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From the headscarf to the burqa: the role of social theorists in shaping laws against the veil

Peter Baehr and Daniel Gordon

Abstract

Opposition to the burqa is widespread in Europe but not in the United States. What explains the difference? Focusing primarily on the French case and its Belgian facsimile, we seek to underscore the role of social theorists in legitimizing bans on the full veil. Ironically, this role has been largely disregarded by Anglophone theorists who write on the veil, and who often oppose its prohibition. This article suggests that Europe tends to be more *repressive* towards full veils because its political process is more *open* to multiple theoretical representations of the phenomenon of veiling. Conversely, the United States is more open to the provocative display of religious symbols in public because the political process is pre-structured by legal conventions that tend to filter out social theory. The push to ban the burqa in France principally derives from its brand of republicanism rather than being a product of racism and Islamophobia. Of particular significance in the French case is the emphasis on reciprocity as a political principle, a principle that is elongated into an ideal of sociability by French theorists in different disciplines. The arguments of these theorists are described, their rationale is explained and the impact of their intervention on the policy process is documented. The French case, where the popular press and legislature play a major role in shaping policy towards the burqa, is contrasted with that of the United States, where the judiciary, defending religious freedom, remains the most influential collective actor. Each country has correspondingly different attitudes to democracy. In France, the mission of democracy is to extend political

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equality to the social realm whereas in the United States it is religion that is prioritized so as to protect that which is deemed most sacred to the individual.

Keywords: burqa; deflection of theory; elongation of the political; headscarf; law; reciprocity; sociability; veil.

Introduction

Social theory versus the 'artificial reason' of the law

Why is the Muslim veil[1] discordant with European sensibilities? According to a Pew Global Attitudes Survey conducted 7 April–8 May 2010, opposition to full-face coverings such as the burqa and niqab is strongest in France (see Figure 1). Yet, even in countries with different cultural histories, the majority approves of a ban. The roots of discomfiture are deeper than any peculiar national experience. While antipathy towards full veils is more pronounced among those who are 55 or over, a majority of people in all age groups censures it. There is no significant gender difference. Europeans of diverse political persuasions tend to agree on this issue. In France 75 per cent of those on the Left support a ban (Pew Research Center, 2010). The American difference – widespread disapproval of a ban – is stark, reminding us that there is not a single 'Western' attitude toward the veil. Yet, the American case also serves to highlight that in Europe there is, *comparatively* speaking, very robust opposition to it.

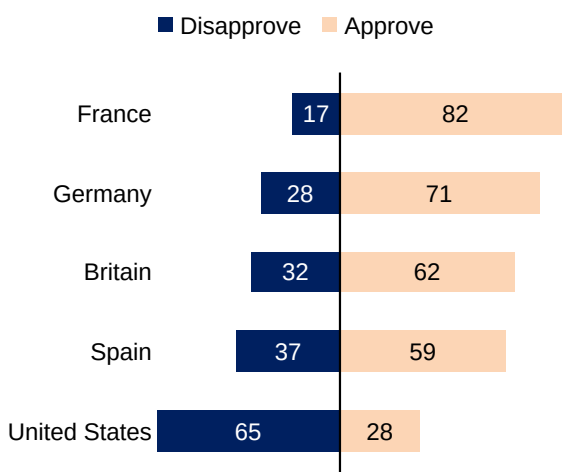

Figure 1 Ban on veils that cover the whole face.
Source: Pew Research Center Q59 & Q59fra.

The term 'comparatively' has been italicized to make a methodological point about the feasibility of generalizing. As Whitman writes with respect to the comparison of legal systems:

> Comparative law is the study of relative differences. Indeed, it is the great methodological advantage of comparative law that it can explore relative differences. No absolute generalization about any legal system is ever true. It would be false, for example, to say that American law is hostile to the social welfare state; it is easy to think of exceptions to this generalization. But what is true is that American law is more hostile to the social welfare state than continental law – and that is a statement that is not only true, but highly important to understanding the world in which we live.
>
> (Whitman, 2004, p. 1163)

These remarks about comparing legal regimes are pertinent. The Pew survey indicates not only that many Europeans *disapprove* of full veils but also that they are ready and willing to *legislate*. In April 2011, France implemented a law against full-face coverings in public. A similar law went into effect in Belgium in July 2011. Broad bans on full veils are pending in Italy and Holland. Bans restricting full veils in particular places, such as schools and municipal buildings, are now sprinkled across Europe.[2] There is no sign of comparable legislation in the United States. However, when we speak in this study of legal dimensions of the veil controversy, we have more in mind than whether or not legislation exists. We are concerned with how debate about the veil is framed in governing bodies and how social theory affects the disposition to legislate.

In the United States, the role of social theorists in matters concerning religious freedom is constrained by the legal framework. Social theory does not easily filter through the 'artificial reason of the law' associated with the judicial oversight of constitutional liberties. The phrase hails from Sir Edward Coke (as reported by Humphry William Woolrych) who reported on his legal jousting with King James I:

> Then the king said that he thought the law was founded upon reason, and that he and others had reason as well as the judges. To which it was answered by me that true it was that God had endowed His Majesty with excellent science and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life or inheritance or goods or fortunes of his subjects are not to be decided by natural reason, but by the artificial reason and judgment of law – which law is an act which requires long study and experience, before that a man can attain to the cognizance of it.
>
> (Woolrych, 1826 [1607], p. 282)

Bickenbach states:

> In practice, legal argumentation is 'artificial', in the sense Coke obviously had in mind, simply because the law itself sets constraints on what is to count as an acceptable legal argument . . . fundamental legal principles directly shape the dialogic structure of a legal argument. The most obvious example of this is the criminal trial where the presumption of innocence creates a wide-ranging dialogic asymmetry which favours the accused and sets limits as to what will count as an acceptable prosecution.
>
> (Bickenbach, 1990, p. 23)

The American approach to questions involving religious freedom revolves around judicial precedents and diminishes the leverage of non-judicial actors. As Robert Jackson famously said in a case involving the right of Jehovah's Witnesses to be exempt from saluting the flag in public schools, 'The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts' (1943, p. 637). The American Supreme Court and other federal courts tend to insulate constitutional topics from democratic sovereignty, just as Coke sought to insulate certain topics from the monarch's sovereignty.

In contrast, the debate on the veil in European countries is centred in the popular press and the legislature. Unlike courts, these are zones in which social theorists may brandish their own disciplines freely, unlimited by the artificial reason of the law. An intellectually effervescent rather than legally disciplined discourse on the burqa has thus emerged in some European countries. This theoretical free-for-all is particularly clear in France. In June 2009, the French National Assembly created an Information Committee on the Practice of Wearing the Full Veil on National Territory (henceforth called the Information Committee). The Information Committee's report, completed in January 2010, is a capital document for illustrating the role that theorists can play in shaping public policy on the full veil. The Information Committee invited professors and public intellectuals to give statements and to respond to questions. Social theorists, prosecuting the full veil as destructive of reciprocity and of equal citizenship, pushed the legislative process to its conclusion: 'No one, in the public space, may wear clothing designed to dissimulate one's face.'[3]

Members of the Information Committee also believed that its report was 'destined to pass beyond its [French] frontiers' (ANRI, 2010, pp. 13, 150).[4] And the report did. When Belgium became, in July 2011, the second country to implement a ban on full-face coverings (*Moniteur Belge*, 2011) the impact of the French model was palpable. One Belgian deputy, Catherine Fonck, a member of the Democratic Humanist Centre, stated that it was unnecessary to solicit the opinion of social scientists because it would be 'unproductive' to repeat the 'voluminous work' of the French Information Committee (CRB1, 2011, p. 20).[5]

Focusing primarily on the French case and its Belgian echo, we seek to underscore the role of social thinkers in legitimizing bans on the full veil.[6] We suggest through these examples that Europe tends to be more *repressive* toward full veils because its political process is more *open* to multiple theoretical representations of the phenomenon of veiling. Conversely, the United States is more open to the provocative display of religious symbols in public because the political process is pre-structured by legal conventions that tend to filter out social theory.

The deflection of theory

Our approach is potentially controversial because we suggest that democratic theory, independent of racial or gender prejudice, is an important factor behind the European tendency to repress Islamic veils. Academic commentary has at times portrayed the propensity to legislate as if it is grounded primarily in racism and/or misogyny (see, e.g., Al-Saji, 2010; Bourdieu, 2008 [2002]; Ezekiel, 2006; Fernando, 2004; Keaton, 2005; Scott, 2007; Winter, 2008). To illustrate the difference between our methodology, emphasizing the influence not only of ideas but of *democratic* ideas on decision making, and a methodology based more on the deconstruction of prejudice, we first adduce the 2004 French law banning the headscarf and other religious symbols in public schools. An overview of this earlier controversy will serve two important preliminary purposes. First, it can alert readers to the existence of an entrenched scholarly tendency to deflect attention away from prominent social theorists who advocate bans on veils.

The second reason for making a pass over the headscarf controversy is to demonstrate that the debate over the full veil is taking place on a different theoretical terrain than the debate over the headscarf. As the Information Committee stated in its report (ANRI, 2010, p. 90), 'Wearing the Islamic headscarf and the full veil reflect two distinct problematics'. Schematically speaking, the debate over the full veil is no longer about the meaning of *laïcité* (secularism) for democratic education; it is instead a debate about the meaning of 'reciprocity' for democracy *tout court*. This has implications for the European-wide debate. *Laïcité* is a distinctively French way of thinking about the relationship between state and religion; it is not highly influential outside France, except in Turkey, which banned headscarves in public schools even before France did (Kuru, 2009, pp. 187–93; Ozdalga, 1997). Reciprocity, a more generic democratic concept, is highly exportable. This is why French theory against the burqa and niqab migrated easily into the Belgian legislative process. We see little to prevent it from translating into other national contexts, except where judicial traditions confine the influence of social theory in framing religious policies.

From the headscarf to the burqa

Régis Debray: The Republic as an épreuve de force

A former guerrilla warrior turned novelist, playwright, philosopher and media theorist, Régis Debray is one of France's best-known public intellectuals. He was a member of the commission, known as the Stasi Commission, appointed by President Jacques Chirac in 2003 to study the headscarf controversy. Debray's influence, though, was antecedent to the Commission. On 2 November 1989, he co-authored, with four other prominent French intellectuals, a letter to *Le Nouvel Observateur* against the wearing of the headscarf in public schools. Winter observes that 'the publication of this statement marked a significant escalation' (2008, p.136) of the headscarf controversy. (We can, however, point to Winter as an example of the tendency to deflect attention away from theory: she does not summarize the article or profile the theories of any of its five authors.)

After studying with the communist philosopher Louis Althusser at the École Normale Superieure, Debray worked with Che Guevara in Cuba and Bolivia. He was tortured by the Bolivian authorities and imprisoned from 1967 to 1970. Debray published a handbook for guerrilla warfare, *Révolution dans la revolution?,* in 1967. His thesis was that, in a political struggle, violence is not merely a means of self-defence. To limit oneself to self-protection is to expose one's organization to attrition. 'Revolutionary politics, if they are not to be blocked, must be diverted from politics as such. Political resources must be thrown into an organization which is simultaneously political and military, transcending all existing polemics' (1967, p. 124). Debray's militant view of politics was evident decades later when he theorized on the headscarf. In *Ce que nous voile le voile* (2004a) he described the principle of *laïcité* as the foundation of 'neutrality' in French public schools. The French Republic is a community 'among individuals of all religions or without a religion'. Young people need to receive an apprenticeship in intellectual independence. The secular school is a 'refuge' and 'asylum' from the ideological pressures of one's family. It is where individuals learn that they have the power to inquire. 'Parents create children; only the school can make students'. Students are thus free to express their individual religious opinions but not to make a spectacle of their allegiance to a religious group. The educational atmosphere is to be trans-ethnic, not multi-ethnic. To preserve this open atmosphere, the school cannot be 'passive' (Debray, 2004a, pp. 19–22, 25–6, 37, 42). This is where Debray's views on secular education rejoin his views on guerrilla war.

According to Debray, the French Republic must ensure the primacy of its values over competing forms of 'transcendence'. Coercion, through law, is unavoidable. 'The republican synthesis has never been a dinner party but is rather a confrontation [*une épreuve de force*]' (2004a, p. 17). Social values inevitably collide and democracy must protect itself.

> There is perhaps no clash of civilizations, but neither is there an irenic and pacific dialogue among cultures. We cannot ignore relations of violence. The Republic was not founded by consensus. In 1792 we were on the verge of war. 1905, the separation of Church and State, this did not come from friendly cooperation with the Catholic world . . . .No society is secular (*laïque*) naturally . . . Society is to some degree the war of all against all. The State, that is, the general interest, is there to try to pacify, coordinate these frictions. Yes, there must be a State – and thus laws – to have secularism [*laïcité*].
>
> (Debray, 2004b)

Debray's transition from guerrilla tactician to theorist of the headscarf ban is intelligible in relation to his core idea: that every political value must forcibly carve out and preserve its place in the world.[7]

We know of no scholarly treatment of the headscarf debate in France that covers Debray's ideas. A tendency to deflect attention away from theorists in general is evident in the secondary literature. For Scott the headscarf ban is connected to the 'long history of French racism' (2007, p. 16). She organizes much of her book diachronically, providing a sketch of French colonialism and its racist premises since the 1830s. She offers just a few paragraphs about the Stasi Commission's report and no details on the background and ideas of its members (many of them were academic philosophers and social scientists). Other key sources on the headscarf controversy, richly laced with social theory, go unanalysed. Thus, the National Assembly issued an 860-page study with intellectually suggestive chapter headings such as: 'The historical foundations of secularism [*laïcité*]; 'The theoretical foundations'; 'Wearing the veil and the quest for identity' (ANRM, 2003, table of contents). In light of such texts, Scott's claim that opposition to the headscarf was a form of 'political hysteria' and 'a kind of knee-jerk racism' (2007, pp. 120–1) appears to be an exaggeration. So does her claim that those favouring the ban displayed a 'paucity of philosophical resources' and that it was only the opponents of the ban who tried to bring 'complexity' into the debates (2007, pp. 121, 135). With its emphasis on the racist 'subtext' (2007, p. 90) of the headscarf law, Scott's methodology, if applied to the more recent ban on full veils, would suggest that there is nothing new to explain. It is simply racism all over again.[8]

The transition from laïcité to reciprocity

Far from being a reprise, the debate about full veils is taking place in a different conceptual space. This is why some theorists have separate opinions on the two issues. Debray is against any ban on religious symbols that extends further than public schools. For him the public school is a special place where *laïcité* must have primacy over religious organization. But one should be free to exhibit one's religious membership on the streets. He has spoken out against the banning of the burqa in public (Debray, 2010).

The sociologist Nilüfer Göle, of Turkish origin and now a professor in France, has refocused her analysis in the opposite direction. In a seminal book, she critiqued the master narratives of modernization used by secular Turkish elites to ban headscarves in schools and universities. Göle argued that veiling is not limited to highly traditional women seeking to revert to an old religious lifestyle. Veiling in Turkey is a modern social movement in its own right. It is a tool for 'increasing participation in the public realm' and establishing 'a tolerance for differences and separate identities' (Göle, 1997, pp. 2, 23, 138). However, when Göle did this work in the 1990s, full veils were not yet on the horizon in Europe. She now concedes that full-face coverings are a special sociological problem. In testimony to the Information Committee, she said:

> To put it in the manner of philosophers of the public space, such as Hannah Arendt, in European democracies the social actors become citizens when appearing in public. For this, there must be a certain visibility.
>
> (ANRI, 2010, p. 592)

> It [the burqa] may be understood as a regression or, at least, a very radical will to rupture with reciprocity and exchange . . . .The headscarf [hijab]. . . does not pose the issue of the face's visibility but only of the hair. In contrast, the burqa today poses the problem of recognizing the person's face which they carry in the public sphere.
>
> (ANRI, 2010, p. 597)

In the Belgian Chamber of Deputies, an Ecolo (Green Party) representative stated: 'Defending diversity and pluralism in our society, our party supports the freedom to wear the headscarf . . . .However, banning the burqa does not derogate from this principle at all. The burqa goes too far in our eyes, because it excludes women from all social contact . . . .The burqa is a wall that permits no communication' (CRB2, 2010, p. 23).

We contend that racism is not a strong explanatory concept for European laws relating either to the headscarf or the burqa. Racism cannot explain why Turkey, a predominantly Muslim country, was the first nation to ban the headscarf in schools and other public places. It cannot explain why 42 per cent of French Muslims supported the headscarf ban (Laurence & Vaïsse 2006, pp. 169–70; Gordon, 2008, p. 58, n. 27). It cannot explain why Sihem Habchi, the president of *Ni putes ni soumises* (Neither Whores nor Submissives, a feminist organization founded in 2002 to protect the rights of Muslim women), evoked Michel Foucault in the Information Committee and called the burqa a 'carceral system' (ANRI, 2010, p. 320). Or why Abdoulatifou Aly, a deputy in the National Assembly representing the islands of Mayotte, a French overseas department that is 97 per cent Muslim, stated that a ban on the burqa is 'reasonable' in light of the 'risks which weigh upon the republican principles of human dignity, the equality between men and women, and above all, face-to-face

social life' (ANJO, 2010, pp. 5396–7). Finally, racism cannot explain why in the United States, 9/11 did *not* give rise to laws against Islamic symbols.

Citizenship, reciprocity and the elongation of the political into the sociable

The social theory that influenced the Information Committee did not come out of the blue; it can be seen as a specific inflection of democratic thought that we call the elongation of the political into the sociable. The concept of citizenship is the starting point. Citizenship in modern democratic regimes enshrines the idea of politico-legal equality. According to Bellamy, it 'is through being a member of a political community and participating on equal terms in the framing of collective life that we enjoy rights' (2008, pp. 16, 114). He also remarks that 'citizenship involves a degree of solidarity and reciprocity between citizens' and that such citizens 'need to see each other as equal partners within a collective enterprise'.

Full-face coverings such as the burqa and niqab raise the issue of whether democratic 'solidarity' is related to citizens being visible to one another. If I can see your face but you cannot see mine, is this a politically equal encounter? That a degree of mutual visibility is a prerequisite of political equality is strongly implied by Western democratic/republican metaphors: enlightenment, openness, transparency, illumination, recognition, legibility, disclosure, accountability, publicity and, not least, public. However, it is not self-evident that the norm of mutual visibility applies outside the domains where citizenship is directly exercised – the zone where citizens are politically active, such as law-making bodies. While it makes sense that one should not cover one's face in a legislative meeting, what about in places, such as shops and public streets, that can be construed as private? This is the moment where the distinctively *social* thrust of modern democratic theory enters the picture. For there is a modern tradition of elongating the political by emphasizing the socio-economic factors that facilitate or obstruct equal participation in the public sphere. A case in point is the use of the term 'socialism' to suggest that political rights, such as the right to vote, will tend to benefit only the wealthy, unless individuals are equitably endowed with certain 'social rights', such as a minimum wage or the right to education. The discourse of the social is modernity's distinctive contribution to classical notions of the political.

France was one of the countries in which the now pervasive vocabulary of the social field (terms such as *société*, *social and sociabilité*) first came into popularity. An explosion of 'social' discourse occurred in the French Enlightenment (Baker, 1994; Gordon, 1994; Sewell, 2005, pp. 318–35; Singer, 1986). It is not surprising that some French theorists today are virtuosos in articulating the meaning of full veils in relation to the social infrastructure of democracy. Moreover, the French image of the social field, since the Enlightenment, has been particularly rich in conceptions of civility and

reciprocity. Civil society in the French intellectual tradition is not just the economy but also embraces a code of manners promoting democratic manners.[9] This elongation of the political into the *sociable* is evident in the Information Committee's report:

> Now, in the Republic, reciprocity and exchange are two essential notions. French society has been profoundly marked by the notion of 'civility'. . . .Behind this term is the idea that in a society, manners should be polite and should respect rules that permit a civilized exchange between individuals.
>
> (ANRI, 2010, pp. 119–20)

French theorists and legislators tend to perceive the full veil as a social impairment of political equality, for the veil erects a barrier to the mutual recognition of worth upon which common citizenship allegedly rests. We recognize that this elongation of the political into the sociable is not unique to contemporary French theory. One can find it in, among other places, Goffman's analysis of 'face-work' (1966 [1963], 1967) as well as in Frantz Fanon's 'phenomenology of encounters' between the colonized veiled woman and the colonist:

> The woman who sees without being seen frustrates the colonizer. There is no reciprocity. She does not yield herself, does not give herself, does not offer herself. The Algerian has an attitude toward the Algerian woman which is on the whole clear. He does not see her. There is even a permanent intention not to perceive the feminine profile, not to pay attention to women. . . .[In contrast, the] European faced with an Algerian woman wants to see.
>
> (Fanon, 1969 [1959], p. 169)

Fanon encouraged Algerians to provoke the colonists by wearing full veils. The woman unseen by the Western man expecting transparency fights an asymmetrical sartorial warfare. The colonial was indeed an interloper, unwelcome in a foreign land, bending and breaking customs. Today, the argument is heard that Muslims wearing the burqa and niqab are the ones violating the social code. Modern, egalitarian, liberationist, social theory is now being invoked against full veils.

Abdennour Bidar: the 'objective' meaning of the burqa

Among the many academics who spoke in the Information Committee that met from June 2009 to January 2010, Abdennour Bidar proved to be one of the most quoted in the Committee's final report. Bidar is a professor of philosophy and specialist in Islam at the Institute d'études politiques de Paris (Sciences Po). He is a well-known public intellectual who sometimes addresses contemporary issues in an engaging autobiographical style. Bidar relates that,

when he was a student at the prestigious École Normale Supérieure in Lyon, he simultaneously attended a Muslim academy. Feeling 'like a ping pong ball', he struggled to reconcile two cultures. On the one hand, the West, which since the Enlightenment 'has put collective power, social and political, in the service of the individual's discovery of his or her possibilities'. On the other hand, Islam, with its emphasis on 'what is imposed by the family, custom, the past'. Bidar resolved to overcome his split personality by articulating 'an Islam of personal choice' (2008a, pp. 51, 57, 60). In his scholarly works, Bidar has argued that a modern Islam, compatible with democratic individualism, can be elicited from the Koran. He emphasizes that this humanistic potential must be extricated from centuries of theological interpretation. According to Bidar, a tradition of neglecting the resonances of certain Koranic terms has created a deficit of respect in Islamic law and culture for the value of individual choice. His book *Islam sans soumission* is an exegesis of those terms in the Koran that can serve to reconstitute an 'internally and externally tolerant' Islam (Bidar, 2008b, p.15).

Prior to testifying in the Information Committee, Bidar published 'The burqa, a pathology of Muslim culture' in the newspaper *Liberation* (2009). He characterized the full veil as a recent innovation of Muslim extremists, starting in Afghanistan under Soviet rule, passing to Iran after its 1979 revolution and finally adopted in the past few years by the most conservative fringes of Islam in a variety of European countries. His testimony to the Information Committee, however, was far more complex. Instead of focusing on the history of the full veil, he analysed its symbolic intersection with the democratic public sphere. This analysis proved to be influential in the Information Committee's final report, which cites Bidar no less than nine times.

More precisely, Bidar helped the Information Committee theorize its way through two key issues. The first was how to respond to the simple fact that some women choose voluntarily to wear the full veil. Bidar questioned the theoretical value of focusing on the 'subjective' meanings of the full veil. He insisted that the full veil's 'objective' meaning in the democratic public sphere is what counts. According to Bidar, academic efforts to inventory the motives for a self-abnegating practice, such as wearing a full veil, can only trigger 'an interminable debate' about the boundary between free will and social pressure. While some women say they wear the veil voluntarily, the sociologist can discern the impact of outside pressure. 'It is because it is very difficult to respond to this issue that I have tried . . . to displace the problem onto the question of [the full veil's] objective reception' (ANRI, 2010, p. 291). The Information Committee cited Bidar to suggest that focusing on the multiple reasons women had for wearing full veils could not yield data useful for a legislator. It also treated Bidar's analysis of the full veil's 'objective' symbolic meaning as authoritative.

> Monsieur Abdennour Bidar, philosopher, insisted on the symbolic import of this clothing which discourages all communication: 'A very important argument that one can oppose to the wearing of the burqa [Bidar said] is thus that the

> surrounding cultural milieu is unable to integrate a practice that the majority perceives as manifesting a certain symbolic violence.' He continued his presentation by inquiring into the signification of this clothing which becomes a sort of ambulatory prison: 'We may even ask ourselves if a women who wears the burqa exists in the public space. There is, in reality, behind the wish not to reveal oneself, the idea of not appearing in this space, of being ''enclosed outside'', which is however an untenable contradiction.
>
> (ANRI, 2010, p. 112)

In other parts of his testimony that the Information Committee partially quoted in its report, Bidar referred to the problem that he called the 'shareability of the public space'.

> Our vision of the latter [the public space] is in fact that of a space that is shared, and thus shareable. It follows from this that its occupants fulfil towards each other a certain number of duties and cannot segregate themselves through a logic that affirms their individual rights and liberties. It is one of the preconditions of 'getting along' ('*vivre ensemble*').
>
> Indeed the first condition for engaging another is to have access to the face. As Emmanuel Levinas used to say, 'the face of the other speaks to me'. In our cultural tradition, this part of the body has always been the mirror of the soul. By not giving me access to his or her face, the other intends provocatively not to be receptive to the communicative expectations inherent in the public space. On this basis, I am justified in considering his or her comportment as a symbolic violence inflicted on me.
>
> (ANRI, 2010, p. 286 for the above extracts from Bidar's testimony; p. 112 where these passages are partially quoted in the report)

The term 'getting along' or '*vivre ensemble*,' used in quotation marks, became central in the Information Committee's report (ANRI, 2010, pp. 119–22). By way of imitation, it also became prominent in the Belgian legislative record (see, e.g., CRB1, 2011, pp. 5–7, 10, 18–20; CRB2, 2010, pp. 18, 19, 21, 24, 26).

The second problem that the Information Committee resolved with assistance from Bidar was whether banning the burqa would constitute discrimination against Islam. He advised the Committee not to be swayed by 'the discourse of victimization and stigmatization'. Bidar stated that requiring Muslims to integrate into the Western public sphere, far from being a burden, 'represents an opportunity for Islam'. It is a chance for Islam 'to settle the score' with its undemocratic traditions. Bidar identified three traditions in Islam that obstructed democratic modernization and that are all condensed, in his opinion, into the symbol of the burqa. The first is the emphasis on external signs of religiosity: 'By virtue of the traditional propensity of this religion to insist on the binding character of certain external religious signs, the manifestation of individual liberty has long posed a problem'. The second undemocratic element in Islam, according to Bidar, is discrimination against

women. The third, he claimed, is Islam's 'ambition to legislate, to produce a politics based on the religious'. In this context, he cited numerous fatwas ordering women to wear the burqa. According to Bidar, banning the burqa would not only uphold the ideal of reciprocity within the democratic public sphere but would also help to move Islam down the path of democracy (ANRI, 2010, pp. 287–90 for Bidar's testimony as cited in this paragraph; pp. 41, 63-64 where these remarks are partially integrated into the report).

Emmanuel Levinas: the face

The Information Committee noted that Bidar was the first academic to bring the name of Emmanuel Levinas into its proceedings (ANRI, 2010, p. 116). Bidar's longstanding admiration of Levinas is evident in work that predates the burqa controversy (2004, p. 45). His evocation of Levinas was not an *ad hoc* move to delegitimize the full veil. Moreover, Bidar, though the first, was not the only academic who spoke to the Information Committee about Levinas. 'We see that numerous persons interviewed highlighted the symbolic importance of the face, by referring often to the philosophy of Emmanuel Levinas who has made it a central theme in his work' (ANRI, 2010, p. 117). The report even contained a sub-chapter entitled 'The 'Face as mirror of the soul' (Emmanuel Levinas)' (ANRI, 2010, pp. 116–18). This sub-chapter extensively quoted Abdelwahab Meddeb, a professor of comparative literature. Meddeb had spoken about how the full veil withdrew the face from 'the intersubjective or metaphysical relationship' with others (ANRI, 2010, p. 484). The report reiterated Meddeb's comment that the burqa 'is a mask which annuls the face, which abolishes it, hiding from us the expressions which bear witness to the alterity emphasized by Levinas' (ANRI, 2010, p. 117). The Information Commission also quoted Meddeb as saying, 'This supposedly Islamic dress transforms women into mobile prisons or coffins'. Women become 'phantoms barring access to the invisible truths which are extracted from the visible' (ANRI, 2010, p. 117).

It is difficult to imagine an American legislative committee quoting a professor of comparative literature regarding the importance of a phenomenological philosopher from a foreign country. This is because the concept of 'the face' is not a gloss on the American constitution or judicial precedents. The theory of 'the face' approximates pure theory, in the sense of a conceptually circular or self-validating discourse; it is not part of a pre-existing constitutional language game. Yet France's Information Committee endorsed Levinas.

> Emmanuel Lévinas has thus developed the idea that beyond the social contact between two beings, the face-to-face encounter adds a much more profound dimension. Access to the face as a face is above all ethical. As he wrote in *Totality and Infinity*, 'I do not merely look at the face of the other person; I feel

> responsible for him or her, obligated by his or her vulnerability, the essential nakedness of his or her face exposed to the world's violences.
>
> (ANRI, 2010, pp. 117–18)

This is part of a section where the report constructs its own reading of Levinas (as opposed to quoting what the academic experts had told the Information Committee). Consecrated by the Information Committee, Levinas's theory of the face became a recurrent reference point for legislators in France and Belgium deliberating on the issue of full veils.[10]

Élisabeth Badinter: against 'differentialism'

According to a telephone poll in the summer of 2010, Élisabeth Badinter was France's 'most influential intellectual' (Kramer, 2011, p. 44). A professor of philosophy at the École Polytechnique in Paris, Badinter is a prominent feminist thinker. Additionally, as an author of works on the Enlightenment and Revolution, she is known as an authority on the founding ideals of the French Republic. She was one of the four prominent intellectuals who, along with Debray, wrote the influential 1989 article in the *Nouvel Observateur* against the headscarf. In July 2009 she wrote against full veils in the same magazine. Addressing herself to women who voluntarily wear the burqa, she stated, 'In reality, you are using democratic liberties to subvert democracy' (2009). Her testimony to the Information Committee was the most influential of any individual; it is quoted in 12 separate paragraphs in the final report. She was also referenced numerous times in the Belgian Chamber of Deputies where she was called 'an eminent philosopher and great feminist'.[11] An imperious character, as one can see from online videos of her testimony, her authority is enhanced by the fact that she is the wife of the austere and highly respected Robert Badinter, who served as Minister of Justice under President Mitterrand and oversaw the abolition of the death penalty in France (Kramer, 2011).

Badinter's testimony in the Information Committee was ostensibly about the problem of the full veil for women's rights: 'The liberty of women travels obviously first through their control over their own bodies'. In remarks that the Information Committee wove into its report, Badinter stated that freedom to dress as one pleases is a vital right for women and one that French women had struggled for over many decades. Badinter argued that if French society tolerated the full veil it would be counterproductive for women's rights. She emphasized that many women wearing the full veil are pressured to do so by men in their family and neighbourhood. They are also prohibited from wearing clothing, such as skirts, that they wish to wear. Keeping the burqa legal would make it harder for Islamic women to say 'no' to men seeking to control their bodies. The full veil is thus a 'regression' in the history of women's rights (ANRI, 2010, pp. 31–2, 97–8 for where the report quotes her on the above points; pp. 330–40 for her testimony).

By the time Badinter testified many other feminists had already spoken to the Information Committee against the veil in similar terms. Badinter's unique impact stemmed from her theoretical engagement with the values bridging feminism and democracy, notably equality. According to Badinter, the preservation of democracy in Europe hinges on making the right selection among the different possible meanings of equality. The impact of her testimony was to remind the Information Committee of the nation's tradition of Rousseauian republicanism and to steer the committee around multicultural thinking. Her defence of 'universal' and her attack on 'differential' approaches to equality between the sexes made the burqa appear to be a symbol of *gender* inequality. But she also set out to turn the burqa into symbol of group right and thus *anti-citizenship*. In a section of its report called 'A mark of sexual apartheid', The Information Committee stated:

> Madame Élisabeth Badinter . . . drew the committee's attention to the dangers of the differentialism of rights. She declared, '. . .I observe two opposed apprehensions of equality. The one, ours, is that of democracies and found in the Universal Declaration of the Rights of Man. It can be summed up in four words: same rights, same duties. Here, the abstract notion of humanity overrides biological differences, notably sexual differences. Then, there is the other, that of the obscurantists, also used by certain sincere democrats, believers in natural difference. For them, rights and duties are different based on the sexes; the sexes are equal in their differences. This is the model of the complementarity of the sexes, where one is what the other is not. The unifying idea of a common humanity, of abstract citizenship, is no longer valid. Our rights and duties are different but equivalent. This is a conception that I have always combated, including when it works to the advantage of women.'
>
> (ANRI, 2010, pp. 109, 333 for the original testimony; the last sentence was not included when the Information Committee quoted the rest of this paragraph on p. 109)

The Information Committee also referenced Badinter when explaining that a democracy does not have to accommodate the opinions of all cultural groups.

> Mme. Élisabeth Badinter also reviewed the analysis according to which these behaviours [veiling] have a sectarian dimension. She emphasized, 'contrary to what occurs in the Anglo-Saxon countries, liberty of conscience and expression is not total in France. We combat destructive ideologies such as Nazism, racism, and anti-semitism. We combat all ideologies that attack human dignity. We struggle against those sects which, under cover of freedom of conscience, press-gang the minds of others and deprive them of their freedom of thought.'
>
> (ANRI, 2010, p. 104)

Badinter thus offered more than a feminist critique of the full veil. She offered a critique of democratic pluralism, understood as a set of content-neutral

procedural rights (e.g. the right to advance any viewpoint publicly). One could say that she upheld the 'substantive' rather than 'procedural' approach to democracy: democracy must repress radical political parties and sub-cultures whose principles are contrary to the core ideas of democracy itself.[12] However, her mistrust of groups extends beyond those that are overtly anti-democratic. Badinter follows in the tradition of Rousseau, who believed that *no* group allegiances should divert the individual's fundamental sense of self away from commonality. Only the interchangeability of all individuals makes possible the unification of all citizens.[13]

Badinter's polemic against 'differential' feminists is ultimately an argument about the structure of contemporary democratic society. While some feminist theorists underscore the continuing importance of gender in modern societies, Badinter's feminism consists in highlighting its non-importance. In *The unopposite sex*, she portrays the Enlightenment as the start of modernity because it posited equality, in the sense of resemblance, between the sexes. Condorcet, among others, affirmed that all apparent differences between the sexes were the result of education. While emphasizing the slow progress of equality up to the 1960s, Badinter insists that patriarchy in the West ended in the 1960s. Female contraception and abortion were decisive factors. They 'struck the final blow against the patriarchal family, giving the control of procreation to the other side'. Also undermining patriarchy is women's growing economic independence and the increasing sense of the bisexuality common to both sexes. These factors have 'reduced the otherness of the sexes to the strict minimum. (Badinter 1989 [1986], pp. 139–40, 170)

Dead end feminism is Badinter's best-selling polemic against what she calls 'the new wave of feminism' from the United States. According to Badinter, French feminists, influenced by Catherine McKinnon and other American theorists, have made a decisive social scientific mistake by developing an image of women as innocent victims of male violence. Badinter provocatively argues that differential feminists have inflated the meaning of 'sexual harassment' in order to exaggerate male misbehaviour and to preserve an image of Western societies as incorrigibly patriarchal. She also argues that feminist social science is guilty of idealizing the nature of women as peacemakers. She highlights the role of women in the Rwandan genocide of 1994, the problem of the battered husband and patterns of female abuse of the elderly. 'Violence belongs to humanity', she states. It is not gendered. She scorns the idea that women are naturally better listeners, more empathetic or more parental in nature than men. She suggests that the theme of 'equality in difference' was able to gain ground because of the concurrent popularity of cultural relativism in the academy in the 1990s and beyond. When the headscarf issue emerged, too many 'ignored the symbolism of submission to see in it only an act of freedom that called for indulgence'. 'It is high time, as well, to be reminded that no religion, no culture, can ever have the last word against the equality of the sexes' (Badinter 2006 [2003], pp. 2, 4–5, 11, 23, 50, 89–93 for all the views in

this paragraph). Ultimately, her viewpoint prevailed in the headscarf controversy.

She prevailed against the full veil too. The many references to her in the Information Committee's report constitute a declaration that ambiguities in the meaning of equality will be resolved in favour of sameness, not difference. In the report, the veil becomes doubly anti-democratic in its symbolism: not only a refusal of reciprocity but an affirmation of particularity (of women's unique identity, of Islam's unique customs) – thus a refusal of universality. A whole chapter of the Information Committee's report is entitled 'The deleterious sign of a quest for identity and the emblem of communitarian and radical movements'. The report here acknowledges the existence of multicultural theorists, notably the Canadian philosopher Charles Taylor. However, the report portrays his theory as a form of 'differentialism' inconsistent with French democratic traditions (ANRI, 2010, p. 65). The report also cites instances of ethnic conflict in Canada and England, and suggests that the governments of these countries are already rethinking their commitment to multiculturalism (ANRI, 2010, pp. 66, 81, 83–4).

As for the United States, the report concedes that there is a consensus on accommodating unconventional religious practices. However, it states that the United States is a completely different type of democracy, one in which religious freedom is valued so highly that it can be limited only to protect serious breaches of security (ANRI, 2010, pp. 81–2). This shows that the Information Committee was conscious of the distinction between social harms that are overt or material (and may sometimes be regulated in the United States, even when perpetrated under the cover of religion) and social harms that are more symbolic (such as those imputed to the full veil in the Information Committee's report). Having seen how French social theorists construed this symbolic harm, we turn now to consider how it was able to filter through French and European human rights law. This will allow us to suggest some fundamental differences between Europe and the United States when it comes to the relationship between jurisprudence and social theory.

The 'free exercise' of religion contrasted to the 'societal public order'

'A person gets from a symbol the meaning he puts into it'

According to Max Weber 'The external courses of religious behavior are so diverse that an understanding of this behavior can only be achieved from the viewpoint of the subjective experiences, ideas, and purposes of the individuals concerned – in short, from the viewpoint of the religious behavior's 'meaning' (*Sinn*)' (1978, p. 399). When issues concerning the boundaries of religious freedom arise in the United States, a Weberian tendency to portray the subjective views of the religious actors is in evidence. But this is not a by-product of Weberian or other modes of modern social theory. It originates in an

older concept of the social contract that enshrines respect for religious identity. James Madison wrote:

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe. . ..We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.
>
> (Madison, 1901 [1785], p. 185)

This passage contains three important suppositions. The first is that, Hobbes and Rousseau notwithstanding, religious commitments can stream into the public sphere without creating a war of all against all or destroying common citizenship. The second is that religious conscience is like property – it is owned by an individual prior to the social contract. In fact, Madison stated, 'Conscience is the most sacred of all property' (2006 [1792], p. 223). Religion is pre-social and one of the goods that society is designed to preserve. The third is that religious freedom implies not only the right to believe inwardly but the right to behave outwardly – 'exercise' as well as 'conscience'. The term 'exercise' carried into the First Amendment of the Constitution, which Madison helped to draft. 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'.

This is not to say that US history is one of continuous respect for diverse religious practices. In fact, as the wording clearly shows, the First Amendment was meant to limit the power of Congress – not government in general – to control religion. Some American states had established religions well into the nineteenth century. The official religion of Massachusetts was Congregationalism until 1833. The Madisonian conception of free exercise does help to explain the growth over time of constitutional doctrines emphasizing the accommodation of unpopular religious practices. Religious accommodation gained ground particularly after the Supreme Court ruled, starting in the 1920s, that the First Amendment protects speech and religion not only against Congress but against all branches of government, federal and local.[14] Once the Supreme Court established itself as the protector of the First Amendment against all modes of government, it began striking down laws that limited the free exercise of religion. Thus arose the tradition of carefully

scrutinizing the meaning of a religious symbol or practice for the religious actor.

West Virginia v. Barnette was a case during the Second World War concerning a state law that required public school students to salute the American flag and to recite the pledge of allegiance. Justice Robert Jackson observed that the Jehovah's Witnesses believe that:

> the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: 'Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them.' They consider that the flag is an 'image' within this command.
>
> (Jackson, 1943, p. 629)

Noting that '[a] person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn', Jackson argued that it is not the government's role to impose ideological orthodoxies. This suggests that even a governmental symbol, such as the flag, has no 'objective' meaning in the sense used by Bidar when he spoke to the Information Committee.

Wisconsin v. Yoder concerned the right of Amish families to be exempt from the state's compulsory education law. The Chief Justice of the Supreme Court delivered the opinion in favour of the Amish, focusing closely on their attitudes toward mixing with outsiders. 'They believed that by sending their children to high school, they would . . . endanger their own salvation and that of their children' (Burger, 1972, p. 208). The refusal of Amish families to send their children to school can be likened to the full veil, because in both instances the religious actors believe that interaction with others will corrupt them. While the French reserve the right to consider this posture unsociable and unacceptable, it is accommodated in the United States because it does not disrupt the functioning of schools. In a 2003 case involving a public school teacher in Pennsylvania who wore a cross, a federal judge, ruling in favour of the teacher, highlighted the teacher's conception of the symbol:

> Ms. Nichol testified, inter alia, that her mother gave her the cross as a gift after her mother's stroke in 1996, and she began wearing the cross to school shortly after that . . . .Ms. Nichol also stated the following reason she wore her cross and refused to take it off upon request: 'I believe in Jesus Christ as my Lord and Savior. And I believe that this would be denying him in a sense of tucking this cross in because I am not ashamed of my Lord and Savior Jesus. I will do nothing to deny my faith and belief in him.
>
> (Schwab, 2003, pp. 554–5)

Again, given the absence of proof that the religious symbol materially disrupted the school's activities, the court gave priority to the actor's construction of the symbol.

American courts have made it clear that religious practices are generally to be accommodated by law.[15] Hence, local authorities know they face a losing battle if they oppose Islamic coverings. In 2003, a public school principal in Oklahoma asked an 11-year-old Muslim girl to remove her headscarf because the school had a general ban on headgear (to discourage gang symbolism). However, soon after judicial briefs were filed defending the religious and privacy rights of the student and her family, the school quickly agreed to settle out of court. The school added an exception for religious coverings to its headgear ban, and paid an undisclosed sum of monetary damages to the student's family (Gordon, 2008, pp. 37–9). In January 2005, when a student at a Tennessee High School was reprimanded for her religious headscarf, a local civil rights attorney reminded the school that religious expression is protected by the Constitution. The superintendent conceded the point right away: 'This particular item was a little different because it is a religious garment' (Gordon, 2008, p. 39).

In France, the legal discourse approximates to a reverse image of the American model. The concept of religious freedom, though referenced in the 1789 Declaration of the Rights of Man, has not thickened over the course of modern French history into a broad right to exercise one's religion. But the concept of what comprises a harm to public order constantly flexes, providing philosophers and theorists with a wide opening for their social critique of religious practices.

The public order limitation on religion

France's constitution does not reference religious freedom, except by way of the 1789 Declaration, whose authority is acknowledged in the constitution's preamble. Article 10 of the Declaration reads: 'No one shall be disturbed on account of his opinions, even his religious views, provided their manifestation does not disturb the public order established by law'. Two linguistic differences from the American First Amendment are that this text does not protect the 'exercise' of religion and it explicitly posits a limit on religious rights (the First Amendment does not). Moreover, the concept of public order has never been narrowly construed for the sake of protecting religious freedom. Gunn (2004, p. 467, n. 214) states: 'While American jurists might see public order as an unduly vague doctrine . . . it is well respected and is an integral aspect of French law.' The emergence of trans-national human rights law has not diminished the public order limit on religious freedom. Article 9 of the European Convention on Human Rights itemizes several restrictions, including 'public order', on religious freedom. Article 9 finds its origins in a draft drawn up by the International Juridical Section of the

European Movement in the summer of 1949 and referred to a Committee of Experts that met in February and March 1950. Committee members from France and Turkey wished to ensure that their national laws limiting religion would not become illegal by international standards. They recommended limits on religious freedom that entered into the final document (Evans, 1997, pp. 264–72, 281–333). The European Court of Human Rights, when interpreting Article 9, continues to be deferential toward national laws restricting religion. In cases involving bans on Islamic head coverings, the ECHR has repeatedly upheld restrictions. Reviewing these and other religious cases, Ovey and White (2006, pp. 300–16) have highlighted the narrow character, compared to the United States, of religious freedom in the European rights system.

The 'societal' public order

References to 'public order' must of course be more than rhetorical; they must fit into a conception of what public order is. But who gets to define 'public order' and update it in light of new (or perceived new) threats to the community? In France, generally speaking, it is the legislature, not the judiciary. Guy Carcassone, a professor of public law, has authored a textbook (2004) on the French constitution that explains the long French tradition of regarding legislative will as dominant. The elected deputies are presumed to represent the French people, the source of all sovereignty. The constitution of the Fifth Republic, implemented in 1958, created some new limits on legislative sovereignty in light of lessons learned about parliamentary supremacy during the unstable Fourth Republic. But these limits were achieved primarily by heightening the power of the presidency, not by enhancing the judiciary's role as protector of fundamental rights. Compared to the United States, in fact, France has a weak tradition of judicial review. Tocqueville observed, 'There is virtually no political question in the United States that does not sooner or later resolve itself into a judicial question' (2004[1835], p. 310). In contrast, the French Republican tradition has been shaped by the principle that the law (*la loi*) is sacred. Legislation expresses the general will, the national sovereignty. As such, the law is infallible.

Admittedly, a process of judicialization has been occurring in France since the 1970s. In 1971, the Constitutional Council decided that it could scrutinize legislation for its conformity to provisions of the Declaration of the Rights of Man and the Citizen of 1789 as well as the preamble to the 1946 Constitution (which proclaims numerous rights). In 1974, the Constitution was amended to facilitate the referral of legislative enactments to the Constitutional Council. The referral, however, could be made only by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate or 60 deputies of the National Assembly or 60 senators. This review could take place only between the time

of enactment and the time of promulgation. The Council could not invalidate laws already in effect. Ordinary citizens could not initiate constitutional review at any time. An important change took place in 2008, with the addition of article 61–1 to the Constitution (which entered into force on 1 March 2010). The article allows litigants to question the constitutionality of a law implicated in their case. More precisely, the litigant may refer the question to one of two other bodies, the Council of State, or the Court of Cassation, and these may in turn recommend that the Constitutional Council review the question. As Martin A. Rogoff writes, 'What was once unthinkable for fear of "the government of judges' is now a reality'" (2011).[16]

The advent of judicial review in France, however, does not mean that religious questions in general, or the veil in particular, will be treated any differently in the future. Our analysis suggests that judicial review alone is not the reason for the protection of religious freedoms in the United States. There must be a set of constitutional principles to guide judicial review towards an empathetic understanding of the religious actor. These principles are lacking in France; even the Declaration of the Rights of Man and the Citizen subordinates religious freedom to 'public order'.

Thus, when the National Assembly paused to consider the constitutionality of banning the veil, it did not quiver at the prospect of review by the Constitutional Council. It merely had to tweak the concept of public order. One of the legal specialists consulted in the Information Committee about whether a ban on full veils would be constitutionally acceptable was Carcassone. André Gerin, the president of the Information Committee and a member of the French Communist Party, introduced Carcassone in a manner suggesting that legislative will is presumptively constitutional. 'Our decision ultimately will be political', he stated, though he added, 'But our committee naturally takes into account the juridical aspects of the question' (ANRI, 2010, p. 544). It is not surprising that Carcassone's testimony provided a brief for, not against, the legislature's jurisdiction to ban the full veil. He noted that, to avoid religious discrimination, a ban would have to apply to face coverings in general, not just Islamic veils. But once formulated in this neutral manner, 'the solution is simple', '[i]t will suffice to adopt a law based on public order and security'. Realizing that the Information Committee had no intention of proving that full veils were the source of violent disruptions on the streets, he proceeded to stress that public order includes showing respect for the traditional 'social' values of the republic. In this way, he suggested that 'public order' could be elongated towards the social. 'There exists a social consensus that for the sake of convenience I call the "social code", resting on a basis of implicit values', Carcassone said (ANRI, 2010, pp. 556–8).

The Information Committee endorsed this 'social' conception of public order in its report (ANRI, 2010, pp. 120–2). Later, the National Assembly asked a separate legislative committee to submit a report of its own on the legal

implications of banning full-face coverings. This is where the specific term 'societal public order' came to the forefront. Issued on 23 June 2010, the report stated:

> Public order includes, in its classic conception, a material dimension . . . .Public order also has an immaterial or societal dimension.
>
> The act of dissimulating one's face is experienced . . . as 'manifesting a certain symbolic violence', to borrow the terms of the philosopher Abdennour Bidar. All the persons interviewed by the Information Committee expressed themselves in similar terms, judging that the act of dissimulating in a permanent manner one's face in the public space demonstrates, on the one hand, a desire to withdraw from the public space, and on the other hand, a wish to mask one's identity. One can thus suppose that the act of dissimulating one's face in a permanent manner is manifestly contrary to the base of minimal reciprocal exigencies necessary for living in common, that is, the societal or immaterial public order.
>
> (ANRG, 2010, pp. 15-16 for both quotations)

In July 2010, Jean-Paul Garraud, the secretary of the same committee, reiterated the concept of societal public order in a plenary session of the National Assembly:

> Now, public order is not limited to public security, public tranquillity, or public health . . . .Public order is living together (*vivre ensemble*). It is the harmonious relations that must be maintained at the heart of our society . . . .This societal, immaterial, social public order finds its roots in our fundamental texts . . . as the Council of State has many times reminded us when defining that minimal base of reciprocal exigencies indispensable for social living.
>
> (ANJO, 2010, pp. 5423–4)

The organ to which Garraud refers, the Council of State, had indeed been consulted by the Prime Minister in January 2010 on the advisability of a ban on full veils. The Council had not endorsed the societal public order as enthusiastically as Garraud suggested. In fact, it described this principle as 'fragile' and lacking solid precedents. Yet, the Council conceded that public order in general is an evolving concept and that it falls upon the legislature periodically to redefine what this concept means. The principle of societal public order, the Council concluded, is sufficient to provide legal legitimacy for a ban.

> From this perspective, one can maintain that public order responds to a minimal base of reciprocal exigencies and guarantees essential for life in society . . . .Now, these fundamental exigencies of the social contract, implicit and permanent, can imply, in our Republic, that once the individual is in a public place in a broad sense, that is where one is likely to cross others in a fortuitous manner, one

> cannot repudiate one's membership in society . . . by dissimulating one's face before others to the point of preventing all recognition.
>
> (RCE, 2010, pp. 26–7)

In Belgium, the president of the Chamber of Deputies, Patrick Dewael, summarized the Council of State's report. He advised the Chamber to use the same 'enlarged and updated conception of public order' (CRB2, 2010, p. 26).

The only thing missing for a full legal validation of the ban on full face coverings was the imprimatur of the Constitutional Council. That came on 7 October 2010, when the Council, having been asked by the presidents of the National Assembly and Senate to review the ban before its implementation, dispatched the issue quickly in six paragraphs. The Council stated that it was reasonable for the legislator to believe that full-face coverings 'undermine the minimal requirements of life in society . . . and that by adopting the provisions referred to us, the legislature has completed and generalized rules previously applied in specific situations for the protection of public order' (CC, 2010, paragraph 4). The concept of 'societal', 'social' and 'immaterial' public order thus provided a smooth transition between constitutional law and the theories expounded by Bidar, Badinter and others in the Information Committee. Non-legal conceptions of the full veil's impact on the 'social' or 'sociable' underpinnings of democracy were able to get legislative and constitutional traction.

Conclusions

What are the implications of our analysis of the social theory associated with the ban on full-face coverings? Without claiming to be definitive, we suggest three major conclusions.

1. The first is that racism, as an explanatory concept, needs to be viewed critically when assessing contemporary controversies over Islamic practices. Islamophobia should not be the default explanatory category.[17] We have shown that, in France and Belgium, individuals from multiple political parties and religions have chosen to formulate their opposition to full veils in terms relating to the needs of democratic society. Political opinions on the full veil can no longer be reduced to an underlying habitus (Islamophobia). The theoretical terms of the controversy are now important in their own right. As a report issued by a Belgian foundation, Centre Avec, states:

> The visibility of Islam and the claim by Belgian Muslims for recognition of their cultural diversity is stimulating a lively opposition in the country. The latter is no longer confined to the extreme populist Right wing milieu, typically hostile to foreigners, or to the milieu of the Right enamoured of patriotic order and cultural homogeneity. It is also, and perhaps especially, current in the

> milieu of free thought and philosophical secularism, traditionally antiracist. These groups do battle against manifestations of Islam, notably the wearing of the veil, in the name of the universality of human rights and the liberation of women. *The antiracist movement is today profoundly divided on this question.*
>
> (Faux, 2010, p. 5, emphasis added)

In sum, the full veil does not merely reflect pre-existing social divisions and prejudices; it is creating new intellectual fissures and choices.

2. If racism is not constitutive of the opposition to full veils, then a critique of racism cannot be an effective way of defending the right of Muslim women to wear them. The most powerful basis for opposing bans is to defend religious freedom. All other arguments, we believe, are less potent. Arguments to the effect that government should be tolerant of diverse 'cultures' have some utility for defenders of religious head coverings but are open to the rebuttal that diversity must have limits to protect public welfare and democracy. Once a society agrees that certain limits, say on Nazi or paedophile organizations, must be respected, these principles will automatically transfer to religious behaviours that strike the majority as directly or indirectly subversive of democratic order – unless religion is given a higher status of legal protection. It is by highlighting, as in the United States, the distinctive importance of the free exercise of *religion* – not the freedom of political and cultural organizations in general – that one can best articulate a right to wear full veils.

In France, neither legal experts nor social theorists tend to dwell on the nature of religious freedom compared to other freedoms. This could be a result of the memory of Catholicism's linkage to absolute monarchy, a sense that religion historically has posed a barrier to democracy. Whatever the reason, it is clear that even the social theorists who advised the Information Committee not to adopt a ban steered clear of articulating rights that are specific to religious persons. Jean Bauberot, a professor of sociology and theorist of multiculturalism, may serve as an example. In 2003, he had been the only dissenting member of the Stasi Commission that recommended banning the headscarf in schools. When he testified in the Information Committee, he opposed a ban on full veils, but it is difficult to distil a compelling principle from his testimony. In fact, his comments are tinged by the same discourse of the 'social' that others used against full veils. Bauberot stated that 'the knowledge available on the full veil' shows that those who wear it seek 'to maximize their distance' from others and to express their 'rejection of society'. While stating that a democracy ought to be open to criticism, he underscored that 'wearing the full veil is certainly not a good way to begin a process of questioning'.

> Even when worn voluntarily, the full veil goes astray. The rejection of social uniformity leads one to dress in a uniform way – which is very different from manifesting one's own identity through other signs. In this manner, one

> inscribes one's person into a single identity, one erases one's other personal characteristics, one effaces one's individuality.
>
> (ANRI, 2010, p. 424)

Bauberot thus conceded that the full veil is socially deleterious. His basis for opposing a ban was that, unlike genital mutilation, full veils harm the woman only 'temporarily' and not 'permanently'. This does not rebut those who argued that the harm is to all those in the democratic public sphere, not just the veiled woman. Similarly, when the socialist bloc of the National Assembly refused to vote on the final bill, it was a matter of party discipline not conviction: they did not wish to appear supportive of president Sarkozy and the centre and right parties supporting the ban. They had no more tolerance for the burqa than the right – otherwise, the socialists would have voted *against* the law. 'We are totally opposed to the burka. The burka is a prison for women and has no place in the French Republic', said socialist party spokesman Benoit Hamon (BBC, 2010).[18]

3. Our discussion of the United States indicates that, when a nation has a strong tradition of judicial review and when religious freedom is a priority in this tradition, it will be difficult for social theorists to censor religious practices. But, when a democracy is more concerned with maintaining the social mores that serve as an ideal foundation for equal citizenship, then theorists have ample room to test religion. There appears to be a mutually exclusive relationship between the ideal of maximizing religious freedom, on the one hand, and the idea of maximizing social solidarity and equality among citizens, on the other. This is because the concept of the social and the concept of the religious compete with each other for ontological priority.

What comes first, society or religion? Today, the full veil triggers this question more than any other religious symbol. The full veil stimulates theorists to reflect upon the foundation of democracy, to look again at the social contract. How we articulate this imaginary origin shapes how we perceive the ongoing mission of democracy. Is it to elongate the political toward the social, in order to make citizens equal, or towards the religious, in order to preserve what is subjectively most sacred to the individual? France and Belgium, in the course of their inquiries into the full veil, have embraced the social. As one Belgian deputy, Bart Somers of the Open Flemish Liberals and Democrats, stated:

> All clothing which covers nearly the entire face dehumanizes the individual who wears it. It alters the capacities of the human being as a *social*, communicative, and participatory individual, as a human being capable of recognizing others and able to be recognized in *society*....The increasing diversity of multicultural society rests on a base of shared values and ideas. Clothing that covers the face is incompatible with the latter and constitutes an attack on the principles of the Enlightenment.
>
> (CRB1, 2011, pp. 10–11, emphasis added)

The evocation of the eighteenth century is fitting. The article 'Philosopher' in Diderot and d'Alembert's *Encyclopedia* stated: 'For him [the philosopher], civil society is, as it were, a divinity on earth'. Baker, commenting on the explosion of the words 'society' and 'social' in the French Enlightenment, suggests that society replaced religion 'as the ultimate ground of order' (1994, p. 113). Sewell provides a trenchant summary of Baker's findings:

> In the disenchanted world that the Enlightenment invented and that the social sciences have taken up as their object of study, 'society' and the 'social' came to signify the complex and ultimately unknowable reality of human existence, a reality previously represented by such religious concepts as Divine Will or Providence. 'The social' inherited the mysterious ontological referent of the divine, but 'the social' represents this ultimate reality very differently – not as an inscrutable anthropomorphic will but as constituted by a complex 'interdependence in human relations.
>
> (Sewell, 2005, pp. 325–6; the quoted words at end refer to Baker, 1994, p. 114)

By conceptualizing the full veil as a rejection of reciprocity and 'societal' public order, French and Belgian legislators have affirmed the primacy of the social over the religious. If the argument does not persuade in the United States, this is because the Madisonian Enlightenment did not consecrate society: it configured the individual, with a pre-vested interest in property, part of which is one's relationship to God, one's conscience, as the basic unit of political association. We may safely conclude that most democracies are located along a spectrum, between the poles of France and the United States. The future of the burqa and the niqab in the West will depend on whether each country gravitates toward one pole or the other – the religion of society or the society of religions.

Notes

1 In this paper, the term 'veil' refers to any kind of religious head covering, whether it completely covers the face or not. 'Headscarf' refers to a covering that leaves the face exposed. 'Burqa' and 'niqab' are full-face coverings and are also referred to as 'full veils'.

2 An excellent overview is 'Le port de la burqa dans les lieux publics', *Étude de législation comparée* no. 201, October 2009, by the French Senate. Retrieved from http://www.senat.fr/lc/lc201/lc201_mono.html See also 'Italy approves draft law to ban burqa', *Guardian*, 2 August 2011. Retrieved from http://www.guardian.co.uk/world/2011/aug/03/italy-draft-law-burqa

3 Law no. 2010–1192 of 11 October, published in *Journal officiel de la République française*, no. 0237, 12 October 2010, p. 18344. The law went into effect six months later. The law defines the public space as inclusive of all public thoroughfares, places open to the public and places offering public services. It also makes exceptions for festivals, sports and other circumstances.

4 We have used acronyms for certain legal documents produced by governmental committees. See references at the end of the paper.
5 Legislative initiatives to ban full veils in public actually began years earlier in Belgium than in France. But, until the French Information Committee issued its report, Belgian advocates argued that a ban was needed to protect against terrorism and vandalism. See, e.g., Chambre des représentants de Belgique, 'Proposition de loi insérant un article 563bis dans le Code penal en vue d'interdire à toute personne de circuler sur la voie publique et/ou dans les lieux publics le visage masqué, déguisé, our dissimulé', 6 November 2007'. There is no social theory in this proposal. As we suggest later in this paper, after the French Information Committee's report, legislative discussion in Belgium included the theories of social reciprocity articulated in France. With these new ideas, a ban was ratified.
6 We focus in this paper on the influence that social theorists wielded in the legislature. We hypothesize, but do not attempt to prove within the limits of this paper, that European theorists also help to constitute public opinion's opposition to the full veil. The theorists who testified against the full veil in the Information Committee were often public intellectuals with a record of writing in the popular press. The National Assembly also posted videos of the academic testimonies on its internet; 100,000 hits had been counted even before the Information Committee issued its report on 26 January 2010 (ANRI, 2010, p. 21).
7 For further theoretical articulation of this notion of politics, see Debray (1981, pp. 392, 397).
8 More balanced is the treatment by Bowen, but even he provides an in-depth summary of only one theorist of secularism, Marcel Gauchet. At times he appears to endorse the view that the debate over the headscarf was 'irrational' and lacked 'complexity' (2007, pp. 184–88, 244).
9 This analysis confirms Elias's classic accounts of the importance of civility in French culture (1983 [1969], 1994 [1939]). However, Elias focused on the hierarchical content of French courtly manners. He did not capture the growth of a new code of egalitarian sociability in the seventeenth and eighteenth centuries (see Gordon, 1994, 2002).
10 Striking examples of references to Levinas in France beyond the Information Committee are in the National Assembly sessions of 11 May 2010 and 7 July 2010. (All references to Levinas in the National Assembly's deliberations may be retrieved through the National Assembly's website at http://recherche2.assemblee-nationale.fr/resultats.jsp?texterecherche=levinas&legislatureNum=13&auteurid=&categoryid=&texterecherche=levinas&ResultStart=&ResultCount=).
11 See, e.g., the report by the Mouvement Réformateur proposing a ban on clothing that covers the face (Chambre des représentants de Belgique, session extraordinaire, 28 September 2010, pp. 6–7). Also, the Chamber of Deputies' deliberations 29 April 2010 (CRB2, 2010, p. 24), which is where Badinter is cited as an 'eminent' theorist.
12 For fuller discussion of the distinction between 'procedural' and 'substantive' democracy, see Fox and Nolte (1995).
13 See, especially, 'The Sovereign', bk 1, ch. 7, of Rousseau's (1988 [1762]) *Social Contract* as well as Blum (1989) and Shklar (1969).
14 *Gitlow v. New York* (1927) 268 U.S. 652 is the key case. It involved free speech. Other liberties guaranteed in the First and other amendments were subsequently 'incorporated' against the states.
15 The Supreme Court case of *Oregon v. Smith* (1990) appears to be an exception but has not changed the tendency to accommodate religion. The case ruled that that the First Amendment does not yield a right to use illegal narcotics in religious ceremonies. It enhanced the capacity of states to enforce laws that are not intended to target religious activities but affect them only incidentally. However, states may still choose to accommodate religious usages of narcotics, and they often do. Also, the Oregon case

holds that, if a law restricts the individual's religious freedom and some other constitutional freedom (such as free speech) simultaneously, the government must demonstrate a higher level of public necessity for the law ('compelling governmental interest'). The Oregon case has not deterred the growing trend to make religious persons exempt from laws that others must follow. See Hamilton (2005).

16 For discussion of the implications of the 2008 constitutional amendment, see in addition to Rogoff (2011), Duhamel (2011).

17 For further critical discussion of the concept of Islamophobia, see Baehr (2011).

18 See also the declaration by the socialist group in the Information Committee stating that, while the burqa is 'incompatible with the Republic and its values', the group will abstain (ANRI, 2010, p. 189). Jean Glavany, the socialist politician who delivered this declaration, bitterly disagreed with Bauberot when the latter advised against a ban. Glavany said that covering one's face was too radical a practice to be worthy of the 'reasonable accommodations' that multiculturalists advocated. His many interjections in the Information Committee show he was militantly supportive of a ban (for the exchange with Bauberot, see ANRI, 2010, pp. 427–8; for his utterances defending a ban, see, e.g., pp. 280, 288–9, 455, 460, 464, 465, 487, 525).

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