to show who they are. Even if you have decided yourself to do that [wear a burqa] you should not do it in Holland, because we want you to be integrated, assimilated into Dutch society. If people cannot see who you are, or see one inch of your body or your face, I believe this is not the way to integrate into our society.  

A judge in the Ludin case made a similar point about the “German constitutional understanding” of women’s clothing—“The free person shows their face.”

Fears of a Muslim “revolution” also appear in the debate over Wilders’ 2008 film “Fitna” which equates Islam and terrorism and calls for the end of Muslim immigration. Some of this comes from Wilders himself who argues that Islam “seeks to destroy our Western Civilization,” much the way the Kulturkampf’s supporters feared Catholics. In addition, in the debate over the film Wilders has become a martyr along the lines of Theo van Gogh, who is viewed as by many as a victim of a culture war directed by Islam against the West.

Other concerns about migrants are more prosaic. For example, Jyllands-Posten publisher Flemming Rose, defending his decision to run the Mohammed cartoons, referred to high immigrant crime rates. Likewise, a blog calling on “native” Europeans to revolt against Muslims and the European Union, associated Muslims with rapes, muggings and property damage. This is similar to the class arguments Kulturkampf supporters made about Catholics. And, as in the 1870s, there is little

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76 See Mark Mardell, Dutch MPs to decide on burqa ban, BBC NEWS, Jan. 16, 2006 (quoting Wilders).
77 Kahn, supra note 10, at 429. The quote was made by a dissenting judge in the Ludin case who took the position that the civil service could ban the hijab even without state legislation.
78 For an overview of the film’s contents, see Timothy Garton-Ash, Intimidation and censorship are no answer to this inflammatory film, THE GUARDIAN, Apr. 10, 2008.
79 Id.
81 Flemming Rose, supra note 9. Rose compared Danish Muslims unfavorably to Hispanics in the United States. Id. For more on Rose’s arguments defending his decision to publish the cartoons, see Kahn, supra note 10.
interest in egalitarian reform—this would, to use Rose’s words, be giving
in to the “cult of victimology.”

Instead, the headscarf proves the wearer’s socio-economic inferiority, associating her cleaning women and fruit and vegetable vendors.

This leads to another similarity. Just as liberal supporters of the Kulturkampf saw Catholics as backwards and provincial—its European critics view Islam as pre-modern. For example, Wilders has called the burqa “medieval” and, in an interview over the Danish cartoon affair, Ayaan Hirsi Ali in the Jyllands-Posten informed readers that “Islam hasn’t undergone all the reforms and adjustments which Christianity and Judaism have undergone over the last thousand years.” Meanwhile, there have been calls of a Muslim “Reformation”—an interesting request when seen in light of the Kulturkampf, since the defining feature of Catholicism is its lack of a Reformation.

Another similarity with the Kulturkampf is the use of imagery to define the pre-modern Other. Just as Busch’s Pater Filucius targeted Catholics, the Jylland-Posten’s twelve cartoons offended Muslim sensibilities. Likewise, cartoons played a role in the development of anti-Semitism in the late nineteenth and early twentieth centuries, culminating in the pictures appearing in Julius Streicher’s Der Stürmer. Given this history, one wonders what precisely Flemming Rose and the supporters of the Danish cartoons had in mind when they invited Muslims to take part in a Danish/European tradition of satire.

The United States experience with the clerical garb laws also parallels many of the concerns raised by opponents of the headscarf. As in the United States, Europeans have debated whether the headscarf states a fact (that the wearer is Muslim) or sends a proselytizing message. In fact, in the 2003 Ludin case the court appointed experts to answer this very question. There was also a considerable debate about the freedom of the wearer. Just as people asked whether a nun, by virtue of her vows, as a

83 Rose, supra note 9.
84 This, at least is how the debate worked out in Germany, Supporters of the hijab countered by pointing out that headscarf wearers worked in a number of modern professions—including as teachers. Kahn, supra note 10, at 431.
85 Mardell, supra note 76.
88 Because of his activities with Der Stürmer, Streicher was tried and sentenced to death at Nuremberg. For a brief overview of the prosecution, see 17 TULANE J. OF INT’L AND COMP. LAW 117-19 (2008).
89 This was a major issue in the Ludin case, see Kahn, supra note 10, at 418-19
90 Id. at 427.
pawn of the church, opponents of the headscarf often argue it is often worn out of family pressure.\textsuperscript{91}

The headscarf—like the nun’s habit—is seen as a threat to the preservation of the state. In both cases opponents worried about neutrality. Just as the Catholic nun teaching in the public school violated the U.S. constitutional understanding of church-state separation, the German teacher who wears a headscarf violates the German tradition of an independent civil service.\textsuperscript{92} And, in both cases, this neutrality was partially a pretext. As the debate in the United States over the Blaine Amendment shows, separation of church and state was a political argument used by the Republican Party to gain Catholic votes. Likewise, the concerns about civil service neutrality in Germany masked a larger debate about the role of Islam in society.

What accounts for the similarities between the anti-Catholic arguments made during the \textit{Kulturkampf} and the current anti-Muslim arguments made in Europe today? This is a complex and under-researched question. One intriguing possibility, however, has been offered by Peter O’Brien, an expert on anti-Islamic movements, is the inability of liberals to deal with groups they cannot convert to their cause.\textsuperscript{93} According to O’Brien:

Muslims irk the European liberal because they refuse to convert, even after generations. They congregate in ethnic ghettos, form their own exclusive organizations. They forbid their children to attend public schools or attend Qura’n schools to unlearn what is taught in the public schools. They wear distinctive clothes.\textsuperscript{94}

The same could have been said of the nineteenth century Catholics. During that period, liberals on both sides of the Atlantic responded with legal restrictions. How effective were these laws? What does this say about current laws targeting Muslims? To those questions we now turn.

IV. \textbf{THE KULTURKAMPF AND CLERICAL GARB LAWS IN PRACTICE}

\textsuperscript{91} Pascale Fournier, and Gökçe Yurdakul, \textit{Unveiling Distribution: Muslim Women with Headscarves in France and Germany}, in \textit{Migration, Citizenship and Ethnos} 167-84 (Michal Y. Bondemann, and Gökçe Yurdakul eds. 2006).
\textsuperscript{92} Kahn, \textit{supra} note 10, at 428.
\textsuperscript{94} \textit{Id.}
Acting on the anti-Catholic sentiments described above Bismarck enacted a series of restrictive laws during the 1870s. In 1871 he passed a law making it illegal to make political speeches from the pulpit. The following year he excluded members of religious orders from teaching in the public schools. The May Laws of 1873—perhaps the key measure of the Kulturkampf—placed the training and appointment of clergy in the hands of the state. Other laws banned the Jesuits and required civil marriage. By these means, Bismarck and the national liberals had hoped to create a new German Catholic—i.e. a moderate—who would support Berlin, rather than Rome.

Kulturkampf supporters hoped for a “quick and easy victory over the church.” Bismarck and his allies were convinced that the declaration of Papal infallibility had split German Catholics. And, in fact, there was discontent in German Catholic circles. A group of “Old Catholics”—made up of academics, civil servants, and other members of the middle class—did break away from the Church during the 1870s. The Old Catholics opposed what they saw as Rome’s usurpation of German political sovereignty. They also removed those elements of Catholic religious practice—including the Latin Mass, auricular confessions, clerical celibacy, and the cult of saints—that German liberals found problematic. As such the Old Catholics looked like ideal allies in Bismarck’s campaign against the Pope.

These hopes proved illusory. Even at their peak in the mid-1870s, the Old Catholics never made up more than one percent of the Catholic population in Germany. There were two reasons for this. First, while the Old Catholics captured some of the elite, they lacked the support of the rank and file. The same changes in ritual that made the liberals happy kept the Catholic masses away—especially at a time when the Church as a whole was under attack. Second, for all the German liberals’ talk of modernizing Catholicism, the state’s financial support for

95 ROSS, supra note 14, at 6.
96 Id.
97 Id.
98 Id.
99 Id. at 55.
100 Id. at 35.
101 Id. at 36-37.
102 Id. at 38.
103 Id. at 49.
104 Id. at 41.
105 Id. at 49.
the Old Catholics was lukewarm at best. More generally, Bismarck and his allies underestimated the will of the Catholics to resist. When the May Laws were passed, the district governor of Trier thought that “jailing a few priests” would be enough to ensure compliance with the registration requirement. Instead there was massive resistance—as well as clever schemes to get around the full force of the law. For instance, to avoid state confiscation of church property of clergy who resisted registration, lay Catholics would purchase the property at a low price and then let the clergy member in question reside there.

By 1874 the failure of the May Laws was obvious. In a speech before Parliament Bismarck whether “the state [could] tolerate the continuous mocking of its laws” and called for more stringent legislation, which resulted in the 1875 Expulsion Law which subjected recalcitrant clergy to exile. However, as time went on and the resistance continued, German Catholics lost respect for not only the Kulturkampf, but the authority of law itself. Meanwhile, in the eastern provinces with large concentrations of Poles, authorities turned a blind eye to the Catholic resistance lest the end of ecclesiastical authority result in a general breakdown of law and order.

The Catholic resistance was aided by some unintended consequences of Bismarck’s laws—although Bismarck wanted to censor the Catholic newspapers, he needed them to carry his pronouncements. Likewise, the 1874 law establishing compulsory civil marriage took pressure off the beleaguered Catholic clergy which, because of the May Laws, was rapidly dwindling in numbers. The Kulturkampf also had party political repercussions—much to Bismarck’s despair, the Catholic

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106 Id. at 43.
107 Id at 41. As one anti-Catholic critic put it: “Before the infallibility the Catholics at the command of the pope believed that twice two were seven; now, however, when he wishes them to believe that twice four are nine [the Old Catholics] refuse to do so.” Id.
108 Id. at 54.
109 Id. at 61. By the end of the Kulturkampf authorities in Trier had assessed 80,925 marks in fines and ordered clergy to serve 11,975 days in jail. Id.
110 Id. at 57.
111 Id. at 69-70.
112 Id. at 122.
113 Id. at 150.
114 Id. at 122.
115 Spahn, supra note 34. According to Spahn, but for the civil marriage law, “the Catholic population...given the absolute necessity of marriages, would have had to...either tolerate the state clergy or...bring pressure to bear on the Catholic clergy” to obey the new laws. Id.
Center party grew noticeably during the 1870s.\textsuperscript{116} The development of a powerful, assertive Catholic political party further weakened support for the \textit{Kulturkampf}.\textsuperscript{117}

Although diplomatic negotiations between Berlin, Rome, and German Catholics lingered into the 1880s, the period of active repression was over by 1878. There were several external reasons for this including the death of Pius IX and political alliance between the German Empire and Catholic Austria-Hungary—thus ending Germany’s fears of encirclement by hostile Catholic powers.\textsuperscript{118} But equally important were conservative Protestant protests, the growing strength of the Center Party, and a general sense of exhaustion.\textsuperscript{119} Meanwhile, if the goal of the \textit{Kulturkampf} was the isolation of German Catholics, it failed. Writing in 1908 the author of the Catholic Encyclopedia entry concluded: “One important consequence of the \textit{Kulturkampf} was the earnest endeavor of the Catholics to obtain a greater influence in national and municipal affairs; how weak they were in both respects was clear to them only after the great conflict had begun.”\textsuperscript{120}

Likewise, in the United States prosecutions against wearers of clerical garb also encountered pragmatic difficulties. A good example of this is \textit{Hysong v. Gallitzin Borough School District}.\textsuperscript{121} The case involved the town of Gallitzin, population 3,000, which was roughly 80\% Catholic. Several nuns were employed as teachers at the public school.\textsuperscript{122} Protestant students and parents sued, arguing that this practice violated Article 10 of the Pennsylvania Constitution, which—in the spirit of the Blaine Amendment—made it illegal to spend public money in support of “any sectarian school.”\textsuperscript{123}

According to the Protestant plaintiffs the nuns wore their “garb, insignia, and emblems…in such a manner as to impart to the children under their instruction certain religious and sectarian lessons[].”\textsuperscript{124} The plaintiffs also expressed concern that the nuns, by renouncing their worldly names, subjected themselves to church discipline. The plaintiffs also alleged that the nuns were unable to converse with males over 14 years old—which, they claimed, would prevent the teaching of hygiene.\textsuperscript{125}

\textsuperscript{116} Ross, \textit{supra} note 14, at 123-25.
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} Spahn, \textit{supra} note 34.
\textsuperscript{119} Spahn, \textit{supra} note 34; Ross, \textit{supra} note 14, 68-69.
\textsuperscript{120} Spahn, \textit{supra} note 34.
\textsuperscript{121} 164 Pa. 629, 30 A. 482 (1894).
\textsuperscript{122} The material in this and the next paragraph comes from the lower court opinion in \textit{Hysong} which is appended to the Supreme Court opinion in the LEXIS version of the case. \textit{See Hysong v. Gallitzin Borough School District}, 1894 Pa. LEXIS 1133 (1894).
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.} at 2.
\textsuperscript{125} \textit{Id.}
There were also allegations that the nuns taught the Catechism during school hours and received visits from local priests. In its defense, the Church denied teaching the Catechism during school hours and said that nothing in the church rules prohibited nuns from conversing with members of the opposite sex or teaching hygiene.

At the trial 37 witnesses testified about a wide variety of issues—including the meaning of the nun’s oath of poverty and the nature of the requirement that nuns wear the habit. Apparently, the nuns are not allowed to take off the habit either “on account of their work” or “because of the heat of the day.” The court sided with the defendants on the issue of teaching physical hygiene—there was simply no evidence they could not teach that subject. The court, reviewing the case law, found support for the idea that schools should not become “the medium for disseminating [religious] beliefs” but concluded that the school board’s hiring of the nuns, however unwise, would have to stand given the absence of any law explicitly banning the wearing of clerical garb. The court then helpfully pointed out that other states had much stricter laws.

The Pennsylvania Supreme Court affirmed in an opinion that was much more critical of the plaintiff’s position. The Court noted that other religious groups—such as the Quakers—wore distinctive garb and asked whether courts were to decide whether “the cut of a man’s coat” or “the color of a woman’s gown” are evidence of “sectarian” teaching. There was, however, a vigorous dissent. By renouncing the world, nuns have “ceased to be civilians or secular persons.” While “taste or fashion in dress” should be favored by the “largest liberty,” the clerical robes mark nuns off as “representatives of a particular order in a particular church whose lives have been dedicated to religious work under the direction of that church.” This, claimed the dissent, was how the Protestant children of Gallitzin saw the nuns.

The following year the Pennsylvania legislature responded by enacting a clerical garb law which had the goal of avoiding “all appearances of sectarianism...in the administration of the public

126 Id. at 2, 17.
127 Id. at 9.
128 Id. at 18.
129 Id.
130 Id. at 24, 31.
131 Id. at 33.
132 Hysong, 30 A. at 484.
133 Id.
135 Id.
136 Id.
While the Pennsylvania law was upheld, overall the record of clerical garb laws has been mixed—with courts in North Dakota and Indiana striking down such laws on the basis that they were mere pretexts for anti-Catholic bias. More recently, Pennsylvania’s clerical garb statute has been called into question as possibly violating the establishment clause because of its tendency to endorse a specific religious view. Likewise, Oregon’s clerical garb law—upheld as recently as 1986 in Cooper v. Eugene School Dist.—was repealed in 2010.

One difficulty posed by clerical garb laws is determining whether the clothing in question is religious. While this is relatively easy with the nun’s habit, it is proven more difficult for other types of head covering. This issue came up in EEOC v. Reads, Inc. In Reads, an auxiliary teacher, Cynthia Moore, was dismissed for wearing a colored scarf on her head. In ruling for Moore, the court noted that the company had presented no evidence that she wore the scarf for religious reasons. The court also noted that Moore and her Imam made statements that the headscarf had no religious significance. This last evidence made the court a bit uneasy. While crediting the statements of Moore and the Imam, it explained that it had no wish to “rule on matters of compliance with the requirements of a particular religion.”

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137 The characterization of the legislature’s goal in enacting the statute comes from Commonwealth v. Herr, 229 Pa. 132, 78 A. 68 (1910), in which the Pennsylvania Supreme Court upheld the state’s new religious garb law.
138 Blum, supra note 14 at 875-76.
140 301 Ore. 358 (1986)(upholding Ore.Rev.Stat. §§ 342.650). In applying the law to a case involving a Sikh, the Oregon Supreme Court stressed that obligation of a teacher to adhere to religious neutrality was not limited to members of the majority religion. Id at 376. It then added that—while the plaintiff’s dress may seem like “an exotic curiosity”—one must also keep in mind that, given “[t]he tides of immigration and home grown religions,” what the court finds “exotic today may tomorrow gain many thousands of adherents and potential majority status in some communities.” Id. at 377. In reaching reach this conclusion, the court mentioned the Know-Nothing movement of the mid-nineteenth century and the Blaine Amendment—both expressions of anti-Catholic nativism. Id. Oddly enough, it saw these events as a reason to support the law, since they showed how easily religious beliefs could give rise to the type of “contention” that imperils religious neutrality. Id.
141 See Betsy Hammond, Oregon Governor Signs repeal on teachers’ religious dress, THE OREGONIAN, Apr. 1, 2010. The effort for repeal was lead by a broad coalition of interfaith and civil rights groups but was opposed by the Oregon ACLU, which warned that repeal risked endangering the “religious neutrality” of public schools. Coalition seeks repeal of Klan-era ban on religious garb in Oregon schools, CATHOLIC NEWS AGENCY, Feb. 7, 2010 (available at www.catholicnewsagency.com).
143 Id.
144 Id. at 1158.
145 Id.
146 Id. at 1158, n. 11.
In a slightly different case, *Mississippi Employment Security Commission v. McGlothin*, a state court did just that. Deborah McGlothin, a teacher, sought unemployment benefits after she was dismissed from her job as a school teacher in response to her wearing a religious head covering. The state benefits office argued that the head covering was an expression of McGlothin’s Ethiopian cultural background—therefore she was not dismissed from her job because of her religion and was not entitled to benefits. In rejecting this argument, the Court held that McGlothin was dismissed on religious grounds even though: (1) the Hebrew Israelite group to which she belonged did not require that women wear headdresses; (2) she did not regularly attend church services; and (3) she was “selective” in wearing the head covering. In part the court seemed moved by the its rejection of the school district’s rationale in terminating McGlothin—that she would not be able to teach classes in health and hygiene.

While the story of the clerical garb laws may lack the drama of the *Kulturkampf*, two themes emerge: (1) given the prevalence of religious clothing across a large number of faiths, laws that single out the clothing of Catholics (or Muslims) are increasingly likely to be seen as discriminatory; and (2) because people wear clothing for a wide variety of reasons, courts encounter great difficulty in determining whether a given item is, in fact, worn for religious reasons.

V. **FOUR QUESTIONS ABOUT TODAY’S ANTI-HEADSCARF LAWS**

What then do the experiences of Germany and the United States in legislating against public expressions of Catholicism suggest about Europe’s anti-headscarf laws? Here are four speculative conclusions.

First, will the headscarf and burqa bans achieve the goal of “integrating” European Muslims? If by “integration” one means separating “moderate” Muslims from their more extremist counterparts, the answer is most likely “no.” Just as the imposition of the *Kulturkampf* made the Catholic rank-and-file less receptive to the Old Catholics message, it is hard to see how banning the headscarf will win over ordinary Muslims. Instead, bans will increase the likelihood that those women who continue to wear the headscarf (or burqa) will learn to see it not only as a religious duty but also as a symbol of resistance to secular Western society. More
generally, the experience of the Kulturkampf suggests that measures aimed to suppress (or, more charitably, “regulate”) a religious minority will in the end spur it to greater political mobilization—this, at least, was what happened with the rise of the Center Party and the determination of German Catholics to never again put themselves in a position where they cannot respond to legal repression.\textsuperscript{152}

Second, can the bans be enforced? As a practical matter, bans on religious behavior are very difficult to enforce. Religious practices, like wearing the headscarf, are deeply held. They are part of daily life—even if, as in the case of Deborah McGlothlin, they are incorporated selectively. As a result, restrictions encounter deep resistance. A comparison to the hate speech context is instructive. A ban on hate speech works politically because, in general, no one in society claims to be in favor of hate. As a result, the laws—even if they are ineffective—are not likely to antagonize any group in society.

By contrast, when Europeans ban the burqa or headscarf because it is a sign of “political Islam,” “totalitarianism” or “extremism”—in the manner of the Kulturkampf and anti-Catholic hysteria in the United States—they insult Muslims even before the laws are enforced. Oddly for secular liberals, who generally seek to separate what one does in private with what one does in public,\textsuperscript{153} there is a great desire to unpack the meaning of the headscarf. Wouldn’t it be more consistent with the liberal separation of public and private to ban the specific bad things the headscarf is said to represent—honor killing, terrorism, etc—rather than to ban a clothing item many women wear for completely “innocent” reasons?

Third, there is a question any society that seeks to ban religious clothing needs to worry about—the scope of the ban. The Pennsylvania Supreme Court \textit{Hysong} was troubled because the Protestants as well as Catholics wore religious clothing.\textsuperscript{154} Likewise, interpreters of the Federal Constitutional Court in Ludin debated whether the German states that banned the headscarf must also ban the crucifix.\textsuperscript{155} The stakes in this debate are high. Banning the headscarf alone raises questions of religious discrimination; banning the headscarf and crucifix (and other religious symbols) risks pushing society in an overly secular direction. The latter

\textit{France’s attack on the veil is a huge blunder}, \textsc{Guardian}, Jan. 26, 2010 (available at www.guardian.co.uk).

\textsuperscript{152} See supra note 120 and accompanying text.

\textsuperscript{153} For an overview of the distinction, see Jeff Weinraub, \textit{The Theory and Politics of the Public/Private Distinction} 1 in \textsc{Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy} (Jeff Alan Weinraub & Krishan Kumar eds. 1997). For a classic critique, see Duncan Kennedy, \textit{The Stages of Decline of the Public/Private Distinction}, 130 U. PA. L. REV. 1349 (1981-82).

\textsuperscript{154} 30 A. at 484.

\textsuperscript{155} See Kahn, supra note 10, at 429.
concern was expressed by Former President of the Federal Republic of Germany Johannes Rau in his 2004 New Year’s address.\textsuperscript{156}

A fourth set of questions are definitional. While it is certainly possible to ban headscarf wearing as such, the tendency has been to focus on the motivation of the wearer, the impact on the audience (school children in the case of teachers), and the message wearing the headscarf sends to the larger society. As \textit{Reads} and \textit{McGlothlin} show, these are not easy questions. Should the ban apply where the garment is worn selectively, for non religious reasons by someone who is unaffiliated with a religious group? Should the ban apply to some one who, while religious in other respects, wears the garment as a “fashion statement”? And how can a court—or anyone else—determine whether school children interpret a headscarf as a statement of the fact their teacher is Muslim, as opposed to an effort to convert them to Islam? While these questions may appear speculative, the large number of Muslim women who wear the headscarf in public guarantee that they will make their way into courts and administrative tribunals.\textsuperscript{157}

VI. CONCLUSION: LOOKING TOWARDS THE FUTURE

Despite these practical difficulties, the current trend in European politics favors bans on Islamic clothing.\textsuperscript{158} The bans draw support from a view that such clothing is, to use the words of French President Nicolas Sarkozy, “contrary to our values and contrary to the ideals we have of a woman’s dignity.”\textsuperscript{159} As we have seen, in the late 19th century similar concerns were raised about the nun’s habit in the United States.\textsuperscript{160}

Today, however, concerns about the nuns habit, if expressed at all, are much fainter. Instead, at a time when bans on Islamic clothing are on the rise in Europe and elsewhere, anti-Catholic laws are notable for their obscurity. Viewed from the vantage point of the twenty-first century, the anti-Catholicism of the \textit{Kulturkampf} and clerical garb laws looks antiquated. While pockets of anti-Catholicism persist in the United States and Europe, the general picture has changed remarkably. The current government of the Federal Republic of Germany is led by the Christian Democrats, a successor to the German Center Party which combines

\textsuperscript{156} \textit{Id.} at 430.

\textsuperscript{157} In future work I want to show more direct parallels between the anti-Catholic laws of the nineteenth century and the current laws targeting Muslims. One interesting overlap involves citizenship. Just as Germany and Denmark today are requiring Muslims to take citizenship tests, the May Laws of 1873 required clergy to pass examinations in philosophy and related subjects. \textit{See ROSS, supra} note 13, at 55.

\textsuperscript{158} \textit{See Erlanger supra} note 2.

\textsuperscript{159} \textit{Id.} (quoting Sarkozy).

\textsuperscript{160} \textit{See supra} notes 67-70, 89-92 and accompanying text.
Protestants and Catholics and, as such, symbolizes the acceptance of Catholics into German society.\footnote{See Merkel Becomes German Chancellor, BBC News, Nov. 22, 2005 (available at http://newsvote.bbc.co.uk). For a discussion of the origins of the CDU, see NOEL D. CARY, THE PATH TO CHRISTIAN DEMOCRACY: GERMAN CATHOLICS AND THE PARTY SYSTEM FROM WINDTHORST TO ADENAUER, viii-x (1996).}

Likewise, John F. Kennedy’s election as president in 1960 showed the extent to which Catholics had become an accepted part of American social and political life. Writing on the occasion of Kennedy’s funeral, E. Digby Baltzell noted how much had changed over the past 50 years. Explaining how “hope and faith rank higher than confidence in the hierarchy of human virtues,” Baltzell continued:

Theodore Roosevelt was a dreamer of dreams who dared to hope that America would, in the long run, conquer the values of caste and someday send a distinguished Catholic, and eventually a Jew, to the White House. Among other things, this funeral dramatized the fact that part of his hopes have now been realized.\footnote{BALTZELL, supra note 59, at xv.}

Hope is not a stranger to Europe. One day, European Muslims will be as “integrated” into their society as U.S. and German Catholics are today. The path will not necessarily be an easy one, but when that time is reached, hopefully headscarf laws will be as passé as the \textit{Kulturkampf} and clerical garb laws are today.