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I. INTRODUCTION

In October 2006, hundreds of young people marched through Paris to commemorate the deaths of Zyed Benna and Bouna Traore, two young boys from Clichy-sous-Bois, a largely immigrant- populated Parisian suburb.[1] One year before, Benna and Traore were electrocuted when they jumped into an electrical substation, allegedly attempting to hide from the police.[2] This incident sparked nearly three weeks of violent rioting throughout

1. *As Anniversary of Riots Nears, Suburban Youths March on Paris*, N.Y. TIMES, Oct.. 26, 2006, at A5.
2. *Id.*

France, during which time, about 9000 cars were burned and almost 3000 people were arrested.[3]

The unrest was widely attributed to Islamic extremism, but many rioters were incensed by the desperate conditions in minority Parisian suburbs, resulting from high unemployment and discrimination.[4] Over one year later, little has changed. According to the Deputy Mayor of Clichy-sous-Bois, "[t]he explosion came as the result of both a spark and a powder keg. The pow[d]er keg is still here, and a new spark could trigger another blast."[5]

The riots of October 2005 are merely one skirmish in the ongoing struggle to find a place for the growing Muslim population in French society. In March 2004, President Jacques Chirac ignited another battle by approving a ban on "the wearing of symbols or clothing by which students conspicuously [*ostensiblement*] manifest a religious appearance" in public schools.[6] The prohibition on conspicuous religious dress, hereafter referred to as the Headscarf Law, was enthusiastically approved with votes of 494 to thirty-six in the French National Assembly and 276 to twenty in the French Senate.[7] The ban received support across the political spectrum, placing the far-right National Front in unlikely company with the Socialist Party and prominent feminists.[8] The Headscarf Law's widespread approval may be attributable to the government's declared motion for the law—the protection of the French brand of secularism, or *laïcité*.[9]

"*Laïcité*, the French term for balancing religious freedom and public order . . . is a principle of religious neutrality that is intended to create the conditions for religious freedom."[10] As a brand of secularism that removes religion from the public sphere, *laïcité* has become an elemental part of the French national identity, rep-

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3. Henri Astier, *Tense Anniversary in French Suburbs*, BBC NEWS, Oct. 26, 2006, http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/6083790.stm.

4. *As Anniversary of Riots Nears, Suburban Youths March on Paris, supra* note 1, at A5.

5. Astier, *supra* note 3.

6. Elisa T. Beller, *The Headscarf Affair: The Conseil d'Etat on the Role of Religion and Culture in French Society*, 39 TEX. INT'L L.J. 581, 581 (2004).

7. *Id.*

8. Steven G. Gey, *Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools*, 42 HOUS. L. REV. 1, 13 (2005).

9. President Jacques Chirac, Speech on Respecting the Principle of Secularism in the Republic (Dec. 17, 2003), *available at* http://www.elysee.fr/elysee/root/bank/print/2675.htm.

10. Justin Vaïse, *Veiled Meaning: The French Law Banning Religious Symbols in Public Schools*, U.S.-FRANCE ANALYSIS SERIES (The Brookings Institute, Washington, D.C.), Mar. 2004, at 2, *available at* www.brookings.edu/fp/cusf/analysis/vaisse20040229.htm.

resenting core values of neutrality, equality, and freedom of conscience.[11]

However, for those who do not subscribe to the French national identity, the protection of *laïcité* may not justify infringing on religious expression. Certainly, the forty-eight students who were expelled for refusing to remove their conspicuous religious symbols may dispute the legitimacy of the Headscarf Law.[12]

Under French law, any attempt to invalidate the Headscarf Law as a violation of religious freedom would have to be addressed by the *Conseil Constitutionnel* (Constitutional Council) before the law is actually enacted.[13] However, the *Conseil Constitutionnel* only reviews draft laws by referral from sixty members of either houses of Parliament, or by other political authority such as the Prime Minister or the President of the Republic.[14] Because the Headscarf Law did not have sixty objectors in either chamber of Parliament, and it is no longer a draft, but a law in force, the *Conseil Constitutionnel* offers no remedy.

In addition, it seems unlikely that French voters would encourage the revocation of the Headscarf Law anytime in the near future, as they have just elected an advocate of cultural integration as their president.[15] Fearing a violent reaction to Sarkozy's election, the French government deployed 3000 police into Paris and its multi-ethnic suburbs to quell any signs of unrest.[16] Interior Minister Nicolas Sarkozy, who proposed deporting all immigrant participants in the riots[17], won the presidential election on May 6, 2007.[18] When Sarkozy accepted his party's nomination in January of this year, he said it is "unacceptable to 'want to live in France without respecting and loving France and learning the French language. . . . 'If you live in France then you respect the laws and the

11. T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 466 (2004).

12. *French Schools Expel 48 Over Headscarf Ban*, EXPATICA, Jan. 20, 2005, http://www.expatica.com/source/site_article.asp?subchannel_id=58&story_id=15996&name=French+schools+expel+48+over+headscarf+ban. Expatica is a web site that prints articles from the Agence France-Presse in English.

13. Beller, *supra* note 6, at 620.

14. For an explanation of the procedures of the Conseil Constitutionnel, see http://www.conseil-constitutionnel.fr/langues/anglais/ang4.htm.

15. *Sarkozy Takes French Presidency*, BBC NEWS, May 6, 2007, *available at* http://news.bbc.co.uk/2/hi/europe/6630797.stm.

16. *Id.*

17. Mark Landler, *France to Deport Foreigners in Riots*, INT'L. HERALD TRIB., Nov. 10, 2005, *available at* http://www.iht.com/articles/2005/11/09/news/france.php.

18. *Sarkozy Takes French Presidency*, *supra* note 15.

values of the Republic'"—the same Republic he also referred to as "the heirs of 2000 years of Christianity."[19]

Because there are substantial legal, political, and social obstacles to contesting the Headscarf Law within France, any challenge to the ban as a violation of the freedom of religious expression should be brought in an alternate forum. The following article addresses this hypothetical scenario: If an expelled student were to bring the Headscarf Law before the European Court of Human Rights as a violation of Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, how would the Court decide?

To deduce the Court's probable conclusion, Section II describes the European Court of Human Rights and the procedure of enforcing the European Convention for the Protection of Human Rights and Fundamental Freedoms. Section III analyzes the Court's precedents to determine how religious expression is protected by Article 9 and under what circumstances a state can justifiably limit religious freedom. Section IV focuses on *Sahin v. Turkey*, a recent decision of the European Court of Human Rights which upheld a Turkish headscarf prohibition at the university level. Lastly, Section V describes the Headscarf Affair in France as the facts of this hypothetical case, and attempts to predict the likely outcome if the Headscarf Law were adjudicated by the European Court of Human Rights.

II. THE EUROPEAN COURT OF HUMAN RIGHTS

The atrocities of World War II brought human rights standards to the forefront of policy-making in Europe. The Holocaust served as tragic evidence that individual states may not be the best guardians of human rights, even with regard to their own citizens.[20] Moreover, Europe acutely perceived a growing threat from the Communist Eastern Bloc countries, encouraging it to solidify a multilateral position on democracy and human rights.[21] Contemporary political thought emphasized that suppression of human rights was directly linked with totalitarianism and international

19. Elaine Sciolino, *French Governing Party Endorses Sarkozy for President*, INT'L HERALD TRIB., Jan. 14, 2007, *available at* http://www.iht.com/articles/2007/01/14/news/france.php.

20. Peter G. Danchin & Lisa Forman, *The Evolving Jurisprudence of the European Court of Human Rights and the Protection of Religious Minorities*, *in* PROTECTING THE HUMAN RIGHTS OF RELIGIOUS MINORITIES IN EASTERN EUROPE 192, 194 (Peter G. Danchin and Elizabeth A. Cole eds., 2002).

21. Robert Blackburn, *The Institutions and Processes of the Convention*, *in* FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES, 1950-2000 3, 4 (Robert Blackburn & Jorg Polakiewicz eds., 2001).

conflict.[22] Wishing to prevent future war, the European states considered a supranational approach.

In May of 1948, the Congress of Europe assembled at The Hague and adopted a resolution that envisioned a European human rights charter enforced by a unified court of justice.[23] Within a year, ten European countries formed the Council of Europe and assumed the task of drafting a multilateral human rights treaty.[24] Their work produced the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, Convention), which entered into force on September 3, 1953.[25] Undertaking enforcement of the Convention, the European Court of Human Rights (hereinafter, ECHR) heard its first case in February of 1959.[26]

Today, the Council of Europe has forty-six members, and accession to the Convention is a condition of membership.[27] Each contracting member state "undertakes that its domestic law and administrative practices conform to the Convention's articles and, where any violation of human rights is held to exist by the Strasbourg organs [ECHR], that it will take positive action to remedy the breach, if necessary by introducing corrective legislation in its national Parliament."[28] The Convention also encourages resolution of human rights claims at the domestic level: "The States must provide effective remedies before a national authority and guarantee the rights and freedoms of their individual citizens without discrimination on any ground."[29]

As the enforcement body, the ECHR has jurisdiction over "all matters concerning the interpretation and application of the Convention and the protocols thereto. . . ."[30] Individuals, as well as groups of individuals and non-governmental organizations have standing to bring complaints before the Court if they have been

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22. *Id.*

23. *Id.* at 3-4.

24. The Statute of the Council of Europe was signed on May 5, 1949 by Belgium, Denmark, Sweden, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, and the United Kingdom. *Id.* at 4.

25. *Id.* at 6.

26. *Id.* The first enforcement body for the Convention was the European Commission, established in 1954, which reviewed petitions before transferring admissible claims to a limited Court of Human Rights. The Commission was later dissolved by Protocol 11, which allows petitioners to apply to the ECHR directly.

27. THE COUNCIL OF EUROPE, THE COUNCIL OF EUROPE'S MEMBER STATES, http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp. *See also* Danchin & Forman, *supra* note 20, at 194.

28. Blackburn, *supra* note 21, at 11.

29. Keturah A. Dunne, Comment, *Addressing Religious Intolerance in Europe: The Limited Application of Article 9 of the European Convention of Human Rights and Fundamental Freedoms,* 30 CAL. W. INT'L L.J. 117, 129 (1999).

30. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 32, para. 1, *opened for signature* Nov. 11, 1950, E.T.S. No. 005 [hereinafter Convention].

injured by a member state's action.[31] Originally, individual complaints were directed to the European Commission on Human Rights, which acted as a filter for the Court.[32] The Commission would investigate the claims, submit a report to the state in question, and request either written or oral responses to the complaint.[33] The Commission would also provide conciliation services to promote friendly settlement between the parties.[34]

By 1994, many Eastern European countries had joined the Council of Europe, creating a dramatic surge in applications to the Commission.[35] In an effort to address new logistical difficulties and onerous workloads, the Council approved Protocol 11, which collapsed the Commission and the Court into a single enforcement body.[36] As a result of Protocol 11, individual petitions are submitted directly to the ECHR, which is responsible for deciding both the admissibility of a particular case and its merits.[37]

The current Court is comprised of forty-six judges, each nominated by a member state and appointed by the Parliamentary Assembly of the Council of Europe.[38] The judges are expected to be neutral and not to act as representatives of their nominating state.[39] The Court will not consider a petition unless all domestic remedies have been exhausted and the petition is filed within six months of the final domestic judgment.[40] The preliminary review of admissibility is conducted by a committee of three judges, who can dismiss the complaint by unanimous vote for procedural problems or because the application is manifestly unfounded.[41] If the committee approves the petition, the entire case will be heard before a Chamber of seven judges.[42]

If the parties are dissatisfied with the Chamber's judgment, they can appeal to the Grand Chamber within three months from the Chamber's final decision.[43] A panel of five judges has the dis-

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31. *Id.* at art. 34.
32. Blackburn, *supra* note 21, at 15.
33. *Id.*
34. *Id.*
35. *Id.* at 14.
36. *Id.* Previously, the Court was considered a limited court because admissibility issues were considered by the Commission.
37. *Id.*
38. *See* THE COUNCIL OF EUROPE, *supra* note 27. *See also* Convention, *supra* note 30, at art. 20.
39. Convention, *supra* note 30, at art. 21. Judges sit ex officio when a case involves their nominating state. Javier Martínez-Torrón, *The European Court of Human Rights and Religion, in* CURRENT LEGAL ISSUES 2001: LAW AND RELIGION 185, 188 (Richard O'Dair & Andrew Lewis eds., 2001).
40. Convention, *supra* note 30, at art. 35.
41. *Id.* at art. 28. *See also* Martínez-Torrón, *supra* note 39, at 187-88.
42. Convention, *supra* note 30, at arts. 27 & 29.
43. *Id.* at art. 43.

cretion to accept the appeal if it raises a serious issue of interpretation or has the potential to overturn case precedent.[44] Likewise, the Chamber of seven judges may voluntarily relinquish jurisdiction to the Grand Chamber of seventeen judges before making their final judgment.[45]

With regard to legal method, the ECHR has been described as a common law system because it allows case law to elaborate on the Convention and considers itself bound by its prior decisions (stare decisis).[46] However, the Convention clearly states that judgments are only binding on the parties to the dispute.[47] The relationship between ECHR precedent and the Convention can be characterized in the following light: "It may indeed be argued that the interpretation of a provision which the Strasbourg Court has developed in a series of individual applications, and which transcends the particular facts of these cases, becomes an integral part of that provision and thereby acquires its binding force."[48]

In other words, a state will not per se violate the Convention under the principle of res judicata by acting in contradiction of precedent. However, there is a high probability that the interpretation of a given provision will evolve to include consistent case law patterns.

Unfortunately for petitioners, the ECHR is a court of limited remedy. Because jurisdiction is restricted to interpreting and applying the Convention, the Court can only decide whether the member state is in violation or not.[49] Thus the ECHR "operate[s] as a supranational system of review of the human rights practices of member states", rather than as a typical form of judicial review.[50] While the Court can award compensatory damages to the petitioner, it cannot force the member state to amend or repeal any violating national law.[51] This limitation of remedy reflects the subsidiary nature of the ECHR system, which must maintain a

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44. *Id.*
45. *Id.* at art. 30.
46. Blackburn, *supra* note 21, at 25.
47. Convention, *supra* note 30, at art. 46, para. 1.
48. Jörg Polakiewicz, *The Execution of Judgments of the European Court of Human Rights*, *in* FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES, 1950-2000 55, 73 (Robert Blackburn & Jörg Polakiewicz eds., 2001).
49. Danchin & Forman, *supra* note 20, at 194-95.
50. *Id.*
51. Joshua Briones, *Religious Minorities in Russia*, 8 U.C. DAVIS J. INT'L L. & POL'Y 325, 330 (2002). *See generally* European Court of Human Rights, How the Execution of Judgment Works, http://www.echr.coe.int/ECHR/EN/Header/The+Court/Execution/How+the+execution+of+judgments+works/

delicate balance between state sovereignty and supranational enforcement.[52]

III. ARTICLE 9 PROTECTION OF RELIGIOUS EXPRESSION AND ITS JURISPRUDENCE

In Article 9(1), the Convention provides for freedom of thought, conscience, and religion: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance."[53] Article 9(2) describes justifiable limitations on the freedom of religious expression:

> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[54]

As a preliminary observation, it is important to note that only religious expression, not religious belief, can be justifiably limited by state action. Breaking Article 9 into its elements, the petitioner must show that the state has interfered with his right to manifest his religious beliefs.[55] To justify the interference, the state must demonstrate that the interference was (1) prescribed by law, (2) directed at a legitimate aim, and (3) necessary in a democratic society.[56] Subsequent case law further elucidates the standards of Article 9.

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52. Blackburn, *supra* note 21, at 25.

53. Convention, *supra* note 30, at art. 9, para. 1.

54. *Id.* at art. 9, para. 2. Although many articles of the Convention touch on religious freedom (*see Article 10 Freedom of Expression, Article 11 Freedom of Assembly and Association, Article 14 Prohibition Against Discrimination)*, I have chosen to focus on Article 9 for two reasons. First, Article 9 most directly addresses the issues of religious expression raised by the French Headscarf Law. Second, the ECHR previously addressed the headscarf issue as an Article 9 violation in *Sahin v. Turkey*, which will be used as a point of comparison in this piece.

55. *Id.*

56. *Id.*

A. Interference with the Freedom of Religious Expression

In order for interference to be recognized, the petitioner must satisfy the Court that the offended belief has reached a "certain level of cogency, seriousness, cohesion and importance."[57] All conventional religions, as well as some less mainstream religious beliefs have achieved this standard (i.e. Jehovah's Witness, Church of Scientology), but the Court refused to acknowledge Wicca as a religion capable of suffering interference.[58]

Once the belief system is recognized, the Court will consider whether interference actually occurred.[59] With regard to this inquiry, the Court has been reluctant to find interference where the offending rule is generally applied in a neutral manner.[60] For example, in *Efstratiou v. Greece* and *Valsamis v. Greece*, two secondary school students refused to participate in a parade to commemorate the outbreak of war between Greece and Italy in 1940 because of their Jehovah's Witness beliefs.[61] The Court ruled that the students had no right to be exempted from the parade, because participation was universally required and neutral with regard to religion.[62]

The Court has been criticized for declaring "neutral" laws of general applicability incapable of interference, because in doing so, it arguably ignores the subjective experience of the petitioner.

> [T]he Court in effect substituted its own judgment on a matter of conscience for that of the persons concerned. The Court was . . . presuming to define what [is] "reasonable" for the applicants to believe with regard to their participation in a national commemorative ceremony. . . . But this does not mean that a secular court is competent to elucidate when a person's beliefs are sufficiently consistent from an "objective" point of view. This is a slippery slope.[63]

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57. Danchin & Forman, *supra* note 20, at 197 (citing Campbell & Consens v. United Kingdom, 48 Eur. Ct. H.R. (ser. A) at para. 36 (1982)).

58. Danchin & Forman, *supra* note 20, at 197 (citing X v. United Kingdom, No. 7291/75, 11 D.R. 55 (Dec. 1977)).

59. Danchin & Forman, *supra* note 20, at 197-99.

60. Martínez-Torrón, *supra* note 39, at 202.

61. Efstratiou v. Greece, 1996-VI Eur. Ct. H.R., para. 9; Valsamis v. Greece, 1996-VI Eur. Ct. H.R., paras. 8-9.

62. Efstratiou, 1996-VI Eur. Ct. H.R. at para. 37; Valsamis, 1996-VI Eur. Ct. H.R. at para. 36-38.

63. Martínez-Torrón, *supra* note 39, at 201.

Moreover, by declaring neutral laws incapable of causing interference, the Court indirectly protects mainstream religions over minorities. Even if the language of the law is technically neutral, in practice "'[n]eutral' laws will rarely conflict with the morals of the major churches, but they will sometimes lead to conflict with minority religious groups that are socially atypical."[64] As a result, the laws reflecting mainstream religious concepts are excluded from Article 9 review. "The fact that the Court has fashioned an approach whereby 'neutral' laws will automatically prevail . . . constitutes a significant risk for the rights of minorities."[65]

In spite of the challenges to its position, the Court generally denies that interference has occurred where a law is universally applied and considered neutral with regard to religion.[66] On the other hand, where a law is directed at expression of a recognized religion, the Court has treated the interference requirement as being rather self-evidently satisfied.[67]

B. "Prescribed by Law"

To justify interference with religious expression, the state must demonstrate that its action was "prescribed by law" as a form of due process notice requirement.[68] "[T]he law in question must be both adequately accessible to the individual and formulated with sufficient precision to enable him to regulate his conduct."[69] If a law is unduly vague, the Convention will not protect state action in accordance with that law.[70] However, the Court has given the state some leeway by recognizing that vagueness may be necessary to "keep pace with changing circumstances."[71] Moreover, the Court imputes knowledge of the state's case law as a supplement to the language of the law itself.[72] Therefore, if the petitioner had sufficient notice of the proscribed action from either the language

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64. *Id.* at 202.

65. Danchin & Forman, *supra* note 20, at 212 (citing Javier Martínez-Torrón & Rafael Navarro-Valls, *The Protection of Religious Freedom in the System of the European Convention on Human Rights*, Paper presented to the Oslo Conference on Freedom of Religion and Belief, Aug. 11-15, 1998, at 14).

66. Martínez-Torrón, *supra* note 39, at 200.

67. *See* Manoussakis and Others v. Greece, 1996-IV Eur. Ct. H.R., at para. 36, where the existence of a law requiring discretionary approval from the Ministry of Education and Religious Affairs in order to build a place of worship was summarily determined to be interference without further discussion.

68. Larissis and Others v. Greece, 1998-I Eur. Ct. H.R. para. 40.

69. *Id.*

70. *See id.*

71. Kokkinakis v. Greece, 260-A Eur. Ct. H.R. (ser. A) para. 40 (1993).

72. *Id.*

of the law or its subsequent jurisprudence, the state action is considered "prescribed by law."

C. "Legitimate Aim"

The language of Article 9(2) indicates that states may legitimately interfere with religious freedom in the interests of health and safety, public order, morals, or the protection of rights and freedoms of others. Arguably, the state does not bear a heavy burden in this area because most legislation is at least ostensibly enacted to serve the public good. However, the Court has assisted the states' positions by accepting the government's benevolent objectives and ignoring any less legitimate aim in the legislative intent.

For example, in *Kokkinakis v. Greece*, a Jehovah's Witness couple challenged a Greek anti-proselytism law. Mr. and Mrs. Kokkinakis visited the wife of a local cantor of the Greek Orthodox Church to discuss their religious beliefs.[73] When the cantor heard of the visit, he alerted the local police, who arrested Mr. and Mrs. Kokkinakis.[74] Greek law criminalizes proselytism, which is defined as:

> [A]ny direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion . . . with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naïvety.[75]

The local criminal court convicted Mr. and Mrs. Kokkinakis and sentenced them to four months in prison.[76] On appeal, Mrs. Kokkinakis' conviction was overturned and Mr. Kokkinakis' sentence was reduced and converted to a pecuniary fine.[77] In spite of his reduced sentence, Mr. Kokkinakis applied to the Commission

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73. *Id.* at para. 7.
74. *Id.*
75. *Id.* at para. 16.
76. *Id.* at para. 9.
77. *Id.* at para. 10.

under Article 9 because the Greek courts refused to declare the anti-proselytism law unconstitutional.[78]

With regard to its legitimate aim, the Greek government contended that the purpose of the law was to protect the religious rights and freedoms of those who would fall victim to "influence . . . by immoral and deceitful means. . . ."[79] The Court accepted the government's proposition in full, despite its acknowledgment that the anti-proselytism law commonly had been used against minority believers in an overwhelmingly Greek Orthodox country.[80] The Court itself makes a distinction between "bearing Christian witness . . . [which] corresponds to true evangelism" and improper proselytism, which in the opinion of the Court is justifiably criminalized.[81] Overall, the Court addressed the question of a legitimate aim with broad strokes, not considering whether the law was more particularly designed as a mechanism for suppressing minority religions.

The Court took a similarly superficial approach to identifying a legitimate aim in *Manoussakis and Others v. Greece*.[82] A group of Jehovah's Witnesses rented a room "for all kinds of meetings [and] weddings,"[83] without obtaining the government's authorization to establish a place of worship as prescribed by Greek law.[84] The group submitted a request for authorization, but the government withheld issuance of a permit for over a year, alleging that it had not received all the necessary information from other departments involved.[85] Meanwhile, the group was arrested for operating an illegal place of worship and sentenced to four months in prison convertible to a fine of 400 drachmas per day.[86] Mr. Manoussakis and the group made application to the Commission, arguing that the permit requirement and the ensuing interminable process constituted interference with religious expression in violation of Article 9.[87]

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78. *Id.* at para. 29.
79. *Id.* at para. 42.
80. T. Jeremy Gunn, *Adjudicating Rights of Conscience Under the European Convention on Human Rights*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE 305, 325 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).
81. Kokkinakis, 260-A Eur. Ct. H.R. (ser. A) at para. 48.
82. 1996-IV Eur. Ct. H.R.
83. *Id.* at para. 7.
84. *Id.* at para. 16.
85. *Id.* at para. 11.
86. *Id.* at para. 15.
87. *Id.* at para. 16.

Speaking to the law's legitimate aim, the Court cast a significant vote in favor of mainstream religion by equating protection of Greek Orthodoxy with the maintenance of public order in Greece.[88] The Court reasoned: "In Greece virtually the entire population was of the Christian Orthodox faith, which was closely associated with important moments in the history of the Greek nation. The Orthodox Church had kept alive the national conscience and Greek patriotism during the periods of foreign occupation."[89] Under this standard, any state that ascribes part of its identity to a majority religion could arguably establish a legitimate aim for legislation restricting minority beliefs in the name of public order. In addition, the Court again referred to "various sects . . . [who] manifest their ideas and doctrines using all sorts of 'unlawful and dishonest' means."[90] Protecting individuals from such manipulation was also classified in the interest of public order.[91]

If the discriminatory purpose was obvious in the anti-proselytism law, it is blatant in *Manoussakis*. The Court acknowledged that the authorization requirement had disproportionately been used "to impose rigid, or indeed prohibitive, conditions on practice of religious beliefs by certain non-Orthodox movements, in particular Jehovah's Witnesses."[92] While the Court may have considered the discriminatory effects of the law with regard to its necessity in a democratic society (*see infra* Subsection (4)), the clear existence of a secondary illegitimate purpose for the law is effectively ignored.

Together, *Kokkinakis* and *Manoussakis* clarify the Court's approach to finding a legitimate aim under Article 9(2). First, "the Court effectively holds that a government satisfies its burden by offering *any* justification that can be tied, however remotely, to the 'protection of the rights and freedoms of others.' "[93] By finding legitimate aims amidst substantial evidence of illegitimate purposes, the Court "suggests that the requirement . . . is in fact meaningless. . . ."[94] Secondly, by defining legitimate aims to include the protection and fostering of mainstream religions, the Court reveals a reoccurring bias against minority beliefs.[95] This tendency will

88. *Id.* at para. 39.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at para. 48.
93. Gunn, *supra* note 80, at 324.
94. *Id.*
95. *Id.* at 325. While Mr. Kokkinakis and Mr. Manoussakis technically won because the Court found violations of Article 9, neither was fully vindicated. *Kokkinakis* was decided on the facts, holding that Mr. Kokkinakis' form of proselytism was not improper in this case. The Court did not, however, rule that criminalizing proselytism is a violation of

weigh more heavily when the Court addresses the necessity of the interfering law in a democratic society.

D. "Necessary in a Democratic Society"

On several occasions, the Court affirmed that freedom of religious expression is a fundamental feature of a democratic society, and governments have a duty to ensure religious pluralism.[96] To that end, Article 9(2) creates a balancing test that places the legitimate aims of the government against the need for preserving religious freedom in a democratic society. While restrictions may be necessary to allow various religious groups to coexist,[97] the Court must "determine whether the measures taken at [the] national level [are] justified in principle and proportionate" to the government's concern.[98]

A central element to the balancing test is the doctrine of margin of appreciation. Although the ECHR acts as a supranational authority, accession to the Convention is not a general relinquishment of sovereignty. Because of the subsidiary nature of the Convention, primary responsibility for enforcing the Convention lies with the states, which have relative autonomy when incorporating the provisions into their national law.[99] "The margin of appreciation encompasses the discretion afforded by the Court to member states to employ varying standards of conventional protections."[100] In application, the margin of appreciation lessens the burden on the state, because the Court expects some variation when the Convention's language is implemented into domestic law.

However, because Article 9 enshrines a freedom fundamental to a democratic society, the Court should closely monitor national approaches to protecting religious expression. In *Manoussakis,* the Court held:

> In delimiting the extent of the margin of appreciation . . . the Court must have regard to what is at stake, namely the need to secure true religious pluralism, an inherent feature of the notion of a democratic society. . . . The restrictions imposed on the

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Article 9 per se. Likewise, the Court's holding in *Manoussakis* did not include a condemnation of the registration requirement for non-Orthodox places of worship.

96. Kokkinakis v. Greece, 260-A Eur. Ct. H.R. (ser. A) at para. 31; Manoussakis, 1996-IV Eur. Ct. H.R. at para. 44.

97. Kokkinakis, 260-A Eur. Ct. H.R. at para. 33.

98. *Id.* at para. 47.

99. Blackburn, *supra* note 21, at 25.

100. Danchin & Forman, *supra* note 20, at 195.

> freedom to manifest religion [in this case] call for very strict scrutiny by the Court.[101]

In *Manoussakis*, the Court ultimately found that Greece had strayed too far from the objectives of Article 9 by criminalizing the failure to obtain authorization for a place of worship, while at the same time allowing the public officials too much discretion in granting the permit.[102] However, the Court did not categorically rule that requiring authorization interfered with religious expression under Article 9.

Likewise, in *Kokkinakis*, the Court did not issue a comprehensive ruling demonstrating strict scrutiny review under Article 9. Instead, the Court based the violation on a lack of factual evidence that Mr. Kokkinakis' acts constituted improper proselytism.[103] Without proof of the proscribed act, the Court naturally reasoned that the punishment was disproportionate to the crime. To the extent that the Greek law criminalized "improper proselytism," which the Court did not clearly define, it did not find the law objectionable.[104]

In *Kokkinakis* and *Manoussakis*, the Court-determined margin of appreciation preserved laws that had admittedly been used to discriminate against religious minorities. As a result of these two decisions, critics have begun to question whether "strict scrutiny" is merely a stated policy of the Court with regard to Article 9, or whether it has the practical effect of limiting the margin of appreciation.[105] They suggest that the Court's tendency to favor mainstream religions can account for the gap between the enunciated standard and its application.[106]

When a government's law favors one religion, that religion is necessarily protected and privileged before the Court to the extent of the margin of appreciation. Based on case law precedent, the Court grants a wide margin of appreciation when considering laws that implicate the delicate balance between church and state, acknowledging that various reasonable relationships could exist in a legitimate democracy.[107] "To grant [a] margin of appreciation to majority-dominated national institutions . . . is to stultify the goals

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101. Manoussakis, 1996-IV Eur. Ct. H.R. at para. 44.

102. *Id.* at para. 45.

103. Kokkinakis, 260-A Eur. Ct. H.R. at para. 49.

104. *Id.* at paras. 16, 48.

105. *See generally* YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR (2002).

106. *See generally* YUTAKA ARAI-TAKAHASHI, *supra* note103; Gunn, *supra* note 78; Dunne, *supra* note 29; Danchin & Forman, *supra* note 20.

107. *See* Cha'are Shalom Ve Tsedek v. France, 2000-VII Eur. Ct. H.R. 259.

of the international system and abandon the duty to protect the democratically challenged minorities."[108] Thus, the current precedents regarding the margin of appreciation do not demonstrate a fervent protection of minority religions.

Overall, Article 9 case law reveals broad patterns of interpretation. In general, the Court will recognize interference with religious freedom unless the offending law is deemed neutral. The "prescribed by law" element represents a basic notice requirement that is easily fulfilled. Despite the presence of ulterior motives, the Court seems willing to find a legitimate aim if the government presents any rational argument that it is motivated by the public good. In balancing the legitimate aim against the democratic demand of religious pluralism, the Court professes to be protecting an interest of the highest order with strict scrutiny review. However, the Court's hesitant restriction of the margin of appreciation and its position on neutral laws leave significant opportunity for governments to discriminate against minority religions without violating Article 9.

IV. THE TURKISH HEADSCARF CASE: SAHIN V. TURKEY

A. The Facts of the Case

If the French headscarf law were ever to come before the European Court of Human Rights, *Sahin v. Turkey* would be the most relevant precedent. In this case, the Court considered a University of Istanbul policy prohibiting students from wearing head coverings and beards in class lectures or exams.[109] Leyla Sahin was a student in the Faculty of Medicine who considered it her religious duty to wear a headscarf.[110] After the Vice-Chancellor of the University issued the no-headscarf policy in February of 1998, Sahin was excluded from several exams and lectures, and was prevented from registering for other classes.[111]

Sahin filed a complaint in the Turkish Administrative Court, arguing first that the Vice-Chancellor had no authority to make such a policy, and second, that in doing so, he violated her rights

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108. Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U J. INT'L L. & POL. 843, 850 (1999).

109. Sahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R., para. 16 (2005) (Grand Chamber), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=6&portal=hbkm&action=html&highlight=sahin%20%7C%20v.%20%7C%20turkey&sessionid=11508006&skin=hudoc-en.

110. *Id.* at para. 14-15.

111. *Id.* at para. 17.

under the Convention.[112] The Turkish Administrative Court held that the Higher Education Act authorized the Vice-Chancellor to regulate student dress to maintain order, in accordance with the Constitution and supplementary case law.[113] In its original form, the Higher Education Act allowed students to wear veils and headscarves, but the Turkish Constitutional Court immediately declared the policy contrary to the principles of secularism and sexual equality, as enshrined in the Turkish Constitution.[114]

In their judgment, the Constitutional Court judges explained, firstly, that secularism had acquired Constitutional status by reason of the historical experience of the country and the particularities of Islam compared to other religions; secularism was an essential condition for democracy and acted as a guarantor of freedom of religion and of equality before the law.[115]

The Constitutional Court emphasized Turkey's unique position, as a secular state with a majority Muslim population, facing serious threats from fundamentalist Islam.[116] In their opinion, the state had to limit religious expression in schools to prevent discrimination against non-practicing Muslims and create a "calm, tolerant and mutually supportive atmosphere" for learning.[117] Accordingly, the Higher Education Act was amended to reflect "the laws in force" prohibiting veils and headscarves.[118]

Thereafter, Sahin was subject to several disciplinary measures for continuing to wear her headscarf and for participating in an unauthorized assembly to protest the policy.[119] She petitioned the ECHR, arguing that the University policy violated her rights under Article 9 of the Convention.[120] Sahin's case was heard before the Chamber and successfully appealed to the Grand Chamber, but in both instances, the Court found no violation of Article 9. In coming to this conclusion, the Court provides further elucidation on the requirements of Article 9, specifically in relation to the headscarf as a form of religious expression in schools.

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112. *Id.* at para. 18.
113. *Id.* at para. 19.
114. *Id.* at para. 39.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at para. 40.
119. *Id.* at *paras.* 21-28.
120. *Id.* at para. 3.

B. Interference with the Freedom of Religious Expression

As demonstrated by prior case-law, the ECHR seems rather willing to recognize that interference with religious expression has occurred as long as the offending law or regulation is not religion-neutral or subject to general applicability. *Sahin v. Turkey* follows this pattern: the headscarf policy negatively impacts certain religious groups, and therefore is not neutral or generally applied. Accordingly, the Court is readily satisfied that Sahin suffered interference with her religious freedom, despite the government's argument that the policy in question complies with the Convention as interpreted.

C. *"Prescribed by Law"*

The "prescribed by law" requirement was the subject of much debate in *Sahin v. Turkey*. Sahin argued that the prohibition on wearing headscarves was not in written law until the Vice-Chancellor issued his circular in 1998, some four years after Sahin began her studies.[121] Moreover, Sahin asserted that when the policy was issued, there was no basis for the Vice-Chancellor's authority within the laws in force (making reference to the language of the Higher Education Act).[122] To address this issue, the Court clarified the "prescribed by law" standard:

> [T]he Court observes that it has always understood the term "law" in its "substantive" sense, not its "formal" one; it has included both "written law", encompassing enactments of lower ranking statutes and regulatory measures . . . and unwritten law. . . . In sum, the "law" is the provision in force as the competent courts have interpreted it.[123]

Applying this standard, the Court said that "laws in force" included the binding decision of the Constitutional Court, which clearly prohibited wearing veils and headscarves in places of higher education in defense of secularism.[124] By declaring that law should be understood in a "substantive sense," the Court includes

121. *Id.* at para. 79.
122. *Id.* at para. 86.
123. *Id.* at para. 88 (emphasis added).
124. *Id.* at paras. 92-93.

all laws, statutes, case law, and possibly judicial commentary as sources providing foreseeability.[125]

D. "Legitimate Aim"

In line with previous treatment, the Court wastes little time addressing the issue of the government's legitimate aim:

> Having regard to the circumstances of the case and the terms of the domestic courts' decisions, the Court is able to accept that the impugned interference primarily pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order, a point which is not in issue between the parties.[126]

Because the Court pays significant attention to the history and importance of secularism in Turkey, it can be reasonably assumed that "the circumstances of the case and the terms of the domestic courts' decisions" refer to the public interest of maintaining secularism in Turkey.[127] The Court does not even reflect on other possible motivations, such as suppression of traditional Muslim practices, which coincides with prior Article 9 jurisprudence.

E. "Necessary in a Democratic Society"

As described above, Article 9 requires that the offending law be necessary in a democratic society to place a limitation on the legitimate aims asserted by the government. In essence, the government is granted a margin of appreciation to apply the Convention according to its own customs and history, subject to the duty to maintain religious pluralism that is fundamental to a democratic society.

In *Sahin v. Turkey,* Turkey argued for a wide margin of appreciation. As the only Muslim country to have adopted a liberal democracy, the Turkish government argued that it required the capacity to strictly enforce secularism as a means of self-preservation.[128] In response, Sahin questioned the necessity of the headscarf ban as a means of preserving secularism. She argued

125. *Id.* at para. 88.
126. *Id.* at para. 99.
127. *Id.*
128. Sahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R. para. 91 (2004) (Fourth Section), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=44774/98&sessionid=10411350&skin=hudoc-en.

that the headscarves presented no threat to the educational atmosphere in universities because reasonable adults are less likely to participate in or overreact to religious discrimination.[129] Finally, Sahin reiterated that "no European State prohibited students from wearing the Islamic headscarf at university and . . . there had been no sign of tension in institutions of higher education that would have justified such a radical measure."[130]
Citing the broad margin of appreciation in affairs of church and state, the Court forthrightly declared that secularism is necessary to a democratic society:

> The Court considers this notion of secularism to be consistent with the values underpinning the Convention. It finds that upholding that principle, which is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in Turkey. An attitude which fails to respect that principle . . . will not enjoy the protection of Article 9 of the Convention.[131]

Here, the Court presents a significant step in Article 9 case law. With this decision, the Court endorses the view that religious pluralism can legitimately be achieved through strict secularism,[132] an approach to religious expression common to both France and Turkey.

Taking this principle to the French headscarf case, two important questions arise. First, is secularism a justifiable means of preserving democracy in Turkey's case alone, or would the same fervent defense of secularism be necessary in a more established democracy like France? The Court makes several references to secularism promoting sexual equality and avoiding confrontations between practicing and non-practicing Muslims:

> As has already been noted, the issues at stake include the protection of the "rights and freedoms of others" and the "maintenance of public order" in a country in which the majority of the population, while professing a strong attachment to the rights of

129. Sahin v. Turkey, Eur. Ct. H.R. at para. 101 (Grand Chamber).
130. *Id.* at para. 100.
131. *Id.* at para. 114 (emphasis added).
132. *Id.*

> women and a secular way of life, adhere to the Islamic faith. Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since, as the Turkish courts stated . . ., this religious symbol has taken on political significance in Turkey in recent years.[133]

In addition, the Court cites "extremist political movements" in Turkey as further justification for imposing a strict notion of secularism, "based on its historical experience."[134] Overall, the opinion offers a sense of sympathy for Turkey as a state struggling to maintain its democracy. It is unclear to what extent the margin of appreciation was expanded in *Sahin v. Turkey* to accommodate Turkey's compromised position. Likewise, it is debatable whether France would receive the same specialized treatment if its headscarf law were to come before the Court.

Sahin v. Turkey generates a second significant question: Does the Court's approval of secularist policies end the pattern of favoring mainstream religions? As illustrated above, the Court has applied a broad margin of appreciation, resulting in weak protection of minority religious expression. However, with a complete separation of church and state, there should be no state-favored religion for the margin of appreciation to protect. On the other hand, if strict secularism is treated as the government's enforced policy on religion, it may likewise benefit from a broad margin of appreciation, to the detriment of minority religions. If the Court were applying *Sahin v. Turkey* to the French Headscarf Law, the position of secularism as a state-sponsored "religion" and the threat of religious fundamentalism would largely determine whether such a law is necessary in a democratic society.

V. FRENCH HEADSCARF LAW BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

A. The Headscarf Affair: The Facts of the Case

The first confrontation over the Headscarf Law took place in the Parisian suburb of Creil in October 1989.[135] The principal of a majority-Muslim middle school suspended three girls for refusing

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133. *Id.* at para. 115 (citing Sahin, Eur. Ct. H.R. at para. 108 (Fourth Section)) (emphasis added).

134. *Id.*

135. Beller, *supra* note 6, at 582.

to remove headscarves in the classroom.[136] Within a week of the incident, headscarves dominated the national press while public response revealed a deep divide in French society.[137] Politicians seized on the hot topic, making the wearing of headscarves an ever more controversial issue.[138] After announcing his support for the Muslim students, Education Minister Lionel Jospin requested that the Conseil d'Etat, France's highest administrative court, address the propriety of the principal's actions.[139]

In November 1989, the Conseil d'Etat ruled that wearing religious garb in schools was permissible, as long it was not so "'ostentatious' [*ostentatoire*] as to 'constitute an act of intimidation, provocation, proselytizing, or propaganda. . . .'"[140] In addition, no religious symbols that disrupt the academic environment or threaten the dignity and freedom of other students should be allowed.[141]

By declaring that *laïcité* requires schools to protect religious expression, the Conseil d'Etat showed some support for the Muslim students.[142] Yet at the same time, the Court diverted its authority by instructing principals to interpret and implement the pronounced standards on a case-by-case basis.[143] Prime Minister Jospin and the subsequent Minister of Education, Francois Bayrou, issued circulars attempting to clarify the Conseil d'Etat's decision, but the controversy persisted because students were often subject to disparate treatment according to their principal's personal opinions.[144] Moreover:

> The *affaire des voiles*, or affair of the scarves, as it has become known, crystallized many of the conflicts in French society surrounding immigration and national . . . identity[,] . . . [including] the role of secularism in the public school system; women's rights; "the spectre of a fundamentalist, aggressive Islam proselytising France"; and the integration of North Africans and other non-European immigrants.[145]

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136. *Id.* at 582-83.
137. *Id.* at 583.
138. *Id.*
139. *Id.* at 584.
140. *Id.*
141. *Id.*
142. *Id.* at 617.
143. *Id.* at 584.
144. *Id.*
145. *Id.* at 585 (citing MIRIAM FELDBLUM, RECONSTRUCTING CITIZENSHIP: THE POLITICS OF NATIONALITY REFORM AND IMMIGRATION IN CONTEMPORARY FRANCE 136 (1999)).

Many were unhappy with the Conseil d' Etat's decision,[146] and the Headscarf Affair simmered in French society for a few years without firm resolution until, rather spontaneously, it re-emerged in the spring of 2003.[147] At that time, Prime Minister Jean-Pierre Raffarin made several statements on the radio and before the National Assembly proposing a ban on wearing headscarves in public schools in defense of *laïcité*.[148] On May 17, former Prime Minister and Socialist deputy Laurent Fabius advocated the adoption of such a law, which led to the establishment of a parliamentary Inquiry Commission on the "Question of Wearing Religious Signs at School."[149] Thereafter, President Chirac commissioned a similar inquiry on *laïcité* in modern France, led by French Ombudsman, Bernard Stasi.[150]

The Stasi Commission made a central finding in favor of banning religious or political expression in public schools.[151] President Chirac praised their report and declared his government's intentions in a December 17 speech to the French people:[152]

> In all conscience, I consider that the wearing of clothes or signs which conspicuously denote a religious affiliation must be prohibited at school. Discreet signs, for example a Cross, a Star of David or Hand of Fatima will of course remain allowed. On the other hand, . . . the Islamic veil, . . . the Kippa or a Cross of a clearly excessive size, have no place in State schools. State schools will remain secular.[153]

Within the first semester after the Headscarf Law's enactment, forty-eight students were expelled for refusing to remove conspicuous religious symbols at school.[154]

B. Interference with the Freedom of Religious Expression: "Prescribed By Law"

If an expelled student were to bring the Headscarf Law before the Court, *Sahin v. Turkey* and the other precedents discussed

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146. Gunn, *supra* note 11, at 455-56.
147. *Id.* at 459.
148. *Id.*
149. *Id.* at 461.
150. *Id.* at 462.
151. *Id.* (citing Rapport AU PRESIDENT DE LA REPUBLIQUE, at 68 (2003), http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf)).
152. *Id.*
153. President Jacques Chirac, *supra* note 9.
154. *French Schools Expel 48 Over Headscarf Ban*, *supra* note 12.

above would have direct bearing on the outcome of the case. Several fairly reliable patterns have emerged from Article 9 case law, making their hypothetical application to the Headscarf Law rather straightforward.

First, the Court's opinions demonstrate a willingness to recognize that a law has interfered with religious expression, unless that law is religion-neutral and generally applied to a range of believers and non-believers alike (*supra* Sections III(1) & IV(2)). In its defense, the French government could argue that the Headscarf Law prohibits conspicuous Christian crosses and Jewish head coverings, as well as Muslim headscarves, making it generally applicable to all public school students. However, unlike requiring participation in a commemorative parade (*see Efstratiou* and *Valsamis*, *supra* Section III(1)), preventing students from exhibiting their religious beliefs in school can hardly be classified as religion-neutral. Accordingly, the Court is likely to recognize that the Headscarf Law constitutes interference with religious expression under Article 9(1) of the Convention.

Likewise, precedent presents a rather certain interpretation of the "prescribed by law" requirement of Article 9(2) of the Convention. As discussed above (*supra* Sections III(2) & IV(3)), the Court will consider a government's action "prescribed by law" if justification for that action is present in published laws, statutes, or case law. The Headscarf Law was published in *Le Journal Officiel*, the official reporter of the French Republic, on March 17, 2004.[155] Furthermore, if the Court continues to read this requirement broadly, it may even consider that extensive coverage of the Headscarf Law in the international press as a source of basic due process notification. Thus, the decision to expel public school students who refused to remove their headscarves was prescribed by law in accordance with Article 9(2) of the Convention.

C. "Legitimate Aim"

As explored previously, the language of Article 9(2) indicates that public order, public health and safety, and the protection of the rights of others qualify as legitimate aims that may justify limiting religious expression.[156] In application, the Court has approved governments' stated purposes that are tangentially related to the aims proposed by the Convention, making this portion of Article 9's conditions relatively easy to fulfill (*supra* Sections III(3) &

155. The record of Headscarf Law in *Le Journal Officiel* can be found in French at http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MENX0400001L.

156. Convention, *supra* note 30, at art. 9 ¶2.

IV(4)). Moreover, the Court tends to dismiss evidence of illegitimate aims, such as the suppression of minority religions (*see Kokkinakis* and *Manoussakis, supra* Section III(3)).
As if defending itself before the Court, the Stasi Commission justified its recommended ban on religious garb with two public order arguments:

> (1) to respond to the coercion suffered by Muslim girls whose families and communities force them to wear headscarves against their will (. . . [which] exacerbates sexual discrimination and religious polarization within France); and (2) to respond to administrative difficulties suffered by school officials who are forced to implement confusing directives in situations of intense pressure.[157]

These justifications are reminiscent of the accepted legitimate aims proposed by the Turkish government in *Sahin v. Turkey* (*supra* Section IV(4)). In all likelihood, the arguments presented by the Stasi Commission would be approved as legitimate aims under the current jurisprudential standard of the Court. As identified in previous cases, the French government may have multiple motivations for enacting the Headscarf Law, exhibited by the effects of the law in French society. The Stasi Commission made reference to religious polarization as a rising concern in the absence of the proposed ban.[158] This statement intimates a broader apprehension about the Muslim community's failure to integrate, according to the French standard.

The French conception of "citizen" requires an immigrant to "actively take on [the French] culture, including the all-important French language, and participate in [the French] political life."[159] "[I]mmigrants become part of the French nation as individuals, not as groups having a common ethnicity or religion."[160] Thus, when the Muslim community began to demand a supply of *halal* meat, Islamic schools and cultural centers, and permission to wear religious dress in schools, the French people sensed a threat of inva-

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157. Gunn, *supra* note 11, at 467 (citing Rapport au President de la Republique, at 31 (2003), http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf)).

158. *Id.*

159. Beller, *supra* note 6, at 586 (citing ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY 35-49 (1992)).

160. JOEL S. FETZER & J. CHRISTOPHER SOPER, MUSLIMS AND THE STATE IN BRITAIN, FRANCE, AND GERMANY 95 (2005).

sion.[161] The government has attempted to encourage integration by establishing specialized agencies to enforce anti-discrimination laws and increasing funding to problem schools in Muslim suburbs.[162] Nevertheless, the Muslims in France are still widely regarded as "fundamentally 'unassimilable.'"[163]

In response to the growing national identity crisis, the government turned to "[t]he instrument par excellence for entrenching the Republican Idea,"[164] the unified public school system. By removing religious dress from school, the French government forced a significant move towards integration, at least on a superficial level. This "fortunate side-effect" of the Headscarf Law suggests that encouraging assimilation may have been one of the government's original motivations. However, the ECHR has already demonstrated that a government's surreptitious goal of suppressing minority religions can be overlooked if a legitimate aim, such as public order, is proposed. Therefore, the French government would likely be successful in justifying the Headscarf Law as pursuing the legitimate aim of maintaining public order.

D. "Necessary in a Democratic Society"

Because Article 9 represents a fundamental freedom, the Court has a stated policy of applying a stricter standard of review to determine whether state action is necessary in a democratic society. However, in practice, the Court has not confirmed this position by placing a clear limit on the margin of appreciation to respect Article 9 as a fundamental freedom.[165] As evidenced by *Kokkinakis* and *Manoussakis,* state-favored or majority religions often receive privileged treatment without condemnation from the Court by hiding within the state's margin of appreciation (*supra* Section III(4)).

The strict secularism demanded by the Headscarf Law represents the official state position on religion, and, as seen in *Sahin v. Turkey*, it may likewise benefit from a broad margin of appreciation as if it were a state religion.

> [S]tates frequently adopt an aggressive secularism and endeavor to remove any actual reference to reli-

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161. Neil MacMaster, *Islamaphobia in France and the "Algerian Problem", in* THE NEW CRUSADES 288, 297-98 (Emran Qureshi & Michael A. Sells eds., 2003).

162. FETZER & SOPER, *supra* note 160, at 68.

163. *Id.* at 67.

164. President Jacques Chirac, *supra* note 9.

165. As two of the few violations of Article 9 recognized by the Courts, *Kokkinakis* and *Manoussakis* were not decided based on a limitation of the margin of appreciation, but instead on factual nuances that did not address the problem of the offending laws in general.

> gious beliefs and practice from public life. Secularism then becomes a sort of official 'religion'. Religious intolerance transforms a religious dogma into the law of the State. Secular intolerance transforms the law of the State into a religious dogma. Neither of these seems to be an adequate solution to the question of freedom of religion and belief.[166]

French secularism, or *laïcité*, demands a separation between church and state, which began with political opposition to the Catholic Church in the 1700's.[167] During the French Revolution, "church property was confiscated, the Christian calendar was replaced by a revolutionary one, and Christianity itself was replaced by a 'religion of reason.' "[168]

The secularist ideal was first institutionalized in public schools in 1882, when the Ferry Law "effectively laïcized public education" by removing religious influence.[169] The Ferry Law revoked the clergy's right to monitor school curriculum and fire non-conforming teachers.[170] Then in 1905, France rebuked the Catholic church with the Separation Law, which declared that the French government would no longer "recognize [or] pay salaries or other expenses for any form of worship [*culte*]."[171]

Laïcité remains a vigorously protected ideal in modern day France. In the speech confirming the decision to enact the Headscarf Law, President Chirac describe *laïcité* as a "'pillar' of the French Constitution: Its values are at the core of our uniqueness as a Nation. These values spread our voice far and wide in the world. These are the values that create France."[172]

In addition, *laïcité* is still considered an essential component of French public schools. Speaking about his decision to expel several Muslim girls for refusing to remove their headscarves, a principal in Creil said: "It is *laïcité* that has allowed the public school to be the melting pot in which, through the alchemy of education, differences vanish so [a] nation can emerge."[173]

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166. Martínez-Torrón, *supra* note 39, at 203 (emphasis added).

167. William Safran, *Religion and Laïcité in a Jacobin Republic: The Case of France*, *in* THE SECULAR AND THE SACRED 54, 54 (William Safran ed., 2003).

168. *Id.*

169. *See* FETZER & SOPER, *supra* note 158, at 70 (the Ferry Law "effectively *laïcitized* public education.").

170. *Id.*

171. *Id.*

172. Gunn, *supra* note 11, at 428 (citing President Jacques Chirac, Speech on Respecting the Principle of Secularism in the Republic).

173. FETZER & SOPER, *supra* note 160, at 62.

As a founding principle of the French Republic, *laïcité* has fervent believers within the French government and its public servants. Not unlike Orthodoxy in Greece, *laïcité* is recognized by the government as a conviction common to the majority of French citizens which is integrated into the national identity. The Headscarf Law is a modern manifestation of France's historical approach to religion in the public sphere, and as such it represents a zealously-protected national policy. Considering the Court's record of applying a broad margin of appreciation to the delicate relations between church and state (*supra* Section IV(5)), the Headscarf Law would likely be protected from condemnation by the Court as if it were a state-favored religion.

In *Sahin v. Turkey*, the Court added another nuance to determining whether state action limiting religious expression is necessary in a democratic society.

> In a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students . . . may be justified under Article 9 § 2 of the Convention. In that context, secular universities may regulate manifestation of the rites and symbols of the said religion . . . with the aim of ensuring peaceful co-existence between students of various faiths and thus protecting public order and the beliefs of others.[174]

Thus, the Court acknowledged that the need to control dangerous fundamentalist movements and protect public order could justify prohibiting headscarves in public universities. Would the Court apply this holding to the French Headscarf Law? By sheer numbers, Turkey and France face different situations.

> While Turkish secularist law extends from a minority (the government and the military) over the majority, French secularist law extends from the majority over a minority. But both countries have agreed that when the principle of secularism is not voluntarily adopted by their respective Muslim popula-

174. Sahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R., para. 99 (2004) (Fourth Section), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=44774/98&sessionid=10411350&skin=hudoc-en (emphasis added).

> tions, it must be imposed by force for the sake of national integrity.[175]

Could France argue that the Court has already declared its support for the Headscarf Law? The proposed aims of preventing religious coercion and establishing a religion-free school zone are common to the headscarf prohibitions in both Turkey and France. However, the Court would likely need to see that Muslim fundamentalism in France poses a significant threat to the French Republic as it does to the secularist Turkish state.

Unfortunately, the true status of fundamentalism in France is somewhat obscured by the fear and distrust pervading French society. During the first sixty years of Muslim immigration, the practice of Islam was not very visible to the average French citizen.[176] However, as immigrant families reunited in the 1960s and 1970s, the Muslim community emerged as a separate entity, which was regarded as an aggressive religious assertion amounting to an invasion of French society.[177] During the 1980s, anti-immigrant rhetoric fueled the growth of the LePen's *Front National*, which made a successful electoral breakthrough in 1983.[178]

Thereafter, France supported a military junta in Algeria, intending to suppress the swell of fundamentalism.[179] Concurrently, the Minister of the Interior initiated a large-scale police operation in France to arrest supporters of the popular party in Algeria, the Islamic Salvation Army (FIS).[180] These arrests and the ensuing media frenzy encouraged the perception that fundamentalist Islam had a significant presence in France, and that it was likely to spread throughout the Muslim community.[181] In 1995, many fears and suspicions were confirmed when Khaled Kelkal led members of the Armed Islamic Group in blowing up the Paris RER train.[182] Subsequent rising crime rates have largely been attributed to delinquent Muslim youths.[183]

It is impossible to detect the actual breadth of Islamic fundamentalism in France today. However, the French government and much of French society certainly perceive a grave threat. Appre-

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175. Maximilien Turner, *The Price of the Scarf: The Economics of Strict Secularism*, 26 U. PA. J. INT'L. ECON. L. 321, 331 (2005).

176. MacMaster, *supra* note 161, at 297. Prayer rooms and meeting houses were improvised and did not have "the external architectural symbolism of the traditional mosque."

177. *Id.* at 297-98.

178. *Id.* at 298.

179. *Id.* at 302.

180. *Id.*

181. *Id.* at 304

182. FETZER & SOPER, *supra* note160, at 66.

183. *Id.* at 66-67.

hensions rooted in the Muslim community's failure to assimilate have grown into a profound sense that France has an enemy within. With Islamic fundamentalism identified as a probable cause of the recent rioting, France may have a stronger argument than ever that certain limitations on religious freedom, such as the Headscarf Law, are necessary to remedy the failure of Muslim integration and preserve public order.

VI. CONCLUSION

The French Headscarf Law is not likely to be condemned as a violation of Article 9 by the ECHR. The Court may readily recognize the prohibition on religious dress as interference under Article 9(1) because it is not neutral with regard to religion. However, the French government can successfully justify its actions as pursuing the legitimate aim of maintaining public order and protecting the rights of others. Even if France is executing forced integration through the Headscarf Law, the proposed objectives coincide with the aims of the Convention, and the Court has a tendency to disregard the state's less acceptable motivations. With a broad margin of appreciation protecting *laïcité* and violent unrest in minority suburbs in recent memory, the ECHR would almost certainly conclude that the Headscarf Law is a justifiable interference on the religious freedoms enshrined in Article 9 of the Convention.