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Summer 2017

# France Bans the Veil: What French Republicanism Has to Say about It

Stéphane Mechoulan



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## FRANCE BANS THE VEIL: WHAT FRENCH REPUBLICANISM HAS TO SAY ABOUT IT

Stéphane Mechoulan\*

### ABSTRACT

*In 2010, France banned the wearing of face-veils in public. This criminalization of face covering was criticized by the U.S. State Department, prominent non-governmental organizations (“NGOs”), and legal academics of the Anglo-liberal tradition as a violation of freedom of religion and expression. Against this backdrop, the European Court of Human Rights’ 2014 decision to uphold the ban provides a timely opportunity to better understand the French republican rationale behind it. Through reconsidering the competing conceptions of the common good produced by Anglo-liberalism and French republicanism this article explores how the ban aims to preserve an organizing principle of the Rousseauist social contract. Specifically, it investigates the legal concept of “immaterial public order” which operationalizes the political and philosophical foundations of that principle. Teasing out how French republican values mesh with French identity, this article exposes the political threat that the practice of hiding one’s face triggers, while questioning how far those values and cultural identity concerns may go in curbing fundamental freedoms. Ultimately, as a friction point between competing rights, the face-veil ban invites commentators to analyze the political and historical tenets of human rights ideology and investigate whether their purported universality can accommodate substantive variations in their implementation. This inquiry is all the more relevant as Western countries, now pluralist and secular, struggle to integrate an increasing number of individuals of foreign cultural and religious backgrounds.*

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\* I thank James Barry, Justice Peter Bryson, James Bryson, Bruce Elman, Marcella Firmini, Kristin Good, Bennett Lowenthal, Eric Mechoulan, Sheldon Nahmod, seminar participants at McMaster University and Northwestern University, particularly Erin Delaney, Andrew Koppelman, John McGinnis, Jide Nzelibe, Sam Tenenbaum and Deborah Tuerkheimer for helpful comments. Ben Bisset, Jim Boyle, and Brandon Knill provided excellent research assistance.

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## I. INTRODUCTION

French writer and politician André Malraux has been often quoted as saying, “[t]he twenty-first century will be religious or it will not be at all.”<sup>1</sup> However prescient this sentence appears today, whoever put those words in his mouth underestimated the speed of the change they were contemplating. Western societies are now under increasing pressure to delineate the place of religion in the public sphere. Arguments have sprung up over issues such as the status of prayers in municipal council meetings, the wearing of distinctly sectarian attire in schools, and the presence of crucifixes in classrooms.<sup>2</sup> These issues reflect those societies’ multicultural shift and secular drift. In this often frenzied context, the relatively new phenomenon of women wearing a face-veil in the streets of Western cities, be it the *niqab* or the *burqa*, calls into question numerous established norms, standards, and values.

In June 2009, then-French president Nicolas Sarkozy declared the *burqa* a sign of subservience and debasement, unwelcome on French soil: “[France] cannot accept, in our country, women imprisoned behind a mesh, cut off from society, deprived of all identity. This is not the French republic’s idea of women’s dignity.”<sup>3</sup> A legislative proposal capturing Sarkozy’s sentiment was introduced shortly after to prohibit the concealing of one’s face in the public space.<sup>4</sup> Following a brief debate that revealed overwhelming support for the ban among the French people, though not amongst French Muslims,<sup>5</sup> the National Assembly and the Senate adopted the ban in 2010.<sup>6</sup> This criminalization of face-covering was criticized by the

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<sup>1</sup> See *Entretien. Pierre Desgraupes fait le point avec André Malraux*, LE POINT, Nov. 10, 1975 (Malraux admitting such words were put in his mouth).

<sup>2</sup> See, e.g., *Town of Greece v. Galloway*, 572 U.S. 1881 (2014); *Multani v. Commission Scolaire Marguerite-Bourgeoys* [2006] SCR 256 (Can.); *Lautsi v. Italy*, App. No. 30814/06, 2011-III Eur. Ct. H.R. 61 (2011).

<sup>3</sup> Emma Jane Kirkby, *Sarkozy Stirs French-Burka Debate*, BBC NEWS (June 22, 2009) <http://news.bbc.co.uk/2/hi/europe/8113778.stm>.

<sup>4</sup> MICHÈLE ALLIOT-MARIE, PROJET DE LOI INTERDISANT LA DISSIMULATION DU VISAGE DANS L’ESPACE PUBLIC, EXPOSÉ DES MOTIFS [LEGISLATIVE PROJECT PROHIBITING THE CONCEALMENT OF THE FACE IN THE PUBLIC SPACE], ASSEMBLÉE NATIONALE [NATIONAL ASSEMBLY] NO. 2520, at 3 (2010), <http://www.assemblee-nationale.fr/13/projets/pl2520.asp>.

<sup>5</sup> The French Muslim community was more divided, not because a majority of French Muslims supports the face-veil but rather because of concerns that the law stigmatized Muslims as a whole. See Claire Chartier, Julie Joly, & Noria Ait-Kheddache, *Voile Intégral: le Malaise des Musulmans*, L’EXPRESS (May 19, 2010) [http://www.lexpress.fr/actualite/societe/voile-integral-le-malaise-des-musulmans\\_892898.html](http://www.lexpress.fr/actualite/societe/voile-integral-le-malaise-des-musulmans_892898.html).

<sup>6</sup> Loi 2010-1192 du 11 octobre 2010 Interdisant la dissimulation du Visage Dans

U.S. State Department, prominent non-governmental organizations (“NGOs”) and many legal academics of the Anglo-liberal tradition as an unjustifiable violation of freedom of religion and expression.<sup>7</sup> Against this backdrop, the 2014 decision of the European Court of Human Rights (“ECtHR”) upholding the face-veil ban in *S.A.S. v. France* provides a timely opportunity to better understand the republican rationale behind it. Even more topically, the growing wave of Muslim immigration in Western Europe, as well as the role that Islam played in the 2016 U.S. presidential election, urge us to refine the analytical framework in which we assess the compatibility of non-customary cultural and religious practices within a twenty-first century pluralist society.

The perspective offered in this paper will dispel the view that the ban was put in place in the name of *laïcité*, France’s constitutional doctrine of state neutrality with respect to religion.<sup>8</sup> While *laïcité* drove France’s earlier prohibition of religious symbols in public schools, the face-veil ban goes far beyond secularism. Nor can the French republican values of gender equality, dignity, or fraternity, in isolation, ground the law on solid constitutional footing. This may appear paradoxical since many of the face-veil opponents perceived the face-veil precisely as an attack against those values.<sup>9</sup> Rather, the law derives fundamentally from an organizing principle of the Rousseauist social contract, or what the French call the “*vivre-ensemble*” (living together) principle. This is a perplexing notion for liberals, as it relates to the idea that the public space ought to foster a

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l’Espace Public (1) [Law 2010-1192 of Oct. 11, 2010 Prohibiting the Concealment of the Face in the Public Space (1)], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344.

<sup>7</sup> See, e.g., Amnesty Int’l, *Choice and Prejudice: Discrimination Against Muslims in Europe*, AI Index EUR 01/001/2012 (Apr. 2012); Human Rights Watch, *France: Submission to the National Assembly Information Committee on the full Muslim Veil on National Territory*, (Nov. 20, 2009), <https://www.hrw.org/news/2009/11/20/france-submission-national-assembly-information-committee-full-muslim-veil-national>; *The Taliban Would Applaud*, N.Y. TIMES, Jan. 27, 2010, at A26; Martha Nussbaum, *Opinion, Veiled Threats?*, N.Y. TIMES: THE STONE, (July 11, 2010) <http://opinionator.blogs.nytimes.com/2010/07/11/veiled-threats/>; Press Briefing, U.S. Dep’t of State, State Department Daily Press Briefing, (July, 14 2010) <http://www.state.gov/r/pa/prs/dpb/2010/07/144643.htm>.

<sup>8</sup> See generally Alain Seksig (ed.), *Laïcité: Les 100 ans d’une idée neuve, Partie 1: À l’école*, HOMMES ET MIGRATIONS, no. 1258, Nov.-Dec. 2005, at 1; Alain Seksig (ed.), *Laïcité: Les 100 ans d’une idée neuve, Partie 2: Culture(s), religion(s) et politique*, HOMMES ET MIGRATIONS, no. 1259, Jan.-Feb. 2006, at 1.

<sup>9</sup> See M. ANDRÉ GÉRIN, AU NOM DE LA MISSION D’INFORMATION SUR LA PRATIQUE DU VOILE INTÉGRAL SUR LE TERRITOIRE NATIONAL [PARLIAMENTARY COMMISSION OF INQUIRY ON THE PRACTICE OF THE FACE-VEIL ON FRENCH TERRITORY], ASSEMBLÉE NATIONALE [NATIONAL ASSEMBLY] NO. 2262, at 104, (2010), <http://www.assemblee-nationale.fr/13/pdf/rap-info/i2262.pdf> [hereinafter GÉRIN REPORT].

minimum level of cohesiveness among citizens. To make matters worse, republicans themselves have not satisfactorily clarified the expedient terminology of *vivre-ensemble*, thus compounding the disagreement between the two viewpoints.

This paper fills in the gaps in the doctrine. In particular, it makes explicit and extends the fragmentary arguments provided by the ECtHR as well as by the different levels of French government and courts that have examined the ban. Specifically, this article deciphers the multifaceted legal concept of “immaterial public order” which operationalizes the political and philosophical foundations of the *vivre-ensemble* principle. In this political soul-searching process, a purposive interpretation of the French Constitution is warranted.<sup>10</sup> To that effect, assuming a republican perspective, this article spells out for the first time the deep connection and complementarity between authors from various disciplines and schools of thought whose works give content to the concept of immaterial public order. This investigation leads to the present essay’s central proposition: why the ban is as necessary for France as it would be inconsistent with the Anglo-liberal model.

Necessary to this demonstration is a brief review of how the republican character of the French polity distinguishes itself from the liberal nature of Anglo-American societies. This review, in turn, leads to a key distinction, namely the competing conceptions of the common good produced by Anglo-liberalism and French republicanism, and, accordingly, their divergence over which societal interests are deemed compelling enough to warrant legislative action. Through elucidating this rift in ideologies, this article takes on the problem of articulating the diffuse, metaphysical nature of the harm that the French perceive in the face-veil. This implies teasing out how republican values mesh with French identity. Specifically, it exposes the political threat that is implicit in the face-veil but also question how far those values and cultural identity concerns may go in curbing fundamental freedoms. As a result, it appears that the ban is *sui generis*. It should not pave the way toward other foreseeable restrictions for the sake of identity or national unity. Pushback on the burkini bans of some French Riviera municipalities in the summer of 2016 implicitly confirms the balanced doctrinal approach to immaterial public order proposed here.<sup>11</sup>

This paper contains four main sections. First, to set the stage for a discussion of the ban by describing the secular nature of French society, it

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<sup>10</sup> And, specifically, an objective approach to purpose as recommended in the constitutional context. See AHARON BARAK, *PURPOSIVE INTERPRETATION OF LAW*, 377 (Sari Bashi trans., Princeton Univ. Press eds., 2007).

<sup>11</sup> Jim Bitterman, Sheena McKenzie, & Catherine E. Shoichet, *French Court Suspends Burkini Ban*, CNN (Aug. 26, 2016) <http://www.cnn.com/2016/08/26/europe/france-burkini-ban-court-ruling/>.

begins with an outline of the political and legal developments of the ban at the national and European levels. Next, it discusses how an appraisal of the main differences between the liberal and republican visions of law, society, and politics is key to understanding the decision to ban the face-veil. Third, it underscores how Anglo-American critics of the ban largely have missed this liberal-republican distinction, and how their evaluations are consequently impaired by a failure to engage with republicanism on its own terms. Finally, the article concludes by showing the long-term dangers of the face-veil to the republican model, but also more specifically to a national identity that has been shaped by a history of sectarian conflicts. This makes the ban a compelling state interest at the most basic political level.

## II. BACKGROUND

### A. Secularism in French Law

To set the scene, it is important to understand the larger context of French secularist thinking embodied in the concept of "*laïcité*." *Laïcité* was shaped through two key periods.<sup>12</sup> The first is the French Revolution, with the abolition of monarchic Church privileges along with the Declaration of the Rights of Man and of the Citizen (the "1789 Declaration").<sup>13</sup> The second is a bitter, protracted battle between the post-Monarchic state and the Catholic Church, at the end of the nineteenth century, culminating in what is commonly referred to as the 1905 Law, or separation of Church and State.<sup>14</sup> This law led to the confiscation of most Church property and the revocation of the Napoleonic Concordat that had made clergymen paid civil servants in compensation for lands seized during the Revolution.<sup>15</sup> *Laïcité* is thus a foundational value, bellicose from its inception and, for the French, a social model from which the entire world can draw inspiration.<sup>16</sup>

<sup>12</sup> See generally Alain Seksig (ed.), *Laïcité: Les 100 ans d'une idée neuve, Partie 1: À l'école*, HOMMES ET MIGRATIONS, no. 1258, Nov.-Dec. 2005, at 1; Alain Seksig (ed.), *Laïcité: Les 100 ans d'une idée neuve, Partie 2: Culture(s), religion(s) et politique*, HOMMES ET MIGRATIONS, no. 1259, Jan.-Feb. 2006, at 1.

<sup>13</sup> *Déclaration des Droits de l'Homme et du Citoyen de 1789* [FRANCE: DÉCLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN], Aug. 26, 1789, Assemblée Nationale [National Assembly], <http://www.assemblee-nationale.fr/histoire/dudh/1789.asp>.

<sup>14</sup> Loi du 9 décembre 1905 concernant la séparation des Églises et de l'État [Law of 9 December 1905 on the separation of Church and State] Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 9, 1905.

<sup>15</sup> Othon Guerlac, *The Separation of Church and State in France*, 23 POL. SCI. Q. 259, 260-76 (1908).

<sup>16</sup> See generally Jeremy T. Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2 BYU L. REV. 419, 428 (2004); RÉGIS DEBRAY & DIDIER LESCHI,

The first article of the 1958 Constitution mentions that France is a *République laïque*, and the Constitution's preamble proclaims the solemn attachment of the French people to the 1789 Declaration that was issued under the patronage of Reason. Recall that the preamble of the 1789 Declaration goes as far as referencing the so-called Supreme Being,<sup>17</sup> a humanistic cult created *ex nihilo* by the French Committee for Public Safety in 1794 to replace the Church.<sup>18</sup> With this background in place, it is easy to see that *laïcité* has become more than a legal doctrine of obdurate state neutrality with respect to religion: it has permeated society with the idea that religion should be confined to the private sphere. It is thus in this context that one must approach the challenge that Islam poses to French social norms, which led to a stricter formulation of the *laïcité* principle in 2004.<sup>19</sup>

To summarize, from 1989 until 2004, the French *Conseil d'État*, the highest administrative court, had formulated casuistic yet conciliatory decisions regarding the wearing of the Islamic headscarf in public schools.<sup>20</sup> These decisions balanced the principle of *laïcité* in maintaining the neutral character of public school environments, while concurrently supporting pluralism and religious freedom.<sup>21</sup> However, in 2003, the issue resurfaced with force in the political debate. The government created an *ad hoc* nonpartisan commission of inquiry over the application of the *laïcité* principle.<sup>22</sup> Notably, the Commission recommended the ban of all ostentatious religious signs in public schools, which became law shortly

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LA LAÏCITÉ AU QUOTIDIEN: GUIDE PRATIQUE [SECULARISM DAILY: GUIDE], 7 (Gallimard ed. 2006).

<sup>17</sup> 1958, CONST. title 17 (Fr.).

<sup>18</sup> This was, of course, a complete failure. When one of the originators of this new cult complained to diplomat-statesman Talleyrand that he could not convince anybody to convert and asked for advice, Talleyrand replied with his signature cynical humor: "Get yourself crucified, and rise again the third day." HANS F. HELMOLT & JAMES B. BRYCE, *THE WORLD'S HISTORY: A SURVEY OF MAN'S RECORD, VOLUME VII WESTERN EUROPE TO 1800* 336 (William Heinemann ed., 1903).

<sup>19</sup> Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics (1) [Law 2004-228 of 15 March 2004 governing, under the principle of secularism, the wearing of symbols or clothing denoting religious affiliation in schools, colleges and public high schools (1)] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17 2004, p. 5190.

<sup>20</sup> See, e.g., CE, Nov. 2, 1992, 130394, Rec. Lebon; CE, Mar. 14, 1994, 145656, Rec. Lebon; CE, Nov. 27, 1996, 172663, Rec. Lebon.

<sup>21</sup> See *id.*

<sup>22</sup> BERNARD STASI, COMMISSION DE RÉFLEXION SUR L'APPLICATION DU PRINCIPE DE LAÏCITÉ [THE REPORT OF THE COMMITTEE ON THE APPLICATION OF THE PRINCIPLE OF SECULARITY IN THE REPUBLIC] (2003) [hereinafter STASI REPORT].

after.<sup>23</sup> The Commission also produced the Stasi Report, which provides a detailed analysis of the *laïcité* principle in terms of values, traditions, culture, and national heritage.<sup>24</sup> *Laïcité* is described there in lavish terms as the harmonious synthesis of values that in fact collide, with an emphasis on individual duties over rights.<sup>25</sup> It sanctions assimilation as the only model for social integration.<sup>26</sup> Interestingly, considerations of public order appear prominently in the report.<sup>27</sup> In 2007, the *Conseil d'État* validated the 2004 law banning all conspicuous religious symbols in schools without difficulties,<sup>28</sup> thus repudiating its own jurisprudence.<sup>29</sup>

The decision to ban the *burqa* and *niqab* in the public space appears to be a logical extension of the report's conclusions. This time, however, it provided a unique insight into the tension between culture and the law, as perceived by the judiciary itself.<sup>30</sup>

## B. A Contested Legal Basis

### 1. The *Conseil d'État* Analysis

Development of the legislative proposal to ban the face-veil began in 2009.<sup>31</sup> Then-French President Nicolas Sarkozy commissioned a fact-finding non-partisan commission of inquiry on the wearing of the face-veil on French territory.<sup>32</sup> The Gérin report condemned the practice vigorously yet outlined the different obstacles that a total ban would encounter and offered various alternatives.<sup>33</sup>

To formally gauge the conformity of a blanket prohibition on the concealment of one's face with French law the executive branch asked the *Conseil d'État* for an opinion.<sup>34</sup> Accordingly, the *Conseil d'État* produced a

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> The latter being "not designed in order to favor immigrants but for the benefit of all and their collective cohesion." Jeremy Jennings, *Citizenship, Republicanism and Multiculturalism in Contemporary France*, 30 B. J. POL. S. 575, 583 (2000).

<sup>27</sup> STASI REPORT, *supra* note 22.

<sup>28</sup> See CE Sect., Dec. 5 2007, 285394 Rec. Lebon; CE Sect., Dec. 5 2007, 295671, Rec. Lebon.

<sup>29</sup> See *Conseil d'État*, No 346893, 27 Nov. 1989.

<sup>30</sup> CE Sect., Dec. 5 2007, 285394 Rec. Lebon.

<sup>31</sup> GÉRIN REPORT, *supra* note 9, at 13.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 19.

<sup>34</sup> See CONSEIL D'ÉTAT, STUDY OF POSSIBLE LEGAL GROUNDS FOR BANNING THE FULL VEIL, at 17, (2010), [http://www.conseil-etat.fr/content/download/1910/5758/version/1/file/etude\\_voile\\_integral\\_anglais.pdf](http://www.conseil-etat.fr/content/download/1910/5758/version/1/file/etude_voile_integral_anglais.pdf) [hereinafter CONSEIL D'ÉTAT REPORT].

detailed analysis that confronts the practice of concealing one's face with the rights and freedoms guaranteed by the French Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention").

The *Conseil d'État* reviewed various arguments, namely the principle of *laïcité*, gender equality, human dignity, public health, and public order.<sup>35</sup> With respect to equality, it declined to give an expansive reading of its jurisprudence upholding the denial of a citizenship application of a woman wearing the *burqa* because of its "incompatibility with the essential values of the French community, notably with the principle of gender equality."<sup>36</sup> The *Conseil d'État* stuck to the view that the principle of equality is not intended to apply to the individual whose personal behavior appears to conflict with that principle.<sup>37</sup> With respect to dignity, construing as self-evident on moral grounds that the face-veil amounts to a complete obliteration of the self, some of the contributors to the Gérin report had suggested an objective characterization of the face-veil as violating that principle of constitutional value, the basis of which may be found in the Preamble of the 1946 Constitution.<sup>38</sup> However, the *Conseil d'État* explicitly retreated from the conclusions of its 1995 decision in *Arrêt Commune de Morsang-sur-Orge*, which made the dignity of the human person a component of public order.<sup>39</sup> Recognizing that the principle of human dignity implies respect for autonomy, the *Conseil d'État* stumbled upon a conflict between the collective moral requirement to protect dignity, which can only be assessed by reference to community norms, and the ECtHR position of affirming the primacy of self-determination over the protection of human dignity however defined by society.<sup>40</sup> Again, the *Conseil d'État* sided with the ECtHR, declaring that dignity is too subjective a concept<sup>41</sup> to

<sup>35</sup> *Id.* at *passim*.

<sup>36</sup> See CE, June 27<sup>th</sup> 2008, 286798, Rec. Lebon. Unfortunately, the Court was silent about what those essential values are. Incidentally, the same issue resurfaced in Canada during the 2015 federal election. Ishaan Tharoor, *How a Muslim Veil is Dominating Canada's Election Race*, WASH. POST (Oct. 5, 2015) <https://www.washingtonpost.com/news/worldviews/wp/2015/10/05/how-a-muslim-veil-is-dominating-canadas-election-race/>.

<sup>37</sup> CONSEIL D'ÉTAT REPORT, *supra* note 34.

<sup>38</sup> See Conseil Constitutionnel [CC] [Constitutional Court] decision No. 94-343/344DC, July 27, 1994, J.O. 11024, 11025 (Fr.), Conseil Constitutionnel [CC] [Constitutional Court] decision No. 94-359 DC, Jan. 19, 1995, J.O. 1166, 1167 (Fr.); see also GÉRIN REPORT, *supra* note 9.

<sup>39</sup> See CE Ass., Oct. 27, 1995, 136727, Rec. Lebon 62.

<sup>40</sup> See KA & AD v. Belgium, App. No. 42758/98 & 45558/99, 2005 Eur. Ct. H.R., <http://hudoc.echr.coe.int/eng?i=001-68355> (recognizing the right for someone to consent to being tortured).

<sup>41</sup> Interestingly, for the majority, Justice Kennedy in *Obergefell v. Hodges* made no

compete with freedom of self-determination.<sup>42</sup>

As for public order, the *Conseil d'État* recognized that it contained an immaterial dimension reflecting the protection of society's essential values.<sup>43</sup> It acknowledged that such a route would be the best potential justification for a ban, but only if public order were construed creatively as the minimal base of requirements for life in common, as well as necessary to express the free exercise of fundamental freedoms.<sup>44</sup> However, the *Conseil d'État* shied away from this expansive interpretation, as it appeared too fragile given the current state of constitutional and European jurisprudence.<sup>45</sup> Thus, a recommendation against the project was inevitable.

To reconcile the preservation of fundamental freedoms with the government's objective of denouncing the face-veil, the *Conseil d'État* recommended several halfway measures that would have made the concealing of one's face more cumbersome: mandating the uncovering of one's face in settings involving security risks and when dealing with public services, an injunction for women wearing face-veils to talk with a representative of an accredited mediation body, and a stiffening of the sanctions for those inciting or coercing others into concealing their face.<sup>46</sup> It is therefore highly revealing that the French government decided to go ahead with the full ban.

## 2. A Thorough Legislative Process

The government declined to clarify further its justification for moving forward with the ban.<sup>47</sup> Rather, it settled on reiterating that the proposal hinged on the notion of *vivre-ensemble*.<sup>48</sup> During the legislative process, an

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fewer than nine references to the concept of individual dignity. See 135 S.Ct. 2584, *passim* (2015) (Supreme Court decision recognizing a constitutional right to same-sex marriage).

<sup>42</sup> CONSEIL D'ÉTAT REPORT, *supra* note 34, at 22.

<sup>43</sup> *Id.* at 27.

<sup>44</sup> *Id.* at 36-40.

<sup>45</sup> *Id.* at 36.

<sup>46</sup> *Id.* at 40-43.

<sup>47</sup> One drafter answered that, "[i]n any event, the *Conseil d'État* found no ground which would allow for a full prohibition. Therefore, we did not elaborate on the rationales." See Cécilia Gabizon, *Burqa: des Amendes Allant de 150 Euros à 15,000 Euros [Burqa: Fines Ranging from 150 Euros to 15,000 Euros]*, Le FIGARO (Apr. 29, 2010), <http://www.lefigaro.fr/actualite-france/2010/04/29/01016-20100429ARTFIG00657-burqa-des-amendes-allant-de-150euros-a-15000-euros-.php>.

<sup>48</sup> See ÉRIC RAOULT & ANDRÉ GÉRIN, PROPOSITION DE RÉSOLUTION RÉAFFIRMANT LA PRÉÉMINENCE DES VALEURS RÉPUBLICAINES SUR LES PRATIQUES COMMUNAUTARISTES ET CONDAMNANT LE PORT DU VOILE INTÉGRAL COMME CONTRAIRE À CES VALEURS [RESOLUTION PROPOSAL REAFFIRMING THE PREEMINENCE OF REPUBLICAN VALUES OF COMMUNITARIAN PRACTICES AND CONDEMNING THE FULL VEIL AS CONTRARY TO THESE VALUES], ASSEMBLÉE NATIONALE [NATIONAL ASSEMBLY] NO. 2272, at 5, (2010), <http://www.assemblee->

impact-assessment document set out the values that the face-veil is deemed to violate.<sup>49</sup> It reproduced the *Conseil d'État's* analysis, except for the opposite conclusion that a total ban was the recommended option.<sup>50</sup> The impact assessment document, while acknowledging the need for a democratic society to accommodate the expression of different cultures and beliefs, adds the caveat that such accommodation should not undermine the foundations of the social contract that makes collective life possible.<sup>51</sup> A more detailed rationale for the prohibition is found in the Explanatory Statement appearing at the beginning of the bill filed in the National Assembly.<sup>52</sup> It asserts that the face-veil constitutes no less than a form of symbolic and dehumanizing violence that offends *le corps social*, which one may translate as "the living body [of the nation]."<sup>53</sup> Subsequent to the presentation of the bill, a report was prepared for the National Assembly, elaborating further on the rationale for a strict prohibition of concealing one's face in the public space and using the notion of public order as a shield, emphasizing its constitutional validity under both French and European law.<sup>54</sup>

The law itself<sup>55</sup> had to be couched in neutral terms to avoid being struck down by the *Conseil Constitutionnel*, France's highest Constitutional Authority. Therefore, although the government had made it clear that the purpose was to ban the *burqa* and *niqab*, this is not explicit in the final text.<sup>56</sup> Rather, the law establishes a blanket ban on the wearing of clothing intended to conceal the face in public.<sup>57</sup> A list of exceptions was included to avoid situations where socially accepted circumstances for concealing one's

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[nationale.fr/13/propositions/pion2272.asp](http://www.assemblee-nationale.fr/13/propositions/pion2272.asp).

<sup>49</sup> See PROJET DE LOI INTERDISANT LA DISSIMULATION DU VISAGE DANS L'ESPACE PUBLIC: ÉTUDE D'IMPACT [LAW PROJECT PROHIBITING THE CONCEALMENT OF THE FACE IN THE PUBLIC SPACE: IMPACT STUDY] at 7 (2010), <http://www.assemblee-nationale.fr/13/projets/pl2520-ei.asp> [hereinafter IMPACT STUDY].

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 11.

<sup>52</sup> See ALLIOT-MARIE, *supra* note 4, at 3.

<sup>53</sup> *Id.*

<sup>54</sup> See generally JEAN-PAUL GARRAUD, COMMISSION DES LOIS CONSTITUTIONNELLES, DE LA LÉGISLATION ET DE L'ADMINISTRATION GÉNÉRALE DE LA RÉPUBLIQUE SUR LE PROJET DE LOI (N° 2520), INTERDISANT LA DISSIMULATION DU VISAGE DANS L'ESPACE PUBLIC [REPORT ON BEHALF OF THE COMMITTEE ON CONSTITUTIONAL LAW, LEGISLATION AND THE GENERAL ADMINISTRATION OF THE REPUBLIC REGARDING THE BILL PROPOSAL (N° 2520) ON THE PROHIBITION OF THE CONCEALING OF THE FACE IN THE PUBLIC SPACE] ASSEMBLÉE NATIONALE [NATIONAL ASSEMBLY] No. 2648, <http://www.assemblee-nationale.fr/13/rapports/r2648.asp>.

<sup>55</sup> Law 2010-1192 of Oct. 11, 2010 (Fr.).

<sup>56</sup> *Id.*; IMPACT STUDY, *supra* note 49, at 3-13.

<sup>57</sup> "Nobody can, in the public space, wear any clothing the purpose of which is to conceal one's face." Law 2010-1192 of Oct. 11, 2010, art. 1 (Fr.).

face would have run afoul of the law (e.g., medical reasons, Carnival masks, etc.).<sup>58</sup>

The *Conseil Constitutionnel* had a last chance to contribute arguments to the debate. Disappointingly, it only added to the list of exceptions that face-covering attire should be lawful inside places of worship that are open to the public.<sup>59</sup> In particular, the appeal by the *Conseil Constitutionnel* to republican principles was not supported by a robust expansion of republican jurisprudence, nor by any analysis of what those principles entailed.<sup>60</sup> The concept of immaterial public order was not analyzed, let alone given constitutional authority. The *Conseil Constitutionnel* simply acknowledged that France's republican identity was a primary motivation for the policy.<sup>61</sup> It took note of the limitation on individual freedoms, embraced the purpose of the law, and validated it after implementing a terse proportionality test.<sup>62</sup> The law came into force shortly after.<sup>63</sup> Hence, France's highest court cursorily validated a less than well-principled restriction on religious freedom for the perceived higher sake of idealized collective interests and cultural preservation.

### C. The ECtHR lawsuit

#### 1. Context of the Challenge to the ECtHR

The Council of Europe rejected the French face-veil ban as alien to European values.<sup>64</sup> The ban was lambasted by the U.S. State Department, NGOs, and many academics of the common law tradition as injurious to human rights and contrary to international law, including the *Universal Declaration of Human Rights* ("UDHR").<sup>65</sup> Adopted in the wake of the Second World War, the UDHR was designed to represent a global consensus on the fundamental rights of human beings, insulated from the vagaries of cultural biases.<sup>66</sup> This reasoning stems to a large extent from an international human rights system premised on liberal human rights values, and highlights a critical issue that international legal entities have been

<sup>58</sup> *Id.* at Art. 2.

<sup>59</sup> Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2010-613DC, Oct. 7, 2010, J.O. (Fr.).

<sup>60</sup> *See id.*

<sup>61</sup> *Id.*

<sup>62</sup> Constitutional Court No. 2010-613DC, Oct. 7, 2010 (Fr.), at [5].

<sup>63</sup> Law 2010-1192 of Oct. 11, 2010 (Fr.), at Art. 5.

<sup>64</sup> Thomas Hammarberg, *Human Rights in Europe: No Grounds for Complacency*, COUNCIL OF EUR. COMM'R FOR HUM. R., Apr. 2011, at 39-43.

<sup>65</sup> *See* articles cited *supra* note 7.

<sup>66</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, pmbl. (Dec. 10, 1948).

struggling with: the balance between universal aspirations and cultural relativism.<sup>67</sup>

The ECtHR is thus caught between two paradigms. The Convention draws its inspiration from the UDHR.<sup>68</sup> However, given that it is intended to be a functional piece of European legislation, the ECtHR has interpreted its provisions with deference to Council of Europe member states.<sup>69</sup> This is reflected in the “margin of appreciation” doctrine guiding ECtHR jurisprudence. The doctrine developed from case law as a means of balancing the diversity of approaches to, and interpretations of, Convention-based human rights.<sup>70</sup> Broadly speaking, the ECtHR will show more deference to states accused of infringing certain Convention-protected rights where there is little sign of a European consensus on the correct interpretation and application of a provision.<sup>71</sup>

It is against this background that the ECtHR was asked to determine the conformity of France’s face-veil ban with European human rights law. The hearing of the Grand Chamber of the ECtHR in *S.A.S. v. France* was held on November 27, 2013.<sup>72</sup> S.A.S. was supported by organizations such as Amnesty International and the Soros Foundation.<sup>73</sup>

S.A.S. argued that the prohibition is disproportionate, discriminatory, and in contravention of her rights to freedom of religion, expression, and private life.<sup>74</sup> She submitted that the law concerns an intimate aspect of one’s identity and that women wearing a face-veil are part of a small, vulnerable group.<sup>75</sup> She also asserted that the law, while neutral on its face, targets Muslim women wearing a face-veil.<sup>76</sup> Therefore she alleged that the ban discriminates on the basis of gender, ethnicity, and religion.<sup>77</sup> Furthermore, she referred to the exceptions to the ban, that is, instances in which covering

<sup>67</sup> See Exec. Board, Am. Anthropological Ass’n, *Statement on Human Rights*, 49 AM. ANTHROPOLOGIST 539, 542-43 (1947).

<sup>68</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

<sup>69</sup> James A. Sweeney, *Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era*, 54 INT’L & COMP. L.Q. 459, 471 (2005).

<sup>70</sup> *Id.*

<sup>71</sup> Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT’L L. & POL. 843, 851 (1998).

<sup>72</sup> *S.A.S. v. France*, App. No. 43835/11, 2014-III Eur. Ct. H.R. 1 (2014).

<sup>73</sup> See Saïla Ouald Chaib, *S.A.S. v. France: A Short Summary of an Interesting Hearing*, STRASBOURG OBSERVERS (Nov. 29, 2013), <https://strasbourgobservers.com/2013/11/29/s-a-s-v-france-a-short-summary-of-an-interesting-hearing/>.

<sup>74</sup> *S.A.S. v. France*, supra note 72, at 59-64.

<sup>75</sup> *Id.* at 43.

<sup>76</sup> *Id.* at 64.

<sup>77</sup> *Id.* at 35.

the face is still allowed, as producing absurd outcomes.<sup>78</sup> S.A.S. also referred to her willingness to compromise, for example, to uncover her face when needed for identification.<sup>79</sup> Finally, she argued that the law would lead, in a perverse way, to more hostility and intolerance against women wearing face-veils.<sup>80</sup>

After attempting to block the litigation on technical grounds, France argued that the scope of the ban falls within the margin of appreciation doctrine.<sup>81</sup> Further, it advanced that the ban is proportionate to the goal of public safety, which mandates that individuals be identifiable in the public space, and to the goal of preserving the *vivre ensemble*.<sup>82</sup> The French submission conceded that the law could infringe an individual's right to freedom of religion under certain conditions.<sup>83</sup> However, it rejected the idea that the law is discriminatory against Muslims since it prohibits all face coverings, notwithstanding the exceptions noted above, and because the use of the veil is not widely practiced in Islam.<sup>84</sup> France also emphasized that the law is not discriminatory based on gender, since it promotes equality between men and women, and protects human dignity.<sup>85</sup> At issue, essentially, was whether the ban would come under the exception provided in the European Convention on Human Rights ("ECHR") Article 9(2), which establishes that the freedom to manifest one's religious beliefs may be subject to limitations that are "prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."<sup>86</sup> France did not venture into an expansive definition of public order as a possible justification, preferring instead to invoke the protection of the rights and freedoms of others.<sup>87</sup>

## 2. The Decision in *S.A.S. v. France*

The ECtHR ruled in favor of France on July 1, 2014 by a majority of fifteen to two.<sup>88</sup> The Court applied a four-part test to determine whether the

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<sup>78</sup> *Id.* at 37 (explaining that the exceptions to the law allowed Christians to use clothing that concealed the face during Christian festivities while Muslim women were barred from using the face veil even during Ramadan).

<sup>79</sup> *Id.* at 36.

<sup>80</sup> *Id.* at 38.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 37-38.

<sup>84</sup> *Id.* at 39.

<sup>85</sup> *Id.*

<sup>86</sup> ECHR, *supra* note 68, at art. 9.

<sup>87</sup> *S.A.S. v. France*, *supra* note 72, at 37-40.

<sup>88</sup> *Id.* at 59.

ban constitutes an infringement of the appellant's Convention rights.<sup>89</sup> For the applicant, the Court found those arguments alleging infringement of the right to respect for private life guaranteed in Article 8 and the right to manifest one's beliefs as expounded in Article 9 to be admissible.<sup>90</sup>

After determining that the ban constitutes a limitation of those rights that has been prescribed by law, the Court considered whether France had a legitimate aim in enacting the ban.<sup>91</sup> The Court accepted public safety as a legitimate aim, but mused about whether it was applied as retroactive justification.<sup>92</sup> The Court emphasized instead the submission that the law aims to ensure the respect for the minimum set of values of an open and democratic society, specifically: respect for equality between men and women, respect for human dignity, and respect for the minimum requirements of life in society.<sup>93</sup> The arguments built on the first two values were rejected; however, the Court held that the third value corresponds with the legitimate aim of protecting the rights and freedoms of others.<sup>94</sup>

After finding that the ban is premised on a legitimate state objective, the Court considered whether the ban is proportional to the legitimate aim.<sup>95</sup> First, the Court determined that the ban would be a disproportionate response to an argument based on public safety.<sup>96</sup> Second, it found that the ban is proportionate to the goal of promoting *vivre ensemble*, drawing attention to the fact that the ban does not specifically target Muslims, but rather targets the practice of concealing the face.<sup>97</sup> In doing so, the Court reaffirmed the idea that the face is an important part of human interactions and necessary to proper socialization.<sup>98</sup>

Succinctly, the Court referred to the ban as a "choice of society," acknowledged the schism in human rights values, and chose to be deferential to the value system adopted by France.<sup>99</sup> While many of France's arguments were rejected, the Court's analysis is noteworthy for its balancing of the competing conceptions of rights, and its ultimate

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<sup>89</sup> *Id.* at 46-49.

<sup>90</sup> *Id.* at 59.

<sup>91</sup> *Id.* at 48-51.

<sup>92</sup> *Id.*, at 47.

<sup>93</sup> *Id.* at 48-49.

<sup>94</sup> *Id.* at 49 ("The Court is . . . able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialization which makes living together easier.").

<sup>95</sup> *Id.* at 46.

<sup>96</sup> *Id.* at 54-55.

<sup>97</sup> *Id.* at 55.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 57.

conclusion that where there is no European consensus on values,<sup>100</sup> “a wide margin of appreciation” should be given to the logic of a state’s philosophical system.<sup>101</sup> The judgment, however, does not elaborate on the necessity to uphold the ban within a republican legal framework: where does the right to live in a “space of socialization” originate? Rather, it concedes that France offered valid justifications that do not warrant overturning the ban.<sup>102</sup> In other words, it condones more than it supports the law.

Interestingly, the two dissenting judges probed from an opposite angle, arguing that it is wrong to allow abstract rights, deemed “far-fetched and vague,” to trump concrete rights.<sup>103</sup> For them, the “general concept of living together [did] not fall directly under any of the rights and freedoms guaranteed within the [European] Convention.”<sup>104</sup> Their analysis imports liberal ideology as a *de facto* starting ground and undermines the principle behind the margin of appreciation doctrine.

A comprehensive analysis of the ban requires an understanding not only of French secularism, but also—and more importantly—of the republican political philosophy that sustains it and of its historical foundations. As discussed below, the republican character of the French polity distinguishes it from the predominantly liberal nature of Anglo-American societies, which justifies a separate view of the role of the state and of its responsibilities.

### III. THE FACE-VEIL DEBATE REVEALS TWO VISIONS OF SOCIETY

#### *A. Liberalism v. Republicanism (or, Reformation Liberalism v. Enlightenment Liberalism)*

Liberal and republican ideologies tend to interpret human rights from different perspectives. The republican version of rights emphasizes “civic

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<sup>100</sup> Although the only other European state that has enacted a full ban on face veils in the public space is Belgium, several other European states have either implemented partial bans in public institutions, or are considering a full public space ban. See generally *The Islamic Veil Across Europe*, BBC NEWS (July 1, 2014) <http://www.bbc.com/news/world-europe-13038095>. The Swiss canton of Ticino adopted a full ban in 2015. See *Veil: The Ticino Parliament Approves Anti-Burqa Law*, LE MATIN (Nov. 23, 2015), <http://www.lematin.ch/suisse/Le-Parlement-tessinois-approuve-la-loi-antiburqa/story/18598071>. A similar proposal is currently being debated in Germany. See *Germany: Burka Ban to be Proposed in Security Clampdown*, BBC NEWS (Aug. 10, 2016), <http://www.bbc.com/news/world-europe-37033286>.

<sup>101</sup> *S.A.S. v. France*, *supra* note 72, at 58.

<sup>102</sup> *Id.* at 58-59.

<sup>103</sup> *Id.* at 61.

<sup>104</sup> *Id.*

virtue as a necessary condition for establishing effective and sustainable free institutions.”<sup>105</sup> It “is [closely] associated with an idea of [government and] citizenship defined in terms of positive belonging to and participation in the affairs of the state,” hence further “associated with practices generating reciprocity, civility, and trust.”<sup>106</sup> Republicanism has, at its core, the teleological notion that individual self-realization requires a civic space in which virtuous citizens, imbued with a belief in the possibilities of deliberative dialogue, move beyond initial substantive disagreements to a communal understanding of the good.<sup>107</sup> In other words, republicanism is concerned primarily with a community’s ethical context.<sup>108</sup>

Attached to this idea of self-realization through civic participation are normative conceptions of the role of the state. Several authors have enumerated the characteristics of the ideal republican polity.<sup>109</sup> Briefly speaking, those include a universal commitment to a form of dialogic politics, or an attitude of receptivity to persuasion through political engagement.<sup>110</sup> Citizens must embrace the democratic process and its attendant obligation for reasonable, good faith interaction resulting in eventual consensus.<sup>111</sup> The proper function of the state is to establish and safeguard the legal and cultural institutions necessary for continuous, democratic deliberation.<sup>112</sup> Republican laws and public policies reflect “not the preferences that [people] hold as private consumers, but instead

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<sup>105</sup> That is, by definition, the cultivation of habits that are commonly understood to be important for the success of the community as well as the dedication of citizens to the common welfare even at the cost of their individual interests. See Duncan Ivison, *Republican Human Rights?*, 9 EUR. J. OF POL. THEORY 31, 33 (2010).

<sup>106</sup> *Id.* at 32-33.

<sup>107</sup> See *id.* at 32; see generally Cynthia V. Ward, *The Limits of “Liberal Republicanism”: Why Group-Based Remedies and Republican Citizenship Don’t Mix*, 9 COLUM. L. REV. 581, 584-85 (1991).

<sup>108</sup> See Jürgen Habermas, *Human Rights and Popular Sovereignty: The Liberal and Republican Versions*, 7 RATIO JURIS 1, 7 (1994).

<sup>109</sup> See, e.g., Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FL. L. REV. 443, 445-46 (1989); Ward, *supra* note 107, at 587-89.

<sup>110</sup> See, e.g., Frank I. Michelman, *Alumni Distinguished Lecture in Jurisprudence-Conceptions of Democracy in American Constitutional Argument: The case of Pornography Regulation*, 56 TENN. L. REV. 291, 291-92 (1988-89).

<sup>111</sup> Republicans emphasize Article 29 of the UDHR: “Everyone has duties to the community in which alone the free and full development of his personality is possible.” Incidentally, French jurist René Cassin insisted on inserting the word “universal” while Americans preferred the term “international.” See Antoine Prost & Jay Winter, *RENÉ CASSIN AND HUMAN RIGHTS: FROM THE GREAT WAR TO THE UNIVERSAL DECLARATION* 249-50 (2011).

<sup>112</sup> See Ivison, *supra* note 105, at 34.

collective judgments, aspirations or considered reflections.”<sup>113</sup> From this basis, political rights are understood as positive liberties, facilitating and guaranteeing involvement in the civic praxis.<sup>114</sup>

For liberals, this stance is misdirected and the concept of right is closely associated with the notion of a perimeter of individual freedom defined *against* the state.<sup>115</sup> Government, writes Dworkin, “must not constrain liberty on the ground that one citizen’s conception of the good life of one group is nobler or superior to another’s.”<sup>116</sup> Absent are the teleological, reflexive trappings of republicanism; in its place is a preference for a level playing field on which individuals can live according to their preferred ethical code.<sup>117</sup> Achieving equilibrium among potentially competing rights-holders requires a state that is philosophically neutral. Its objective must be to apply laws that guarantee the compatibility of individual freedoms. A prominent liberal political thinker like Benjamin Constant thus could write: “let us ask the authorities to keep within their limits. Let them confine themselves to being just. We shall assume for ourselves the responsibility of being happy.”<sup>118</sup>

The republican-liberal divide can also be framed in terms internal to liberalism itself. Considering the proper role of liberal-democratic states in relation to cultural minorities within their jurisdiction, liberals typically divide into two main camps.<sup>119</sup> On the one hand, so-called reformation liberalism seeks to maximize the public space in which different individuals and groups, even deeply illiberal ones, can live out their differences within, of course, the bounds of the law.<sup>120</sup> This perspective, which takes as a central tenet the toleration of religious diversity, includes the value-pluralism of Isaiah Berlin.<sup>121</sup> In fact, reformation liberals openly welcome,

<sup>113</sup> Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3, 14 (1991).

<sup>114</sup> See *id.* at 3-4; Ivison, *supra* note 105, at 32.

<sup>115</sup> See Michael Ignatieff et al., HUMAN RIGHTS AS POLITICS AND IDOLATRY 63-77 (Amy Gutmann ed., Princeton Univ. Press 2001) at 63-77; Ivison, *supra* note 105, at 32.

<sup>116</sup> Ronald Dworkin, TAKING RIGHTS SERIOUSLY 272-73 (Harvard Univ. Press 1977)

<sup>117</sup> See *id.*

<sup>118</sup> BENJAMIN CONSTANT, DE LA LIBERTÉ DES ANCIENS COMPARÉE A CELLE DES MODERNES, DISCOURS PRONONCÉ A L’ATHÉNÉE ROYAL DE PARIS (Feb. 1819), in COLLECTION COMPLÈTE DES OUVRAGES PUBLIÉS SUR LE GOUVERNEMENT REPRÉSENTATIF ET LA CONSTITUTION ACTUELLE, OU COURS DE POLITIQUE CONSTITUTIONNELLE 283 (Paris, L’Imprimerie de Fain 1819), translated in Benjamin Constant on “*The Liberty of the Ancients and the Moderns*” (1819), in French Liberalism in the 19th Century: An Anthology 68, 81 (Robert Lérout & David M. Hart eds., 2012). Note, however, that Rawls professes to see no incompatibility between classical liberalism and republicanism. See John Rawls, JUSTICE AND FAIRNESS: A RESTATEMENT 144 (Harv. Univ. Press 2001).

<sup>119</sup> See William A. Galston, *Two Concepts of Liberalism*, 105 ETHICS 516, 521 (1995).

<sup>120</sup> See *id.* at 533.

<sup>121</sup> See Quentin Skinner et al., MACHIAVELLI AND REPUBLICANISM 299 (Gisela Bock,

if not call for, the collision of moral views, explicitly discounting the harm of contemplating ways of life antithetical to one's own.<sup>122</sup> Such liberalism embraces "the open clash between earnestly held ideals [and opinions] about the nature and basis of the good life."<sup>123</sup> According to this view, "far from being a legitimate ground for interference," moral distress is a "positive and healthy sign that the process of ethical confrontation that Mill called for is actually taking place."<sup>124</sup> Thus, a key reason for protecting illiberal ideas is that they are bound to induce such distress.

On the other hand, so-called enlightenment liberalism sees liberal democracy itself as the political expression of a specific vision of the human good. In this second view, the liberal state is entitled to interfere with some minorities' practices in order to protect the distinctive set of values and virtues that are essential to the success of liberal political institutions.<sup>125</sup> This last approach is echoed in former U.S. Supreme Court Justice Felix Frankfurter's controversial quote: "the ultimate foundation of a free society is the binding tie of cohesive sentiment."<sup>126</sup> In *Minersville School District v. Gobitis*, religious conviction was held to be an insufficient ground to override the school district's requirement that all students must salute the flag and recite the Pledge of Allegiance.<sup>127</sup> Justice Frankfurter's approach was to balance the secular aim of the policy, in order to promote national unity among children, with the First Amendment right to the free exercise of religion.<sup>128</sup> The Court deferred to the legislature's view that in order to achieve the secular goal, the religious education received by the child at home, which would result in the formation of opinions contrary to state-sanctioned ideology, could fairly be balanced with the public development of civic-mindedness.<sup>129</sup> Though rooted in the liberal context, Justice Frankfurter's willingness to curb individual freedoms for the collective national good nevertheless bears a

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Quentin Skinner & Maurizio Viroli eds., Cambridge Univ. Press 1990); Walter E. Schaller, *Liberal Neutrality and Liberty of Conscience*, 24 LAW & PHIL. 107, 111 (2005) (discussing how after the reformation, liberty was seen more as tolerance of differences between individuals and groups, hence "Reformation liberals").

<sup>122</sup> See Jeremy Waldron, *Mill and the Value of Moral Distress*, in LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991 115, 125-26 (Cambridge Univ. Press 1993).

<sup>123</sup> See *id.* at 120.

<sup>124</sup> See *id.* at 115, 124-25.

<sup>125</sup> See Galston, *supra* note 119, at 525-27 (discussing the enlightenment liberalism notion that the examined life is superior and the state's degree of openness to differences which are not based on the "examined life").

<sup>126</sup> *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 596 (1940).

<sup>127</sup> *Id.* at 586.

<sup>128</sup> See *id.* at 596-99.

<sup>129</sup> See *id.* at 599.

striking resemblance to republican reasoning.<sup>130</sup>

A more recent example of the tension between individual freedom and collective interest, still in the context of treatment of the American flag, can be found in *United States v. Eichman*.<sup>131</sup> While the Supreme Court held the First Amendment right to flag desecration as being within the limits of freedom of expression, the narrow five to four margin reveals the ambivalence of American society on the subject.<sup>132</sup> Writing for the dissent, Justice Stevens held that the government has a legitimate interest in curbing an individual freedom in such circumstances, as the collective good of the American public is potentially at stake.<sup>133</sup>

Hence, Western democracies struggle with the power of anti-statist symbols, political distress so to speak. France and the U.S. have balanced the issue somewhat differently and prioritized different values. The parallel therefore makes for a useful introduction to the disparity between the logic of French and American Republicanism.

### *B. Republicanism in American Legal Scholarship*

In the American literature, republicanism has received attention primarily in the context of the debate over the character of the American Revolution and, by extension, of the American state. Yet it is fundamental to this article's thesis to explore its underpinnings in order to get to the root of the misunderstanding that the French face-veil ban triggers among Anglo-liberal thinkers. At issue is the degree to which American colonial elites were inspired by classical republicanism or by liberalism, the latter being a nascent political philosophy at that time. Put differently, the debate revolves around whether the American Revolution may be better understood as part of a long intellectual tradition that emphasizes civic virtue or, rather, as the expression of new ideas about individualism and the market.

The most widely read expression of the liberal thesis is likely Louis Hartz's 1955 book, *The Liberal Tradition in America*, which argues that the U.S. has always been guided by implicit devotion to a "Lockian doctrine" embedded in the "American Way of Life."<sup>134</sup> According to Hartz,

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<sup>130</sup> This tension between the two strands of liberalism is systematically explored in Jacob T. Levy, *RATIONALISM, PLURALISM, AND FREEDOM 2* (Oxford Univ. Press 2015). It seems appropriate to fit Justice Frankfurter's view in Quentin Skinner's so-called "instrumental republicanism." See, e.g., Skinner, *supra* note 121, at 293-309.

<sup>131</sup> See *United States v. Eichman*, 496 U.S. 310, 311 (1990).

<sup>132</sup> See *id.*

<sup>133</sup> *Id.* at 319, 321.

<sup>134</sup> See Louis Hartz, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* 11 (Harcourt, Brace & World, Inc. ed., 1955). Locke's version of the Social Contract hinges on the preservation of individual freedom and private property, which constitute the two essential natural rights of men. See

American society possessed an egalitarian character from the outset, manifested in the economic realm as a prevailing sense of independent entrepreneurialism and in politics as a commitment to personal freedom.<sup>135</sup>

The liberal premise of the American Revolution was disputed beginning in the late 1960s. The so-called republican revival saw scholars in various disciplines attempt to rehabilitate the role of republicanism in early American politics.<sup>136</sup> Gordon Wood, for example, suggests "the sacrifice of individual interests to the greater good of the whole formed the essence of republicanism and comprehended for Americans the idealistic goal of their Revolution."<sup>137</sup> The main argument of the "republican synthesis" is that "virtue was the core civic value; commerce, self-interest, and individual rights were suspect."<sup>138</sup> Pre-revolutionary political thought, according to this perspective, was informed by the political ideals of classical antiquity.

Despite efforts by some historians to depict the Founding Fathers as the culminating generation of civic humanists,<sup>139</sup> the bulk of political theorists' later works on the "republican synthesis" challenges the assumption that classical republicanism shaped the revolutionary period.<sup>140</sup> Zuckert and others argue that a novel form of republicanism prioritizing the Lockian conception of natural rights framed the American political scene.<sup>141</sup> The effect of this orientation is illustrated by the institutional debates that followed the American Revolution. A key concern for the drafters of the Constitution was how best to divide power among the branches of government in order to preclude a gradual return to tyranny.<sup>142</sup> The newly independent colonists had no desire to see a distant tyrant replaced with a local one.<sup>143</sup> Thus, the resulting vision of politics acknowledged private liberty as a necessary safeguard against the potential domination of the

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John D. Lewis, *Book Review*, 49(4) *The American Political Science Review* 1155, 1155 (1955) (reviewing Louis Hartz, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (1955)).

<sup>135</sup> Cf. Sanford Lakoff, *Liberalism in America: Hartz and His Critics*, 8(1) *CRITICAL REV. OF INT'L SOC. AND POL. PHIL.* 5, 7-8 (2005).

<sup>136</sup> See Michael P. Zuckert, *NATURAL RIGHTS AND THE NEW REPUBLICANISM* 150-64 (Princeton Univ. Press 1994).

<sup>137</sup> Gordon S. Wood, *THE CREATION OF THE AMERICAN REPUBLIC* 53 (Univ. of N.C. Press 1969); see also Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79(1) *J. AM. HIST.* 11, 18 (1992).

<sup>138</sup> Kenneth Cmiel, *The Recent History of Human Rights*, 109(1) *AM. HIST. REV.* 117, 120 (2004).

<sup>139</sup> See, e.g., John G. A. Pocock, *Virtue and Commerce in the Eighteenth Century*, 3(1) *J. INTERDISC. HIST.* 119, 120, 124 (1972).

<sup>140</sup> Zuckert, *supra* note 136, at 150-51.

<sup>141</sup> *Id.*; Lakoff, *supra* note 135, at 20-21.

<sup>142</sup> Zuckert, *supra* note 136, at 154.

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

federal government.<sup>144</sup> Negative rights, in this sense, fostered the expression and practice of the republican civic virtue glorified by many of the Founding Fathers;<sup>145</sup> the legal architecture set out in the U.S. Constitution would be the basis for the nation's republican quality.<sup>146</sup> This approach turned the logic of classical republicanism on its head. In short, the objective of American political philosophy transitioned during this period from "the republic of virtue to the constitutional republic, based upon checks and balances designed to limit power and the damage that could be done to the commonwealth by vested interests."<sup>147</sup>

This preoccupation with negative rights gave rise to an intellectual tradition that fostered the modern liberal understanding of the American state. In law and politics, the prevailing view became that the public good represents simply the sum of private interests, and that the Constitution provides for a "neutral state with neutral law."<sup>148</sup> Proponents of this approach<sup>149</sup> emphasized the influence of Locke on American political thought, establishing "Locke and nothing more" as the unofficial motto of the intellectual historiography of the revolutionary period.<sup>150</sup> The liberal ascendancy in American law was transmitted to the international realm during the construction of the global human rights regime after World War II. Indeed, the "near perfect fit between liberalism and the [UDHR] reflects a deep and essential theoretical connection."<sup>151</sup>

Although the literature has since moved beyond the rights-virtue debate,<sup>152</sup> its main relevance to the present argument is its illustration of the

<sup>144</sup> *Id.* at 154-55.

<sup>145</sup> John Adams, for example, famously proclaimed that "[t]he only foundation of a free constitution is pure virtue; and if this cannot be inspired into our people in a greater measure than they have it now, they may change their rulers and the forms of government, but they will not obtain a lasting liberty." Letter from John Adams to Zabdiel Adams (June 21, 1776), in *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES* 399, 401 (Boston: Little Brown & Co. 1854).

<sup>146</sup> Zuckert, *supra* note 136, at 156-57.

<sup>147</sup> Lawrence Goldman, *Introduction* to Alexander Hamilton, James Madison & John Jay, *THE FEDERALIST PAPERS* at ix, xxxvii (Lawrence Goldman ed., Oxford Univ. Press 2008) (ebook).

<sup>148</sup> See Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 68-69 (1987).

<sup>149</sup> See, e.g., Cass R. Sunstein, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 4-5, 175-83 (Basic Books 2004).

<sup>150</sup> See, e.g., Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 WM. & MARY Q. 49, 49 (1972).

<sup>151</sup> Rhoda E. Howard & Jack Donnelly, *Human Dignity, Human Rights, and Political Regimes*, 80 AM. POL. SCI. REV. 801, 805 (1986).

<sup>152</sup> See Cmiel, *supra* note 138, at 120.

serious attention afforded to the causes and effects of American republicanism, and to its subsequent evolution into a liberal consensus, within Anglo-American academia.<sup>153</sup> French republicanism, however, has received considerably less attention in English-language literature.<sup>154</sup>

### C. Converging Critiques of Liberalism

#### 1. A Republican Critique

Jean-Claude Michéa's book, *Realm of Lesser Evil*, which critiques liberal individualism,<sup>155</sup> serves as a useful starting point for discussing alternatives to Anglo-liberal philosophy. Michéa observes that, throughout history, societies tended to be organized around a civic morality that valued personal sacrifice and heroism.<sup>156</sup> Following the religious upheavals of the sixteenth and seventeenth centuries, European political philosophy became animated by a desire to identify the conditions necessary for lasting peace.<sup>157</sup> The result was a cultural pivot away from the glorification of individual military valor, a process of devalorization and neutralization, and the promotion of the bourgeois gentleman, defined as prosaic, peaceful, and inoffensive, as the paragon of desired civic behavior.<sup>158</sup>

The neutralization of virtue opened the door for the rise of liberalism, whose proponents appealed to reason, abstraction and stability. According to this new philosophy, the public space ought to be stripped of its religious and ethical dimensions and organized instead according to the impersonal dynamics of the market and by a neutral legal system aimed at the equitable treatment of rights-bearing individuals.<sup>159</sup> In practice, it meant "that all parties involved [in politics] would now agree to abstract from their personal convictions as to the essence of true religion or the good life."<sup>160</sup> This was, to borrow Michéa's terms, a deliberate strategy of lesser evil,<sup>161</sup> intended to temper religious passions and thereby achieve the minimum conditions necessary for peaceful co-existence. The law and the market

<sup>153</sup> See, e.g., Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L. J. 1539, 1539 (1988).

<sup>154</sup> See Keith M. Baker, *Transformations of Classical Republicanism in Eighteenth-Century France*, 73 (1) J. MOD. HIST. 32, 33-35, 34 n.6 (2001).

<sup>155</sup> Jean-Claude Michéa, *THE REALM OF LESSER EVIL: AN ESSAY ON LIBERAL CIVILIZATION I* (David Fernbach trans., Polity Press 2009).

<sup>156</sup> See *id.* at 13-14.

<sup>157</sup> See Cécile Laborde, *Secular Philosophy and Muslim Headscarves in Schools*, 13 J. POL. PHIL. 305, 305 (2005).

<sup>158</sup> *Id.*; see also Michéa, *supra* note 155, at 15-16.

<sup>159</sup> See Laborde, *supra* note 157, at 305.

<sup>160</sup> Michéa, *supra* note 155, at 50.

<sup>161</sup> *Id.* at 51.

replaced religion as the coordinating logic of society. It was a bottom-up model aggregating individual interests, but one without a universal goal—just political empiricism. According to Francis Fukuyama's well-publicized theory,<sup>162</sup> this evolution was meant to become the concluding chapter of all political aspirations.

Yet, this model suffers from a fundamental contradiction stemming from its assumption of rational egoism.<sup>163</sup> In particular, this ethos undermines the very attitudes and habits that undergird liberal economics, including the disposition to enter into and subsequently trust contracts. These attitudes are not inherent to the liberal order, but rather are the vestiges of earlier cultural conditioning. French philosopher Elizabeth de Fontenay offers for these reasons the following warning: "It is a political mistake to neutralize one of the most vivid elements of human experience, the sense of belonging . . . to a nation or to a people, because it lures men into the abstract nature of commercial relations that makes them equivalent without making them equal."<sup>164</sup>

Therefore, in a way that is reminiscent of Marxism's critique of capitalism, liberalism "paradoxically leads to endangering the effective operation of its own underlying constructions, thus risking the reintroduction at all levels of social existence of that war of all against all . . . which it was in theory its initial *raison d'être* to definitively leave behind."<sup>165</sup> Contrary to the Republican model, the liberal order has no tool to protect the collective body from the individual.<sup>166</sup> In short, by suppressing the civic virtues that once facilitated social cohesion—generosity, fidelity, decency, mutual assistance, indebtedness, abnegation, selflessness, and sacrifice—liberalism gives rise to the conditions of its own gradual demise.

## 2. A Conservative Critique

A parallel attack on liberalism comes from the stream of conservative philosophy. To appreciate its complementarity to the Republican critique, it is helpful to consider the version of the social contract articulated by John

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<sup>162</sup> See generally Francis Fukuyama, *THE END OF HISTORY AND THE LAST MAN* xi (Free Press 1992).

<sup>163</sup> Michéa, of course, was not the first one to level this line of criticism. See, e.g., Allen Patten, *The Republican Critique of Liberalism*, 26 *BRIT. J. POL. SCI.* 25, 25-26 (1996).

<sup>164</sup> See Elizabeth de Fontenay, *ACTES DE NAISSANCE, ENTRETIENS AVEC STÉPHANE BOU* 103 (Éditions du Seuil 2011).

<sup>165</sup> Michéa, *supra* note 155, at 96.

<sup>166</sup> See, e.g., Ellen Wiles, *Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality*, 41 *LAW & SOC'Y REV.* 699, 702 (2007).

Rawls.<sup>167</sup> Its key characteristic is the removal of any conception of the common good which might distinguish one group of citizens from their neighbors.<sup>168</sup> In that framework, law itself is invested with the responsibility for articulating a common moral architecture and there is no need for supporting arguments outside it.

Yet, this social contract is a purely artificial construct deriving from a hypothetical thought-experiment that may be conceivable as philosophical speculation, but corresponding to no actual or implied arrangement between members of any actual body politic. Describing this thought-experiment as the theology of a post-religious society, Roger Scruton describes Rawls' project as one of the limits of the Western idea of a political order in which all bonds of membership are contained within a citizen's abstract rights.<sup>169</sup>

Rawls relies on principles he regards as universal, and therefore suitable to everyone, regardless of history or condition.<sup>170</sup> However, human societies are not comprised of all people everywhere.<sup>171</sup> They are by construction exclusive, granting privileges and benefits to members only.<sup>172</sup> Those cannot be conferred to outsiders without sacrificing trust, the cement of any enduring social structure.<sup>173</sup> The social contract's allegorical foundation begins when a group of people gathers to decide on their common future.<sup>174</sup> However, if they are in a position to determine a common future, it is because they already recognize a certain togetherness and mutual dependence.<sup>175</sup> Rawls' social contract presumes only a first-person singular actor endowed with free, rational choice behind the so-called "veil of ignorance."<sup>176</sup> Yet, it should "presuppose a first-person plural, in which the burdens of belonging have already been assumed."<sup>177</sup>

Axiomatically then, the social contract can only emerge from members of a preexisting community.<sup>178</sup> Further, this relation of membership is not

<sup>167</sup> For brevity, I do not consider here the branch of liberal theory that brands itself as ethical, as opposed to contractarian. For example, Ronald Dworkin has explicitly repudiated contractarianism. See, e.g., Ronald Dworkin, *Foundations of Liberal Equality*, in 11 Ronald Dworkin et al., *THE TANNER LECTURES ON HUMAN VALUES* (Univ. of Utah Press 1990).

<sup>168</sup> John Rawls, *A THEORY OF JUSTICE* 10-12 (The Belknap Press 1999).

<sup>169</sup> See ROGER SCRUTON, *THE WEST AND THE REST: GLOBALIZATION AND THE TERRORIST THREAT* 11 (2002) (ebook).

<sup>170</sup> Rawls, *supra* note 168, at 113-14.

<sup>171</sup> SCRUTON, *supra* note 169, at 11.

<sup>172</sup> SCRUTON, *supra* note 169, at 11.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 10-11.

<sup>175</sup> *Id.* at 4, 13.

<sup>176</sup> Rawls, *supra* note 168, at 118.

<sup>177</sup> SCRUTON, *supra* note 169, at 12.

<sup>178</sup> *Id.* at 11-12.

extinguished after the social contract has been established:

There cannot be a society without this experience of membership. For it is this that enables me to regard the interests and needs of strangers as my concern; that enables me to recognize the authority of decisions and laws that I must obey, even though they are not directly in my interest; that gives me a criterion to distinguish those who are entitled to the benefit of the sacrifices that my membership calls from me, from those who are interloping.<sup>179</sup>

Scruton's analysis reaches, from another perspective, the anthropological conclusion that some rebuff of alien values and customs constitutes a necessity.<sup>180</sup> In his address *Race and Culture*, French anthropologist Claude Lévi-Strauss explains why a society cannot survive when its members express radically separate modes of existence.<sup>181</sup> In turn, any culture must, for the sake of self-preservation, shield itself from the specific traits of foreign cultures, without necessarily rejecting them as ontologically inferior—that is, acknowledge foreign cultures, but only from a distance.<sup>182</sup> In a globalized environment rooted in the expansion of all modes of communication and the elimination of barriers, where hybridization is commonly regarded not simply as an inevitable phenomenon but also condoned as source of rejuvenation and creativity, it is all the more difficult to appreciate the depth of Lévi-Strauss' argument. In this view, remaining true to one's values implies a certain deafness to the appeal of other values, even going so far as rejecting them, if not denying them altogether.<sup>183</sup>

These arguments illustrate a key distinction highlighted in this paper: the competing conceptions of human rights and of the common good (or lack thereof) produced by Anglo-liberalism and republicanism. In particular, they help unmask the central but often implicit liberal conceit that its tenets

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<sup>179</sup> *Id.* at 13. Note the parallel with Michéa's emphasis on sacrifice for the benefit of the community as a paramount value in any given society. The sacrifice need not be that of one's life and the idea can be extended to relinquishing part of one's economic and social welfare. A large literature in political science and economics suggests that preference for redistributive taxation is positively correlated with group homogeneity. *See, e.g.,* Esteban Klor and Moses Shayo, *Social Identity and Preferences over Redistribution*, 94 J. OF PUB. ECON. 269 (2010).

<sup>180</sup> *See* SCRUTON, *supra* note 169, at 611, 614.

<sup>181</sup> *See generally* Claude Lévi-Strauss, *Race and Culture* 23 INT'L SOC. SCI. J. 608, 611 (1971).

<sup>182</sup> *See id.* at 611, 614.

<sup>183</sup> "[O]ne cannot fully enjoy the other, identify with him, and yet at the same time remain different." CLAUDE LEVI-STRAUSS, *THE VIEW FROM AFAR* 24 (Joachim Neugroschel & Phoebe Hoss trans., Basic Books, Inc. ed., 1985). "If completely successful, full communication with the other sentences, more or less imminently, the originality of his and my creation." Lévi-Strauss, *Race and Culture*, *supra* note 181, at 625.

can be abstracted from the present anthropological moment. Liberalism was not an inevitable response to the religious violence of earlier centuries, nor is it the only system that supports a rational, enlightened society.<sup>184</sup> By accepting liberalism as the natural culmination of historical progress, we overlook its inherent contingency, and fall into the trap of believing that it reflects the work of “unmarked moderns” who have transcended historical and cultural facts.<sup>185</sup> Moreover, given that the liberal paradigm is free riding on the remnants of the value systems attached to Europe’s republican heritage, a certain degree of hypocrisy is evident in the promotion of liberalism as the proper organizing philosophy for all societies, which is the leitmotiv of the dominant progressivist discourse.<sup>186</sup>

#### *D. Republicanism in the French Context*

Like its American precursor, the French Revolution evinced republican characteristics. Yet, the republicanism of France differs in important ways from the American variant, and French republicanism, a top-down model grounded in the idea of universality, operates according to a moral logic that is under-appreciated in the Anglo-American literature.<sup>187</sup> The modern republican model that the French Revolution spearheaded embodies the prospects for societal cohesion based on shared values. Contrary to liberals, French republicans embrace a vision of society as an intentional project requiring solidarity among citizens.<sup>188</sup>

An imperative of the French republican project, however, is the exchange of absolute-freedom for the attainment of what Rousseau calls civil liberty.<sup>189</sup> As Rousseau emphasizes, this transaction is a political act with an intrinsic moral dimension, producing the conditions necessary for individual self-fulfillment.<sup>190</sup> The terms of the social contract require the

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<sup>184</sup> See Wood, *supra* note 137, at 53-54 (discussing how republican ideology shaped the American revolution’s idealistic goal of an enlightened society).

<sup>185</sup> Ulrike Spohn, *Sisters in Disagreement: The Dispute Among French Feminists About the “Burqa Ban” and the Causes of Their Disunity*, 12 J. HUM. RTS. 145, 158 (2013).

<sup>186</sup> This intuition has largely vindicated those who were pessimistic about the viability of a democratic liberal Russian state. See generally Henry E. Hale, *Civil Society From Above? Statist and Liberal Models of State-Building in Russia*, 10 DEMOKRATIZATSIYA 306, 306-11 (2002).

<sup>187</sup> See LOUIS DUMONT, GERMAN IDEOLOGY: FROM FRANCE TO GERMANY AND BACK 3-4 (Univ. of Chi. Press 1994).

<sup>188</sup> See *id.* at 220.

<sup>189</sup> Not to be confused with the civil and political liberties conceived by the negative view of human rights. See JEAN-JACQUES ROUSSEAU, DU CONTRAT SOCIAL OU PRINCIPES DU DROIT POLITIQUE 49 (Union Générale d’Éditions 1963) (1762), [http://classiques.uqac.ca/classiques/Rousseau\\_jj/contrat\\_social/Contrat\\_social.pdf](http://classiques.uqac.ca/classiques/Rousseau_jj/contrat_social/Contrat_social.pdf) [hereinafter ROUSSEAU, DU CONTRAT SOCIAL].

<sup>190</sup> See Jerrold Seigel, THE IDEA OF THE SELF 220-21 (Cambridge Univ. Press 2005).

individual to alienate a legitimate part of his or her freedom.<sup>191</sup> The individual is more than compensated, however, in the common good thus created, which makes possible the exercise of his or her natural rights.<sup>192</sup> Intimately connected to this transformation is a shift in one's allegiance from the self to civil society.<sup>193</sup> The parameters guiding one's behavior are reorganized around civic duty and integrity.<sup>194</sup> Rousseau is unequivocal about the inherent moral superiority of the general will over individual freedom.<sup>195</sup> This is because rights enter the discussion only after the social contract is enacted: "Rights aren't pre-political constraints on the state, in other words, but our moral and civil freedom is only realized through politics and the processes of collective will-formation."<sup>196</sup>

Rousseau's argument that the establishment of society alters the moral character of humanity separates him from earlier social contract theorists, including Hobbes.<sup>197</sup> Indeed, Rousseau is critical of his predecessors for assuming that humans in the state of nature share the same qualities and motivations as those in civilization.<sup>198</sup> For Rousseau, as solitary beings motivated by physical needs, humans in their natural condition "are devoid of reason, speech, foresight, contentious passions, and pride."<sup>199</sup> Through gradual socialization, humanity undergoes a "remarkable change"<sup>200</sup> as justice, duty, and a concern for the greater good replace instincts.<sup>201</sup> In comparison, the social contract envisioned by Hobbes retains a self-interested flavor, where citizens adhere to the rules of society for purely

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<sup>191</sup> *Id.* at 220.

<sup>192</sup> *Id.* at 220-21.

<sup>193</sup> *Id.* at 220.

<sup>194</sup> See J.S. Maloy, *The Very Order of Things: Rousseau's Tutorial Republicanism*, 37 POLITY 235, 245-47 (2005) (discussing state's regulation of behavior through social institutions meant to promote civic virtue).

<sup>195</sup> *Id.* at 235-36, 242.

<sup>196</sup> Ivison, *supra* note 105, at 32.

<sup>197</sup> Maloy, *supra* note 194, at 240, 242-43, 248, 259.

<sup>198</sup> *Id.* at 235, 242.

<sup>199</sup> John T. Scott, *The Theodicy of the Second Discourse: The Pure "State of Nature" and Rousseau's Political Thought*, 86 AM. POL. SCI. REV. 696, 702 (1992).

<sup>200</sup> ROUSSEAU, DU CONTRAT SOCIAL *supra* note 189, at 20.

<sup>201</sup> Rousseau valorized pre-social man and attributed to him a sort of primitive nobility; it was through socialization that Rousseau felt man's good nature and healthy-sense of self-regard (*amour de soi*) was corrupted. Civic virtue mitigates the conceit of *amour propre*, a negative form of self-regard by which man is preoccupied with seeking advantage relative to others, and it makes self-governance under the social contract possible. Simply put, in Rousseau's view, socialization in itself was not good (in fact it was corrupting), it was life under the social contract that was desirable given its formative effects on human moral psychology. See *id.*; Scott, *supra* note 199, at 696.

selfish reasons.<sup>202</sup> John Scott identifies in Hobbesian thought, as in liberalism, an emphasis on “the continuation of motion without giving that motion any determinate direction or end. The existence of the individual is characterized by the *pursuit* of happiness, while happiness itself remains indeterminate.”<sup>203</sup> This is not the case for Rousseau, who depicts the emergence of a society that receives from the subsumption of individual liberty “its unity, its common identity, its life and its will.”<sup>204</sup> As the preeminent articulation of this vision of the social contract, Rousseau’s work stands as a key text in the canon of French republicanism.

Together, the ideas discussed above continue to play a significant role in shaping French political culture and public policy. Moreover, this version of republicanism, as articulated either implicitly or explicitly by Rousseau, Michéa, and others, is to a large degree incompatible with the individualistic precepts underlying contemporary liberalism. Understanding this strand of political thought, central to French politics but often unduly discarded by Anglo-American scholars,<sup>205</sup> is key to comprehending the decision to ban the face-veil.

#### IV. IMPLICATIONS OF THE LIBERAL-REPUBLICAN DIVIDE FOR FACE COVERING IN THE PUBLIC SPACE

##### A. A Legal Tension Informed by Two Competing Conceptions of Rights

Having summarily articulated the precepts of French republicanism and its opposition to liberalism, the discussion will turn now to how that political philosophy is challenged by the face-veil. A full ban on the concealment of the face would likely not survive a constitutional challenge in Canada or in the U.S. for example. This is not to say that all religious practices are protected. Notably, the U.S. Supreme Court upheld a law effectively forbidding an American Indian community to use peyote, an

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<sup>202</sup> Scott, *supra* note 199, at 701.

<sup>203</sup> *Id.* at 707.

<sup>204</sup> ROUSSEAU, DU CONTRAT SOCIAL, *supra* note 189, at 18.

<sup>205</sup> See, e.g., Robert Goodin, *Folie Républicaine*, 6 ANN. REV. POLIT. SCI. 55, 64 (2003) (excoriating French republicanism as “a particularly vicious form of closed communitarianism, a collective attitude of ‘We’re all right, [Jean-]Jacques.’”). Generally, liberals question the moral legitimacy of French republicanism and dismiss it as a parochial ideology. This opposition is especially vivid nowadays since the French Republican tradition was revived in the 1980s with a focus on national identity free from ethnic and racial diversity considerations, thus increasingly at odds with the current Western liberal trend. See, e.g., REPUBLICANISM AND POLITICAL THEORY (Cécile Laborde & John Maynor eds., 2008); LA RÉPUBLIQUE ET SES DÉMONS: ESSAIS DE RÉPUBLICANISME APPLIQUÉ 14-15 (Vincent Bourdeau & Roberto Merrill eds., 2008).

illegal drug, in its religious ceremonies.<sup>206</sup> Similarly, Canada's Supreme Court found it to be a reasonable limit on religious freedom that a woman may be forced to remove her veil when testifying if it poses a serious risk to the fairness of the trial.<sup>207</sup>

A key difference, however, is that the infringement on religion may only be justified if it is incidental,<sup>208</sup> whereas the French law is directly aimed, despite a neutrally worded text, at one religious practice. Further, and most importantly, the diffuse nature of the harm, in the case of the face-veil, is more difficult to perceive and articulate. Those differences illustrate a deeper divergence between the French Republican and the Anglo-liberal world over which interests are deemed compelling enough to warrant legislative action.<sup>209</sup>

The French Republic is built, like all political and juridical orders, on a fiction: in this instance, that of free individuals related to one another by common universal principles, distinct from the liberal fiction of fully autonomous, atomistic agents. French philosopher Régis Debray has systematically explored the contrast between the two social projects, or

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<sup>206</sup> *Employment Div, Dept. of Hum. Resources. v. Smith*, 494 U.S. 872 (1990) (the presence of exemptions in the French law would make a similarly worded prohibition on the concealment of the face more difficult to justify in the U.S. because even under *Smith* religious exemptions can continue to exist in cases where a government has in place a generalized scheme of exemptions).

<sup>207</sup> *R v. N.S.*, [2012] 3 S.C.R. 726, 727 (Can.).

<sup>208</sup> More precisely, inquiries into whether some impugned law has a proper purpose aims at filtering out legislation maliciously crafted to target a specific group. In turn, there is nothing in the Anglo-American constitutional proportionality methodology that makes a direct prohibition of a religious practice impermissible as a matter of course. For an example of a neutrally worded law that was struck down because it was targeting one religion in particular see *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

<sup>209</sup> See, e.g., Religious Freedom Restoration Act, 42 U.S.C.S. § 2000bb (1993) (although only applying to the U.S. federal government), the Act mandates that strict scrutiny be used when determining whether the Free Exercise Clause of the First Amendment has been violated: the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." The law provides an exception if two conditions are both met. First, the burden must be necessary for the "furtherance of a compelling government interest." Under strict scrutiny, a government interest is compelling when it is more than routine and does more than simply improve government efficiency (i.e. "a compelling interest relates directly [with] core constitutional" issues). The second condition is that the rule must be the least restrictive way in which to further the government interest. Essentially, the law reinstated the pre-*Smith* Sherbert Test set forth by *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Therefore, presumably, under the Act, the only way a law prohibiting the concealment of one's face could stand scrutiny is if it can be based on watertight security grounds.). See Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV. 605, 627 (1999).

ambitions.<sup>210</sup> Back in 1989, when the debate over the presence of headscarves in public schools erupted, he wrote in defense of the prohibition:

The universal idea governs the republic. The local idea governs democracy . . . . Reason being its supreme point of reference . . . in a republic, there are two nerve centers in each village: the town hall, where the elected representatives deliberate in common about the common good, and the school where the teacher teaches pupils how to thrive without a teacher . . . . In a democracy, it is the church and the shopping mall, or alternatively the cathedral and the stock exchange . . . . In a republic, society should resemble the school, whose first mission is to form citizens capable of judging all things by their natural intelligence alone. In a democracy, it is the school which resembles society, its first mission being to form products adapted to the labor market.<sup>211</sup>

Importantly, then, one should not confuse the universal aspiration of the French Republic with simple majoritarianism: universalism is conceptually distinct from the order any majority wishes to establish.

Twenty-five years after the first headscarf dispute, political science scholar Laurent Bouvet connected that same Rousseauist vision to the specific challenge of sectarian claims in the public space.<sup>212</sup> Notably, Bouvet hails the commonwealth defining the French Republic as the only way for people to rise above their multiple identity characteristics and specific loyalties to such-or-such particular subgroup in society.<sup>213</sup> That is, going beyond our specific differences in the public space allows the defense, guarantee, and even the development of those in the private sphere. It is through such a mechanism that the free and emancipated individual, meaning the full-fledged republican citizen, can be deployed.<sup>214</sup> As opposed to starting from those specificities and differences themselves in the hope that a minimalist society, a market based society for example, would ensure a more or less peaceful coexistence.<sup>215</sup> In that perspective, fighting the contemporary drift towards cultural or religious insularity becomes a paramount objective. For such a drift also reflects one's inability

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<sup>210</sup> Régis Debray, *Etes-vous démocrate ou républicain?*, LE NOUVEL OBSERVATEUR, Nov. 30, 1989.

<sup>211</sup> *Id.* For an insider criticism of the Republican ideal preventing France from becoming a mature, pluralistic democracy, see CHANTAL DELSOL, *LA RÉPUBLIQUE, UNE QUESTION FRANÇAISE* 7, 9 (2002).

<sup>212</sup> See generally LAURENT BOUVET, *L'INSÉCURITÉ CULTURELLE* (2015).

<sup>213</sup> *Id.* at 175-78.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

to think of solidarity and struggling against inequalities in a society that no longer conceives itself as the common space.<sup>216</sup>

Succinctly, the French prioritize liberty, the Anglo-liberals freedom. In light of these opposite conceptions, this article now considers the main liberal critiques of the ban and shows how they overlook the valid precedence of a legal order informed by republicanism.

### *B. Divergent Grounds for Criticism: Assessing Liberal Concerns*

#### 1. The erroneous argument of an alleged overextension of *laïcité*

One liberal critique that is easy to dispel is that the face-veil is an overextension of the principle of *laïcité*. *Laïcité*, while informing how certain constitutional concepts are construed, is almost a secondary matter in this respect. Technically, *laïcité* only applies to the character of the state: the services it provides, its premises, servants, and possibly (albeit more problematically) those users of the state's services, including pupils in the public educational system. *Laïcité* was a paramount feature of the ban of religious signs in schools.<sup>217</sup> This is not at play with respect to banning the concealment of one's face in the public space.

Thus, if the ban could only be grounded in *laïcité*, Hunter-Henin's point that the ban is an over-extension of that principle would be pertinent.<sup>218</sup> Barton provides a similar critique, arguing that in passing judgment on the legitimacy of the *belief* in wearing a headscarf, French politicians have themselves committed a violation of *laïcité*.<sup>219</sup> According to these critics, the secular plank of the French state has become warped to the extent that it serves as the basis for the deployment of tools of "coercive cultural uniformity,"<sup>220</sup> such as the ban or, to borrow Charles Taylor's terminology, by the "imposition of one metaphysical view over others."<sup>221</sup>

This argument is well-taken but misplaced. Indeed, the concept of *laïcité* entrenched in the 1905 law was intended to preserve state neutrality as well

<sup>216</sup> *Id.*

<sup>217</sup> The preamble of the 1946 Constitution, attached to the 1958 Constitution, makes it a duty for the state to ensure a comprehensive, free, and *laïque* public education system. See 1946 CONST. pmbl. (Fr.); Elaine Sciolino, *French Assembly Votes to Ban Religious Symbols in Schools*, N.Y. TIMES (Feb. 11, 2004), [http://www.nytimes.com/2004/02/11/world/french-assembly-votes-to-ban-religious-symbols-in-schools.html?\\_r=0](http://www.nytimes.com/2004/02/11/world/french-assembly-votes-to-ban-religious-symbols-in-schools.html?_r=0).

<sup>218</sup> See generally Myriam Hunter-Henin, *Why the French don't like the Burqa: Laïcité, National Identity, and Religious Freedom*, 61 INT'L & COMP. L.Q. 613 (2012).

<sup>219</sup> Daniel Barton, *Is the French Burka Ban Compatible with International Human Rights Law Standards?*, 9 ESSEX HUM. RTS. REV. 1, 20-21 (2012).

<sup>220</sup> Shaira Nanwani, *The Burqa Ban: An Unreasonable Limitation on Religious Freedom or a Justifiable Restriction?* 25 EMORY INT'L L. REV. 1431, 1444 (2011).

<sup>221</sup> Charles Taylor, *Modes of Secularism*, in SECULARISM AND ITS CRITICS 37 (Rajheev Bargava ed., 1998).

as to limit government intrusion on freedom of conscience; in turn, as recognized by the *Conseil d'État*, *laïcité* as an isolated concept does not sufficiently justify the government's action.<sup>222</sup> There is an extent to which some French media have fallen into the same trap, falling back on popular and convenient terminology that connects well with the public.<sup>223</sup> From a broader theoretical vantage point, however, the focus should be on how the ban fits within the logic of republican government, and not whether it is an extension of *laïcité*.<sup>224</sup> That the face-veil is a religious garment is almost peripheral to its political significance, an important aspect that Anglo-liberal commentators discounted to a large extent.<sup>225</sup>

## 2. A lack of "sympathetic imagination"

In *The New Religious Intolerance*, Martha Nussbaum submits that government policies placing limitations on religious freedom are essentially rooted in fear of the "other."<sup>226</sup> Extending this argument, policies such as the ban may be understood as the product of ignorance about the meaning and purpose of foreign cultural and religious practices.<sup>227</sup> The solution, she writes, is not condemnation but rather more "respect for human equality" and a "curious and sympathetic imagination."<sup>228</sup>

Based on this approach, Nussbaum addresses arguments for banning the face-veil based on security, objectification, coercion, health, and civic friendship.<sup>229</sup> The last one is the central concern of this paper, and informed the ECtHR's ratio in *S.A.S. v France*. Nussbaum's rebuttal to the contention that the face and eyes are necessary to proper civic relations focuses on instances where citizens adapt to the particular circumstances of other people.<sup>230</sup> Nussbaum discusses the propensity for individuals to find difficulty talking to "people who look odd," and the "unfortunate human

<sup>222</sup> Jennifer Heider, *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*, 22 IND. INT'L & COMP. L. REV. 94, 95, 98, 116 (2012).

<sup>223</sup> Stéphanie Le Bars, *Du Voile à L'école au Port de la Burqa dans L'espace Public*, le Débat a Changé, LE MONDE, (July 2, 2009), [http://www.lemonde.fr/societe/article/2009/07/02/du-voile-a-l-ecole-au-port-de-la-burqa-dans-l-espace-public-le-debat-a-change\\_1214388\\_3224.html#meter\\_toaster](http://www.lemonde.fr/societe/article/2009/07/02/du-voile-a-l-ecole-au-port-de-la-burqa-dans-l-espace-public-le-debat-a-change_1214388_3224.html#meter_toaster).

<sup>224</sup> See generally BLANDINE KRIEGL, PHILOSOPHIE DE LA RÉPUBLIQUE (1998).

<sup>225</sup> *Viewpoints: Should Full-face Veils be Banned in Some Public Places?*, BBC NEWS (Sept. 16, 2013), <http://www.bbc.com/news/uk-24106142>.

<sup>226</sup> See MARTHA C. NUSSBAUM, *THE NEW RELIGIOUS INTOLERANCE: OVERCOMING THE POLITICS OF FEAR IN AN ANXIOUS AGE* (2012) (ebook).

<sup>227</sup> *Id.* at 12.

<sup>228</sup> *Id.* at 21. This notion assumes that the "other" shares your sympathy, which is arguably naïve.

<sup>229</sup> *Id.* at 105–30.

<sup>230</sup> *Id.* at 111–12.

tendency to blame this difficulty on the person who looks odd rather than oneself.”<sup>231</sup> She compares the reaction to women wearing a face-veil with reactions to physically or mentally disabled individuals, who have historically experienced discrimination and exclusion.<sup>232</sup> In essence, Nussbaum argues that while the practice of veiling may be initially off-putting, individuals and societies can easily adapt, as we have following the introduction of new forms of oral communication that do not require face-to-face interaction, such as the telephone.<sup>233</sup>

While this certainly offers pause to consider our own biases when evaluating interactions with others, an argument basing the face-veil ban on close-mindedness alone is simplistic. It treats the ban as a reaction to the individuals choosing to veil, rather than as one geared towards fighting off an attack on the republican community project. Republicanism’s aversion to the veil is not the result of bigoted suspicion. To be clear, one does not have to engage in that line of reasoning. After all, the face-veil is customary, not a religious requirement.<sup>234</sup> But, for the sake of the argument, the only religious justification for the face-veil would be that it shields women from unhindered male concupiscence and harassment, which reinforces the view that males are sexual predators, which can hardly be accepted, gradually or otherwise, by the non-believer. According to Tunisian psychoanalyst, Fethi Benslama, the veil is not a religious sign, but rather an object that prohibits the female body from the sight of men:

This is the canonical definition of the word *hijâb* [female head covering] in Arabic. The reason is that the body of women, according to tradition and Islamic texts, is considered completely taboo since it carries within it the seeds of seduction and sedition for the whole city. Women are reported lacking in religion and reason, they are the henchmen of the devil, according to some hadith.<sup>235</sup>

In this perspective, the female face itself is a threat to public order. For Benslama, the face-veil illustrates the larger issue of women’s condition in traditional Muslim societies, itself a root cause of their failure against many commonly accepted measures of human development.<sup>236</sup> As he explains, women’s oppression does not just degrade women but organizes in the

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<sup>231</sup> *Id.* at 112.

<sup>232</sup> *Id.* at 113.

<sup>233</sup> *Id.* at 112.

<sup>234</sup> GÉRIN REPORT, *supra* note 9, at 39–40 (Dr. Mohammed Tantawi, Sheikh of the University of Al-Azhar, a renowned Sunni university, claims that “the full veil is not part of a religious requirement [,] but [is instead merely] custom.”).

<sup>235</sup> Sadi Lakhdari, *Entretien avec Fethi Benslama*, 1 OUTRE TERRE 507, 509 (2005).

<sup>236</sup> FETHI BENSLAMA, DECLARATION D’INSOUMISSION: A L’USAGE DES MUSULMANS ET DE CEUX QUI NE LE SONT PAS 33 (2009).

whole of society inequality, the hatred of otherness and, ultimately, violence.<sup>237</sup>

Nussbaum's liberal atomistic framework is by construction unreceptive to arguments based on social externalities. Its inadequacy is compounded by America's deep-running puritanism where male sexual frustration remains a taboo topic.<sup>238</sup> Yet, anthropologist Germaine Tillion already explained in the 1960s how the hiding of the woman's body in traditional North African societies shapes the young male demographic in a detrimental way.<sup>239</sup> This reality is inseparable from a larger picture where the seclusion of women leads to the so-called "republic of cousins" (cousins marry each other since men cannot freely meet other women) as opposed to the exogamous "republic of citizens" (the western model), which prevents the evils associated with tribalism.<sup>240</sup> Ignorance is therefore certainly not at issue: the veil is correctly perceived as a signal of allegiance to a set of political and anthropological values that inherently contradict the republican ethos.<sup>241</sup>

Fundamentally, the personal motivation for wearing the face-veil is irrelevant,<sup>242</sup> and Nussbaum's sympathetic imagination would not change what the French consider offensive, as opposed to frightening, to themselves individually, but more so offensive to the collective. Nussbaum's invitation fails a common-sense test. Someone wearing a swastika in public is not worthy of our sympathetic imagination,<sup>243</sup> even if

<sup>237</sup> *Id.* at 33. In a society where veiling is the norm, women not wearing a veil can become the target of gang sexual harassment, a phenomenon reportedly called "*taharrush gamea*" in Arabic. See *Cologne attackers were of migrant origin—minister*, BBC NEWS (Jan. 11, 2016), <http://www.bbc.com/news/world-europe-35280386>.

<sup>238</sup> Matthew Hutson, *Still Puritan After All These Years*, N.Y. TIMES (Aug. 3, 2012), <http://nyti.ms/NRnrbi>.

<sup>239</sup> Cf. GERMAINE TILLION, *LE HAREM ET LES COUSINS* 208–11 (1966). For feminist voices from that region that open up now on this topic, see MONA ELTAHAWY, *HEADSCARVES AND HYMENS: WHY THE MIDDLE EAST NEEDS A SEXUAL REVOLUTION* (2015).

<sup>240</sup> This thesis is refined and generalized in EMMANUEL TODD, *L'ORIGINE DES SYSTÈMES FAMILIAUX. TOME I. L'EURASIE*, 14–15 (2011).

<sup>241</sup> Political not in the narrow sense of influencing the form of government, but rather deriving from the original Greek *politikos*, that is "of, for, or relating to citizens." See John R. Bowen, *How the French State Justifies Controlling Muslim Bodies: From Harm-Based to Values-Based Reasoning*, 78 SOC. RES. 325, 325 (2011).

<sup>242</sup> For an elaboration on this misconception, see Eva Brems, *Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings*, 2 J. L. & POL. 517, 528 (2014).

<sup>243</sup> The same would go for naming one's child Osama in post 9/11 United States. Cf. Ishaan Tharoor, *Is It Time for the Confederate Flag to Be As Taboo As the Nazi Swastika?*, WASH. POST (Jun. 24, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/06/24/how-germanys-ban-of-the-nazi-swastika-echoes-in-the-battle-over-the-confederate-flag/>.

the motivation for wearing it is genuinely derived from Hinduism or Buddhism.

It is worth noting that Nussbaum's understanding of intolerance is grounded in the early history of the U.S. approach to freedom of religion.<sup>244</sup> Therefore, her conceptual framework is that of theological divergences within the Christian world in the late eighteenth century, and the contextual solution of tolerance adopted to address that challenge. Back then, the multiplicity of religious sects was seen from the beginning as a guarantee of religious freedom because no majority could emerge to oppress and persecute the rest.<sup>245</sup> Such historical context still accounts for the amount of deference that religion is entitled to as a constitutionally protected interest; in the U.S., it means that all religions are afforded accommodation under the Constitution.<sup>246</sup>

More importantly, Nussbaum partakes in the widespread ideological movement that sees the continuous expansion of societal liberalism as a pathway to increased human welfare, in the same way the expansion of liberalism in economics has made possible a spectacular, tangible increase in wealth. The drawbacks of economic liberalism, such as increased wealth inequalities, environmental degradation, and private enrichment of elected officials, are on display for everyone to see today;<sup>247</sup> in contrast, the limits to societal liberalism are less obvious.<sup>248</sup>

One will easily recognize in Nussbaum's vision the Rawlsian "overlapping consensus" approach, which she implicitly adopts, and from which all her arguments logically follow.<sup>249</sup> The long-term implication of

<sup>244</sup> NUSSBAUM, *supra* note 226, at 73–74, 83.

<sup>245</sup> James Madison, *Debates on the Adoption of the Federal Constitution*, in THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, 1787, 399 (Jonathan Elliot ed., J. Lippincott Co. 1901) (1836).

<sup>246</sup> *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

<sup>247</sup> See GEORGE AKERLOF AND ROBERT J. SHILLER, PHISHING FOR PHOOLS: THE ECONOMICS OF MANIPULATION AND DECEPTION 150–51, 162 (2015) (debunking the myth for the general public of the benevolent so-called "invisible hand": market failures are the rule, and not the exception).

<sup>248</sup> Yet, the tacit congruence between economic and societal liberal agendas have been illuminated by, for example, the American historian Christopher Lasch and French philosophers Michel Clouscard, Gilles Lipovetsky and Jean-Claude Michéa, among others: in an attempt to shape a modern citizen of the world, free from cultural or customary constraints and straightjackets perceived as oppressive, arbitrary, and biased, they have only served the interests of the market by fashioning an uninhibited, philistine consumer of nowhere. Cf. CHRISTOPHER LASCH, THE CULTURE OF NARCISSISM (1978); Michel Clouscard et al., *L'Individu Plus Que Jamais*, ESPRIT, July–Aug. 1984, at 69–70; JEAN-CLAUDE MICHÉA, THE REALM OF LESSER EVIL (2009).

<sup>249</sup> See NUSSBAUM, *supra* note 226; John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. OF LEGAL STUD. 1, 24–25 (1987).

such an axiologically neutral society, which was certainly not on the first liberal thinkers' agenda, is that to defend individual freedom, the original values-driven "government of men" must yield to the formal "administration of things."<sup>250</sup>

Ironically, Nussbaum's position in favor of the passive acceptance of behaviors that an overwhelming majority of native-born citizens consider abhorrent and repulsive falls into the trap that British conservative philosopher Edmund Burke perceived when writing about the French Revolution.<sup>251</sup> He correctly predicted that the most radical ambitions of the revolutionary societal project were bound to fail because they were cut off from France's normative heritage.<sup>252</sup> As Marcel Gauchet reminds us, people first live in political communities before being organized in economic and juridical orders.<sup>253</sup> In that sense, Nussbaum's vision, when applied to France, is truly a revolutionary one. Furthermore, her critique of the face-veil ban, which rests on the canonical liberal hubris, illuminates a central concern of this paper. Indeed, as others have done, Nussbaum's argument hinges on the primacy of individual freedom without appraising the alternative context in which the ban was enacted, thereby implicitly universalizing the tenets of liberal human rights.

Liberals' failure to appreciate this alternative historical context and value system can also be traced to a failure of republicans to self-promote.<sup>254</sup> In practical terms, this means fostering and institutionalizing a distinct, unabashed republican conception of rights, in the same way that reformist liberal jurists, legal scholars and politicians have promulgated, over time, an Anglo-American rights agenda. France, however, has been hesitant to undertake this sort of project—recall it did not even defend its conception of public order before the ECtHR, and, as a result, until the decision in *SAS v. France*, found itself on the defensive on the international stage.<sup>255</sup> A

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<sup>250</sup> See ERIC HOBSBAWM, *HOW TO CHANGE THE WORLD* 25, 29-30 (2011) (ebook) (attributing these expressions to French utopian philosopher Saint Simon, whose work paradoxically inspired both liberal and Marxist thinkers).

<sup>251</sup> See Louis -Gottschalk, *Reflections on Burke's "Reflections on the French Revolution,"* 100 AM. PHIL. SOC'Y 417, 427 (1956).

<sup>252</sup> Alan Wolfe, *Democracy, Social Science, and Rationality: Reflections on Burke's Reflections on the Revolution in France*, in *REFLECTIONS ON THE REVOLUTION IN FRANCE* 271, 271-77 (Frank M. Turner ed., 2003).

<sup>253</sup> Marcel Gauchet, *Les Ressorts du Fondamentalisme Islamique*, LE DÉBAT, no. 185, 2015, at 64, 67-68, 73.

<sup>254</sup> Debray, *supra* note 210. This failure may also stem from the fact that the whole idea of "the common good" became too closely associated with totalitarianism in the twentieth century.

<sup>255</sup> *S.A.S. v. France*, App. no. 43835/11, at 7; *France: Face-Veil Ruling Undermines Rights*, REUTERS, July 3, 2014, <https://www.hrw.org/news/2014/07/03/france-face-veil-ruling-undermines-rights>.

proper republican model would affirm its doctrinal distinctiveness and originality. It seems appropriate to outline briefly one of its components, which has been relatively neglected in the literature: the tradeoff between paternalism and emancipation. While not determinative with respect to the face-veil ban, it nonetheless illuminates the schism between the republican and liberal conceptions of an ideal political order.

*C. An Example of Conflicting Views: the Meaning of Free Choice*

The individualist component of the modern liberal approach to freedom of religion has been canvassed by landmark judicial decisions such as *R. v. Big M Drug Mart Ltd.* and illustrates a broad, generous acceptance of those behaviors dictated by one's conscience: "The values that underlie our political and philosophical traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided . . . only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own."<sup>256</sup>

Against that perspective—setting aside, for now, the notion that the face-veil is in fact injurious to the face-veil wearer's neighbors—one may object that many women who wear the face-veil are coerced in subtle ways that most liberals would disregard in the name of respect and non-interference. Yet, some Muslim women may be unaware of their own oppression if they have accepted the attitudes and stereotypes of their community as absolute truth. Further, those who break with traditional practices "often put themselves out on a limb, rescinding with their act traditional group ties and becoming a minority within a minority."<sup>257</sup> Hence, to the French, the ban is justified by the no less generous need to protect women from community and family pressure, even guilt, when the choice to wear it is not truly meaningful.<sup>258</sup> This emancipating move, in turn, would allow women to follow different paths of their own choosing, including exit from the group, therefore enabling their capacity for personal autonomy.<sup>259</sup> In other words,

<sup>256</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (Can.).

<sup>257</sup> E.L. Cerroni-Long, *Marrying out: Sociocultural and Psychological Implications of Inter-marriage*, 16 J. OF COMP. FAM. STUD. 25, 31 (1985).

<sup>258</sup> See GÉRIN REPORT, *supra* note 9, at *passim* (speaking of "voluntary servitude," "civil self-mutilation," "sexual apartheid," "exile," or "alienated freedom"). This is reminiscent of Allan Bloom's remark that "the most successful tyranny is not the one that uses force to ensure uniformity but the one that removes the awareness of other possibilities, that makes it seem inconceivable that other ways are viable, that removes the sense that there is an outside." ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 249 (1987).

<sup>259</sup> See generally Cécile Laborde, *Female Autonomy, Education and the Hijab*, 9 CRITICAL REV. INT'L SOC. POL. PHIL. 351. Similar arguments were advanced during the debate about the ban of religious signs in public schools.

the face-veil is seen as a voluntary prison: it traps its wearer in a form of immature living and thus incapacitates the individual from positive participation in and contribution to society. Obviously, there is a risk: some women may prefer to stay secluded at home rather than show their face in public, thus drifting further away from the conception of citizenship France wants to instill. On a cost benefit analysis, however, French society believes the ban will do more good than harm.

Historically, this approach is consistent with the Jacobinist vision of liberalism revealed by historian Pierre Rosanvallon, where the republican state frees the individual from the influence of community groups or intermediaries, such as the Church, which otherwise cripple his potential for self-realization.<sup>260</sup> The face-veil debate thus pits republicans and enlightened liberals against reformation liberals in a classic “freedom through the state” versus “freedom from the state” opposition. This confrontation crystallizes around the notions of consent and paternalism,<sup>261</sup> and it goes as far back as Plato’s allegory of the cave.<sup>262</sup>

To sum up, the two models of society diverge in how they see the state’s responsibility in protecting its members, if necessary even from themselves.<sup>263</sup> The French ban watches over and empowers women who, according to the community, have internalized dehumanizing norms. Liberal critics point to a slippery slope that discounts individual dignity under the guise of protecting it, and refuse to pass judgment on the face-veil.<sup>264</sup> In the absence of commonly accepted values, the prohibition of certain private conducts in the name of the so-called general interest must be treated as discriminations in disguise, and fought as such. The French model evidences a Rousseauist conception where the state has affirmative duties to promote substantive rights and not just formal equality. From that perspective, the state is entrusted with the responsibility of guaranteeing not only negative, but also positive, liberty. However, positive liberty can only

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<sup>260</sup> See generally PIERRE ROSANVALLON, *LE MODÈLE POLITIQUE FRANÇAIS: LA SOCIÉTÉ CIVILE CONTRE LE JACOBINISME DE 1789 A NOS JOURS* (2004).

<sup>261</sup> See generally Ionna Tourkochoriti, *The Burka Ban: Divergent Approaches to Freedom of Religion in France and in the U.S.A.*, 20 WM. & MARY BILL RTS. J. 791 (2012).

<sup>262</sup> 7 PLATO, *THE REPUBLIC* (G.R.F. Ferrari ed., Tom Griffith trans., 2000).

<sup>263</sup> Note that there is no general “duty to rescue” in the common law tradition. See *Jackson v. City of Joliet*, 715 F.2d 1200, 1202 (7th Cir. 1983) (citing *Yania v. Bigan*, 155 A.2d 343 (1959) (“Now there is of course no general common law duty to rescue a stranger in distress even if the rescue can be accomplished at no cost to the rescuer.”)).

<sup>264</sup> Henin, *supra* note 218; Compare *Wisconsin v. Yoder*, 310 U.S. 586 (1940); with *Minersville Sch. Dist. v. Gobitis*, 406 U.S. 205 (1972). The *Yoder* decision illustrates a greater goal of emancipating the individual is almost nonsensical in the liberal state, which can be thought of as the exact opposite of *Minersville School District* from a political perspective, specifically the amount of deference that the state should grant to communities. *Yoder*, *supra* note 209; *Gobitis*, *supra* note 126.

flourish within a given socio-cultural environment, which the republican state is entrusted to safeguard.

## V. THE FRENCH CONCEPTION OF PUBLIC ORDER

### A. *The Substance of the Harm*

#### 1. The Debasement of Republican Social Norms

The *Conseil d'État* had not clarified the substance of the harm that the face-veil inflicts on the collectivity. This would have been an essential step in demonstrating that the limit to freedom of religion resulting from the ban is justified in a free and democratic society pursuant to Article 5 of the 1789 Declaration stating: "The law has the right to forbid only actions harmful to society."<sup>265</sup> France's submission on this point before the ECtHR was surprisingly laconic given that the entire case hinged on it. To wit:

the face plays a significant role in human interaction: more so than any other part of the body, the face expresses the existence of the individual as a unique person, and reflects one's shared humanity with the interlocutor, at the same time as one's otherness. The effect of concealing one's face in public places is to break the social tie and to manifest a refusal of the principle of "living together" (*le "vivre ensemble"*).<sup>266</sup>

The judiciary is not used to looking for guidance in philosophy texts. However, the philosophy of the Enlightenment teaches us that in the human face we find a paradigm of meaning. That is, we uncover in the face both the proof of our freedom and the mark of self-consciousness. "In seeing an array of the features" of the face, such as smiles, blushes, kisses, glances, one understands the other person as a "partner in dialogue" and their "real presence in our shared world of *you*."<sup>267</sup> According to the Hegelian dialectical narrative, the face-to-face contact with others makes us "aware of the constraints of practical reason," when agents come to accept each other as subjects, meaning persons bound by "rights and duties that are mutually recognized," within the *Lebenswelt*.<sup>268</sup> "It is at this point that . . . life in society begins."<sup>269</sup>

To elaborate in the context of modern French philosophy which, arguably, has pondered more than any other school over the role of the "other" in the shaping of our attitudes and states of mind, Emmanuel

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<sup>265</sup> Declaration, *supra* note 13, at art. 5.

<sup>266</sup> *S.A.S. v. France*, *supra* note 72.

<sup>267</sup> ROGER SCRUTON, *THE SOUL OF THE WORLD* 97–98, 104 (2014).

<sup>268</sup> *Id.* at 109–13.

<sup>269</sup> *Id.* at 111.

Lévinas explored the centrality of the face as a pathway to understanding one's responsibility toward fellow human beings long before the veil dispute erupted.<sup>270</sup> For Lévinas, the epiphany of the face calls into question, obliges, and forbids killing because of the humanity revealed by the other person's face.<sup>271</sup> Critically, the necessity of seeing the other's face is distinct from the mere looking at his or her eyes only:

You turn yourself toward the Other as toward an object when you see a nose, eyes, a forehead, a chin, and you can describe them. The best way of encountering the Other is not even to notice the color of his eyes.<sup>272</sup>

Further still, psychology echoes the conclusions of philosophy as it teaches us that self-awareness itself depends on the nature of one's interaction with others.<sup>273</sup>

American author, William Arthur Ward, put it this way: "A warm smile is the universal language of kindness."<sup>274</sup> Whether one accepts that this language is truly universal or not, in French society, the face-veil imposes a diffuse cost as it frustrates the fulfillment of the community members' ethical self-realization. In other words, the deliberate concealing of the face is a public nuisance: it attacks the foundations of the *vivre-ensemble* at its ethical core.<sup>275</sup> Such is the importance of the social bond connecting citizens together in the French republican psyche that the revolutionaries explicitly hailed fraternity as one of the Republic's overarching goals.

## 2. *Fraternité*

Fraternity is that spirit of brotherhood and fellowship hailed by the Revolution that enjoins citizens of all backgrounds to rally around a common ideal transcends individual differences.<sup>276</sup> France referred to

<sup>270</sup> EMMANUEL LEVINAS, *ETHICS AND INFINITY* 85–87 (Richard A. Cohen trans., 1984).

<sup>271</sup> *Id.* at 86.

<sup>272</sup> *Id.* at 85.

<sup>273</sup> Edmond-Marc Lipiansky, *L'Identité dans la Communication*, 97 COMMUNICATION ET LANGAGES 31, 34, 36–37 (1993); see also Seigel, *supra* note 190, at 20, 148–49.

<sup>274</sup> William Arthur Ward, *Reward Yourself*, in READER'S DIGEST QUOTABLE QUOTES (Deborah DeFord et al., eds., 1997).

<sup>275</sup> Syrian poet Adonis went further in a 2003 interview: "[T]he assertion of a particular and different identity within the singular public identity . . . represents a challenge to public sentiments, public tastes, public culture, and public morality." *Hijab for the Head or Hijab for the Mind?*, LAWNOORDER (Oct. 15, 2015), <http://lawnorder.blogspot.ca/2005/10/islamic-poet-adonis-on-use-of-veils-by.html>.

<sup>276</sup> For civility and the role of the law in governing interpersonal relations, see James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279 (2000). That work perceptively analyzes how history and culture inform which societal interests are worthy of legal protection within the Western world.

fraternity briefly in its submissions before the ECtHR.<sup>277</sup> The different administrative and legislative documents that prefaced the ban mentioned it multiple times as well.<sup>278</sup> Former Canadian Supreme Court Justice Gonthier, a Quebecois, wrote: “In my view, fraternity is simply . . . the glue that binds liberty and equality to a civil society.”<sup>279</sup> Relatedly, note the importance of the spirit of concord, a term that is all but forgotten in English but so prominent in the French political subconscious that a central place in Paris is dedicated to it.

The assertion that religious communities might develop exclusory practices is inconsistent with the civic values of fraternity and concord. In France, the face-veil is injurious to those principles, one of which is engraved in the country’s motto, yet, once again, without formal constitutional traction.<sup>280</sup> French philosopher Elizabeth Badinter declared, insisting on the paradoxical “perversity” of the face-veil:

The full veil goes against the principle of brotherhood—this fundamental principle that we have so little opportunity to refer to—and beyond that, to the principle of civility, to the bond we hold toward others. To wear the full veil is to absolutely refuse interacting with others, or more precisely, to refuse reciprocity: dressed like this, a woman claims the right to see me but refuses for me the right to see her.<sup>281</sup>

Admittedly, even under Scott Shapiro’s theory that law’s overriding principle is social planning, if the ban is viewed as a tool that is meant to help with the integration of Muslims into the republican mold, it is particularly blunt.<sup>282</sup> Indeed, the ban, by itself, is certainly insufficient and

<sup>277</sup> *S.A.S. v. France*, supra note 72, at 4.

<sup>278</sup> GÉRIN REPORT, supra note 9, at *passim*.

<sup>279</sup> Charles D. Gonthier, *Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy, or Fraternity: The Unspoken Third Pillar of Democracy*, 45 MCGILL L.J. 567, 569 (2000). For the conference proceedings on the value of fraternity in French constitutional law, see Guy Canivet, *Responsabilité, fraternité, et Conférence 264 durable en droit: Une Conférence en mémoire de l’honorable Charles D. Gonthier Manuscrits de la Conférence 1-2*, CTR. FOR INT’L SUSTAINABLE DEV. L., <http://cisdl.org/gonthier/public/pdfs/papers/Conf%C3%A9rence%20Charles%20D%20Gonthier%20-%20Guy%20Canivet.pdf>.

<sup>280</sup> 1958 CONST. ART. 2 (Fr.).

<sup>281</sup> GÉRIN REPORT, supra note 9, at 118–19 (quoting Elizabeth Badinter). Similarly, philosopher Frédéric Lenoir considers that an important critique that may be addressed to modern Western society is that it has disregarded the fraternity ideal by focusing exclusively on formal equality and individual freedoms. FRÉDÉRIC LENOIR, *LA GUÉRISON DU MONDE* 226 (2014).

<sup>282</sup> See SCOTT SHAPIRO, *LEGALITY* 274 (2011) (the key insight of the planning theory of law is that “laws are plans or planlike norms [with the purpose] to guide and organize the

may be counterproductive if not bundled with other measures, especially with respect to education, counseling, and information. Nonetheless, it is revealing that philosopher Pierre Manent, who recently asked France to embrace its Muslim community,<sup>283</sup> drew two red lines: the face-veil, being described as antithetical to the spirit of civic friendship defining French society, and polygamy.<sup>284</sup>

### 3. Double Standards?

At this point, it is useful to contrast the face-veil ban with the idea, once advocated by the far right party Front National's leader, of banning any ostentatious religious sign in the public space, including Jewish skullcaps.<sup>285</sup> This move betrayed a troubling misunderstanding of the rationale behind the face-veil ban. It is nonetheless interesting insofar as it invites us to think of the key differences between the face-veil and the yarmulke. This can help to more precisely delineate the uniquely injurious nature of the face-veil compared to other religious signs being displayed in the public space.

France's Jews, since their emancipation by the Revolution, have displayed a participation in the affairs of the state consistent with the

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conduct of members of a community both over time and across persons.”).

<sup>283</sup> PIERRE MANENT, *SITUATION DE LA FRANCE* 58 (2015).

<sup>284</sup> *Id.* Incidentally, another way to apprehend the ubiquitous harm created by the face-veil may be grasped by reflecting on the likely consequences of accepting polygamy in Western societies. Polygamy is another religious custom practiced by consenting adults in many parts of the world. In Canada, in 2011, the so-called Polygamy Reference addressed the constitutional challenge raised by members of the fundamentalist Mormon community of Bountiful in the province of British Columbia. Among the arguments advanced by British Columbia Chief Justice Robert Bauman in upholding the prohibition of polygamy was that “the law seeks to advance the institution of monogamous marriage, a fundamental value in Western society from the earliest of times [and] to protect against the many harms which are reasonably apprehended to arise out of the practice of polygamy.” Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588. Expert witnesses provided, inter alia, evidence that the average individual in a polygamous society has fewer liberties than the average individual in states that outlaw polygamy. *Id.* Similarly, countries where any variation of the full face-veil is practiced on a large scale have appalling human rights records. Adam Taylor, *The Facts—and a Few Myths—About Saudi Arabia and Human Rights*, WASH. POST (Feb. 9, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/02/09/the-facts-and-a-few-myths-about-saudi-arabia-and-human-rights/>. Already, Montesquieu linked the social norms that guide male-female interpersonal relations with particular political orders; in particular, he had the intuition that the strict separation between men and women that characterize polygamous societies is inseparable from despotism. MONTESQUIEU, *DE L'ESPRIT DES LOIS*, 81-82, 201 (Anne M. Cohler, et al., eds., 1989).

<sup>285</sup> See Interview by Luc Bronner, Abel Mestre, and Caroline Monnot with Marine Le Pen, President, National Front (*Le Monde*, Sept. 21, 2012).

republican idea of citizenship despite religious customs that appear foreign to most French people. While a few neighborhoods with a strong Jewish presence exist, Jews have left behind the ghettos where they had historically been corralled and have embraced living amongst the rest of society.<sup>286</sup> The Jewish community leaders summoned by Napoleon in 1807 to answer a series of questions accepted full integration of the Jewish community into French life—except for mixed marriages.<sup>287</sup> However, an answer based on the historical record would not be entirely satisfactory. Some could say that Muslim women who wear the face-veil have not yet had the opportunity to show how the practice of veiling does not hamper their civic-mindedness, and that the law does not give them that chance now.<sup>288</sup>

This reasoning, however, would be mistaken. Simply put, there is no shared expectation that men should not have their head covered. Thus, the yarmulke does not run against the principles of civility and reciprocity—necessary republican virtues that go beyond mere courtesy. Secondly, and more critically, hiding one's face is, at least in Western societies, inconsistent with the notion of basic trust in interpersonal relations, the cornerstone of civic dialogue that the republican ethic fosters.<sup>289</sup> The practice of veiling promotes cultural insularity, thus creating a kind of secular profanation within the community of the Republic. A minimum level of openness is a precondition for the type of integration necessary to support a republican state. In particular, the practice of veiling makes it virtually impossible for Muslim women to meet anyone outside of their group.<sup>290</sup> This prevents the sort of exchange and dialogue that is necessary

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<sup>286</sup> *A Brief History of the Jewish Community in France*, FRANCE.FR, <http://us.france.fr/en/about-france/brief-history-jewish-community-france> (last visited Oct. 31, 2016).

<sup>287</sup> Interestingly, not just in the French Republic, since the regime had changed. Napoleon was referring to the Civil Code which he had created to translate into law the philosophical principles that had been hailed by the Revolution. See Papot Emmanuelle, *Napoleon and the Jews*, LA FONDATION NAPOLEON, <http://www.napoleon.org/en/history-of-the-two-empires/articles/napoleon-and-the-jews/> (last visited Oct. 29, 2016); see also Michael Goldfarb, *Napoleon, the Jews and French Muslims*, N.Y. TIMES (Mar. 18, 2007), <http://www.nytimes.com/2007/03/18/opinion/18iht-edgoldfarb.4943373.html>.

<sup>288</sup> See, e.g., Raza Habib Raja, *Burqah Ban, Multiculturalism and Secularism*, HUFF. POST (Sept. 8, 2014), [http://www.huffingtonpost.com/raza-habib-raja/burqah-ban-multiculturalism\\_b\\_5551825.html](http://www.huffingtonpost.com/raza-habib-raja/burqah-ban-multiculturalism_b_5551825.html) (discussing the perspective of supporters of the ban).

<sup>289</sup> This intuition appears to be confirmed by modern science: face-based judgments can predict trustworthiness. See generally Michael L. Slepian & Daniel R. Ames, *Internalized Impressions: The Link Between Apparent Facial Trustworthiness and Deceptive Behavior Is Mediated by Targets' Expectations of How They Will Be Judged*, 27 PSYCHOLOGICAL SCI., 282 (2016).

<sup>290</sup> Margot Badran, *Islam, Patriarchy, and Feminism in the Middle East*, WOMEN LIVING UNDER MUSLIM LAWS (1988), <http://www.wluml.org/node/249> (noting that the veil largely acts to segregate the sexes but can provide including privacy and protection).

for full republican citizenship. Put differently, republicanism's aversion to the veil stems from its effects on the capacity for individuals to engage and participate meaningfully in society. Third, and relatedly, the yarmulke does not question the status of women as being ontologically equal in the city (as *polis*), a basic premise that was engraved in the 1789 Declaration.<sup>291</sup>

The key distinction between the liberal, private conception of equality (of opportunities, in the labor market especially) and the republican, more radical conception of effective political equality is this. Because the republican view of liberty emphasizes the importance of the public dimension of autonomy and self-government, it supports a more demanding ideal of participatory and deliberative democracy. In turn, it also calls for a subtler and ambitious notion of political equality that goes beyond formal equality and procedural fairness. The type of political equality promoted by republicanism should lead to the functional capacity of all citizens to influence and determine the political decisions that bind them.<sup>292</sup>

### B. France's "Mission Statement"

#### 1. Gender Integration

For literature and linguistics professor Claude Habib, the veil that was banned in public schools was not targeted *qua* religious symbol and the ban was not explained by a concern for formal equality between men and women, which was a criterion invoked in the public and judicial debate.<sup>293</sup> According to Habib, the ban becomes understandable if one refers to the background of gallant tradition that presupposes the visibility of women, and makes it possible to elevate a tribute to femininity as a national trait.<sup>294</sup> Wearing a veil is a display of chastity, which means the interruption of gallant play and even its ultimate impossibility.<sup>295</sup> Echoing Benslama's

<sup>291</sup> 1958 CONST. pmbl. (Fr.).

<sup>292</sup> See SAMANTHA BESSON & JOSÉ LUIS MARTÍ, *LEGAL REPUBLICANISM: NATIONAL AND INTERNATIONAL PERSPECTIVES* 19-20 (2009).

<sup>293</sup> CLAUDE HABIB, *GALANTERIE FRANÇAISE* (2006).

<sup>294</sup> *Id.*

<sup>295</sup> American historian Joann Scott castigates intellectuals like Habib for glorifying gallantry instead of denouncing it as a stereotype and a remnant of male oppression in society. In true radical liberal fashion, she thus calls for a new vision of community where common ground is found amid individual differences, and where the embracing of diversity—not its suppression—is recognized as the best path to social harmony. JOAN W. SCOTT, *THE POLITICS OF THE VEIL* 19-20 (Princeton Univ. Press, 2007). In essence, this approach conceptualizes the new common ground that people should satisfy themselves with, and even desire, as the absence of interpersonal commonality. From either an anthropological, historical, or sociological perspective, this substitution ideology is a non-starter. Incidentally, it is a perfect illustration of the thesis presented in CHRISTOPHER LASCH, *THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY* (W. W. Norton & Company,

analysis, and generalizing to the face-veil context, one should recognize that a veiled woman tacitly asserts that every man is a danger that must be kept in check.<sup>296</sup> The veil interrupts the flow of elegance and compliment, thus reminding the community that there is another possible rule of coexistence between genders: strict separation.<sup>297</sup> And with that, an entire modality of human experience can disappear. This insight is reminiscent of late eighteenth-early nineteenth century French novelist Madame de Staël: "In France the Republic would never be so Republican as when it integrates the best part of the Old Regime in which enter literature, manners, the softening presence of women and the civilizing exchange between the two genders."<sup>298</sup>

Around the same time, Scottish philosopher David Hume considered France to be the "land of women."<sup>299</sup> He had been introduced to the salons organized by women, which he described as the "*États Généraux* of the Human Spirit."<sup>300</sup> For Hume, deference to women was the sign of a "polite nation," the delicate mark of civility,<sup>301</sup> to be contrasted with barbarian regimes where women are treated as commodity. Earlier still, the idea of chivalry had been recognized as a French national trait dating back to the tradition of courtly love originating with the so-called troubadours of the late eleventh century.<sup>302</sup>

## 2. Identity

Simply put, the emblematic visibility of women's faces is an essential component of French identity. Granted, the word must be manipulated with caution.<sup>303</sup> Philosopher Alain Finkielkraut's heartfelt support for the ban in

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Inc. ed., 1996).

<sup>296</sup> HABIB, *supra* note 293.

<sup>297</sup> See *id.* at 411, 413.

<sup>298</sup> See Mona Ozouf, *L'idée républicaine et l'interprétation du passé national*, 6 ANNALES, HISTOIRE, SCIENCES SOCIALES 1075, 1082 (1998).

<sup>299</sup> JACK GOODY, *FOOD AND LOVE: A CULTURAL HISTORY OF EAST AND WEST* 141 (1998).

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

<sup>301</sup> See David Hume, *Of Essay Writing*, 2 ESSAYS, MORAL AND POLITICAL 151, 155-56 (R. Fleming & A. Alison eds., 1742).

<sup>302</sup> SIDNEY PAINTER, *FRENCH CHIVALRY: CHIVALRIC IDEAS AND PRACTICES IN MEDIAEVAL FRANCE* 95-148 (1957). Incidentally, the fundamental role of the face, as expression of individuality, accounts for the prominence of the portrait in Western art, as opposed to other cultures' arts.

<sup>303</sup> In the U.S. context, political scientist and historian Samuel Huntington stroke a similar cord in his polemical and controversial 2004 *Foreign Policy* essay "The Hispanic Challenge," further refined in SAMUEL P. HUNTINGTON, *WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY* (Simon & Schuster eds., 2004). In particular, he feared that Hispanic immigration could bifurcate America into a bilingual, bicultural society. Like

the name of identity reflects a palpable tension between the indiscriminate scope of human rights-based demands and the danger of cultural homogenization and in turn, stultification, that they entail.

Should the concern to not stigmatize a religion lead to a right to bury the 'female face' in the land of gender integration, that is to say, the time-honored presence of women in social life? No. Is this a question of identity? Yes. This word, to some, is nauseating. To be inclusive, they ask France to be nothing more substantial than a mall or an airport. But is this really how people live?<sup>304</sup>

Refining his thoughts in his 2013 book *L'Identité Malheureuse*, he explains how the state does not just defend those principles of fraternity, secularism, and equality that those in support of the right to veil have turned against it.<sup>305</sup> Rather, "the state defends a mode of being, a way of life, and a type of sociability—in short, a common identity."<sup>306</sup> According to Finkelkraut, justifications in the name of fraternity, secularism, and gender equality are the necessarily imperfect and incomplete translations of the concept of identity he surmises to be the genuine foundation of the face-veil ban.<sup>307</sup>

Schnapper summarizes this conception thus: "[French] national identity is not a biological but a political fact: one is French through the practice of a language, through the learning of a culture, through the wish to participate in an economic and political life."<sup>308</sup> Again, while French identity is now encapsulated in republicanism, it was not born with it. However, can the prohibition survive the fact that it is based, in essence, on a cultural stratum?<sup>309</sup>

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Scruton, Huntington doubted that a nation could survive on the sole basis of a political contract among individuals lacking any commonality. See generally SCRUTON, *supra* note 169.

<sup>304</sup> See Interview by Alain Finkelkraut with Alain Badiou, JOURNAL DU DIMANCHE (May 8, 2010). Note the parallel rhetoric with Debray, *supra* note 210.

<sup>305</sup> Alain Finkelkraut, *L'Identité Malheureuse* (2013) at 82-83.

<sup>306</sup> *Id.*

<sup>307</sup> See generally Wiles, *supra* note 166 (following a similar insight in the context of the headscarf ban within public schools).

<sup>308</sup> See DOMINIQUE SCHNAPPER, LA FRANCE DE L'INTÉGRATION 63 (1991).

<sup>309</sup> A parallel could be made with laws against blasphemy, since the face-veil can be analogized to an insult to French identity. Laws against blasphemy have no place in a society where organized religion does not subside as the coordinating logic of society. However, they make sense where it occupies a central place, and blasphemy remains a criminal offence in such countries as Finland, Greece, India, Israel, or Poland. *Blasphemy Law*, WORLD HERITAGE ENCYC., [http://www.worldlibrary.org/articles/eng/blasphemy\\_law](http://www.worldlibrary.org/articles/eng/blasphemy_law) (last visited Nov. 5, 2016).

### 3. Sociability

One answer could be the following: Republican equality is France's passion and *raison d'être*. As discussed above, modern French identity is not simply some folkway among others. That is, in France, the pre-revolutionary era, and particularly Rousseau's legacy, anchored the ideal of equality at the heart of national identity.<sup>310</sup> Again, it is not just formal equality of rights but more substantively equality of status, participatory equality, which evolved into a political philosophy driving principle, into a *Grundnorm*.

But a purely political approach to identity is not a complete answer. French philosopher Vincent Coussédière, expounding the imitation model of nation formation and maintenance developed by nineteenth century French sociologist Gabriel Tarde,<sup>311</sup> explains how the fabric of the French republic derives ultimately, and perhaps more prosaically, from a shared way of life.<sup>312</sup> A people is not just a deliberative assembly, a set of social classes, or a collection of taxpayers; it is first the lifeblood flowing between its constituent parts, the foundation of which is sociability. And sociability comes from commonness, likeness, and similarity. Proposed almost a century before anthropologist René Girard's related and better known theory of mimetic desire, Tarde's thesis is that there is no social bond or sociability without an effort of imitation.<sup>313</sup> Imitation is, to paraphrase later anthropologist Marcel Mauss' expression, the "total social fact."<sup>314</sup> Tarde opposes the imitation model to liberal utilitarianism, where people's interactions are driven by how much utility they can achieve: an interest provides an incentive, but does not contribute to a social structure.<sup>315</sup> Without assimilation in the community through imitation and sharing of existing symbols, emotions, opinions, habits, etiquettes, customs, practices, and norms, no social contract may be established between individuals. The parallel with Scruton's analysis is striking.<sup>316</sup>

This framework does not prevent some innovations from being added to old ways, provided those innovations are complementary or enhancing in nature, but not competing or substitute. That is the essential problem of

<sup>310</sup> ROUSSEAU, *DU CONTRAT SOCIAL* *supra* note 189, at 16.

<sup>311</sup> See generally Gabriel Tarde, *Les Lois de l'Imitation* (1890), [http://classiques.uqac.ca/classiques/tarde\\_gabriel/lois\\_imitation/tarde\\_lois\\_imitation\\_1.pdf](http://classiques.uqac.ca/classiques/tarde_gabriel/lois_imitation/tarde_lois_imitation_1.pdf).

<sup>312</sup> See generally VINCENT COUSSEDIÈRE, *LE RETOUR DU PEUPLE* (2016).

<sup>313</sup> See, e.g., PASI FALK, *THE CONSUMING BODY* 119 (1994) (comparing the two theories); see generally Tarde, *supra* note 311; see generally RENÉ GIRARD, *LA VIOLENCE ET LE SACRÉ* (Bernard Grasset, ed., 1972).

<sup>314</sup> MARCEL MAUSS, *THE GIFT* (W.W. Norton & Company, Inc. ed., 1990).

<sup>315</sup> Tarde, *supra* note 311, at 77.

<sup>316</sup> SCRUTON, *supra* note 169.

multiculturalism: not all innovations are cumulative.<sup>317</sup> Some are incompatible with the existing models and their confrontation results in what Tarde calls “logical duels.”<sup>318</sup>

Importantly, Tarde’s imitation model applies to the social contract envisioned by Rousseau himself. Like Montesquieu,<sup>319</sup> Rousseau was acutely aware of the link between a society’s mores (*les mœurs*) and its legal architecture.<sup>320</sup> In his search for the origins of positive law, sensitivity to a local context plays a key part.<sup>321</sup> Then, in the description of the exercise of legislative action, Rousseau pays particular attention to feelings, mores, and opinions.<sup>322</sup> Specifically, in the *Social Contract*, Rousseau defines four types of laws: political, civil, criminal, and mores-inspired, with that last type guaranteeing the possibility of existence of the three others.<sup>323</sup> Elsewhere, he writes: “Let us not flatter ourselves that we shall preserve our liberty while renouncing the mores by which we acquired it.”<sup>324</sup> This concern is further illustrated in Rousseau’s “applied essays,” namely his constitutional considerations for the governments of Corsica and Poland. All states, Rousseau recognizes there, are rooted in history and circumstance, and will die if their national roots are indiscriminately cut.<sup>325</sup> In this difficult balancing act lies the hidden task of the lawmaker. In sum, politics, according to Rousseau, must always be backed by a careful,

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<sup>317</sup> See generally Mathieu Bock-Côté, *Le Multiculturalisme comme Religion Politique* (2016).

<sup>318</sup> Tarde, *supra* note 311, at 114.

<sup>319</sup> Montesquieu wrote: “Should there be a country whose inhabitants were sociable, open-hearted, cheerful . . . no one ought to endeavour to fetter their temperaments by laws, lest they cripple their virtues . . . . They might, e.g., restrain women, enact laws to reform their manners . . . but who knows whether by these means they might not lose that peculiar taste which happens to be the source of the nation’s wealth . . . . Let government leave us the way we are . . . laws that would constrain our sociability would not be proper for us.” MONTESQUIEU, *supra* note 284, at 231-32. So, then, should a country enact laws that preserve that sociability so as to safeguard those virtues.

<sup>320</sup> ROUSSEAU, *DU CONTRAT SOCIAL* *supra* note 189, at 28.

<sup>321</sup> *Id.* at 26.

<sup>322</sup> *Id.* at 28.

<sup>323</sup> *Id.* at 27-28.

<sup>324</sup> Jean-Jacques Rousseau, *Letter to M. d’Alembert on Theatre*, in *ŒUVRES COMPLETES DE JEAN-JACQUES ROUSSEAU* 8, 165 (Alexandre Houssiaux ed., 1853).

<sup>325</sup> JEAN-JACQUES ROUSSEAU, *DISCOURS SUR L’ÉCONOMIE POLITIQUE* (2002), [http://classiques.uqac.ca/classiques/Rousseau\\_jj/discours\\_economie\\_politique/discours\\_eco\\_pol.pdf](http://classiques.uqac.ca/classiques/Rousseau_jj/discours_economie_politique/discours_eco_pol.pdf); JEAN-JACQUES ROUSSEAU, *PROJET DE CONSTITUTION POUR LA CORSE* (2002), [http://classiques.uqac.ca/classiques/Rousseau\\_jj/projet\\_corse/projet\\_corse.pdf](http://classiques.uqac.ca/classiques/Rousseau_jj/projet_corse/projet_corse.pdf); JEAN-JACQUES ROUSSEAU, *CONSIDÉRATIONS SUR LE GOUVERNEMENT DE POLOGNE* (2002), [http://classiques.uqac.ca/classiques/Rousseau\\_jj/considerations\\_pologne/considerations\\_pologne.pdf](http://classiques.uqac.ca/classiques/Rousseau_jj/considerations_pologne/considerations_pologne.pdf).

contextual knowledge of the human condition.<sup>326</sup> This perspective is famously encapsulated in nineteenth century French writer Ernest Renan's depiction of the nation as "a daily plebiscite, just as an individual's existence is a perpetual affirmation of life . . . grounded [in] the shared possession of a rich heritage of memories . . . the will to continue to cherish the entire inheritance one has received . . . the culmination of a past full of efforts, sacrifices, and devotion, going back a long way."<sup>327</sup>

In turn, political action cannot be guided by abstract principles alone, but must be incarnated, meaning attached to a people, within a given history, traditions, beliefs, and social relationships. Consequently, and perhaps at first puzzlingly, the reliance on civic virtue that underlies the French republican legal order—which, from an external perspective, makes mistaken claims of universal values—would be severely weakened without a basic experience of membership which predates the Enlightenment era and the formation of modern French political identity. This experience takes multiple forms and is fed through different circles, e.g., school, family, workplace, or public opinion. Formally, the law has difficulties recognizing its debt to such a complex, subtle, and intangible arrangement.

#### 4. Coming Full Circle

Legislating according to sociability benchmarks alone could lead to the tyranny of majoritarian conformism and play into the liberal critique hands. Conversely, ignoring sociability in the name of pluralism undermines the foundations of the social contract. Caught in this dilemma, what type of conduct should the state prohibit? In the case of the French face-veil ban, it is arguably the combination of the two attacks—on French sociability and on the French republican conception of equality—which reaches the breaking point.

This implicit dual concern for sociability and political identity likely explains why the French Parliament decided to justify the ban not in the name of *laïcité*, formal gender equality, or objective standards of dignity, mere aspirations within the face-veil context, but, more soundly, though somewhat elusively, through the notion of immaterial public order. Immaterial public order refers to the implicit social code without which a given political community cannot function. While the popular terminology of *vivre ensemble* carried the day all the way up to the ECtHR, strictly speaking, it is really immaterial public order that operationalizes the cultural concepts of identity and sociability in the legal sphere.

As recognized by the *Conseil d'État*, public order is not simply the

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<sup>326</sup> SUZANNE DUDON, *LES LOIS ET LES MŒURS: ANTHROPOGÈNE DU POLITIQUE CHEZ J.-J. ROUSSEAU* (2006).

<sup>327</sup> See Ernest Renan, *What is a Nation?* in *NATION AND NARRATION*, 10, 19 (Homi K. Bhabha ed., 1990).

absence of physical disturbances.<sup>328</sup> It contains a metaphysical dimension, namely mores—the customs, values, and behaviors that are accepted by a particular group—common decency, to venture an analogy with George Orwell’s pet phrase,<sup>329</sup> which the notions of public morality, human dignity and community values help circumscribe. The following analogy may help. Constitutional scholar Guy Carcassonne perceptively linked obscenity laws to a matrix of basic social norms of conduct in society.<sup>330</sup> For Carcassonne, French society can define what it considers acceptable by reference to its cultural context:

Why talk about public order? Social codes are such that there are elements of our body that we hide, and others that we show. Perhaps in a thousand years we shall expose our sex while concealing our face. Yet, for the moment, it is the opposite that is unanimously accepted. We are entitled to consider that what harms others, under Article 4 of the [1789 Declaration], is the fact that someone hides her own face, thus telling them that they are not worthy enough, pure and respectable to be able to see her.<sup>331</sup>

Yet, the final step in the demonstration is missing. What entitles the French to consider face-veiling harmful is not contingent on any subjective, amendable interpretation of the message that the behavior is sending. It is objectively grounded in France’s political and philosophical identity, as well as in a given and much older form of sociability. This specific conception of membership, based on commonality within the political community, with its correlative rights and duties, including that of reciprocity, accords with the Preamble of the 1789 Declaration.<sup>332</sup> In essence, the ban protects the constitutive cultural values underlying the social contract that gave birth to the modern French Republic.

The invocation of immaterial public order, determinative as it is, cannot dispense with an analysis of the mischief that can be reasonably contemplated if such order were to be violated, in line with the prospective argument mentioned in the *Polygamy Reference* case.<sup>333</sup> Appealing to the minimum set of principles necessary for sustaining life in common echoes Scruton’s warning that, for most people, a conception of the good is a

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<sup>328</sup> Rim-Sarah Alouane, *Freedom of Religion and The Transformation of Public Order in France*, 13 THE REV. OF FAITH & INT’L AFF. 31 (2015).

<sup>329</sup> See Bruce Bégout, *De la décence ordinaire: Court essai sur une idée fondamentale de la pensée politique de George Orwell* (2008).

<sup>330</sup> GÉRIN REPORT, *supra* note 9, at 120.

<sup>331</sup> *Id.*

<sup>332</sup> 1789 Const. pmb. (Fr.).

<sup>333</sup> See sources cited *supra* note 184.

necessary starting point for the building of a genuine, viable society.<sup>334</sup> Conversely, the experience of living among people with a different conceptions of the good is disturbing, alienating, and in the end destructive.<sup>335</sup>

The veil promotes—in everyone else’s face, so to speak—a competing conception of the common good that is based upon a creed community. In that competing vision, all secular laws lose the fragile character that makes it possible for the people to adhere to them as opposed to being ruled by them. A key ingredient of shared membership is thus nullified. The face-veil opponents therefore perceive it as a symbol and vector of subversion, a Trojan horse, a call for the disintegration of the republican compact, a diffuse and subtle message to undermine the foundations of a certain civilization, and when the edifice is weak enough, civil unrest.<sup>336</sup>

### *C. A Conduit to Cultural and Religious Segregation: the Face-Veil as Material Threat*

The face-veil can be cast in the broader perspective of its tangible effects on society. While the different legislative reports focused on the threat to immaterial public order, the full veil threatens material public order in non-trivial ways. Aside from immediate security reasons, a forward-looking and more speculative public policy justification for the ban should underscore the existential consequences of leaving unchecked behaviors that threaten national unity. This exercise does not come out of nowhere; the first article of the Constitution mentions that France is “indivisible.”<sup>337</sup> Hence, at a

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<sup>334</sup> SCRUTON, *supra* note 169, at 14-15.

<sup>335</sup> *Id.* at 13-14. The case of the burkini ban, first enacted by the French Riviera municipality of Cannes and followed by several others in August of 2016, which was declared illegal by the *Conseil d’État*, was instructive to follow. Despite the allegation of security risk, the ban was grounded, implicitly, but exclusively, on the notion of sociability: it does trigger unease among fellow beach goers. See *Cannes Bans Burkinis Over Suspected Link to Radical Islam*, BBC (Aug. 12, 2016), <http://www.bbc.com/news/world-europe-37056742>. On the other hand, one could not make a forthright argument that showing skin while frolicking in the water is imperative for the sake of republican civic dialogue and deliberative participation. As several mainstream political leaders have now called for a law banning the burkini at the national level the looming debate will need to clarify the foundations of the doctrine. At the present moment, it is an understatement to say that there is a great deal of confusion surrounding it. Philippe Cossalter, *The French Burkini Case: “Uncover This Breast That I Cannot Behold,”* REVUE GÉNÉRALE DU DROIT, September 5, 2016, <http://www.revuegeneraledudroit.eu/blog/2016/09/05/the-french-burkini-case-uncover-this-breast-that-i-cannot-not-behold/>.

<sup>336</sup> For Syrian poet Adonis: “Anyone studying this position objectively and accurately will see that [the veil] supporters must not be characterized as men of religion but as politicians.” Adonis, *supra* note 275.

<sup>337</sup> 1958 CONST. 1 (Fr.)

higher level, the ban is meant to hinder the spread of any ideology that may result in religious (and also, typically, ethnic and linguistic) enclaves, possibly leading to cultural apartheid and, in turn, secessionist claims.

This concern over territorial schisms resonates with Scruton's emphasis on the notion of territorial jurisdiction as a necessary condition for the loyalty of citizens toward a nation under the rule of law.<sup>338</sup> As he demonstrates, "the emergence of the modern Western state, in which jurisdiction is defined over territory, supported by secular conceptions of legitimacy and associated with the rights and duties of citizenship, has also coincided with the emergence of a special kind of pre-political loyalty."<sup>339</sup> Specifically, it is through the cultural prism of the nation that one should understand the allegiance presupposed in the contractarian view of citizenship.<sup>340</sup> In turn, excessive attachment to particular lifestyles, religions, and customs threaten national loyalty, in that they invade the public space in the interest of sectarian beliefs. Today, media story after media story confirms that Scruton was spot-on when he predicted the serious difficulties facing Western societies with respect to the integration of immigrant communities into a form of existence that perceives exclusion, militancy, and public displays of apartness as threats to the experience of membership.<sup>341</sup>

Accordingly, claims pressing the state to admit the public display of any communal particularism are met with more acute reluctance in the French context. Even Schnapper acknowledges that in France "particularities must not form a political identity recognized as such within the public space."<sup>342</sup>

<sup>338</sup> SCRUTON, *supra* note 169, at 46-47.

<sup>339</sup> *Id.*

<sup>340</sup> In the preamble of the 1946 French Constitution, which, since 1971, has regained constitutional authority, it is the nation, not the state, which is entrusted to enable the individual's development potential. 1946 CONST. (Fr.). More generally, some degree of national parochialism is essential to the existence of the rule of law. *See generally* JEAN-LOUIS HAROUEL, *REVENIR À LA NATION* (Jean-Cyrille Godefroy ed., 2014).

<sup>341</sup> SCRUTON, *supra* note 169, at 47-51. Early 20<sup>th</sup> century French socialist leader Jean Jaurès said that nation membership is the only property of the destitute. JEAN JAURÈS, *STUDIES IN SOCIALISM* (Mildred Minturn trans., 1906). This is in line with American philosopher Michael J. Sandel's idea that the nation state provides a republican link between identity—defined by a common history, language, or tradition—and self-rule. *See* MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 344 (1996); Arthur Cohn, *Refugee Promise, Immigrant Fear*, JEWISH J. (Oct. 14, 2016), [http://www.jewishjournal.com/opinion/article/refugee\\_promise\\_immigrant\\_fear; Immigrants Struggling to Integrate in France](http://www.jewishjournal.com/opinion/article/refugee_promise_immigrant_fear; Immigrants Struggling to Integrate in France), THE LOCAL (Jan. 9, 2016); Claire Adida, David Laitin & Marie-Anne Valfort, *The Muslim Effect on Immigrant Integration in France*, THE WASH. POST (Sept. 30, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/09/30/the-muslim-effect-on-immigrant-integration-in-france-2/>.

<sup>342</sup> DOMINIQUE SCHNAPPER, *LA COMMUNAUTÉ DES CITOYENS: SUR L'IDÉE MODERNE DE NATION* 100 (Gallimard ed., 1994).

Republicanism tries to rein in the centrifugal tendencies that contemporary societal liberalism exacerbates. Absent the social glue, when individuals are left with too high a degree of autonomy over their private affairs, the risk is that they gather towards their likes, form homogeneous communities, soon demand group rights and undermine the real or implied social contract whereby each citizen agrees to the principles of government.<sup>343</sup> Against the original liberal ideal of pluralism being upheld by a constant collision of values runs the crude reality that people choose to live with their cultural kin as much as possible.<sup>344</sup> In his 2008 study over the ban of religious signs in public schools, John Bowen perceived France's fear of splinter into self-centered communities as a background motivation, and in this new context these insights have resurfaced to the spotlight.<sup>345</sup>

Arguably, the Anglo-liberal model creates the illusion of a secular society bound by rational consensus, yet fragments religious groups into "petty fortresses,"<sup>346</sup> in this case scattered communities removed from public scrutiny, accountability, and a common space to live together in disagreement.<sup>347</sup> Pushed to its limits, what Michael Ignatieff labelled the "Rights Revolution,"<sup>348</sup>—entrenching the primacy of individual agency over majoritarian conformism—in the end may not empower the individual but rather confine him or her into another conformism, i.e., that of the ideologies and customs of the clan which he or she comes from.<sup>349</sup>

This is all the more perplexing in the present context because the ideology most consistent with the face-veil is not just religious in nature—in the sense of a system of beliefs and worshipping precepts. It can be associated with a civil and criminal code,<sup>350</sup> namely *Sharia* law,<sup>351</sup> which is

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<sup>343</sup> SCRUTON, *supra* note 169, at 6.

<sup>344</sup> Moreover, the theory of selective exposure well establishes that people prefer to listen to those media that comfort and reinforce their biases rather than those which would challenge them. See, e.g., Dietram A. Scheufele & Matthew C. Nisbet, Commentary, *Online News and the Demise of Political Disagreement*, 36 COMMUNICATION Y.B. 45 (2012) (discussing the effects of encountering disagreement on democratic citizenship).

<sup>345</sup> See generally JOHN R. BOWEN, *WHY THE FRENCH DON'T LIKE HEADSCARVES: ISLAM, THE STATE, AND PUBLIC SPACE* (2008).

<sup>346</sup> MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 39 (1983).

<sup>347</sup> See Alex Fielding, *When Rights Collide: Liberalism, Pluralism and Freedom of Religion in Canada*, 13 APPEAL 28 (2008).

<sup>348</sup> See generally MICHAEL IGNATIEFF, *THE RIGHTS REVOLUTION* (2000).

<sup>349</sup> According to sociologist Jean-Pierre Le Goff, the sovereignty of the self-dogma abandons the now unattached individual to some "soft barbarity" where he or she becomes prey to all sorts of manipulations. JEAN-PIERRE LE GOFF, *MALAISE DANS LA DÉMOCRATIE* (2016). This is entirely consistent with sociologist Alexis de Tocqueville's ethics-driven, anti-individualist conception of liberalism.

<sup>350</sup> See, e.g., ALAIN BESANÇON, *PROBLEMES RELIGIEUX CONTEMPORAINS* (2015).

in potential competition with existing secular institutions and capable of filling a vacuum created by the desertion of the natives who have moved away from a place of residence deemed inhospitable. *The Republic's Lost Territories*, the title of a stirring book describing the grim reality of the suburban (“*banlieues*”) school environment<sup>352</sup> has now become part of the regular French political vocabulary. It refers more generally to a population substitution effect in suburbs turned into ethno-religious ghettos through a process that sociologist Gilles Keppel coined “neighborhood halalization.”<sup>353</sup>

Such patterns of exclusion, which have been consistently relayed in the media over the last ten years, renew in a religious context the concept of “White Flight” that has been associated so far with racial segregation.<sup>354</sup> Numerous studies—most of which have been conducted in the American context—link ethnic segregation with diminished economic opportunities and an increase in violence.<sup>355</sup> In France, the “White Flight” from the suburbs resulted to a large extent from the fact that citizens of “French stock” (or “*Français de souche*,” a now controversial expression) did not want to live in what were increasingly perceived as culturally foreign neighborhoods.<sup>356</sup> Those disenfranchised suburbanites (“*banlieusards*”) had

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<sup>351</sup> The 2003 ECtHR annual report’s introduction (6) reads: “[the Court] has a role to play in identifying the constituent elements of democracy and in reminding everyone of the minimum essential requirements of a political system if human rights within the meaning of the Convention are to be protected. . . . In [*Refah Partisi (The Welfare Party) and Others v. Turkey* [41340-4/98] (2003)], it carried out a thorough examination of the relationship between the Convention, democracy, political parties and religion, and found that a Sharia-based regime was incompatible with the Convention, in particular, as regards . . . the place given to women in the legal order and its interference in all spheres of private and public life in accordance with religious precepts.” LUZIUS WILDHABER, EUR. CT. OF H.R., ANN. REP. 2003 (2004). However, in *S.A.S.* the Court did not leverage *Refah* to read into the individual practice of face-veiling a long-term threat to any political system capable of sustaining human rights within the meaning of the Convention, and therefore the ratio in *S.A.S.* fails to explicit the final step of its underlying logic. *S.A.S. v. France*, *supra* note 72.

<sup>352</sup> GEORGE BENSOUSAN, *LES TERRITOIRES PERDUS DE LA RÉPUBLIQUE: ANTISÉMITISME, RACISME ET SEXISME EN MILIEU SCOLAIRE* (2002).

<sup>353</sup> See GILLES KEPEL, *QUATRE-VINGT-TREIZE* (2012). “Halal” can be translated as “permitted” or “legitimate.”

<sup>354</sup> Political scientist Robert Putnam described how, in multicultural cities, social capital, i.e., the building blocks of life in common, is eroded. Trust between individuals diminishes, leading to individual isolation and social stagnation. See Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-first Century* The 2006 Johan Skytte Prize Lecture, 30 SCANDINAVIAN POL. STUD. 137 (2007).

<sup>355</sup> See, e.g., Scott Akins, *Racial Residential Segregation and Crime*, 1 SOC. COMPASS 81 (2007); Edward S. Shihadeh & Nicole Flynn, *Segregation and Crime: The Effect of Black Social Isolation on the Rates of Black Urban Violence*, 74 SOC. FORCES 1325 (1996).

<sup>356</sup> Jocelyn Cesari, *Ethnicity, Islam, and les banlieues: Confusing the Issues*, SSRN

left their traditional environment to settle even further away from the big cities in so-called periurban territory.<sup>357</sup> This result occurred despite it being more inconvenient and costly in commuting to work, being forsaken by politicians, and correlatively less endowed in terms of infrastructure and amenities. They had lost, and sought elsewhere, what Scruton refers to as “a kind of mute sense of belonging—an inarticulate experience of neighborliness—founded in the recognition that this place where we live is ours.”<sup>358</sup>

#### *D. The Historical Sources of French Anxieties about Factionalism*

The form of religious group differentiation described above has an instinctive impact on a nation wrought with a history of factionalism and religious conflict. Though fears that allowing people to veil in public will lead to an increase in crime may be overblown, the tangible effects of segregation as manifested in the suburbs suggest that the face-veil can be linked with a type of behavior that is anathema to the French DNA. Rousseau, expressing this sentiment in acute terms, had thus warned: “if the general will is to be able to express itself . . . there should be no partial society within the State, and . . . each citizen should think only his own thoughts.”<sup>359</sup> The fact that France has historically suffered episodic violence stemming from sectarian divisions provides material evidence to this concern.

An early example is the suppression of the Cathar heresy and the massacre of the population of Beziers in 1208.<sup>360</sup> Later, in 1572, thousands of Protestants perished during the St. Bartholomew massacres.<sup>361</sup> A better-known, more recent illustration is the siege of La Rochelle, the hotspot of a Huguenot rebellion, in 1627 to 1628.<sup>362</sup> This instance became popularized later by Alexandre Dumas’ novel, *The Three Musketeers*.<sup>363</sup> During the

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(Nov. 30, 2005), <http://riotsfrance.ssrc.org/Cesari/>; CHRISTOPHE GUILLUY, *FRACTURES FRANÇAISES* (François Bourin ed., 2010).

<sup>357</sup> Jocelyne Cesari, *Ethnicity, Islam, and les banlieues: Confusing the Issues*, SSRC, Nov. 30, 2005.

<sup>358</sup> SCRUTON, *supra* note 169, at 48.

<sup>359</sup> ROUSSEAU, *DU CONTRAT SOCIAL*, *supra* note 189, at 14.

<sup>360</sup> *Cathari*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Cathari> (last visited Oct. 30, 2016).

<sup>361</sup> *Massacre of Saint Bartholomew's Day*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Massacre-of-Saint-Bartholomews-Day> (last visited Oct. 30, 2016).

<sup>362</sup> *France in the Early 17th Century*, ENCYC. BRITANNICA, <https://www.britannica.com/place/France/France-in-the-early-17th-century#ref465002> (last visited Oct. 30, 2016).

<sup>363</sup> ALEXANDRE DUMAS, *THE THREE MUSKETEERS* (1984).

siege, the population of La Rochelle decreased from 27 thousand to 5 thousand due to casualties, famine, and disease.<sup>364</sup> And the war in Vendée, where the Catholic royalists staged a military rebellion against the First Republic, ended with mass war crimes against the Vendean population, and historians continue to debate whether the term genocide ought to be applied.<sup>365</sup> Incidentally, because of their historical ties with Lebanon, the French have paid close attention to the near destruction of the Lebanese state caused by religious strife and have coined the term "*libanisation*" to refer to any violent fragmentation of religious communities within a state.<sup>366</sup>

More generally, the violent religious upheavals of these periods impressed on the French psyche a deep-seated reluctance concerning the capacity for tolerance among sharply divided groups. This is clear from Michéa's account of the rise of liberalism described above, and is the basis for Jeffrey Sawyer's assertion that "fearsome memories" of the religious wars continued to shape French political culture into the seventeenth century.<sup>367</sup>

A more gradual, but ultimately no less violent, example is France's transition from splintered feudal monarchy to bourgeois bureaucracy. During this process, which accelerated in the seventeenth and early eighteenth centuries, France experienced what Theda Skocpol describes as "the consolidation of a unified imperial state administration."<sup>368</sup> Through these centralized structures, and despite upholding privileges and inequalities, the monarchy cast itself as the expression of the burgeoning national interest, in opposition to the localism of the feudal aristocracy. Thus, by the time of the Revolution, the state was "almost unanimously

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<sup>364</sup> *La Rochelle*, ENCYCLOPEDIA.COM, <http://www.encyclopedia.com/places/britain-ireland-france-and-low-countries/french-political-geography/la-rochelle> (last visited Oct. 31, 2016).

<sup>365</sup> See REYNALD SECHER, *LE GÉNOCIDE FRANCO-FRANÇAIS: LA VENDÉE-VENGÉE* (1986).

<sup>366</sup> See, e.g., Christian Jelen, *La Régression Multiculturaliste*, 97 *Le Débat*, 137 (1997); CHRISTIAN JELEN, *LES CASSEURS DE LA REPUBLIQUE* (1997).

<sup>367</sup> MICHÉA, *supra* note 155; see JEFFREY K. SAWYER, *PRINTED POISON: PAMPHLET PROPAGANDA, FACTION POLITICS, AND THE PUBLIC SPHERE IN EARLY SEVENTEENTH-CENTURY FRANCE* 3 (1990).

<sup>368</sup> THEDA SKOCPOL, *STATES AND SOCIAL REVOLUTIONS: A COMPARATIVE ANALYSIS OF FRANCE, RUSSIA, AND CHINA* 52 (1979). This point is validated externally by Quebec's somewhat similar position to France with respect to secularism, even though Québec fell under English rule decades before the French Revolution. Both people still share a common political culture and a common sociability. Philip Authier, *Quebec Values Charter 2.0: Ban Against Crosses, Hijabs Would Only Apply to New Public Employees*, NAT'L POST (Jan. 16, 2015).

perceived as the *guardian of the general interest*.<sup>369</sup> Upon assuming power, the revolutionaries chose to strengthen the institutions of the state, which were seen as emancipatory rather than oppressive.<sup>370</sup> Although organized more along social groups than religious or cultural lines, the paroxysms of this period continue to feed into French anxieties about the harmful effects of factions motivated by parochial concerns. The resurgence of such factions in the contemporary era is made possible by the tolerant pluralism of the liberal model.<sup>371</sup> This account is consistent with Laborde's observation that, many historical factors combined "to ensconce the view that 'the state' stands for a homogeneous, autonomous public domain."<sup>372</sup>

The historical record thus explains why French society is so concerned with the possibility of fragmentation into factions, and, accordingly, why France has steadfastly refused for itself the vision of a bureaucracy in charge of managing the coexistence of constituent communities.<sup>373</sup> Factionalism represents a sort of political taboo, and it is not surprising that the power of the law would be harnessed to arrest its spread in order to promote societal cohesion. Insofar as the state is the guarantor of that cohesion, the face-veil ban's proactive affirmation of the authority of the state is justified not only philosophically, but also, in the light of historical precedents, as a political imperative for the long-term survival of the French republican state.<sup>374</sup> To repeat, France is a country of religious civil wars,

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<sup>369</sup> See Lucien Jaume, *The Unity, Diversity and Paradoxes of French Liberalism*, in *FRENCH LIBERALISM FROM MONTESQUIEU TO THE PRESENT DAY* 36, 37 (Raf Geenens & Helena Rosenblatt eds., 2012) (emphasis in original).

<sup>370</sup> *Id.*

<sup>371</sup> American scholars show little sensitivity to the concern of religious factionalism planting the seed of sedition, perhaps because the Civil War had no religious connection. Allen Guelzo, *Did Religion Make the American Civil War Worse?*, *THE ATLANTIC* (Aug. 23, 2015), <http://www.theatlantic.com/politics/archive/2015/08/did-religion-make-the-american-civil-war-worse/401633/>. To which American scholars may reply that the U.S. did not experience religious wars precisely because the Constitution embraces pluralism and accommodation of minority groups and practices. U.S. CONST. amend. I. Be that as it may, in each case, the resulting situation represents equilibrium, i.e. a situation where it is best not to deviate from.

<sup>372</sup> Laborde, *supra* note 157, at 316.

<sup>373</sup> Historian and journalist Jacques Julliard warns us that the utopian vision of a peaceful cultural apartheid is nothing but a joke that will turn out bloody: the alternative being either integration or civil war. See Jacques Julliard, Editorial, *Nous ne nous Aimons plus*, *MARIANNE* (Mar. 26, 2016) <http://www.marianne.net/nous-ne-nous-aimons-plus-100241440.html>.

<sup>374</sup> A typical liberal critique here is that arguments based on togetherness have been historically used to persecute minorities. In France, some (anti-republican royalists and Catholics mainly) wanted to see Captain Dreyfus convicted no matter what for the sake of national cohesion, since the army was perceived to be the cement and guarantor of the country's unity. However, none of this is at play with the face veil. It does not target any

and the Republican state, endowed with more symbolic power than in Anglo-liberal democracies, has been determined to defuse the resumption of those bloody conflicts that have marred its history. If no universally acceptable foundation for human rights exists other than the memory of the horrors that result from their violation, then one should not stop at World War II, the fount of the modern human rights movement. Each country has a historical record that must be taken into account when considering how much authority a state is entitled to for the preservation of, at a minimum, peace and order. In this sense, the success of the collective depends on enhanced regulation of the public space.

## VI. CONCLUSION

The foregoing discussion suggests a principled, pragmatic, context-specific approach to the face-veil debate. This approach allowed for much needed consistency in the doctrine driving the prohibition. In particular, the republican notion of *immaterial public order* emerged here as a category of interest worthy of legal protection. Specifically, drawing from the complementary views of authors spanning various schools of thought and, in particular, between republican, and conservative thinkers, this article shows which values underlie such a concept and brought to light their interconnectedness. The French Republic, informed by bloodstained memories of sectarian conflicts, defends liberty in a substantively different way than does liberalism.

Crucially, in calculating the effects of the face-veil ban, one must account for more than the individual rights of the women who might wear it. The assumption of a republican perspective directs one's attention to the artificiality of the dichotomy between group and individual rights. In practice, the two are mutually constitutive. The right to observe one's religion or participate in cultural customs implies a communal activity. This higher level perspective points to potential demands for group rights in minority enclaves where veiling would become commonplace. And, then, what of the right of the majority to live according to its own mores?<sup>375</sup> Such concerns are not far-fetched even in a country organized around liberal principles.<sup>376</sup>

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identifiable group of persons, only a sectarian practice, just as a law prohibiting flag burning in the U.S. could not be said to persecute political dissenters at large. LUCIEN BÉLY, *HISTORY OF FRANCE* 101 (Angela Moyon trans., Jean-Paul Gisserot ed., 2002).

<sup>375</sup> Nineteenth century British Prime Minister Benjamin Disraeli said: "I prefer the liberty we now enjoy to the liberalism they promise, and find better than the rights of men the rights of Englishmen." Cited in BENJAMIN DISRAELI, *ALL IS RACE: ON RACE, NATION AND EMPIRE* 97 (2011).

<sup>376</sup> Through Britain's policy of multiculturalism, many communities are becoming increasingly homogenized along religious and ethnic lines and those starkly divided groups

The liberal jurist must grapple with the existential consequences of leaving unchecked overt conduct that negate the foundations of society's principles governing interpersonal relations. When a society tolerates behaviors that are so injurious to the natives' way of life that they alienate them in their own land, those natives' adherence to the implicit pact that binds them under the rule of law is eroded. Without a basic willingness to live together, the preexisting conditions necessary for any architecture of rights—what Scruton calls “pre-political loyalties”—fall apart.<sup>377</sup> British historian Arnold Toynbee is perhaps best known for his cautionary admonition that civilizations die from suicide, not by murder; in other words, the fate of civilizations is determined by their response to the challenges facing them.<sup>378</sup> In that perspective, for Republicans, the ban illustrates, as a prophylaxis, the upholding of supra-constitutional values.

Both rights frameworks—republican and liberal—are holistic, meaning their constituent parts are interdependent. Put another way, both paradigms are comprehensive approaches to organizing state-society relations, and aspects of one cannot be easily transplanted into legal systems characterized by the other without compromising its integrity. Therefore, the French model, despite being internally consistent in viewing itself as universal, cannot simply be transferred to other jurisdictions wholesale. Conversely, the piecemeal transposition of liberal values—multiculturalism, atomistic individualism and the acceptance of expressions of radical pluralism—condemns the republican arrangement.

Specifically, the face-veil debate demonstrates how competing understandings of the common good lead to adjudicating contentious claims differently, and more generally shed light on a fundamental tradeoff between the assertion of concrete individual rights and the pursuit of more intangible collective rights, which may be understood as social justice. In particular, despite broad commonalities, the conclusions that each ethical system reaches over the face-veil ban are incompatible and irreconcilable.

In turn, this rift explains why the rights enshrined in regional and global human rights conventions reflect a baseline understanding of fundamental rights,<sup>379</sup> and yet no universal consensus has developed regarding the

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have minimal meaningful interaction with one another. In 2005, the chairman of the Commission for Racial Equality cautioned that Britain was “sleepwalking into segregation” due to multiculturalism’s toleration of separateness. MUNIRA MIRZA, ABI SENTHILKUMARAN & ZEIN JA’FAR, *LIVING APART TOGETHER: BRITISH MUSLIMS AND THE PARADOX OF MULTICULTURALISM* 12 (2007). Note that anti-immigration themes played a major role in the “Brexit”: Simon Tilford, *Britain, Immigration and Brexit*, 3 CTR. FOR EUR. REFORM, Jan. 2016.

<sup>377</sup> SCRUTON, *supra* note 169, at 46-47.

<sup>378</sup> ARNOLD J. TOYNBEE, *A STUDY OF HISTORY* 273 (1947).

<sup>379</sup> What Michael Ignatieff refers to as minimalist human rights, i.e., those rights that are agreed upon by most cultures and permeate values systems, including putting an end to

details of their implementation. Hence, both liberal and republican states can ratify the same human rights agreement, and yet differ on interpretation. When several logical responses can be contemplated, different cultures, informed by the historical tenets of their social contract, will weigh differently the violation of individual rights against a more hypothetical threat to society at large. As the ECtHR recognized, where there is no universally accepted standard of practice, deference must be granted to state sovereignty to construct policies sensitive to their political, historical and cultural context in order to accord with the moral architecture of the society that produces them.

However, many contemporary liberal thinkers of the Anglo-Saxon tradition do not simply agree to disagree. Indifferent, if not hostile, to the French republican project, they use the face-veil ban as an opportunity to don armor that used to shine in the fight against anti-Semitism and xenophobia.<sup>380</sup> Undoubtedly, the fact that the face-veil ban had the overwhelming support of the French population helped trigger those intellectuals' default position of siding with the minority. However, indulging in cliché thinking reveals a quixotic intellectual posture.<sup>381</sup>

French writer, Paul Valéry, wrote that whenever a person, or an assembly, seized with urgent or embarrassing circumstances, is forced to act, their deliberation considers much less the very state of affairs as it has never presented itself until then, but rather consults its imaginary memories: "Obeying a kind of least action principle, reluctant to create, to respond with inventiveness to the originality of the situation, the hesitant thinking tends to go towards automatism; it begs precedents and surrenders itself to historical spirit that leads to *remember first*, even when it deals with a radically new case."<sup>382</sup>

The context is indeed different, and so must be the arguments that

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"torture, beatings, killings, rape, and assault and to improve, as best we can, the security of ordinary people." IGNATIEFF, *supra* note 115, at 173.

<sup>380</sup> Many Western intellectuals currently refer to 1930s anti-Semitism to delegitimize any criticism of unconventional religious or cultural practices in European societies because they are unable to think outside the convenient box of Manichaeism: there must be innocent victims on the one hand, and their persecutors on the other. *Manichaeism*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Manichaeism> (last visited Oct. 30, 2016). Notably, in France, such anti-Semitism was not linked to Republicanism but rather a manifestation of Maurrassism, a fanatically nationalist movement rooted in the idealized vision of a royalist France purged of its non-Christian minorities. *Charles Maurras*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Charles-Maurras> (last visited Oct. 30, 2016).

<sup>381</sup> Thus illustrating Nobel Prize winner Henri Bergson's quip: "out of ten political mistakes, nine simply consist in believing that what ceased to be true still exists." HENRI BERGSON, *LA PENSÉE ET LE MOUVANT, ESSAIS ET CONFÉRENCES* 97, 111 (1934).

<sup>382</sup> PAUL VALÉRY, *REGARDS SUR LE MONDE ACTUEL* 20 (1931).

properly address it. Unwilling to confront the unique challenges posed by the face-veil, they have failed to heed Charles Péguy's admonition: "Always say what you see. Above all, and this is more difficult, always see what you see."<sup>383</sup>

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<sup>383</sup> CHARLES PÉGUY, *PENSÉES* 45 (1934).