
State paternalism and religious dress code

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The so-called “burqa ban” in France (July 13, 2010) suffers from even graver flaws than the 2004 hijab ban, insofar that it extends paternalistic coercion from children onto adults. The article further explores the question as to whether, if there are relevant differences between the hijab and the niqab, they have any bearing on the normative case against legal regulation, including within state schools.

In my previous research, I used the case study of the 2004 ban on religious signs in French public schools to articulate and defend a *critical republicanism*. This critical republicanism sharply rejects recent moves towards the state regulation of Muslim (particularly female) dress and practices. However, it seeks to reformulate and uphold a progressive republicanism—one informed by the insights of critical theory, yet able to rescue positive republican ideals of freedom, equality, and community. A version of these ideals was, at least ostensibly, present in the justifications advanced in France for the 2004 law.¹ Advocates of the law drew on the ideals of (a) individual autonomy, to argue that women must be emancipated from oppressive forms of religious belief; (b) secular equality, to suggest that a religion-free public sphere is the best way to show respect to all citizens regardless of their religion; and (c) national cohesion, to denounce religious signs as “ostentatious” symbols of divisiveness and of insufficient

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¹ My claim is not that the passing of the law was *motivated*, let alone *caused*, by high-minded philosophical ideals (much more sordid political calculations played a now well-documented part). However, insofar as ideals were brought upon to *legitimize* or *justify* the law, it is important to engage and contest them at the same level: that of normative political argument.

integration of minorities into the national community. Yet, as I have argued elsewhere, no plausible interpretation of the three central republican ideals justifies a ban on religious signs in schools. However, this should not be taken to imply that the ideals themselves are not worth defending, provided they are incorporated into what I call a “critical republicanism.”²

In this article, I concentrate on the first line of the argument in support of the ban: the autonomy-based, paternalist line of reasoning. It posits that the prohibition of *hijab* in schools assists the emancipation and autonomy of young girls.³ In the first section, I briefly summarize the republican paternalist position against the *hijab* and explain why it is flawed, in the light of the critical republican ideal of non-domination. In the second section, I expand the argument and apply it to recent controversies around the wearing of the burqa or *niqab* (full-face covering). I argue that the so-called “burqa ban” in France (July 13, 2010) suffers from even graver flaws than the 2004 *hijab* ban, to the extent that it extends paternalistic coercion from children onto adults. More generally, I explore the question as to whether, if there are relevant differences between the *hijab* and the *niqab*, they have any bearing on the normative case against legal regulation.

1. Hijab, republican paternalism and non-domination

In this first section, I briefly reconstruct the terms of the debate about state paternalism, before setting out an alternative approach based on the critical republican ideal of non-domination.⁴ The paternalist, autonomy-based argument for the ban on *hijab* in schools has three steps. First, it sets out a normative ideal of the republican state as promoting individual autonomy. The republican ideal of liberty is closer to Isaiah Berlin’s ideal of “positive liberty”—the realization of one’s essence as a rational being able to reflect upon inherited beliefs and identities—than to a purely “negative” ideal of liberty as non-interference. In republican mythology, since the 1789 Revolution, the French state has been the main driving force behind the emancipation of individuals, notably from the grip of the reactionary, illiberal, and authoritarian Catholic church. The French state, as a result, is routinely described as an emancipatory institution, while the sources of “communitarian” oppression are firmly located in the civil society (the family, churches, and now immigrant communities).⁵ One group which has (largely retrospectively) been constructed as the object of special state concern were women who, thanks to the republic, were said to have been emancipated

² CÉCILE LABORDE, *CRITICAL REPUBLICANISM: THE HIJAB CONTROVERSY AND POLITICAL PHILOSOPHY* (2008).

³ Note that this line of argument, in contrast to the other two, is not meant to apply to all religious signs but only to those (Islamic) signs which were interpreted as symbols of male domination.

⁴ A fuller argument can be found in my *CRITICAL REPUBLICANISM*; see *supra* note 2, at chapters 5–7.

⁵ CLAUDE NICOLET, *L’IDÉE RÉPUBLICAINE EN FRANCE (1789–1924). ESSAI D’HISTOIRE CRITIQUE* [The Republican Idea in France (1789–1924): An Essay in Critical History] 483 (Gallimard 1994); PIERRE ROSANVALLON, *L’ÉTAT EN FRANCE. DE 1789 À NOS JOURS* [Statehood in France. From 1789 to the Present] 93–135 (Seuil 1990); ALAIN FINKIELKRAUT, *LA DÉFAITE DE LA PENSÉE* (Gallimard 1987), translated as *THE DEFEAT OF THE MIND* (Judith Friedlander trans., 1995).

from patriarchal Catholic domination. The second step of the argument draws an analogy between nineteenth-century female oppression and the religious and patriarchal domination symbolized by the wearing of *hijab* by women of immigrant origin in contemporary France. The “veiled woman”—much like the Catholic nun at the turn of the twentieth century—is perceived as the contemporary figure of the “anti-Marianne.”⁶ She is a visible symbol of the rejection of the “secular feminism” (*féminisme laïc*) articulated in France in the 1980s and 1990s.⁷ For many republican ideologues, the contemporary Islamic revival in France is, at heart, a deeply patriarchal and reactionary movement.⁸ It flourishes within embattled immigrant communities, who have come to hold the preservation of the dignity and modesty of “their” women as the guarantee of the honor of the group as a whole. This Islamic revival is, therefore, fundamentally anti-feminist. The republican state should firmly side with women all around the world who fight against the regression of women’s status. The republican paternalist argument, therefore, has established so far (a) that the republican state promotes autonomy and (b) that the *hijab* is a symbol of heteronomy. But if that is the case, we may ask, why should the *hijab* be banned only in schools? And, on the other hand, does not the ban on *hijab* conflict with the ideal of autonomy itself?

To answer these questions, we need to reconstruct the third, crucial step of the argument. It appeals to the republican philosophy of *education*.⁹ On the republican view, it is mostly (if not exclusively) within schools that the state is able to promote the ideal of autonomy. Schoolchildren are taught to reflect on the norms and values they have inherited from their family, peer group, or religious community: education is the best weapon against the unreflected internalization of heteronomous norms. Adults, by contrast, should not be “forced to be free” in the same way: the best the state can do against the dangers of “mental manipulation” by dangerous “sects” is not to ban them or forcibly prevent individuals from joining them but, instead, to inform the public about their perceived risks. Republican paternalism, therefore, is primarily an educational paternalism. Within schools, a robust and substantive ideal of autonomy is promoted. Pupils are not only exposed to a variety of life choices; they are encouraged to think of themselves as individuals potentially detached from their religious beliefs and identities. Thus, within schools, pupils do not only learn about autonomy, they are expected to practice it. By removing their *hijab*, young girls can experience and experiment with new forms of freedom—the freedom freely to interact with members of both sexes, to speak their minds, and so forth. On the republican paternalist view, the *hijab* is not merely a sign of religious piety: it is an obstacle to free thinking and learning.

⁶ Florence Rochefort, *Foulard, genre et laïcité en France* [The Headscarf, Gender, and Laicity in France] 75 VINGTIÈME SIÈCLE 145, 148 (2002).

⁷ FADELA AMERA, NI PUTES, NI SOUMISES [Neither Whores Nor Submissives] (La Découverte 2003); NACIRA GUÉNIF SOULAMAS & ERIC MACÉ, LES FÉMINISTES ET LE GARÇON ARABE [The Feminists and the Arab Boy] 8–10 (Editions de l’Aube 2004).

⁸ JANE H. BAYES & NAVEREH TOHIDI, GLOBALIZATION, GENDER AND RELIGION: THE POLITICS OF WOMEN’S RIGHTS IN CATHOLIC AND MUSLIM CONTEXTS 18 (2001).

⁹ HENRI PENNA-RUIZ, DIEU ET MARIANNE. PHILOSOPHIE DE LA LAÏCITÉ [God and Marianne. The Philosophy of Laicity] 288 (Presses Universitaires de France 1999); CATHERINE KINTZLER, LA RÉPUBLIQUE EN QUESTIONS [The Republic in Questions] 78–81, 85 (Minerve 1996).

This republican paternalist argument, which I have sought to reconstruct in its most plausible version, has been subjected to powerful and devastating criticisms. Two main points have been raised. The first concerns the normative premises of state paternalism. The ban on *hijab* is not an ordinary school regulation. It has led to the exclusion of recalcitrant pupils from school which—arguably—will not aid their emancipation through education. And on which grounds can the mere wearing of religious dress be deemed to be an obstacle to intellectual development?¹⁰ More generally, critics have challenged the conflation between piety and heteronomy implicit in republican paternalistic ideology. In many republican writings, Muslim piety has replaced the old Catholic faith as a sign of “mental manipulation” or “voluntary servitude.”¹¹ Yet in contemporary France, it may well be the pious and the faithful who are exercising the highest degree of individual autonomy, given the range of societal pressures (including youth fashion) pushing in the opposite direction. The second point made by critics questions the so-called “secular feminist” critique of the *hijab*. Republican paternalists mistakenly analyze the neo-Islamic revival as a pre-modern, reactionary, anti-individualist movement. This is because they interpret it through an antiquated anticlerical lens which, while it may have had purchase in combating nineteenth-century Catholic domination, mis-targets contemporary Islam. The Islamic revival in Europe should, instead, be read against the renewed interest in spirituality among the young—many of them do not look back to the “old” religion of their family or country of origin but, rather, seek to invent a European Islam shaped by individualism, globalization, and the virtual (internet-mediated) *Umma*, and offer an “alternative modernity” to the consumerist and secularist modernity dominant in the West.¹² Some have gone further and argued that this neo-Islamism is not necessarily patriarchal or anti-feminist. Young women are not necessarily victims: they are agents and subjects of their spiritual lives, and they assert their agency in relation to their religion.¹³ Wearing a *hijab* can be an ingenious way to reconcile a commitment to faith and family on the one hand, and freedom in the public sphere on the other.¹⁴ More radically, wearing a *hijab* has become a symbol of individual empowerment, whereby young women assert their right to gain direct access to the sacred texts of Islam, without the mediation of male religious authorities.¹⁵ The *hijab*, on this view, is

¹⁰ David Kessler, *Laïcité: du combat au droit* [Laicity: From the Struggle to Law], 77 *LE DÉBAT* 95, 99 (1993).

¹¹ DANIELE HERVIEU-LÉGER, *LA RELIGION EN MIETTES OU LA QUESTION DES SÈCTES* [Crumbling Religion or the Question of Sects] 185 (Calmann-Lévy 2001).

¹² FARHAD KHOSROKHAVAR, *L'ISLAM DES JEUNES* [The Islam of the Young] (Flammarion, 1997); OLIVIER ROY, *L'ISLAM MONDIALISÉ* [Globalized Islam] (Seuil 2004).

¹³ Nancy J. Hirschmann, *Western Feminism, Eastern Veiling, and the Question of Free Agency*, 5 *CONSTELLATIONS* 345, 351, and 355 (1998).

¹⁴ NACIRA GUÉNIF SOULAMAS, *DES BEURETTES* [The Beurettes] 25 (Grasset & Fasquelle, 2000); FRANÇOISE GASPARD & FARHAD KHOSROKHAVAR, *LE FOULARD ET LA RÉPUBLIQUE* [The Headscarf and the French Republic] (La Découverte 1995); NANCY VENEL, *MUSULMANS ET CITOYENS* [Muslims and Citizens] (Presses Universitaires de France 2004).

¹⁵ NADINE B. WEIBEL, *PAR-DELÀ LE VOILE. FEMMES D'ISLAM D'EUROPE* [Beyond the Veil. European Muslim Women] 201 (Complexe 2000); Homa Hoodfar, *The Veil in their Minds and on our Heads: Veiling Practices and Muslim Women in WOMAN, GENDER, RELIGION: A READER* 420, 421 (E. A. Castelli ed., 2001).

a symbol of an emerging “Islamic feminism.” The ban on *hijab* cannot be justified by appeal to the ideal of autonomy of the women wearing it, as it is itself one of the modes of postmodern individual agency.

So far, I have briefly reconstructed two positions: the first defends an ideal of individual autonomy and a paternalist ban on *hijab* in schools; the second advocates an ideal of postmodern agency and acceptance of the *hijab* as one mode of individual expression. The position that I would like to advance is distinctive and it defends both education to autonomy and acceptance of *hijab* in schools.¹⁶ This “critical republican” approach places non-domination, rather than autonomy or agency per se, at its heart. It asserts that republican paternalists are wrong to think that autonomy is about emancipation from religion and culture through the exercise of secular reason. One does not need to detach oneself from one’s beliefs and culture to be free. A life of piety and devotion is no less respectable, if it is freely accepted and endorsed, than a life of existential disengagement. A good life is not a life of permanent questioning of beliefs from a presumptively abstract, rational place. And yet, it is important that individuals be given the skills to be able to question inherited beliefs at critical junctures of their lives and, in particular, in order to resist enterprises of domination.¹⁷ On this view, the acquisition of autonomy-related skills (through education, but not exclusively) is instrumental to the good life, though not an end in itself. So, for example, I may decide to become a nun and devote my life to God: I may autonomously decide to give up my autonomy in the name of values that are more important to me, such as my commitment to God. In this perspective, education to autonomy is essential—so that no one is forced to alienate their freedom—but the exercise of autonomy is not in itself the criterion of the good life. So if autonomy is not the supreme value, is there such a thing?

Here I broadly follow Phillip Pettit in suggesting that what matters is that individuals are not *dominated*.¹⁸ Freedom from domination differs both from positive and from negative liberty. Let us recall that for republican paternalists, Muslim women are only free if they affirm their autonomy conceived as positive liberation from religious oppression. Many of their critics appeal to something like an ideal of negative liberty and argue Muslim women should be left alone to express their agency. Critical republicans, by contrast, argue that Muslim women, like all citizens, are free if they are not dominated by others, if they are protected against the arbitrary power of others. Pettit has invoked the figure of the slave to explain how one can be unfree without being interfered with. Even if my master happens to be a benign master who does not exercise his power by interfering with my plans, I am still unfree, insofar I live in a situation of anxiety and uncertainty about his future plans. On this account, domination is experienced as a subjective experience—an experience of vulnerability and dependence. By contrast, in classic analyses of domination, such as those of Karl Marx, Max

¹⁶ This position is incompatible with the “paternalist republican” stance but it is not incompatible with the broad critique of it presented in the previous paragraph. It is distinctive in that it does not assume that the *hijab* must be accepted on the grounds that it is an expression of individual autonomy or agency.

¹⁷ See also EAMONN CALLAN, *CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY* 152–157 (1997).

¹⁸ PHILLIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997).

Weber, and Pierre Bourdieu, domination works precisely because it is invisible to its victims: they internalize its norms. It is from this perspective of domination-as-socialization that education to autonomy is justified on critical republican grounds. Education to autonomy equips pupils with discursive power, the ability to contest and re-appropriate norms. In contemporary, French as well as Anglo-American, political theory, too strong a contrast is often drawn between “culture” and “religion” on the one hand, and individual “autonomy” on the other. Individual autonomy is typically presented as a measure of the presence of a substantive “right of exit” from culture or religion.¹⁹ On the critical republican perspective, by contrast, what matters is not that people have a “right of exit” but, rather, that they have a right of voice. For example—to come to back to our main topic—Muslim women do not have an interest in repudiating their religion in order to be autonomous. Rather, they have an interest in being able to criticize those interpretations of Islam which might deny their status as discursive subjects. This is what it means to be non-dominated. So education to autonomy is more effective and fairer than coercion or exclusion, insofar as it respects the discursive status of those to whom it is directed. But it implies that the state itself—and the public education system—should not be dominating. Women wearing *hijab* in France have not been heard in public discussions about them, they have been seen as victims incapable of speaking in their own name. The ban on *hijab*, to that extent, is dominating. It is rooted in the assumption that the wearing of a *hijab* makes Muslim girls resistant to the acquisition of autonomy-related skills, and thereby unable to integrate into the learning environment of the school. But such assumption is false, and teachers should not judge the beliefs and dispositions of particular children on the basis of the external religious signs they wear. It is their responsibility to inculcate generic skills to all children—most of them, *ex hypothesi*, are not autonomous yet, regardless of their religious or cultural background. It is important that all children be inculcated with such autonomy-related skills, as children may—now or later—use them to resist enterprises of domination. Of course, education is not sufficient to promote non-domination, and critical republicans advocate wider strategies of political, economic, and social empowerment. But the republican emphasis on the right kind of education to citizenship and autonomy is worth preserving.

2. From *hijab* to *niqab*

The previous section has established that, on the critical republican view, state schools should both accept that pupils wear the *hijab* and provide robust autonomy-promoting education to all. What matters is domination, and there is little evidence that the wearing of *hijab* in itself embodies a form of domination. It is for Muslim girls to decide whether they want to wear it, provided that—like other children—the education

¹⁹ See, e.g., Chandran Kukathas, *Are There Any Cultural Rights?*, 20 *POL. THEORY* 105 (1992); Susan Okin, “*Mistress of their own destiny*”: *Group rights, Gender and Realistic Rights of Exit*, 112 *ETHICS* 205 (2002); BRIAN BARRY, *CULTURE AND EQUALITY* 148–151, 239–245 (2001).

they receive exposes them to a range of possible futures. Arguments along similar lines have been put forward by critics of the ban. One interesting feature such arguments share is that, as the previous section made clear, they partly rely on two factual assumptions about the wearing of *hijab*. The first is that the *hijab* is an expression of religious faith and should not be rashly interpreted as a symbol of female oppression, inequality between the sexes, or the holding of radical Islamist political views. The second, well-documented, fact is that many young Muslim women in Europe are voluntarily choosing to wear the *hijab*—the outward symbol of a pious Muslim identity. The *hijab* is commonly and voluntarily worn by growing numbers of Muslim teenagers, and there are as many ways of wearing the *hijab* as there are ways of being a teenager. If that is the case, then, banning the *hijab* would not be a measure of benevolent paternalism but, instead, an instance of patronizing illiberalism.

At this point, we are bound to be faced with a possible line of objection. Let us assume, a critic could say, that relevant factual assumptions about the benign nature of a particular dress code do not hold. Let us assume, specifically, that there is a form of dress code—critics would typically have in mind the full-face covering, or the *niqab*—that is explicitly associated with a radical Islamist worldview and with a strict, anti-feminist view of gender roles. Would the critical republican argument against paternalistic intervention still hold? In this section, I attempt to answer this possible line of objection. It is interesting in that it points to a presumptively “hard case” of toleration. We have seen that the state does not have to tolerate the wearing of *hijab* because it does not have valid reasons to disapprove of it in the first place. (Strictly speaking, toleration refers to the patient endurance of actions one has good reasons to disapprove of.)²⁰ But if there are practices that are rightly disapproved of, does the state not have the duty to protect individuals against them?

Let us examine, then, whether the objection to a ban on *hijab* would also apply to a ban on *niqab*. I suggested in the last paragraph that this is a “presumptively” hard case, as it is not clear (to me) that the differences between the *niqab* and *hijab* are significant enough to have any bearing on the normative case against legal regulation. But let it be the case, for the sake of argument, that there are significant differences. Islam expert Olivier Roy, for example, has suggested that what is called in France “burqa” is in fact a recent (twenty-year-old) *Salafi* invention, imported to Europe from Pakistan and the Gulf states, and influenced by the conservative, puritanical, and highly prescriptive Wahhabi version of Islam sanctioned in some of these states.²¹ It is this *niqab* (often a jilbab-plus-niqab combination) that is appearing in Europe, rather than the burqa (a rural tradition imposed upon the female population of Afghanistan in the 1990s by

²⁰ SUSAN MENDUS, *TOLERATION AND THE LIMITS OF LIBERALISM* (1989); John Horton, *Toleration as a Virtue*, in *TOLERATION* 28 (David Heyd ed., 1996).

²¹ Catherine Fournier, «La burqa et le voile, ce n'est pas du tout la même chose» [“The Burqa and the Veil Are Not At All the Same Thing,” Interview with Olivier Roy], 20 MINUTES, July 16, 2008, available at <http://www.20minutes.fr/article/242108/France-La-burqa-et-le-voile-ce-n-est-pas-du-tout-la-meme-chose.php>.

the Taliban).²² Scholars have pointed out that it is not a genuinely Islamic symbol, and it is disapproved of by leading Muslim authorities.²³

For Roy, this form of dress should not be confused with the simple *hijab*: it is an “obstacle to integration,” as it constrains women within a drastically limited physical and social space. On that view, in contrast to the *hijab*, the wearing of *niqab* signifies endorsement of a radicalized, extremist interpretation of Islam, which advocates a particularly pernicious form of male domination. The wearing of *niqab*, then, is harmful to the women concerned; and those wearing it cannot be said to have exercised a genuine choice. Insofar as this practice is imposed on women, paternalistic regulation, which we found was unjustified in the case of *hijab*, might be defensible in the case of *niqab*.²⁴

The argument goes wrong, however, in that it overplays the contrast between “freely chosen” *hijab* and “imposed” *niqab*. Recent research on face veiling in Europe suggests, in fact, that while the *niqab* expresses a deeply conservative and inegalitarian view of gender relations, it is, nonetheless, often voluntarily adopted by young women. Women use this “*salafi* fashion” as a complex marker of social distinction vis-à-vis other Muslims—a sign of their more profound, deeper religiosity. Their embrace of *salafi* dress code also embodies a stance of defiant rebelliousness against the perceived hostility, racism and Islamophobia of the mainstream society. In all these respects, the wearing of *niqab* is not so different, phenomenologically, from the wearing of *hijab*. As Samir Amghar has observed, many young Muslim women began donning a *niqab* after being expelled from French state schools for wearing a *hijab*.²⁵ Salafism is thus one conscious path of religious radicalization for young women, and *hijab* and *niqab* are on a continuum of degrees of religiosity, rather than being “not at all the same,” as Roy suggested.

²² Sara Silvestri, *Europe's Muslims: Burqa Laws, Women's Lives*, OPEN DEMOCRACY, July 15, 2010, available at <http://www.opendemocracy.net/sara-silvestri/french-burqa-and-%E2%80%9Cmuslim-integration%E2%80%9D-in-europe>. The burqa covers the full body, with an embroidered opening for the eyes; the niqab is a veil of different colors, often black, covering the nose and the mouth only; the hijab is a scarf covering the head, loose or tight, of all sorts of colors (for instance black in Iran, bright in Malaysia, patterned in Turkey), and wrapped and knotted in different fashions under the neck or behind the head; the jilbab is normally a dark long dress or cloak, going from the head to the feet, usually covering other clothes underneath.

²³ *Egypt Al-Azhar Scholar Supports French Niqab Ban*, Agence France Presse, September 15, 2010, available at <http://www.google.com/hostednews/afp/article/ALeqM5jNAnCNRui8FnoLVQOOSJ8Mj9Qm6Q>.

²⁴ Note that I do not attribute this view to Roy. He draws the distinction between *hijab* and *niqab* in relation to a Council of State decision to confirm the refusal to grant nationality to a woman wearing a *niqab*. The idea that the *niqab* is oppressive and “barbaric,” however, is widely shared in France and was routinely voiced by all members of the Mission d’information parlementaire sur la pratique du port du voile intégral [Parliamentary Mission of Information on the Practice of Wearing Full Veil] which led to the “*burqa* law.” (Tellingly, similar rhetoric was also deployed against the *hijab* a few years previously).

²⁵ See Samir Amghar’s hearing at the Mission d’information parlementaire sur la pratique du port du voile intégral sur le territoire national, available at <http://www.assemblee-nationale.fr/13/cr-miburqa/09-10/index.asp>. See also Samir Amghar, *Le niqâb, pour s'affirmer?* [The *Niqab* As Self-Assertion?], 314 CERAS PROJET (2010), available at <http://www.ceras-projet.com/index.php?id=4196>.

Be that as it may, let us grant the main point about the *niqab*–*hijab* distinction. Whether or not women make a truly voluntary decision to wear the *niqab*, it is still the case that the *niqab* is the visible sign of a particularly oppressive, inegalitarian, and patriarchal ideology. By contrast to the *hijab*, which merely signifies Muslim piety, the *niqab* is a flag of *salafi* radicalism. Admittedly, such radicalism advocates views about women which are profoundly at odds with basic notions of gender equality. It may be worn voluntarily, but it is still objectively harmful to women: the woman donning a *niqab* resembles the paradigmatic figure of the “contented slave.”²⁶ Now, the question is this: Even if the *salafi* view of women, and the wearing of *niqab* that it prescribes, were a particular, pernicious form of patriarchal domination, does this give the state grounds for banning full face veils? By formulating the question in this way, I have deliberately framed the *niqab* controversy as a “hard case” of toleration—as a case where there are presumptively valid moral objections to a particular practice.

To most French politicians (and a majority of the public) the issue seemed settled in 2010. The *niqab* was not seen as a hard case of *toleration* but as a textbook case of legitimate *paternalism*—the rightful prohibition of an unacceptable, harmful practice. The so-called “burqa law,” voted on July 13 and promulgated on October 11, 2010, declares that “it is forbidden to wear in public places any garment designed to hide the face” (article 1).²⁷ Article 2 is no less pithy, and defines public place in the broadest way possible, as referring to any space outside the home. Article 3 creates a new criminal offense: that of *coercing* someone to hide her face. The law makes no mention of religion, religious dress code, or of the *niqab*. Yet it is carefully designed to target the latter. Article 2 presents a long list of exceptions concerning professional, medical, festive, or sport-related facial coverings. To this, the Constitutional Council, in an otherwise deferential ruling, added that covering one’s face should also be permissible within mosques and other religious buildings.²⁸ (The Council thereby explicitly recognized the religious dimension of the prohibited garment and the possible infringement of religious freedom that the law constituted.)²⁹ Article 3 of the law is designed to protect women from the influence of their male co-religionists—but in its zeal to target the wearing of *niqab*, the article is redundant as it duplicates existing legislation against violence and coercion in the domestic sphere.

²⁶ THOMAS E. HILL, *AUTONOMY AND SELF-RESPECT* 4–18 (1991); CATRIONA MCKINNON, *LIBERALISM AND THE DEFENCE OF POLITICAL CONSTRUCTIVISM* chapter 3.3 (2002).

²⁷ Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l’espace public (1) [Law 2010-1192 of October 11, 2010 banning face covering in public spaces (1)], *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE* [J.O.] [OFFICIAL GAZETTE OF FRANCE], October 12, 2010, p. 18344, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022911670&dateTexte=&categorieLien=id>.

²⁸ Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2010-613DC, October 7, 2010, J.O. October 12, 2010, p. 18345, available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2010/2010-613-dc/decision-n-2010-613-dc-du-07-octobre-2010.49711.html>.

²⁹ Cf. Patrick Weil, *Burqa: La France bientôt désavouée?* [The *Burqa*: A Challenge to France?], *LE TEMPS* (Switzerland), December 1, 2010, available at <http://www.letemps.ch/Page/Uuid/7363e902-fcc8-11df-a790-a3bd9560792f>.

To say that the legal foundations of the law are flimsy would be an understatement.³⁰ One of the drafters of the bill in fact admitted as much, when he confessed to *Le Figaro* newspaper that “the Council of State found no justification that would allow us to implement a total ban. As a result, we did not elaborate on foundations.”³¹ While the law itself is indeed sparse and succinct, the parliamentarians’ concerns are more expansively voiced in the Preamble to the Bill. The following justifications for the ban are offered: the requirements of “public order”; the “fundamental demands” of social cohesion, “civility,” and “fraternity” [*sic*]; gender equality; and the protection of the “dignity” of women. It is the last point that seems to have been the primary concern. Referring to the full veil, the preamble suggests that “this form of public reclusion, even when it is voluntary or accepted, is evidently in breach of the principle of respect for the dignity of the person.” The principle of dignity, however, is a notoriously “slippery” principle in European law, and has a marginal place in French law itself.³² Appeal to public order requirement, on the other hand, is also too weak to be able to justify on its own the infringement of basic religious freedoms in public places. Although the European Court of Human Rights has in the past granted member states a large margin of appreciation in determining the parameters of “public order” in freedom of religion cases,³³ it recently ruled against the arrest, in Turkey, of citizens wearing distinctive religious attire on the street.³⁴ It is likely, therefore, that the “burqa law” will not survive a challenge before the Strasbourg Court under article 9 of the ECHR.³⁵

Defenders of the French law will no doubt retort that the ECHR is unduly deferential towards religious freedom and that it underestimates the dangers posed by certain practices and activities defended in the name of religion. Appeal to the legal principle of freedom of religion, they would argue, sometimes conceals and justifies enterprises of religious domination which undermine the ideal of freedom *from* religion. Is legal prohibition, however, the best way to combat such domination? One may doubt whether this is the case. Two sets of considerations—principled and prudential—are relevant here. First, it is a basic principle of liberal society—sometimes forgotten in the midst of the prohibitionist hysteria gripping Europe—that it tolerates beliefs, activities,

³⁰ Eolas, *Cachez moi cette loi que je ne saurais voir*, JOURNAL D’UN AVOCAT (October 13, 2010, 2:35 AM), <http://www.maitre-eolas.fr>.

³¹ Cécilia Gabizon, *Burqa: des amendes allant de 150 euros à 15000 euros* [Burqa: Fines From 150 to 15,000 Euros], LE FIGARO, April 29, 2010, available at <http://www.lefigaro.fr/actualite-france/2010/04/29/01016-20100429ARTFIG00657-burqa-des-amendes-allant-de-150euros-a-15000-euros-.php>. The Council of State was acting here in its advisory (not judicial) capacity.

³² Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655 (2008).

³³ CAROLYN EVANS, FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2001).

³⁴ Strasbourg Consortium: Freedom of Conscience and Religion in the Jurisprudence at the European Court of Human Rights, *ECtHR Decides Arslan v. Turkey, the Aczimendi Case*, February 2010, available at http://strasbourgconsortium.org/index.php?blurb_id=790&page_id=9.

³⁵ Lourdes Peroni, Saïla Ouald-Chaib & Stijn Smet, *Would a Niqab and Burqa Ban Pass the Strasbourg Test?*, STRASBOURG OBSERVERS (May 4, 2010), <http://strasbourgeoiservers.com/>; Gilles Devers, CEDH: La loi anti-burqa peut aller se rhabiller [CEDH: The Anti-Burqa Law Can Go Get Dressed], ACTUALITÉS DU DROIT (February 28, 2010), <http://lesactualitesdudroit.20minutes-blogs.fr>.

and practices that are morally objectionable, dominating, and/or harmful. France, for example, tolerates far-right speech and pornography, to take two examples of harmful or dominating speech. Those who object to them may protest and denounce them, seek to limit their spread and influence, but they are not entitled to use the law to coerce far-right activists and pornographers (apart from the instances of incitement to hatred, physical abuse, etc.). By analogy, citizens should be free to condemn face veils as a severe form of male domination. It is perfectly consistent to be “against” the *niqab* and “against” the ban on *niqab*, even if this position has little visibility in current French debates. In many cases, legal prohibitions—and particularly sartorial bans—are not the best way to combat domination, in particular when they apply to the free activities of adults in public. The ban on the wearing of *niqab* does not so much target the practice itself as the ideology that prescribes the practice. The problem, of course, is that a law can only act on external actions, not on *foro interno*: it may change bodies and garments but it cannot easily change minds. And there is little reason to think that banning the *niqab* will in itself move women away from holding *salafi* views. Women who are (presumed to be) dominated cannot be forced to be free. There is a profound paradox of paternalism for adults, as J.S. Mill warned long ago. It is, at best, hazardous to seek to promote individual autonomy directly through legal coercion.

A second set of concerns about the wisdom of a legal ban are prudential. These considerations, which seek to anticipate the likely consequences of the application of a law or policy, are often decisive in the case of paternalistic policies. Legal coercion is a blunt instrument and, while paternalistic policies are routinely defended by appeal to high-minded principles, they often backfire and end up undermining, rather than fostering, the practical effectiveness of the principles in question. Let us consider the ban on *niqab*. One of its explicit aims is to combat the spread of *salafi* radicalization and the regression of women’s status that it entails. On this view, not only those who wear the *niqab*, but also those who do not, need to be protected against the dangers of pressure and proselytism associated with the practice. The problem, of course, is that *salafism* feeds precisely on a sense of paranoid victimization, and it is hard to see how legal prohibition will not give it further ammunition. It is estimated that France has—at most—5,000 *salafi* militants (out of a population of approximately five million Muslims) and the number of women wearing the *niqab* is estimated to range between 400 and 2,000.³⁶ Given these minuscule numbers, one can safely guess that bad publicity is better, for *salafi* sects, than no publicity. The ban—which went into effect in April 2011—might well turn the *niqab* (and assorted versions of partial and full-face covering) into flags of resistance against anti-Muslim hostility. It also risks aggravating the oppression of those women who are genuinely vulnerable to being pressurized into a highly restrictive, domestic life: they will be forced back into their homes. The ban, in sum, is unlikely to do much good either for female emancipation

³⁶ Flore Galaud, *La burqa, un phénomène marginal en France* [The Burqa, A Marginal Phenomenon in France], LE FIGARO, July 30, 2009, available at <http://www.lefigaro.fr/actualite-france/2009/07/30/01016-20090730ARTFIG00202-la-burqa-un-phenomene-marginal-en-france-.php>.

or for inter-ethnic and inter-religious relations. Advocates of the law often cite the fact that most Muslims in France are hostile to the *niqab* as a justification for the legitimacy of the ban. Yet they omit to say that most Muslims in France are also against a ban on *niqab*—which they see as yet another instance of an unhealthy European obsession with Islamic practices. The only result achieved by the law (admittedly, the main one intended by the Sarkozy government) has been to reassure public opinion that the political class is ready to stand up for “our” values in the face of “foreign” threats to “our way of life.” Whether public opinion will be reassured, or will in fact be more likely to vote for the National Front as a result of the state-managed hysteria, remains to be seen. In conclusion, then, even if it is conceded that the *niqab* is dominating in the way that the *hijab* is not, it does not follow, on either prudential or principled grounds, that it should be banned by law. Therefore, both the ban on *hijab* in schools and the ban on *niqab* in the public square are wrong-headed and pernicious. Does it follow, however, that the *niqab* should be tolerated in schools? To this final hard case I shall now turn.

3. *Niqab* in schools?

The argument thus far has established that banning the wearing of *niqab* in public places would inadmissibly extend paternalistic coercion from children to adults. The ban on *hijab*, by contrast, only applied to schoolchildren—yet, as I argued, it was also inadmissibly paternalist in its wrongheaded assumption that the wearing of *hijab* is a form of domination. Now, assuming that the above assumption about one important difference between *hijab* and *niqab* is correct—namely, that *niqab* is dominating in the way *hijab* is not—it would seem that there might be grounds, in turn, for forbidding the wearing of *niqab* in schools.

The argument would go as follows. While it can be plausibly argued that adults may autonomously choose a non-autonomous life, children cannot as, *ex hypothesi*, they are not yet autonomous. *Salafism* fosters a profoundly patriarchal ideology, not only in the content of its doctrines, but also in the requirement of social separation and segregation which is both symbolized and enacted by the wearing of *niqab*. The wearing of *niqab*, on that view, is an obstacle to the proper integration of schoolgirls into their learning environment. And schools have a duty to act in the educational interests of the young girls concerned, sometimes against the religious convictions of their parents. This is because parents are not always and necessarily the best guardians of their children’s interests, and children’s autonomy-related interests must be fostered in an environment that is conducive to them.³⁷ Insofar as schools must promote autonomy, they may do so, *inter alia*, by enforcing coercive school regulations. There are myriad ways in which schools, over and above the standard inculcation of educational rules and disciplines, seek to protect children, by imposing on them regulations that do not

³⁷ Cf. also Stephen Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?*, 105 *ETHICS* 468 (1995); Amy Gutmann, *Children, Education and Autonomy: A Liberal Argument*, 9 *PHIL. & PUB. AFF.* 338 (1980).

apply outside schools (for example, concerning what children may bring to school, what they may consume in schools, etc). Now, it may be conceded that some adolescents wear the *niqab* as a symbol of defiant rebelliousness, and thus manifest an undisputable degree of autonomy. Yet—the argument would continue—even in their case, school paternalism remains legitimate, insofar as the wearing of *niqab*, regardless of whether it is voluntarily chosen or not, negates many of the values taught in schools. After all, schools, on similar grounds, prohibit far right symbols or pornographic material, even though these are not illegal outside the school. The ban on face veiling, on this view, would be another instance of legitimate school paternalism.

What are we to make of this argument? The first thing to say that it is purely academic in the French context, where there is no reported case of the wearing of *niqab* by schoolchildren. *Salafi* militants are a tiny group in France; they are often too young to have children themselves and, at any rate, there is no evidence to suggest that they would wish that their children display such a radical expression of faith at a young age. The case, therefore, is largely hypothetical. And, even if, on principle, one can be moved by the argument against the wearing of *niqab* at school, it does not follow that legislating on it would be wise. State law is uniquely coercive, and its symbolic potency manifest. Drafters of the *burqa* law hoped that the bill, while legally shaky, would at least convey a powerful message of national mobilization against the threat of Islamism. Yet there are real dangers associated with using the coercive apparatus of the law to convey symbolic messages. In this particular case, the harm caused by the perceived victimization and stigmatization of Muslims might well outweigh any of the anticipated benefits of the law. If the wearing of *niqab* in schools is (plausibly) deemed problematic within schools, an internal school regulation prohibiting facial coverings by pupils, rather than yet another law, should be sufficient. If what matters is that children interact freely and easily with one another, there is little point in mobilizing the heavy-handed apparatus of the law and appealing to the highly charged rhetoric of the liberation of schoolgirls from Islamist oppression. A law banning *niqab* in schools would only perpetuate the tendency of selective targeting and obsessive stigmatization of Muslim practices. A more balanced and reasonable approach was proposed by the French Conseil d'État back in 1989. In its advice to the government, the Council rejected any absolute prohibition of religious signs in schools, and suggested that decisions should be made by headmasters, on a local basis, and upon consultation with all parties concerned, as to whether certain pieces of clothing disrupted “the normal functioning of the school.”³⁸ This decentralized, piecemeal approach—often decried in France as too close to the unprincipled muddling, though typically British, pragmatism—has, in the end, quite a lot to be commended for. After twenty-two years of anti-Muslim hysteria, prohibitionist fever, and legal paternalism in France, there is little evidence that the republican causes of female emancipation, social integration, and inter-cultural understanding have been in any way promoted or furthered.

³⁸ Conseil d'État (CE), Sect. de l'Intérieur, November 27, 1989, Avis No. 346893, Port du foulard islamique, available at http://www.rajf.org/article.php?id_article=1065.