I. INTRODUCTION

In the summer of 2010, France’s parliament banned the wearing of the Islamic full, head-and-body veil in public places, colloquially known as the “burqa ban.” The law prohibits a person in public areas from wearing an item of clothing for the purpose of concealing his or her face. A violation of this provision can lead to a second-degree misdemeanor. The law also criminalizes forcing another person to conceal his or her face on the basis of gender with threats of violence, coercion, or by use of improper authority. A violation of this provision carries a one year imprisonment and a fine of €30,000 or, in case of force applied to a minor, a two year imprisonment and a fine of €60,000.

On October 7, 2010, the French Constitutional Council approved the law, finding that it allowed free exercise of religion in places of worship and that the punishment attached to the ban was...
not disproportionate.\(^6\) In the run-up to the law's passage, French President Nicolas Sarkozy justified the government's policy saying, "[The burqa] is not a religious symbol. It is a symbol of servitude and humiliation . . . . We cannot accept, in our country, women imprisoned behind a mesh, cut off from society, deprived of all identity . . . that is not the French republic's idea of women's dignity."\(^7\) Sarkozy seems to be echoing the sentiments of the French populace, eighty-two percent of which approve of the ban.\(^8\) While other European countries have passed or are considering similar laws,\(^9\) no other European country has taken such a definitive and harsh stance on Islamic veils. In the coming months, European countries will not only look to see whether France's law has positive effects, but whether it survives adjudication within the halls of the European Court of Human Rights (Court).

This Note argues that, in its current form, France's legislation violates European law, specifically Article IX of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Court's interpretation thereof. Moreover, because of the likelihood that the Court will strike down France's law as violative, this Note argues that France should revise the burqa ban in accordance with the Court's jurisprudence. In Part II, this Note will explain the use of the burqa as a religious symbol in Islam and illustrate the underpinnings of its use as an expression of individual belief, despite the growing perception in the western world that its use is degrading to women. In addition, this Note offers a historical account of the place of Muslims in French society. Part II also provides an explanation of the role of secularism in France and the principle of laïcité that governs French decision-making, particularly its role in the current burqa ban. Part II concludes with an analysis of the Court's case law interpreting Article IX, framing the discussion around the use of personal, religious symbols.

In Part III, this Note offers an analysis of France's law under the Court's jurisprudence. Specifically, Part III addresses the separate


\(^8\) Widespread Support for Banning Full Islamic Veil in Western Europe, PEW GLOBAL ATTITUDES PROJECT (July 8, 2010), http://pewglobal.org/2010/07/08/widespread-support-for-banning-full-islamic-veil-in-western-europe [hereinafter Widespread Support].

\(^9\) See discussion infra Part II.B.1.
considerations that the Court would make in a challenge to the burqa ban and demonstrates why the law would fail the Court’s Article IX three-part test. Part III concludes with recommendations for ways that France may redraft the law to make it more consistent with the Court’s decisions and still accomplish its greater interests.

II. BACKGROUND

A. Use of the Burqa in Islam

The burqa (or, alternatively, “burka”) is “a loose enveloping garment that covers the face and body and is worn in public” by Muslim women.\textsuperscript{10} The widely recognized source for Islam’s rationale behind female body coverings can be found in two places within the Qur’an. The first reads “O Prophet! tell thy wives and daughters and the believing women, that they should cast their outer garments over their persons (when abroad): that is most convenient, that they should be known (as such) and not molested.”\textsuperscript{11} The second text reads “[a]nd say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw their veils over their bosoms . . . .”\textsuperscript{12}

As with any historical, foundational text, there are numerous accounts of what these passages mean. Many (though not all) in the Islamic clergy interpret these passages to mean that all “good” Muslim women should engage in the practice of bodily covering.\textsuperscript{13} Within that context, some argue simply for a general robed covering, or hijab, while others maintain that the full-body burqa should be used, all being referred to as a “veil.”\textsuperscript{14} While there are a number of ancillary reasons cited for the use of the veil,\textsuperscript{15} the primary motivation is simply that the cited passages in the Qur’an require

\textsuperscript{12} Id. at 873-74.
\textsuperscript{13} Jen’Nan Ghazal Read & John P. Bartkowski, To Veil or Not to Veil?: A Case Study of Identity Negotiation Among Muslim Women in Austin, Texas, 14 GENDER & SOC’Y 395, 399 (2000) (citations omitted).
\textsuperscript{14} Id.
\textsuperscript{15} Some commentators cite women’s social role as a common motivation for prescribing the use of a veil. See id. Others indicate that the veil should be worn to create a homogenous Muslim culture, distinguishing Muslim women from non-Muslims. See id. (wearing the veil signals “the devout Muslim woman’s disdain” for the practices of other
it, meaning that the veil is uniformly a symbol of devotion to the tenets of the Islamic faith contained in the sacred text.\textsuperscript{16} Drawing on traditional stories concerning the Prophet Muhammad, Islamic clergy point to the Prophet’s desire to distinguish Muslim believers from non-believers.\textsuperscript{17} Thus, the admonition is limited to only those who share the faith: “the believing women.”\textsuperscript{18} Although general veiling as a form of religious expression took some time to gain acceptance, for the religious, it is a sign of adherence to Muslim beliefs.\textsuperscript{19}

For those that do not support veiling, the debate is still religiously centered. Many who oppose veiling interpret the cited Qur’an passages as of no general applicability, but as only contextually relevant as a requirement for the Prophet Muhammad’s wives and daughters.\textsuperscript{20} Critics of the practice point to differing passages in the Qur’an which suggest equality between men and women and that the supposed “modesty” rationale for the veil is equally applicable to both sexes.\textsuperscript{21} Finally, some critics question the translations themselves, arguing that a call for a covering could simply be translated as a “curtain.”\textsuperscript{22} These criticisms underscore that, while there are ancillary social factors to consider, the use of the veil is predominantly a religious debate within the Islamic community.

For the modern Islamic woman, the veil’s religious symbolism is variable. In some respects, the veil is simply religiously overt; it serves as a mechanism for association with God, an opportunity to indicate religious submissiveness and humility.\textsuperscript{23} In other respects, the veil can be a source of power or liberation; a woman who covers those parts of her that society has sexually commoditized can be free to engage in business and education without fear of being compartmentalized.\textsuperscript{24} Even these social concerns have a religious air; as one wearer observed, wearing the veil in daily living assured

\footnotesize{\textsuperscript{16} See id. at 399-400.  
\textsuperscript{17} See id. at 400.  
\textsuperscript{18} ‘\textsuperscript{\textit{Ali, supra note 11, at 1077.}}  
\textsuperscript{20} Read & Bartkowski, \textit{supra note 13}, at 401.  
\textsuperscript{21} \textit{Id.}  
\textsuperscript{22} \textit{Id. at 400.}  
\textsuperscript{23} See id. at 403.  
\textsuperscript{24} See Zahedi, \textit{supra note 19}, at 92.}
her that “[n]o one [was] going to accuse [her] of immorality.”

Moreover, the wearer can feel a kind of “religious sisterhood” with those who follow the practice, being confident that there are others who share her faith. Lastly, for the Muslim woman desiring home and family relationships, the veil becomes an expression of devotion to virtue and morality and signals to potential spouses that she desires similar reciprocation. Central to any discussion of a law prohibiting the wearing of a burqa is the acknowledgement that the covering is predominantly a religious symbol, despite President Sarkozy’s public statements to the contrary.

B. Secularism in France and its Relationship with the Muslim Community

1. Legal Backdrop and Definitions of Laïcité

In addition to understanding the religious issues at stake in France’s actions, one should be aware of the legal and political backdrop to the burqa ban. France has articulated two main rationales for the burqa ban. One is that the burqa is a sign of domination and that the law is intended to protect Muslim women from force and duress. The other interest cited by the French government is one of national security and general welfare. French National Assembly leader, Jean-François Copé, indicated that the ban on the face covering would increase national security by allowing enforcement officers a better opportunity to identify individuals.

The public perception of France’s actions underscores the law’s controversy. While the law has been overwhelmingly accepted by French citizens, from conception to final approval, various international groups have (to no avail) condemned France’s actions. Amnesty International called the ban a violation of “the rights to freedom of expression and religion of those women who wear the

26. See Read & Bartkowski, supra note 13, at 404.
27. See Mule & Barthel, supra note 25, at 329.
28. See Goodenough, supra note 7.
29. See id.
31. See Widespread Support, supra note 8.
burqa or the niqab as an expression of their identity or beliefs."

Liesel Gerntholtz and Gauri van Gulik of Human Rights Watch, said of this and similar bans, "[b]anning the burqa fundamentally undermines [women's] rights and perhaps most importantly does not provide any meaningful assistance to those women who are coerced and forced to cover their bodies and faces." Even Al-Qaeda has weighed in on the debate, stating it will "seek revenge" on France for what it sees as a profound injustice, undermining France’s argument that the burqa ban will bolster national security.

France’s newly enacted law is not an anomaly. In 2004, the French National Assembly passed Law 2004-228 (2004 Law), which prohibited the wearing of ostensibly religious symbols in public schools. Moreover, France is not the only country to have recently passed or debated laws affecting Muslims. In early 2010, Belgium passed a similar law, citing national security as a major motivation for its burqa ban. Italy and Spain have begun debating proposals that would yield the same results as France’s law. Italy cites national security as its primary interest, while Spain characterizes its proposed law as “a very important step in favour of..."
freedom and women's equality.” While not moving toward any substantive legislation, German officials have noted that the burqa is a “full body prison” and that a German burqa law would be a positive message to the rest of the world. Finally, policymakers in the United Kingdom have entered into a public debate about the applicability of a U.K. counterpart to France’s law, with one lawmaker calling for an outright ban to the “walking coffins” and another arguing that any such law would jeopardize the United Kingdom’s efforts to create a “tolerant and mutually respectful society.”

There is, however, a complex interaction between religion and the French government that makes France a unique case study for a wholesale burqa ban. At the core of any discussion of religion in France is the principle of laïcité, a term that, in its barest sense, has come to mean a separation between the state and religion. While other countries have such a principle, merely asserting a separation exists between religion and the state in France would be not only an incomplete assessment but a misleading one. French history and political thought suggest a more nuanced definition of this concept.

French laïcité is ultimately a reaction to the dominance of the Catholic Church (Church); before 1789, the Church held considerable sway in political governance, owning fifteen percent or more of the land in France and collecting a tithe from French}

41. The lawmaker in question, Philip Hollobone, further noted, “We are never going to have a fully integrated society if an increasing proportion of the population cover their faces.” Peter Allen, Calls Grow for Burka Ban in Britain as French Outlaw Islamic ‘Walking Coffins’, DAILY MAIL (July 14, 2010), http://www.dailymail.co.uk/news/worldnews/article-1294610/Calls-burka-ban-grow-Britain-French-outlaw-Islamic-walking-coffins.html.
42. Patrick Hennessy, Burka Ban Ruled Out by Immigration Minister, TELEGRAPH (July 17, 2010), http://www.telegraph.co.uk/news/newstips/politics/7896751/Burka-ban-ruled-out-by-immigration-minister.html. Although Immigration Minister Damian Green’s comments sound conclusory, they apparently do not accord with the rest of the British population’s opinions. Approximately sixty-seven percent of U.K. voters are in favor of passing some kind of burqa ban. Id.
44. See, e.g., U.S. CONST. amend. I (providing that “Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof”).
45. See Troper, supra note 43, at 1267 (noting that French secularism is distinct in comparison to the separation of church and state in the United States).
workers.46 With the Revolution of 1789, the French populace overthrew not only the yoke of the monarchy, but the Church as well.47 The newly created French state seized Church lands, auctioning them off to private owners, and demanded that clergyman swear allegiance to the new republic.48 To rectify any animosity between the government and the Church, Napoleon Bonaparte negotiated the Concordat, which provided, among other things, that the Church would be afforded autonomy, so long as it confined its dealings to purely religious governance, but also required that the Church be overseen by the state through the people.49 One commentator indicates this is only a partial separation, as in the following:

This Concordat has been variously interpreted. Some see a first secularization; to the extent that the state no longer involved itself with supervising religious doctrines, that it protected all religions equally, that it respected freedom of religion, and that the church no longer exercised supervision over the state, one can argue that the state established a form of separation of church and state. But others point out that this is not true separation in that the state issued the Concordat because it judged the propagation of religious values to be necessary for maintaining social cohesion, one of the tasks of its sovereignty.50

With the Concordat, France simply reallocated the previously held power from the Church to the state and tolerated the existence of religious activity as a social function.51 This loose separation between the two authorities implies that laïcité is not defined as a barrier between government and religion, but only as compartmentalization of government and religious functions in separate spheres of authority within French society.52

On a purely legal level, French laïcité has another definition. In 1791, the French National Assembly incorporated the Declaration of the Rights of Man and of the Citizen (Declaration) as the preamble to the French Constitution.52 Enshrined in the Declaration is the assertion that “[n]o one shall be disquieted on account of his

46. *French Secularism – Laïcité*, h2g2 (Oct. 15, 2004), http://h2g2.com/dna/h2g2/A2903663 [hereinafter *French Secularism*].
47. *Id.*
48. *Id.*
49. *Id.*
51. See *id.*
opinions, even religious ones, as long as the manifestation of such
opinions does not interfere with the established Law and Order.”

In so doing, France provided, at least in form, that religion was
purely a private matter, but that the ostentatious expression
thereof was a public concern; where one draws that private/public
distinction one is necessarily determining at what point “the law”
can provide proscriptions on individual action. In this sense, laïc-
ité suggests a separation between privately held opinion and its
public manifestation.

Despite the Declaration’s provision for a separation between the
state and religion, it was not until more than a century later that
France began any kind of secularization. In 1880, Prime Minister
Jules Ferry pushed for laws that precluded the employment of
religious personnel in public schools. With the tenure of Émile
Combes, the French government closed many religious schools
and began the process of creating a formal law establishing clear
boundaries between the government and religion. The result of
this policy was the 1905 law on the Separation of the Churches and
State (1905 Law), establishing separation as a national principle
and prohibiting the use of public funds on behalf of religions.

Even in the face of clear governmental secularism, ambiguities
exist. Consider, for example, France’s attitude toward religion in
public schools. There are serious questions as to whether the “offi-
cial neutrality” used in laws like the 1905 Law requires that no
material support will be given for any religion. Yet, there are
equally serious questions as to whether that same kind of neutrality
discriminates in favor of the non-religious at the expense of the
religious. One commentator notes that France has, at different
points, followed both sides of the dichotomy, as in the following:

These two conceptions have both, alternatively, been considered
to be compatible with French secularism. Until 1959, a principle
of “public funds for public schools, private funds for private
schools” prevailed. Then, in that year, a new law provided that

53. Declaration of the Rights of Man and of the Citizen, Aug. 26, 1789, art. 10
(Fr.).
55. See id. at 1274.
56. See French Secularism, supra note 46.
57. Id.
58. Id.
59. See id.
60. See Troper, supra note 43, at 1276.
61. See id. at 1277.
62. See id.
private schools could enter into contracts with the state whereby the salaries of the teachers and certain costs were paid by the state, provided that those teachers had earned certain degrees and that the content of the programs was analogous to that of programs in the public schools. It is remarkable that one of the justifications for this assistance was that having the private schools under contract assured the public provision of education.63

*Laïcité*, in this context, is not just lines of demarcation between the political and religious realm, but a policymaking balance between disdain for official recognition of religion and the desire to afford individuals a free and open environment for personal decision-making.64

This history illustrates that *laïcité* is a broad term which France uses in a number of ways to justify different effects of secularism. Based on even the most rudimentary assessment of history, French *laïcité* can have at least one of three distinct definitions: (1) the separation into spheres of power the political and religious authorities, (2) the separation between private belief and public manifestation of religion, and (3) the separation between official, government neutrality, and individual expression.

2. Muslims in France

These competing definitions of an official version of *laïcité* are well illustrated in the context of the French government’s interaction with Muslims throughout the twentieth century. Muslims have been a part of the French demographic for centuries; beginning with Charles Martel’s Battle of Poitiers with the Muslim invaders in 732, France has had ongoing interactions with individuals of Muslim background.65 During its colonial era, France engaged with countries like Egypt, Tunisia, Morocco, and Lebanon, all of which were Muslim majority countries at the time of French occupation.66 Still, it was not until the post-colonial era brought dissolution of French imperial rule that Muslims began any kind of full-scale immigration into France proper. Between 1954–1962, when France engaged in the conscription of labor to meet its domestic economic needs, it drew heavily from formerly colonized Muslim

63. *Id.* at 1277–78.
64. For example, in the context of education, “[f]reedom of religion thus implies freedom to open an educational institution and freedom to send one’s children to the establishment of one’s choice.” *Id.*
66. *Id.*
The period between the late 1960s to the 1980s saw a dramatic rise in Muslim immigration, first in the form of first-generation immigrants and then in the form of family reunification. Today, it is difficult to find any conclusive data on the number of Muslims living in France, as France has declined to include racial and ethnic data as part of its official census. The best estimates are between 3.65 and 6 million; anywhere from six to ten percent of the French population is Muslim in origin.

Such a cursory glance at history simply masks the larger reality of French interaction with Muslims. In the colonial period, for example, France engaged in the official policy of "remaking" Muslims in order to preserve French dominance in colonized countries. Under the auspices of assimilation, French settlers would seize lands, establish privatized property systems, and close Muslim religious schools and libraries. With the decline of overt imperialism, France turned to alternative methods of ensuring Muslim integration. For example, in 1919, France instituted a naturalization policy that, as a condition to French citizenship, required Muslim men to "relinquish their 'indigenous' status, which included following Islamic law." In the post-colonial period and the influx of labor migrants, France afforded little in the way of integration into larger society; indeed, one report from the time underscores the unsympathetic disdain with which early Muslim migrants were regarded, as in the following:

In an area hardly larger than a hectare were makeshift shacks built with the debris from old huts and bits and pieces of rubbish, the whole often covered with tarred paper, and we stopped at the threshold paved with rubbish, requiring a strong stomach to confront the foul emanations . . . . And in these antechambers of every disease live, crowded as in a rabbit hutch, nearly a thousand men.

The concern in France during the mid-twentieth century was less about general logistics of handling a large immigrant population and more about whether "the former colonial subjects would over-

67. Id.
68. Id. at 17.
69. Id.
70. Id.
72. Id. at 47.
73. Id. at 48–49.
74. Id. at 51.
run the French homeland, whether, in particular, 'Islam' would colonize 'France.'"\(^\text{75}\)

The interaction between the French government and the Muslim populace grew tenser with the law and policy of the post-colonial period. While the 1905 Law suggests an even-handed approach to religion in the public sphere, France's policymaking after the law was hardly a concession to Muslims living in France.\(^\text{76}\)

For example, the majority of national holidays in France are Christian holidays and France ordered the flying of flags at half-mast following the deaths of Pope John XXIII and Pope John Paul II,\(^\text{77}\) facts that at first blush seem incompatible with laïcité, but become more comprehensible when one realizes that Catholicism is the dominant religion in France.\(^\text{78}\) Something similar has never been done as a sign of respect for an Islamic leader. In the eastern region of Alsace-Moselle, the 1905 Law is non-existent, where Christian and Jewish ministers are considered public servants.\(^\text{79}\) In this same area, Christian and Jewish students attending public school were given release time to attend religious education classes, but Muslim students were sent to drivers education courses.\(^\text{80}\)

In overseas territories under French law, France has managed to find exceptions to laïcité, allowing the rectification of a French mosque, French Muslim cemetery, and French Muslim high school.\(^\text{81}\)

For French Muslims living on the Continent, France's laïcité and official separation yield very different results, particularly with regard to religious apparel. The debate over the use of veils began in 1989 with the expulsion of three Muslim girls who refused to remove their headscarves in a middle school in the town of Creil.\(^\text{82}\)

At the time, a coalition of Catholic, Protestant, and Jewish religious leaders joined the Muslim community in denouncing the government's actions as contrary to any conception of religious neutrality.\(^\text{83}\) The matter quieted down with a ruling by France's highest administrative court, the Conseil d'État, that students could not be denied admission into a public school on the basis of religious sym-

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75. See id. at 69.
76. See Laurence & Vaisse, supra note 65, at 140.
77. Id. at 141.
78. See id. at 15.
79. Id. at 141–42.
80. Id. at 142.
81. Id.
82. Scott, supra note 71, at 21–22.
83. Id. at 23–24.
bols, unless the apparel was unduly disruptive. In 1994, the issue arose again with the decision by education minister, Françoise Bayrou, to prohibit the use of "ostentatious" religious symbols in public schools; subsequently, sixty-nine girls were expelled for wearing the veil. After public outcry, concessions were made in some schools for girls who wore bandanas or who lowered the headdresses upon entering the classroom. In 2003–2004, the debate culminated in the sweeping ban embodied in the 2004 Law, banning all ostentatious religious apparel in the classroom. The French government, under President Jacques Chirac, established what came to be known as the Stasi Commission, the panel responsible for determining the feasibility of enacting such a law. While the Stasi Commission ultimately approved, on laïcité grounds, the enactment of a general ban, it qualified this conclusion by noting the need to encourage tolerance and integration of Muslims in other aspects of society, such as recognition of Aid-El-Kébir as a national holiday or the creation of a national school for Islamic studies. Ultimately, the law passed, with many of its "qualifications" forgotten.

While the 2004 Law sweeps broadly, prohibiting the wearing of the Jewish Yarmulkes and the Sikh turbans, these religious symbols were never at the center of the controversy; at all times it was the Muslim veil that served as the touchstone for policymaking. Moreover, such legislative fiat ensured there would be "no room for the compromises that had been negotiated in years past (scarves on shoulders, "lite" scarves, bandanas)." Like other examples of majoritarian sacrifice for action taken against minorities, France had been willing to forgo liberties for all religious groups to accomplish its goal against one group.

84. Id. at 24–25.
85. Id. at 26–27.
86. Id. at 28–29.
87. See Law 2004-228, supra note 36, art. 1.
89. Id. at 33–34.
90. Id. at 34–35.
91. See id. at 35.
92. Id.
93. See, e.g., Palmer v. Thompson, 403 U.S. 217, 217 (1971) (holding that it did not violate the 14th Amendment's Equal Protection Clause for the city of Jackson, Mississippi to close its swimming pools to all users, regardless of race, rather than obey an order to desegregate).
C. The Burqa Law, European Court of Human Rights Case Law, and Interpretation of Article IX

France's actions over the years against religious expression are in stark contrast with efforts by the European Union to enshrine religious freedoms as fundamental rights. In particular, an action challenging the proscription of the use of a religious symbol like the burqa would fall within the purview of Article IX. Article IX provides as follows:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.94

Since 1959, one of the primary functions of the Court is hearing cases challenging violations of human rights provisions like those in Article IX.95 The Court can hear individual challenges against alleged human rights violations and its decisions are binding on European member states.96 Over the years, the Court has consistently followed a formal approach to interpreting Article IX, reading the second section of Article IX as a three-part test of whether a particular law infringes the guarantees in the first section.97 An alleged violation of Article IX will pass judicial review if it is (1) "prescribed by law," (2) directed to one or more of the legitimate aims set out in the second part of Article IX, and (3) "necessary in a democratic society."98

The Court has had a number of occasions to define the limits of these factors in the context of religious symbols and the three-part test has gone through a series of iterations. In X. v. United Kingdom,99 for example, the Court held that Article IX did not forbid

96. See id.
98. Id.
99. This is a decision by the now-defunct European Commission on Human Rights, but one that is relied upon heavily by the European Court of Human Rights (Court) in later decisions. See, e.g., id. ¶ 64.
the United Kingdom from imposing a fine on a motorcyclist for failure to wear a helmet. The motorcyclist was an Indian Sikh living in the United Kingdom who had failed to wear his helmet due to his religion's requirement obligating him to wear a turban. Ultimately, the resolution of the case turned on the need for uniform public safety requirements, a legitimate governmental interest that trumped the individual's interest and which met the second part of the three-part test. At least in this example, Article IX's accommodation means literally physical well-being; the government can infringe individual liberties where the risks of physical harm are high.

The legitimate aims element in the second part of the three-part test also has a more global definition, expanding general well-being over a larger population. In Phull v. France, the Court held that the public safety interest justified the removal of another practicing Sikh's turban at an airport security checkpoint. The Court relied on X v. United Kingdom, drawing a broad-based public welfare analogy to the individualized safety concerns for motorcyclists; where the government has a legitimate interest in individual safety, it can also have a legitimate interest in safety over a larger group, such as passengers on an airplane or travelers in an airport terminal. The Court was clear to note that this was an isolated instance and not the result of overall policy; for the Court, it was important that this was not a broad-based ban on turbans, but a one-time, temporary act prior to boarding a plane.

The Court further expanded on its three-part test in Dogru v. France, a case involving a female student at a French school in Flers. The student, an eleven-year-old girl, refused to remove her Islamic headscarf during physical education classes; ultimately, the student was expelled from the school for her actions. A claim was brought in the Court, alleging a violation of Article IX, and the Court determined that the Islamic headscarf was foremost

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101. Id. at 234.
102. See id. at 235.
103. See id.
105. See id. at 414–15.
106. See id.
108. Id. ¶¶ 7–8.
109. See id. ¶ 15.
a religious symbol, bringing it within the purview of Article IX. The first part of the three-part test, the “prescribed by law” prong, meant not only that the government must point to a substantive policy, but that the policy “should be accessible to the persons concerned and formulated with sufficient precision to enable them to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.” In this case, it was important to the Court that there was something of a contractual agreement between the school and the student; when the student became enrolled in the school’s curriculum, the disclosure statements given at the beginning of the process were sufficient to make her aware of school policy. Thus, prescribed by law has both a descriptive and normative aspect: the law is X and the law should make party A aware of X.

The Court went further by defining the third part of the three-part test, the necessary in a democratic society prong. The Court first noted that in a society composed of competing religious beliefs, the state has a legitimate interest in being a neutral player, staying aloof by neither rejecting nor affirming a particular faith. This fact is particularly unique in the context of an educational institution run by the state, where there is specific concern “to ensure mutual tolerance between opposing groups.” Drawing an analogy to a similar system in Turkey, the Court noted that France’s principle of laïcité as a vehicle for democratic protection in public schools was sufficient to find that the student had “overstepped the limits on the right to express and manifest religious beliefs on the school premises.” Under the Court’s definition of “necessary,” religious symbols are not by nature incompatible with state secularism, but can become so depending on the context and the potential for conflict between religious groups. Thus, the third part of the three-part test is a relative, circumstantial assessment and not necessarily a formulaic one.

110. Id. ¶¶ 47-48.
111. Id. ¶ 49.
112. See id. ¶ 60.
113. See id. ¶ 49.
114. Id. ¶ 62.
115. Id.
116. Id. ¶ 68.
117. See id. ¶ 70.
Most recently, the Court decided *Ahmet Arslan and Others v. Turkey*, illustrating the limits of the three-part test. In that case, various citizens of Turkey were attending a ceremony outside an Islamic mosque wearing traditional ceremonial clothing. During a tour of the area, the group was arrested, arraigned before a court, and asked to remove their religious apparel. The individuals refused and were charged under a Turkish law similar in scope to that of the French burqa ban, a law that prohibited the wearing of religious clothing in public. The Court reviewed the case under Article IX and found Turkey’s actions violative of fundamental rights. While the Court found that the actions were both prescribed by law and pursued a legitimate purpose, they were not necessary in a democratic society. The Court noted that while the government’s desire to create a secular environment was a valid interest (a *laïcité* determination), it did not overcome the individual interest in free expression enshrined in Article IX. The Court found that proscriptions against religious apparel are necessary in public institutions, which are utilized by a certain segment of the citizenry and run by the state. But those same proscriptions are unnecessary in the general public; thus, the Turkish government could not prevail using principles articulated in *Dogru*. Moreover, the government’s fear of undue pressure on other individuals in the public sphere was baseless; the Court found that the group was simply wearing its religious apparel as a manifestation of belief and not as a tool for proselytizing. For the Court in *Ahmet Arslan*, Article IX draws a fine line in the secular sand: government proscription of religious apparel is necessary in publicly funded environments where the risks of institutional conflict are high (the *Dogru* doctrine), but is unnecessary in general

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119. *Id.*
120. *Id.* ¶ 7, 9.
121. *Id.* ¶ 10.
122. *Id.* ¶ 52.
123. *Id.* ¶ 39.
124. In a single paragraph, the Court noted that secularism is always a legitimate purpose and that the law in question was applicable to that principle. *See id.* ¶ 43.
125. *Id.* (Sajo, J., concurring).
126. *See id.* ¶ 48 (noting the applicants in this case were private citizens rather than representatives of the state).
127. *See id.* ¶ 49.
128. *See id.*
129. *Id.* ¶ 51.
access environments where the risks of undue pressure are low (Ahmet Arslan doctrine).

In sum, the Court's current three-part test defines a very fine line that a national government must tread carefully. In order to meet the first prong of the three-part test, the prescribed by law prong, a government must show that a law is written in such a way that individuals are aware of its provisions and can act accordingly. To establish that a law is directed to one or more of the legitimate aims set out in the second part of Article IX, the second prong of the test, a government can show that the law is either targeted at protecting individual health and well-being or is intended to protect the general welfare of a larger populace. Regarding the latter interest, the Court has indicated that such general interests are not necessarily grounds for broad governmental regulation. Finally, to meet the third prong of the test and prove that a law is necessary in a democratic society, a government must show that, given the circumstances, the government's interest in protecting the population from religious pressure outweighs the individual's interest in religious expression. In the context of state-funded venues restricted to only certain segments of the society (such as schools), the government has the upper-hand; in venues open to the general public (such as streets), the individual's interest trumps that of the state.

III. ANALYSIS

If a case is brought before the Court challenging France's burqa ban, the Court should strike down the prohibition as violative of Article IX. France's law violates each part of the Court's three-part test. In the face of a finding of such a violation, France has multiple options available in drafting further legislation to meet the various interests that France has articulated as motivating the burqa ban.

133. See id. (noting that action was an isolated incident and not a broad ban on turbans).
134. See Dogru, 49 Eur. Ct. H.R. ¶ 64.
135. See id. ¶ 68.
A. France's Burqa Law Violates Provisions of Article IX

France's law prohibits a person from wearing an item of clothing for the purpose of concealing his or her face in public areas. An individual violating this provision faces a second-degree misdemeanor. The law prohibits forcing another person to conceal his or her face on the basis of gender with threats of violence, coercion, or by use of improper authority; a violation of this provision carries a one year imprisonment and a fine of €30,000 or, in case of force applied to a minor, a two year imprisonment and a fine of €60,000.

As a preliminary matter, the Court should treat this strictly as an Article IX matter. Despite what French officials may think, the burqa is predominantly a religious symbol. Whatever cultural significance may attach to the burqa, the bulk of Muslim women and the Muslim community generally view the burqa as a symbol of devotion, submission to the will of God, or an outward manifestation of inward belief. Further, the Court has already held that the Muslim headscarf is predominantly a religious symbol; it is only logical that the burqa should be treated similarly. Once the Court brings this controversy within the purview of Article IX, France's law must be justified within the bounds of the Court's three-part test: whether the policy is (1) prescribed by law, (2) directed at one of the legitimate interests articulated in Article IX, and (3) necessary in a democratic society.

1. Prescribed by Law

In order to establish that the policy is "prescribed by law," France must prove that the burqa ban is written in such a way that individuals are aware of its provisions and can act accordingly. This part of the test was an important factor for the Dogru Court; in that case, a signed disclosure statement indicated willingness on the part of the student to comply and proved that the state had taken due diligence in providing pertinent information to all interested parties. It was clear from the outset that the student was aware

137. See Law 2010-1192, supra note 2, art. 1.
138. See id.
139. See id. art. 4.
140. See Goodenough, supra note 7.
141. See discussion supra Part II.A.
143. See id. ¶ 49.
144. See id. ¶ 60.
or could reasonably be assumed to be aware of the consequences of her actions.\textsuperscript{145}

In contrast, France’s burqa ban leaves open many questions for “the governed.” First, the law does not define a “public place.” Is this limited to state-funded public facilities, such as museums or government offices? Or is it broader than that, including parks, thoroughfares, street corners, and lavatories? Second, the law’s broad language, prohibiting all clothing intended to cover the face, can yield very extreme results. Could a bride, veiled in a park for her wedding pictures, be charged under this provision? Or would a hockey player wearing a mask on his way to a game violate this law? Finally, the law does not specify how much or how little of the face must be covered to avoid prosecution. Would a painter wearing a paint mask around her nose and mouth be violating the burqa ban? Would a college student attending a masquerade party, wearing a masque covering his eyes and forehead, risk criminal prosecution if he enters the ambiguous “public realm?”

The sheer fact that these questions exist underscores that a person in France is left with no hint as to how to comply with this law. Unlike the student in \textit{Dogru}, who was at least given an opportunity to learn upfront what was required of her,\textsuperscript{146} the citizen or visitor of France is only clear about one thing: the French government wants to see his or her face. This overinclusive element of the law makes it difficult to argue that the regulation is clearly prescribed by law within the meaning of \textit{Dogru}.\textsuperscript{147}

More frustrating is that, for the Muslim believer, the discussion of the burqa in the debate surrounding this law raises the same questions as previous French action towards Muslims; like the 2004 Law aimed at headscarves in schools, even if other religious apparel is in the purview of the law, Muslims will ultimately be the bulls-eye in the center of the target.\textsuperscript{148} While the law is drafted in broad, neutral terms, public statements by President Sarkozy\textsuperscript{149} and other officials\textsuperscript{150} should make it abundantly clear to France’s Muslim population that France is not concerned with paint masks and bridal veils, but with Islamic garments. In “prescribing” the law, France has done again what it has done to Muslims for the last

\textsuperscript{145} See id.
\textsuperscript{146} See id.
\textsuperscript{147} See id.
\textsuperscript{148} See Scott, \textit{supra} note 71, at 34–35.
\textsuperscript{149} See Goodenough, \textit{supra} note 7.
\textsuperscript{150} See Copé, \textit{supra} note 30.
several decades;\textsuperscript{151} it has used a vague law which, depending on one's interpretation of its language, may affect a large segment of the general populace, but which, given the overt policy discussions surrounding its passage, strictly targets the Muslim segment of the citizenry. Thus, the Muslim burqa wearer attempting to learn what France has prescribed by law is being asked to not only read the vague language of the law, but to then couple that with official statements made about how the law affects burqa wearers specifically.\textsuperscript{152} Not only should the Court strike down the law as violative of the prescribed by law part of the three-part test, but, in doing so, the Court should be aware that it is also checking France's continuing use of this legal sleight of hand.

2. Directed at a Legitimate Interest in Article IX

The second part of the three-part test requires France to show that the burqa ban is directed at one of the legitimate interests stated in Article IX. A law must be 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."\textsuperscript{153} France has focused on two primary interests as justifications for the law: the protection of Muslim women from force and duress\textsuperscript{154} and the protection of the French populace through increased ease of identification by security officers.\textsuperscript{155} Even with these stated interests, the Court should strike-down France's law.

First, the need to protect Muslim women from force and duress is an interest focused on individualized protection. In many ways, this is similar to the interest laid out in \textit{X v. United Kingdom}, where the government had an interest in protecting the health and well-being of each turban-wearing motorcyclist.\textsuperscript{156} In that case, there was a clear safety concern; the helmet requirement was tied specifically to a clear physical threat.\textsuperscript{157} Moreover, the law was narrowly applied; it was not a broad ban on turbans altogether, but strictly tied to the risks of harm to the individual in particular cases.\textsuperscript{158}

\begin{itemize}
\item \textsuperscript{151} See discussion \textit{supra} Part II.B.2.
\item \textsuperscript{152} See Goodenough, \textit{supra} note 7.
\item \textsuperscript{153} European Convention for the Protection of Human Rights and Fundamental Freedoms, \textit{supra} note 94, art. IX.
\item \textsuperscript{154} See Goodenough, \textit{supra} note 7.
\item \textsuperscript{155} See Copé, \textit{supra} note 30.
\item \textsuperscript{157} See \textit{id.} at 235.
\item \textsuperscript{158} See \textit{id.}.
\end{itemize}
In this case, France’s law goes much further. Certainly, the provisions that prohibit other individuals from forcing facial coverings on another go to the heart of this interest.\footnote{159. See Law 2010-1192, supra note 2, at 4.} Such a criminal provision directly targets the interest France has articulated and punishes those who defy that interest. But the broad ban on the burqa altogether and criminal penalties for the individual wearer,\footnote{160. See id.} who may have chosen to wear the burqa of her own volition, does not achieve this stated interest.

Second, the law goes too far concerning France’s national security interest. This interest was the one raised by the government in \textit{Phull v. France}.\footnote{161. See Phull v. France, 2005-1 Eur. Ct. H.R. 409, 415.} In that case, a Sikh man was asked to remove his turban at a security checkpoint.\footnote{162. See id. at 413.} The Court noted that the government’s actions were tied explicitly to this interest and did not go further than necessary; the removal of the turban was a one-time requirement and not a broad ban on all turban wearing.\footnote{163. See id. at 415.} Here, to meet its objective of facial identification, France could simply have required removal of the facial portion of the burqa at the request of security officers just as airport security asked for the removal of a Sikh’s turban. Instead, France has banned the burqa in public places altogether, even in situations where there is no heightened security risk. Again, even under this interest, the Court should strike down France’s law as beyond the scope of these otherwise legitimate interests.

Finally, as a matter of policy, the Court should be cautious about the legitimacy of either of these stated interests. History has shown, time and again, that this is not France’s first foray into laws that specifically target Muslims.\footnote{164. See discussion supra Part II.B.2.} As has been shown, much of France’s interaction with Muslims over the last century has been tense and, at times, disproportionate in relation to its interaction with other faith groups.\footnote{165. See LAURENCE \& VAISSÉ, supra note 65, at 140–42.} Given that this law comes on the tails of the 2004 Law targeting Muslim headscarves in public schools\footnote{166. Law 2004-228, supra note 36.} and given the international community’s reaction to that law,\footnote{167. See discussion supra Part II.B.1.} it is difficult to imagine that France has no ulterior motives beyond the desire to protect Muslim women from force or the general
French populace from security risks. For all these reasons, the Court should strike down France’s law under the second part of the three-part test.

3. Necessary in a Democratic Society

Finally, the Court should strike down France’s law as violative of the third part of the three-part test, holding that the law is not “necessary in a democratic society.” The Court’s decisions in Dogru and Ahmet Arslan show the careful balance that a government must strike in regulating religious symbols. In Dogru, the Court was clear that in a publicly funded venue, closed to the general populace, a government has the power to issue a broad ban on the wearing of religious symbols. Moreover, in this context, the risks for potential conflict by the wearing of such symbols are high; a student wearing such a symbol may be the target of religious confrontation. The Court was also clear in Ahmet Arslan that the government’s power is more restricted in a venue that is accessible to the population generally. Moreover, the concerns about potential conflict that pervade the wearing of religious symbols in public schools or other restricted access venues are not present when the venue is open to all, such as in a public street. A government that seeks to pass this third factor in the three-part test must carefully walk this line.

France, however, has crossed it. In little more than a sentence, France’s law has had the effect of completely banning a religious symbol from the public at large. To be sure, France has only overtly targeted clothing that covers the face, but, in so doing, has set the stage for the prosecution of a woman wearing a burqa in any public place. France has not delineated only those restricted-access places it funds with public money. Instead, France has left the field of potential regulation wide-open. Ironically, in its effort to protect the Muslim woman from homebound subjugation, France has forced the burqa wearer to stay home. Moreover, like the individuals charged in Ahmet Arslan, a burqaarer in a public environment would only passively manifest her faith. Additionally, as a policy matter, even if France asserts that it is following the

169. See id.
171. See id. ¶ 51.
172. See Law 2010-1192, supra note 2, art. 4.
173. See Arslan, No. 41135/98, ¶ 51.
principle of laïcité as a “necessity” in a democratic society, it is difficult to justify France’s actions. As the Court in Dogru noted, the concept of separation between religion and the state, or laïcité, is a necessary characteristic of a democratic society. But in that case, the definition of laïcité used to justify governmental action was clear; the French government wanted to avoid the risks of endorsing and condoning religious activity in state-sponsored public schools by a clear line of separation. In the case of the current burqa ban, however, it is difficult to identify on which of the many competing definitions of laïcité France is relying. As has been shown, laïcité encompasses at least three different definitions: (1) the separation between political and religious authorities, (2) the separation between private religious opinion and public manifestation thereof, and (3) the separation between government neutrality and individual expression. Regarding the first definition, France’s burqa law is not an attempt to separate its political power from that of Muslim religious authorities. The burqa is an individual expression, one encouraged by some Muslim authorities, but ultimately chosen privately by the Muslim woman. On the second definition, certainly the burqa is a manifestation of private conviction. But it is not any more of a public manifestation than a Catholic nun’s wimple or the Jewish man’s kippah. Finally, regarding the final definition and the balance between governmental neutrality and private conviction, it would be irrational to assume that by allowing Muslim women to wear the burqa in public, France would be perceived as “endorsing” the Muslim faith. It would be one thing if such an allowance were afforded in a publicly funded venue, such as a government office. But a Muslim woman’s wearing the burqa on a street corner hardly violates the principles of governmental neutrality. Therefore, even if France attempts to justify the law as necessary to further the principles of laïcité in a democratic society, the Court should disregard those justifications as insufficient. For all these reasons, the Court should strike down France’s burqa ban as violative of Article IX.

B. Proposals for Post-Review Legislation

France is not without any form of recourse to achieve its larger, and admirable, goals. France’s stated interests—the desire to pro-

175. See id. ¶ 21.
176. See discussion supra Part II.B.1.
tect Muslim women from force and duress and the need to afford security officers sufficient ability to identify individuals—certainly do not justify the broad ban on burqa wearing altogether. Once the law has been struck down, France can still achieve these legitimate aims by narrowly tailoring the law to those interests.

France should rewrite the law to include the following language:

1. The act of any person to impose upon one or more other people to conceal their face by threat, violence, coercion, abuse of authority or of power, for reason of their sex, is punishable by one year of imprisonment and a fine of €30,000.00. If the act is committed against a minor, the punishment is increased to two years of imprisonment and a fine of €60,000.00.

2. Attire that is worn with the aim of concealing the face must be removed by the wearer of the attire so as to reveal the wearer's face and in a manner affording the wearer a reasonable amount of privacy:
   a. at official security checkpoints, such as airport security terminals, and
   b. at the request of a law enforcement officer acting within the scope of his or her official duties and for purposes of identifying the wearer.

This language would ensure a number of things. First, the criminal provisions, taken directly from France's current iteration of the law, would narrow the application of the burqa ban. Rather than targeting individual wearers, many of who may be wearing the burqa of their own volition, the law would go to the heart of France's purported interest of protecting Muslim women from "servitude and humiliation." Second, the removal provision would protect the dignity of Muslim women. By ensuring that the burqa is removed only in so far as to reveal the face and in such a way that the wearer is ensured a "reasonable" amount of privacy, the law would prevent Muslim women from being forced to remove the burqa altogether. Additionally, by specifying that the attire must be "removed by the wearer," the law would guarantee the protection of the Muslim woman's autonomy.

Moreover, the provision regarding security checkpoints would keep the regulations geographically centered on areas where security risks are a constant concern, rather than the fluid and indefinable public area. Finally, the law would afford enforcement officers greater ability to identify both potential criminals and potential victims. The "acting within the scope of his or her duties" language would give police officers the broadest possible power, but this

177. Goodenough, supra note 7.
power would be limited to use only for identification purposes. Thus, one could imagine that a police officer might use the identification provisions in identifying an individual the officer believes to be a man posing as a Muslim woman. At the same time, the officer would be prevented from using this power simply on a whim.

In writing the law this way, France would ensure that a reviewing Court would be clear on the interests at stake. In its current version, a Muslim woman affected by the law would be able to argue that the law’s language makes it unclear whether it is individual and public safety or religious discrimination that is motivating France. The revised version would have none of this ambiguity. In the revised version, the first provision would clearly show that France is concerned with protecting Muslim women from undue pressure, while the second provision would clearly prove France’s intent to protect the populace as a whole. Additionally, this law would fall within the Court’s allowance for broad, public safety interests, but would limit individual infringement to case-by-case actions.\(^{178}\) Thus, France would both be able to achieve its stated objectives and prevent further checks by the Court.

Finally, this version of the law would avoid the historical problems France has had with its relationship to Muslims\(^ {179}\) regarding its use of laïcité.\(^ {180}\) By amending the law, France could avoid discussing the legitimacy and public perception of the burqa at all. France could simply point to the need to protect its citizenry, both from potential security risks and from the private abuses endured by individuals. Laïcité would not even be a necessary talking point; France would not have to explain what definition of this principle it is using as a justification.\(^ {181}\) The revised versions of the law would be entirely secular in nature and applicable over the religious as well as the nonreligious communities. Thus, as a matter of policy, France could avoid much of the controversy it has raised over the last few months of debate and still accomplish larger protective goals.

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179. See discussion supra Part II.B.2.
180. See discussion supra Part II.B.1.
181. See discussion supra Part II.B.1.
IV. Conclusion

France's passage of the burqa ban has raised multifaceted issues. First, complex individual interests are at stake. The burqa itself is a religious symbol carrying with it multiple meanings to the individual wearer. Moreover, a Muslim living in France is faced with a complicated history of French attitudes. Second, the French government has raised its own complex interests. France has cited or implied multiple reasons for its actions and, in turn, raised the complicated principle of laïcité as an implied justification. Finally, regarding European law, the Court has revealed that, in the area of religious symbols, its jurisprudence is also multifaceted. The government is afforded broad powers under Article IX and the Court's interpretations, but there is a point at which the Court has drawn clear limitations.

In a future challenge of France's actions, the Court should strike down France's current iteration of the burqa ban as violative of Article IX. The burqa is predominantly a religious symbol and any proscriptions on its use should be reviewed under Article IX. The law does not pass the Court's three-part test in that the policy is not prescribed by law, not directed toward a legitimate Article IX interest, and not necessary in a democratic society.

Even with this judgment, however, France is not without options. France's stated interests involving national security and protection of individuals from duress, force, and compulsion are valid and important interests. To meet those interests, France can simply rewrite the law to allow for removal of the burqa at security checkpoints and by enforcement officers acting in the scope of their duties. It can also preserve the provisions criminalizing the use of undue influence over individuals to wear the burqa. In so doing, France will not only achieve its own national goals, but provide protection for individual rights without ever invoking the amorphous principles of laïcité. The results will prevent further controversy and draw international attention to France, not as a potential violator of human rights, but as a model to follow in an increasingly complex and diverse world.