The Journal of Political Philosophy: Volume 13, Number 3, 2005, pp. 305–329

Secular Philosophy and Muslim Headscarves in Schools*

Cécile Laborde
Politics, University College London

IT is often remarked that the key principles of liberalism — separation between public and private spheres, religious toleration and equality before the law — were articulated in response to the religious conflicts of post-Reformation Europe. Historically, liberalism has been committed, at least minimally, to a weak version of secularism, which requires the state to abstract from divisive religious views and to appeal to values likely to provide a common point of allegiance for all citizens, regardless of their confessional loyalties. Religion should be removed from public affairs and confined to a politically indifferent private sphere. The de-politicisation and privatisation of religion was not merely a pragmatic, prudential solution to the political instability brought about by the religious wars of the sixteenth and seventeenth centuries. The autonomy of the political sphere from religious institutions and beliefs became an enduring liberal ideal because it offered a powerful articulation of the Enlightenment moral vision of universal rights, freedom and equality. By abolishing the privileges enjoyed by members of the dominant Church, the state guaranteed the free exercise of religious freedoms for all in the private sphere. By establishing a non-sectarian, neutral public sphere, it ensured that all enjoyed the status of equal citizenship, as common membership in a political community transcending particular beliefs and allegiances.

It can be said, therefore, that secularism as a doctrine of separation between the political and the religious spheres provided an early, paradigmatic articulation of the liberal ambition to combine the protection of individual freedoms and the diversity of conceptions of the good in society with shared norms of political membership as equal status. Central to this doctrine was the ideal of liberal equality, an ideal which also underpins most recent liberal discussions of state neutrality. Broadly speaking, a state is neutral when it refrains from appealing to comprehensive values and draws instead on principles which all citizens can endorse, thereby — on a contractualist account of political

*I should like to thank Bob Goodin, and three anonymous referees, for helpful comments on an earlier version of this article. Research for this work was funded by a Large Research Grant from the British Academy (LRG 33562).

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justification — treating them with equal respect. What may be called the 'secular core' of liberalism, therefore, embodies a combination of the three principles of freedom of religion, equal respect and state neutrality.[1] Those three principles were recently articulated as the core values of the French concept of *laïcité* (secularism) in the official report of the 'Stasi Commission',[2] which was convened by President Jacques Chirac in the Summer of 2003 to give advice on whether Muslim schoolgirls should be allowed to wear headscarves in state schools. It is in the name of the republican principle of *laïcité* that the law of 15 March 2004 was voted, which banned 'the wearing of signs or clothes through which pupils ostensibly express a religious allegiance'. This article seeks to reconstruct the secular case for the ban in its most plausible form.

A few preliminary clarifications are in order. First, the ideal of separation between state and religion was merely one of the justifications provided for the ban. Hostility to headscarves in schools was also underpinned by two further considerations. One was a feminist concern: headscarves were held to be powerful symbols of the subordination of Muslim women, and should not be tolerated in republican schools committed to the values of gender equality and to the critique of oppressive religious, familial and traditional norms. The other consideration was a nationalist one: it appealed to the traditional role of schools as nation-building institutions, and castigated the recrudescence of headscarves-wearing as a sign of the presumed unwillingness of Arab immigrants to integrate into the French nation. In this piece, I deliberately leave these important and controversial arguments aside, and concentrate exclusively upon the secular, neutralist and egalitarian case against headscarves.[3] Second, the article focuses on arguments expounded by French 'official republicans'. The term 'official republicans' refers to those French republicans who support the ban on headscarves. Thus, the argument presented is not intended as a comprehensive interpretation of a clearly defined ideology of 'republicanism': it does not preclude the articulation of alternative republican arguments, articulated from

[1]For a synthetic account of the 'liberalism of reasoned respect' in relation to religion, see Paul J. Weithman, ed., *Religion and Contemporary Liberalism* (Notre Dame: University of Notre Dame Press, 1997), pp. 1–37. On the link between political liberalism and post-Reformation religious conflicts see John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. xiv–xvi; on liberal principles of equality as requiring the 'privatisation' of differences and uniform rights see Brian Barry, *Culture and Equality* (Cambridge: Polity, 2001), pp. 24–5. For an articulation of the 'separation doctrine' as being underpinned by libertarian, egalitarian and neutralist ideals, see Robert Audi, 'The separation of church and state and the obligations of citizenship', *Philosophy and Public Affairs*, 18 (1989), 259–96.

[2]Named after its president, the *médiateur de la république* (ombudsman) Bernard Stasi, the Commission was made up of 20 experts (mostly academics and lawyers) and interviewed, between September and December 2003, a number of educational, religious and associational representatives. Its December report (the 'Stasi Report') can be found at: http://medias.lemonde.fr/medias/pdf_obj/rapport_stasi_111203.pdf.

[3]For a broader overview of the debates surrounding the now 15-year long 'headscarf affair', see Cécile Laborde, 'On republican toleration', *Constellations*, 9 (2002), 167–83.

within the French or the Anglo-American tradition. Third, no attempt is made (here at least) to explore the limitations of the 'official republican' case. What the article tries to provide is a coherent and plausible argument for banning headscarves in French schools. Such an argument has, unfortunately, not been readily available during the international controversy surrounding the Law of March 2004. Near-universal scepticism vis-à-vis the wisdom of the ban was compounded by the seemingly self-referential, rhetorical and particularistic style of argument used by its French advocates. What follows, therefore, is an attempt to construct a sympathetic, systematic and cogent case for the ban. As I shall briefly indicate in the conclusion, I personally remain unconvinced by it. Yet I hope to show that it should be taken seriously as one plausible interpretation of the 'secular core' of liberalism briefly spelt out above.

Now to the basic outline of the argument. In what follows, I clarify the implications of the French doctrine of separation of church and state, showing that it embodies liberal ideals of equality and neutrality. I also suggest that *laïcité* offers a distinctively *republican* interpretation of the requirements of liberal neutrality, which notably emerged as a response to the bitter conflicts between French republican institutions and the Catholic Church. In broad terms, republican *laïcité* endorses a more expansive conception of the public sphere than political liberalism, as well as a thicker construal of the 'public selves' which make up the citizens of the republic. So, crucially, state schools are seen to be part of the public sphere and pupils, as potential citizens, are required to exercise restraint in the expression of their religious beliefs. The ban on Muslim headscarves in schools, on this view, helps protect the neutral public sphere from religious interference and secure a system of equal religious rights for all. In other words, limits on the exercise of religious liberties in the public sphere are necessary conditions for the maintenance of a system of equal liberties for all. Therefore *laïcité*, like secular liberalism, attempts to weigh the sometimes conflicting principles of freedom of religion, equality between citizens and state neutrality against one another. The key difference between liberal secularism and republican *laïcité* is that the latter makes greater demands on state institutions (in terms of abstention and non-discrimination) and on its citizens (in terms of restraint). *Laïcité*, like many doctrines of separation between state and religion, contains both an *institutional doctrine of separation*, which outlines what separation means for governmental institutions (I), and a *doctrine of conscience*, which prescribes norms of conduct both for religious organizations and for individual citizens (II).[4] When applied to state schools, the separation doctrine and the doctrine of conscience combine to justify the ban on Muslim headscarves (III). I conclude that the ban on Muslim headscarves in schools can be seen as furthering five central values of secular philosophy.

[4]Here I follow Audi, 'The separation of church and state'.

I. *LAÏCITÉ* AS A SEPARATION DOCTRINE

On 11 December 1905, republicans in power abolished the *Concordat* which, since 1801, had regulated the relationships between the French state and 'recognized religions' and had, in practice, entrenched the political and social power of the dominant Catholic Church. The first two articles of the 1905 Law of Separation between Church and State read:

> Article 1. The Republic ensures freedom of conscience. It guarantees the free exercise of religions.
>
> Article 2. It neither recognises nor subsidises any religion.

The principle of separation between church and state has since been recognized as a quasi-constitutional principle, and is implicitly referred to in Article 1 of the 1946 Constitution, according to which 'France is an indivisible, *laïque*,[5] democratic and social republic'. The 1905 Law of Separation embodies a classical ideal of liberal separation between state and religion, underpinned by an individualistic and egalitarian conception of justice as best pursued through state abstention from religious affairs. As a prominent public lawyer puts it, 'In law, what is *laïcité*? It is deduced from the principle of equality: from the principle of equality follows that of the neutrality of the state and public authorities, and *laïcité* is no more than this principle applied to religious affairs'.[6] In order to clarify the sense in which the Separation Law embodies an ideal of egalitarian justice as state neutrality, I first identify four strands that make up the separation doctrine: libertarian (section I.A), egalitarian (I.B), agnostic (I.C) and individualistic (I.D).[7] When combined, they are shown to lend themselves to a conception of formal, rather than substantive, equality between religions (I.E). French *laïcité*, in this sense, tallies with the influential defence of liberal principles of formal equality before the law and 'the privatisation of difference' recently reiterated, with characteristic vigour, by Brian Barry.[8] Where, however, *laïcité* slightly diverges from such egalitarian liberalism is in its republican emphasis on the strict preservation of the autonomy of the secular public sphere, which is regulated by an independent ethics and more expansively constructed than standard liberal understandings would allow (I.F, I.G).

A. A Libertarian Principle

The state permits the practice of any religion, within limits prescribed by the requirements of public order and the protection of basic rights. It neither

[5] *Laïque* is the adjectival form of *laïcité*.

[6] Michel Bouleau, 'La démission du Conseil d'Etat dans l'affaire du foulard', *L'Islam en France*, ed. Charles Zarka, *Cités* (special edition: March 2004), 277–85, at p. 278.

[7] The first three are adapted from Robert Audi, 'The separation of church and state'. What Audi refers to as a 'neutralist' strand, however, I prefer to call an 'agnostic' one, to avoid confusion with the more general theory of state neutrality represented by *laïcité*.

[8] Barry, *Culture and Equality*.

promotes nor combats particular religious beliefs, and refrains from interfering in the internal affairs of religious institutions. The principle of religious freedom was first (ambiguously) asserted during the 1789 Revolution: in the wording of Article 10 of the Declaration of the Rights of Man, 'no-one should be persecuted [*inquiété*] for their opinions, even religious ones'. A century later, the principles both of religious freedom and religious pluralism were entrenched by the Third Republic: the 1905 Law of Separation graphically symbolised the removal of state control of religion, and the recognition of the pluralist structure of background religious institutions in civil society.

The principle of religious freedom is 'libertarian' in the narrow sense that it chiefly requires that the state *refrain* from interfering in religious affairs. Thus article 1 of the 1905 law ('the republic *guarantees* the free exercise of religions') is typically understood by official republicans not to mandate positive state aid to religions: the exercise of religious freedoms should simply not be unduly constrained or burdened by the state. Religions should be allowed to flourish in the private sphere without state interference, according to the zeal and organisational capacities of their adherents and the appeal of their dogma. Only in particular cases should the state provide financial aid to support the exercise of religious freedoms. For example, the 1905 law authorised the public funding of chaplaincies in 'closed' institutions such as the army, prisons and boarding schools, so as to guarantee rights of religious exercise to those physically unable to attend normal religious services. But this is a rare justifiable exception to the general principle of state abstention. On the whole, therefore, the combination of the provisions of Articles 1 and 2 of the 1905 Separation Law is not deemed to generate a conflict of principles similar to that between the 'non-establishment' and the 'free exercise' clause of the First Amendment of the US Constitution.[9] In American jurisprudence, the protection of the 'free exercise' clause sometimes requires relaxing the 'establishment' clause, by compelling the state to step in positively to guarantee that adequate provision is available for the exercise of (notably minority) religious rights. French official republicans generally opine that non-establishment and state abstention are in themselves sufficient guarantees of the free exercise of religious freedoms.

B. An Egalitarian Principle

Minimally understood, the egalitarian principle requires that the state does not give preference to one religion over another: the equality referred to here is equality between believers of all faiths. This goes beyond the libertarian principle, as the state can theoretically allow unlimited religious freedom and still treat some religions preferentially. Thus French republicans typically refer

[9]For stimulating reflections about this conflict, see 'Developments in the law: religion and the state', *Harvard Law Review*, 100 (1987), 1606–781.

to the 'weak establishment'[10] of the Anglican Church as falling short of the egalitarian principle.[11] Even though religious freedoms and religious pluralism are fully protected in the United Kingdom, establishment in itself confers material and symbolic privileges to adherents to the majority confession. In France, under the *Concordat* Catholicism was similarly recognised as 'the religion of the great majority of the French' throughout the 19th century (without, however, being the official religion of the state), a status which conferred benefits unavailable to the other 'recognised religions', Protestantism and Judaism. The 1905 law aimed to place all religious institutions on an equal plane.

Naturally, this entailed a *capitis diminutio* to the detriment of the Catholic Church: equality between all religions essentially meant the abolition of the privileges of the dominant church. However, strong hostility to the Separation Law by the Vatican, and reluctance by French Catholic authorities to implement it, led republicans to make a number of concessions (notably allowing free use by Catholics of state-owned churches).[12] Such historical compromises, however, are not deemed to generate obligations on the part of the state to extend such benefits to religions, such as Islam, which were not present on French soil (at least in mainland France) in 1905. They are seen as minor, historically unavoidable, infringements of the separation principle. For example, free use of state-owned religious buildings was only possible because church property belonged to the state in the first place. Today, to allow public support towards the construction of Muslim mosques, for instance, would violate the spirit and the letter of the law, which postulated that, *from 1905 onwards*, all religions would be treated identically — none would be subsidised by the state. Therefore, official republicans urge the strict respect of the separation principle and reject the idea of the 'historical compensation' of Islam as incoherent and spurious.[13] In the words of the Stasi report, 'drawing on the principle of equality, the *laique* state grants no public privilege to any religion, and its relationship with them is characterised by legal separation'.

C. An Agnostic Principle

This third principle, understood minimally without reference to its theological connotations, implies that the state should neither favour nor disfavour religion as such: it should be 'agnostic' — neutral by ignorance — vis-à-vis the respective

[10]To use the expression of Veit Bader, 'Religious diversity and democratic institutional pluralism', *Political Theory*, 31 (2003), 265–94, at p. 269.

[11]Jacques Zylberberg, 'Laïcité, connais pas: Allemagne, Canada, Etats-Unis, Royaume-Uni', *Pouvoirs*, 75 (1995), 37–52, at pp. 42–3; Jacqueline Costa-Lascoux, *Les trois ages de la laïcité. Débat avec Joseph Sitruk, Grand Rabbin de France* (Paris: Hachette, 1996), pp. 8, 96–100.

[12]For details, see Alain Boyer, Le *droit des religions en France* (Paris: Presses Universitaire de France, 1993), pp. 125–40.

[13]Jeanne-Hélène Kaltenbach and Michèle Tribalat, *La République et l'Islam. Entre crainte et aveuglement*. (Paris: Gallimard, 2002), p. 118; Daniel Licht, 'La triade médiatique: ignorance, bienveillance, complaisance', *L'Islam en France*, ed. Zarka, pp. 341–5, at pp. 343–4.

claims of believers and non-believers. This is often contrasted to the American situation where, in spite of official non-establishment, a diffuse religious culture permeates public institutions. For French official republicans, when the state introduces religious practices and symbols into its institutions, even of a theistic nature (for example, when it requires state officials to swear belief in God), it implicitly puts pressure on non-believers to conform, and therefore fails to treat them with equal respect. Only a fully secular public culture can adequately respect liberty of conscience, understood as permitting 'free adhesion to a religion and the refusal of any religion'.[14] The 1905 law explicitly put an end to the official recognition of the 'social utility of religion' recognised by the Concordat. Public culture did not need to rely on transcendental foundations: for the first time, the possibility of a fully secular public morality was adduced. As prominent republican Aristide Briand put it, the republican state 'is not religious, nor anti-religious: it is a-religious'.[15] Steps towards the secularisation of the public sphere had already been taken in the 1880s. For example, communal cemeteries were secularised: religious signs such as crosses were removed and only discreet symbols were allowed on individual tombstones. Religious marriages are ignored by French law: only civil marriages have legal validity. Exemption from military service may be granted on non-religious conscientious grounds. The agnostic principle, in sum, requires the state not to single out religious believers for special treatment, and to ensure that the public sphere is bereft of potentially exclusionary religious references and symbols. The 'naked public square' best expresses the ideal of equality between all citizens. In the words of one commentator, 'the non-confessional nature of the state puts all citizens on a plane of rigorous moral equality vis-à-vis the state'.[16]

D. An Individualistic Principle

The individualistic principle stipulates that (i) group membership should not generate differential treatment of individuals by the state and (ii) if rights are attributed to groups, they should not override the individual rights of their members. Thus stated, of course, the principle is too general and must be refined. Principle (i) is clearly too strong: social policy, notably, is typically addressed to groups, or categories of individuals, classified in relation to their income, their occupation and so forth; the only differences that should be ignored by the state are, to use John Rawls's phrase, 'morally arbitrary' differences. As Article 2 of the 1958 Constitution states, the republic 'ensures equality before the law of all

[14]Henri Pena-Ruiz, *Dieu et Marianne. Philosophie de la laïcité* (Paris: Presses Universitaires de France, 1999), p. 138.

[15]Soheib Bencheikh, *Marianne et le Prophète. L'Islam dans la France laïque* (Paris: Livre de Poche, 2003), p. 52.

[16]L. De Naurois, cited in Stéphane Pierré-Caps, 'Les "nouveaux cultes" et le droit public', *Revue de Droit Public*, 4 (1990), 1073–119, at p. 1076. For a general defense of 'laïcité as equality', see Henri Pena-Ruiz, *La laïcité pour l'égalité* (Paris: Mille et Une Nuits, 2001).

citizens, with no distinction made on the basis of origin, race or religion'. This is the core of 'difference-blind' liberalism, which provides each individual with a uniform set of rights regardless of her culture, identity or beliefs.[17] The French state goes as far as forbidding the collection of statistics about racial origins or religious affiliation. The use of ethnic categories (such as 'White', 'Black' or 'Arab') is banned in official discourse, and there are no reliable official statistics on the number of Catholics, Protestants, Jews and Muslims in France. The ban on religious classification graphically symbolises the refusal to allow 'morally irrelevant' religious affiliation either to confer a benefit or impose a burden on individual citizens.

Principle (ii), which asserts the primacy of individual rights over group rights, should be qualified, notably in relation to religion. Religious institutions are not merely aggregates of private individuals: they are inevitably communal institutions which generate their own set of duties and obligations for their members. An overly individualist construal of religious organisation (one, for example, which would require churches to be democratically organised) would clearly undermine the whole point of religious freedom, which entails respect for church autonomy. Early parliamentary drafts of the 1905 law did in fact expound such an individualistic conception, proposing that the internal structure of the Catholic Church be broken up, priests chosen by their congregation, and dissident churches allowed freedom to establish themselves. Rightly criticised for forcing a 'Protestant' reform on the Catholic Church, those projects were shelved: the republican state recognises the hierarchical structure of the Roman Catholic Church. Catholics, however, have complained that individualistic philosophy still permeates the state's view of the Church: the ethos and purpose of Catholic schools, for example, may be violated by the requirement that they may not select their pupils on religious grounds. Critics argue that to conflate religious discrimination with discrimination on morally arbitrary grounds betrays an unnecessarily restrictive view of collective religious rights.[18]

It is undeniable that the official republican reading of *laïcité* is strongly influenced, on different levels, by the wider individualistic philosophy of the 1789 revolution, which strongly asserted both principle (i) and principle (ii). The 'emancipation' of Jews provided an early, paradigmatic model of the individualistic model of citizenship which was substituted for the mosaic of corporate laws inherited from medieval society. In the famous words of *député* Clermont-Tonnerre, 'Jews must be refused everything *qua* nation, and granted everything *qua* individuals. . . . They must no longer constitute a political body or order in the state: they acquire citizenship individually'.[19] In 1791, Jews were

[17]For a recent statement, see Barry, *Culture and Equality*.

[18]Jean-Michel Lemoyne de Forges, 'Laïcité et liberté religieuse en France' in Joël-Benoït d'Onorio, *La liberté religieuse dans le monde. Analyse doctrinale et politique* (Paris: Editions Universitaires, 1991), pp. 149–70, at pp. 153, 164–5.

[19]Cited in Danièle Lochak, 'Les minorités et le droit public français: du refus des différences à la gestion des différences', *Les minorités et leurs droits depuis 1789*, ed. Alain Ferret and Gérard Soulier (Paris: Harmattan, 1989), 111–84, at pp. 111–12.

invited to take a civic oath and to renounce 'all privileges and exceptions formerly introduced in their favour'. They were granted full citizenship as individuals, not as members of a religious minority. In fact, the French state does not recognise the existence of 'minorities' in the nation.[20] As the *Haut Conseil à l'Intégration* forcefully put it in its 1991 report:

> The French conception of integration should obey a logic of equality not a logic of minorities. The principles . . . [of] the Revolution and the Declaration of the Rights of Man and of the Citizen permeate our philosophy, founded on the equality of individuals before the law, whatever their origin, race or religion . . . to the exclusion of an institutional recognition of minorities.

Thus the French government requested a 'reservation' of Article 27 (on minority rights) of the International Covenant on Civil and Political Rights, on the grounds that 'France is a country in which there are no minorities, and where the chief principle is non-discrimination'. It also declared the 1999 European Charter of Regional or Minority Languages incompatible with the French Constitution. Hence the rejection of the legitimacy of group rights: individual rights such as religious freedom, freedom of speech, association and so forth are sufficient to ensure that individuals are free to practice their religion and express their cultural identities in the private sphere, without express public recognition. Multiculturalism — the public recognition of collective identities and the attribution of special rights to communities — is castigated as a return to the mass of anomalies and special cases that entrenched privileges and inequalities under the Ancien Regime. The individualistic conception of *laïcité*, therefore, should be seen as an application to religious affairs of a broader model, that of the revolutionary heritage of legal uniformity,[21] combined with an Enlightenment-influenced 'liberalism of equal dignity', to use Charles Taylor's phrase.[22]

E. A Principle of Fairness

In what sense, then, does the separation doctrine articulated in the last four sections embody an ideal of fairness? The difference-blind and abstentionist neutrality of the state is fair to individuals because it treats them identically, regardless of their particular faith, identity and affiliations. This does not mean that the separation doctrine is hostile to the expression of differences: on the contrary, a diversified, pluralist civil society can develop best under the framework of universalist common laws. It is precisely because liberal freedoms

[20]See Lochak, 'Les minorités et le droit public'.

[21]Norbert Rouland, 'La tradition juridique française et la diversité culturelle', *Droit et Société*, 27 (1994), 381–419.

[22]Charles Taylor, *Multiculturalism and the Politics of Recognition* (Princeton, N.J.: Princeton University Press, 1994), pp. 25–36. Taylor famously contrasts the Enlightenment-influenced 'liberalism of equal dignity' with the Romantic-influenced 'liberalism of authenticity' revived by contemporary multiculturalists.

are important that the politicisation of group identities should be resisted;[23] it is precisely because religious freedom is important that no religious group should be granted recognition. As legal commentator Geneviève Koubi puts it in a deliberately paradoxical phrase, 'le droit à la différence est un droit qui ne se réglemente pas' (roughly: 'the right to difference is not a legally enforceable right').[24] The liberal state only establishes fair background conditions for the free development of religious and cultural identities in the private sphere. This means that liberal equality should not be taken to mean substantive equality or equality of outcome. In cultural and religious matters at least, it is best expressed through the formal equality embodied in uniform, general legislation.

So official republicans concur with Brian Barry in denying that a situation in which religious groups fare differently under a neutral state is inherently unfair. *De jure* equality need not generate *de facto* equality. It is in fact the distinctive feature of the liberal conception of justice defended by Barry and by French official republicans that it establishes fair background conditions, and lets the cards fall where they may, as it were, instead of pursuing the chimerical objective of achieving substantive equality between groups through policies of 'positive discrimination'. Such arguments were recently reiterated in response to a Muslim request that public authorities subsidise the buildings of mosques, to remedy the radically insufficient provision of adequate Muslim religious facilities. Although this is considered as a legitimate request by French authorities, which have sought to bypass the stringent ban on the public funding of religion,[25] it has been rejected by defenders of the separation doctrine on three grounds. First, as we have seen, the principle of 'historical discrimination' is seen as incoherent and spurious: that Muslims were not present on French soil in 1905 cannot justify giving them more than their fair share today. Second, to exempt Muslims from a generally applicable rule would introduce a clear inequality between them and other believers — with Islam benefiting from state funding that is denied to other religions. Third, the very idea that provision of Muslim religious facilities is 'insufficient' and 'unfair' assumes that a baseline for sufficiency and fairness can be objectively determined. However, absent precise statistics about the exact number of practising Muslims in France, the actual meaning of 'substantive equality' (even as *pro rata* equality) remains elusive. At any rate, there might be nothing intrinsically unfair about the small number of mosques in France. As Michèle Tribalat and Jeanne-Hélène Kaltenbach pithily put it, 'the poverty of a religion may stem from the fact that its adherents are poor, too few, or ungenerous'.[26] What would be unfair is if public authorities treated Muslims

[23]Barry, *Culture and Equality*, p. 25.

[24]Geneviève Koubi, 'Le droit à la différence, un droit à l'indifférence?', *Revue de la Recherche Juridique. Droit Prospectif*, 2 (1993), 451–463, at p. 462.

[25]See the recommendations of the Haut Conseil à l'Intégration, *L'Islam dans la République. Rapport au Premier Ministre* (Paris: Documentation Française, 2001), p. 50, *passim*.

[26]Kaltenbach, Tribalat, *La République et l'Islam*, p. 140.

differently from other religious groups — for example, if local authorities (as they too frequently do) unreasonably refuse to grant planning permission for the building of mosques to local Muslim communities, in clear breach of the principle of *laïcité*. But as long as the republic guarantees to Muslims the full and fair application of the law, republicans should not worry about how successful particular religious groups are in translating into specific outcomes the equal set of opportunities offered to them.

Thus far, I have spelt out the implications of the separation doctrine as a doctrine of formal equality. So far, we might say, so liberal. For *laïcité* closely resembles the anti-multiculturalist, egalitarian liberalism recently defended by Brian Barry. Interestingly, from a French perspective, Barry's doctrine, with its emphasis on equality before the law and its hostility to collective rights, would appear as more *républicain* than *libéral* (liberalism in France is often associated with minority rights, the politics of recognition and affirmative action). From an Anglo-American perspective, we could say that French republicanism is a tough-minded version of egalitarian, difference-blind liberalism. For example, the refusal to recognise the existence of 'minorities' and to accept that religious freedom is more than a 'negative' liberty which merely requires state abstention for its proper enjoyment would probably be seen as too uncompromising even by Barry. There are, in addition, two further features which make *laïcité* a distinctively *republican* interpretation of liberalism, influenced by Rousseauist Jacobinism and refined by the founders of the Third Republic. The reluctance to grant public recognition to differences — religious or cultural — appears all the more tough-minded in light both of the relative 'thickness' of the public sphere in France and the claim by the state to embody an independent secular ethics. Both combine to make the 'public' identity of citizenship an expansively constructed identity and one that is more discrepant from the 'private' identity of citizens than political liberals, such as Rawls, would allow.

F. A Homogeneous Public Identity

Separation doctrines in general are founded on a distinction between the public and the private spheres; what characterizes *laïcité* is the relatively expansive construal of the former in relation to the latter. This should be related to the French 'state tradition'.[27] In Kenneth Dyson's words, the state in the Continental tradition appears as a

> highly abstract and impersonal . . . political concept which identifies the nation in its corporate and collectivist capacity, as a legal institution with an inherent

[27]Kenneth H.F. Dyson, *The State Tradition in Western Europe: A Study of An Idea and Institution*. Oxford 1980; Pierre Rosanvallon, *L'Etat en France. De 1798 à nos jours*. (Paris: Seuil, 1990) and for a comparative analysis of French and British concepts of the state, Cécile Laborde 'The concept of the state in British and French political thought', *Political Studies*, 48 (2000), 540–57.

> responsibility for regulating matters of public concern, and as a socio-cultural phenomenon which expresses a new, unique form of associative bond.[28]

Many historical factors combined in France to ensconce the view that 'the state' stands for a homogeneous, autonomous public domain: the Roman-law influenced doctrine of state sovereignty elaborated after the religious wars of the 16th century, the struggles of the absolutist monarchy to shake off the domination of the Vatican, the need to forge national unity out of disparate regional, corporate and religious traditions, and the emergence of a central bureaucracy with a distinctive mission and ethos. As Alexis de Tocqueville perceptively saw, the 1789 Revolution pursued this long-standing effort of centralisation, by transferring the attributes of state sovereignty from the monarchy to a homogeneous *peuple*. The Rousseau-influenced revolutionary hostility to intermediary groups and 'factions' — associated with privileges, divisiveness and corruption — shaped a view of republican democracy as essentially unitary, permanently fragile and under threat. The public sphere was to be protected from the interference of particular loyalties, identities or groups, lest it allow the 'general will' to disaggregate into myriad conflicting private wills.

It is, however, the struggles of the state to establish its political hegemony against a domineering Catholic Church still wedded to the pre-revolutionary order that shaped most deeply the expansive and unitary *laïque* public sphere in the 19th and early 20th centuries. With *laïcité* and the separation of the religious and political spheres, the republican state partly took over the spiritual mission previously pursued by the Catholic Church. As republican philosopher Charles Renouvier lucidly foresaw in 1872, 'let us be aware that the separation between Church and State signifies the organisation of the moral and educational state'.[29] The 19th-century 'conflict between the two Frances' (Catholic and republican) chiefly centred on the control of the public sphere, and notably instances of socialisation such as schools, the 'laboratories of the future'.[30] Hence the central importance of education to *laïcité*. If the republic was to create 'citizens' out of 'believers', it had to engage in a strong formative project, aimed at the inculcation of the public values of democratic and egalitarian citizenship, and introduce an alternative set of civic symbols into the public sphere, so as to lead citizens to endorse a robust public identity capable of transcending more particular religious, cultural and class loyalties.[31] The liberal egalitarian strand of *laïcité,* therefore, advocated a robust, republican implementation of the 'formative project' characteristic of the political liberalism of, for example, John Rawls, Stephen Macedo and Eamonn Callan.

[28]Dyson, *The State Tradition*, p. 43.

[29]Marcel Gauchet, *La religion dans la démocratie. Parcours de la laïcité* (Paris: Gallimard, 1998), p. 47.

[30]To borrow Gauchet's felicitous expression, *La religion dans la démocratie*, p. 52.

[31]Yves Deloye, *Ecole et citoyenneté. L'individualisme républicain de Jules Ferry à Vichy* (Paris: Presses de la Fondation Nationales des Sciences Politiques, 1994).

G. An Independent Public Ethic

In broad terms, political liberalism seeks to identify a set of shared *political* values that all citizens can endorse whatever their particular *comprehensive* conceptions of the good. Charles Taylor has suggestively argued that such a project is at the heart of the tradition of Western democratic secularism. He identifies three 'modes of secularism'. The first, which he terms the 'common ground' approach, was based on a convergence of general but religiously-derived precepts of morality shared by all Christian sects. The second, which he calls the 'independent ethic' approach, sought to abstract from religious beliefs altogether and identify general features of the human condition. Taylor then goes on to show that both approaches are unsuited to contemporary pluralist societies, the first because of its narrow Christian roots, and the second because of its hidden secularist bias. Rawls's 'overlapping consensus' approach seems to him to be a truly 'free-standing' conception which can nonetheless be endorsed from a variety of — secular or religious — perspectives.[32]

It has been rightly suggested that 'French republican secularism is the clearest expression of what Taylor calls the independent ethic mode of secularism'.[33] In 1910, leading republican Ferdinand Buisson (who wrote a book significantly if ambiguously called *The Laïque Faith*) addressed the Chamber of Deputies on the subject of *morale laïque*, claiming that it proved the originality of France, the only country that had tried to found a morality outside of religion and of metaphysics.[34] The French tradition of the autonomy of the state, complemented after the Revolution by the republican ideal of a self-governing people democratically establishing the terms of its political constitution, strongly rejected the 'heteronomy' involved in subjecting political authority to religious institutions, transcendental foundations and revealed truth.[35] More specifically, *laïcité* as an ethic independent of religion, based on reason and conscience, had roots in the Enlightenment search for a natural religion, Victor Cousin's Kantian spiritualism, and in the more radical search for '*la morale indépendante*', a morality wholly detached from religious concepts, in the works of the anarchist socialist Pierre-Joseph Proudhon, neo-Kantians Charles Renouvier and Jules Barni, positivist Emile Littré and *solidariste* sociologists Emile Durkheim, Alfred Fouillée and Léon Bourgeois. Protestants, Freemasons and free thinkers were at the forefront of this attempt to establish the scientific foundations of

[32]Charles Taylor, 'Modes of secularism', *Secularism and its Critics*, ed. Rajeev Bhargava (Delhi: Oxford University Press, 1998), pp. 31–53.

[33]Rajeev Bhargava, 'Introduction', *Secularism and its Critics*, ed. Rajeev Bhargava (Delhi: Oxford University Press, 1998), p. 17.

[34]Cited in Phyllis Stock-Morton, *Moral Education for a Secular Society: The Development of* Morale Laïque *in Nineteenth Century France* (New York: State University of New York Press, 1988), p. 174.

[35]See the stimulating analyses of Gauchet, *Religion dans la démocratie*, pp. 31–60.

morality.[36] Jules Ferry, the main promoter of *morale laïque* as the public philosophy of French schools, argued that such morality was 'neutral' in the sense that it was distinct from 'those high metaphysical conceptions . . . over which theologians and philosophers have been in discord for six thousand years'. Instead, it appealed to 'a moral truth superior to all changes of doctrine and all controversies'. This truth was compatible with — though not derived from — traditional moral views, what Ferry called 'the good old morality of our fathers'.[37] As Marcel Gauchet has suggested, the aim was to 'encompass all religions without doing violence to them, from a superior viewpoint', a project which he contrasts to American-style 'civic religion' and its 'common-ground' strategy of finding a theistic 'lowest common denominator'.[38] To put the point differently, *laïcité* was a kind of 'second-order' secularism, a set of rational, moral values upon which a variety of 'first-order' comprehensive views, including religious ones, could converge. Like contemporary political liberals, French republicans believed that one could be a religious believer in the private sphere and a citizen in the public sphere. However, because of the particularly robust conception of civic identity endorsed by republicans, the demands of citizenship were fairly stringent ones, as we shall see in the next section.

II. *LAÏCITÉ* AS A DOCTRINE OF CONSCIENCE

Laïcité as a doctrine of conscience prescribes norms of conduct for religious organisations, in terms of their internal 'laicisation' (section II.A) and for individual citizens, in terms of religious restraint in the public sphere (II.B).

A. The '*Laïcisation*' of Religions

The chief obligation that the separation doctrine imposes on religious groups is to respect the law, renounce all claims to political power and refrain from intervening in public debate in partisan fashion.[39] Historically, *laïcité* was essentially an anti-clerical doctrine in this sense. 'Clericalism, that is the enemy!' the republican leader Léon Gambetta famously exclaimed in 1877 in the Chamber of Deputies.[40] Throughout the nineteenth century, the Church had used

[36]Stock-Morton, *Moral Education*; Jacqueline Lalouette, *La République anti-cléricale. XIX-XXème siècles* (Paris: Seuil, 2002), pp. 142–60, 227–61. For anthologies on laïcité, see Guy Gauthier and Claude Nicolet eds, *La laïcité en mémoire* (Paris: Edilic, 1987); and on republican philosophy generally, see Claude Nicolet, *L'idée républicaine en France (1789–1924): Essai d'histoire critique* (Paris: Gallimard, 1982).

[37]Cited in Stock-Morton, *Moral Education*, p. 99.

[38]Gauchet, *Religion dans la démocratie*, p. 51.

[39]For a discussion on this point, see: Audi 'The separation of church and state'; Paul J. Weithman, 'The separation of church and state: some questions for Professor Audi', *Philosophy and Public Affairs*, 20 (1991), 52–65; and Robert Audi, 'Religious commitment and secular reason: a reply to Professor Weithman', *Philosophy and Public Affairs*, 20 (1991), 66–76.

[40]On the anti-clericalism of the Third Republic see Lalouette, La *République anti-cléricale*.

its social power — notably its monopoly of primary education — to preach anti-republican, royalist doctrines, and fought to re-establish the *societas christiana* in place of the 'diabolical' regime of modern democracy. It only accepted republican institutions slowly and reluctantly: while Catholics had tactically 'rallied' to the Republic in 1892 (the so-called *Ralliement*), it was only in 1945 that the Assembly of Cardinals and Archbishops of France publicly accepted *laïcité*, as entailing both religious freedom and the 'sovereign autonomy of the state in temporal matters'.[41] At the 1964 Vatican II Council, the Roman Catholic Church finally renounced its ambition to bring about a confessional (Catholic) state and fully accepted religious pluralism. Renouncing clericalism and accepting religious pluralism were not, however, the only concessions that French religions made to the *laïque* order: they also profoundly transformed their doctrine, practices and institutions. Of course, many of these changes may not be due to *laïcité* itself but to the broader secularisation of Western society; yet given the particularly strict conception of the separation of politics and religion and the robust conception of citizenship enforced by the French state, they were perhaps more profound and painful there than elsewhere.

There are three major indices of the laicisation of French religious groups. First is the privatisation and individualisation of religious life. This was a most difficult and protracted adjustment as far as the Catholic Church was concerned, given its claim to constitute a 'total institution' covering the whole of social, cultural and political life. With *laïcité*, it was relegated to the status of a private institution with no legitimacy in public debate and reduced visibility in social life. *Laïcité* implicitly fostered a view of religious life as a discrete and personal activity, a view which notably looked with suspicion at forcible attempts at religious conversion. The right to engage in religious propaganda and 'proselytism' (recognised by the European Court of Justice as being entailed by religious freedom[42]) tends to be seen in France as an unacceptable breach of individual freedom and a divisive threat to public order. Incidentally, such suspicion of proselytism (which resurfaced during the 'headscarf affair') may be traced back to the 16th-century religious wars between Catholics and Protestants, with Protestants — then the only significant religious minority in France — granted an uneasy toleration (the *Edit de Nantes* of 1598), provided they kept to themselves and refrained from attempts at evangelisation and propaganda.[43] The second major transformation forced onto religious believers was the revision of their dogmas, chiefly to allow the primacy of state laws over religious prescriptions. Jews, often presented by French republicans as a model of

[41]Boyer, *Le droit des religions*, p. 65.

[42]For details, see Véronique Fabre-Alibert, 'La loi française du 15 mars 2004 encadrant, en application du principe de *laïcité*, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics: vers un pacte social laïque?', *Revue Trimestrielle des Droits de l'Homme*, 59 (July 2004), 575–609, at pp. 603–4.

[43]The Edict was 'revoked' in 1685, putting an end to this early experience in toleration.

successful laicisation of religion, had in the early 19th century re-interpreted a number of religious obligations (for example, family law, dietary prescriptions) to facilitate their accession to citizenship, according to the principle *Malkhuta dinah* (the country's law is the law).[44] The third transformation was thus the 'nationalisation' of religions, their recognition that believers must show full allegiance to the French state, not to foreign-based religious authorities. Gallicanism — the early monarchical effort to 'nationalise' the French Catholic Church — was rooted in the long-standing suspicion that 'those *messieurs* [the Jesuits] are not from France, they are from Rome'. A distinctive feature of what has been called 'Franco-Judaism' stresses the convergence between the universal values of the French Revolution and those of Judaism, while toning down the national content of Jewish identity and Biblical references to the 'chosen people'.[45]

Drawing on those historical examples, official republicans argue that, just as traditional religions have made significant efforts to adapt to the framework of the *laïque* state, so should more recently established ones such as Islam. The suspicion is that Muslims, in contrast to Catholics, Jews and Protestants in the past, may be unable or unwilling to reform their religion in order to ease the tension between their civic and their religious identities. Contemporary republican discussion is preoccupied with the question of the seeming incompatibility between Islam and *laïcité*.[46] The first worry is the absence of separation between spiritual and temporal spheres in Islam: in the oft-quoted words of Muslim reformer Youssouf al Qardawi, 'from the Islamic point of view, everything pertains to religion, and everything pertains to the law'.[47] As a result, Islam is an all-embracing communal identity, which makes it difficult for believers to distance themselves from their religion to act as full members of democratic society. Because Islam is 'at the same time a religion and a political system', it seemingly 'contradicts the requirements of the French state'.[48] The second difficulty stems from the universal scope of Islam. Membership of the *Umma* (the universal community of believers) overrides national citizenship,

[44]Martine Cohen, 'L'intégration de l'Islam et des musulmans en France: modèles du passé et pratiques actuelles', *La laïcité, valeur d'aujourd'hui? Contestations et renégotiations du modèle français*, ed. Jean Baudouin and Philippe Portier (Rennes: Presses Universitaires de Rennes, 2001), 315–330, at pp. 316–8; Boyer, *Le droit des religions*, p. 18.

[45]Cohen, 'L'intégration de l'Islam'. On the commitment to republicanism and *laïcité* of the Jewish political elite during the Third Republic, see Pierre Birnbaum, *Les fous de la République: Histoire politique des Juifs d'Etat de Gambetta à Vichy* (Paris: Fayard, 1992) and for a nuanced account of the historical 'assimilation' of Jews in France see Esther Benbassa, *Histoire des Juifs de France* (Paris: Seuil, 1997).

[46]This preoccupation is not of course specifically French. For an analysis of the challenges posed by Muslim demands to British 'secular multiculturalists', see, eg., Tariq Modood, 'La place des musulmans dans le multiculturalisme laïc en Grande-Bretagne', *Social Compass*, 47 (#1) (2000), 41–55.

[47]Cited in Michel Renard, 'Lois de l'islam, lois de la République: l'impossible conciliation', *L'Islam en France*, ed. Zarka, pp. 387–95, at p. 390.

[48]Dominique Schnapper, *La France de l'intégration. Sociologie de la nation en 1990* (Paris: Gallimard 1990), p. 143.

potentially creating a conflict of loyalties between civic and religious allegiances. Thus, doubts are cast about the sincerity of Muslim allegiance to the *laïque* state. Muslim intellectuals (such as the influential Swiss academic Tariq Ramadan) are routinely suspected of accepting *laïcité* either on partial grounds (making full use of its guarantee of religious rights without fully accepting corollary duties) or on prudential grounds (as a temporary second best to a more religiously-influenced political order). The Muslim attitude to the French state may therefore represent an unstable and unprincipled *modus vivendi*, rather than a principled endorsement of the values underpinning *laïcité*.[49] Thirdly, republicans fear that the actively proselytising proclivities of Islam threaten the fragile social peace historically achieved through enforced religious restraint. If France has broken with the absolutist past of 'one nation, one king, one law' and embraced religious pluralism, it is still reticent vis-à-vis the pluralism of religious militantism.

Lastly, relationships between the French state and the Muslim community are made difficult by the internally divided and disorganised nature of the latter. One paradox of French *laïcité* is that, for all its commitment to the separation of church and state and its 'privatised' and 'individualised' construal of religion, it has always, of necessity, relied on state recognition of centralised religious authorities, which act as representatives of French Catholics, Jews and Protestants and legitimate interlocutors to the government. Since the 1980s, efforts have thus been made to set up a representative Muslim Council, seen as one important step towards the creation of a truly 'French Islam' (one less dependent on foreign states). The complex events leading to the recently set up (and contested) French Council of the Muslim Cult illustrate the dilemma involved for the French state in avowedly respecting and even encouraging the self-organisation of Muslims while discreetly seeking to entrench the authority of moderate, *laïque* leaders over the Muslim community.[50] (Many expressed their satisfaction — and relief — when the Council's leaders expressed their firm support over the Iraqi hostage crisis of September 2004). The neutral state, therefore, is not totally indifferent to the structure of religious communities or to the content of their doctrines. In particular, it favours the 'laicisation' of Muslim organisations along lines already followed by Catholics, Protestants and Jews. In addition to the demands it makes of religious organisations, *laïcité* also makes specific demands on individuals, especially public agents.

B. Religious Restraint in the Public Sphere

In recent Anglo-American liberalism, debate has focused on the question of the legitimacy of religious argument in public debate. When citizens engage in public reasoning, to what extent should they bracket their comprehensive conceptions

[49]Rawls, *Political Liberalism*, pp. 148, 303.

[50]See the articles by Hervé Terrel, Franck Frégosi, Nacira Guénif-Souilamas, Danièle Hervieu-Léger in Zarka, ed., *L'islam en France*.

of the good and notably their religious beliefs? In France, while similar issues have arisen in relation to censorship, abortion and bioethics, they have been quite marginal, given the *prima facie* suspicion of religious arguments in public debate. More attention has been paid to the question of the legitimacy of the expression of religious faith by state agents. We have seen that *laïcité* postulates that only if the public sphere is kept free of all religious symbols can it treat citizens equally. This puts stringent limits on the expression of religious beliefs by public functionaries. Official republicans insist that a line be drawn between 'freedom of conscience' and the 'expression of faith in the public sphere'.[51] It is not always legitimate for citizens to 'make use of a private right in public':[52] in the public sphere, the value of religious freedom must be balanced against other values derived from the principle of *laïcité* as neutrality.[53] The first is that of equal respect of citizens as users of public services. This implies, of course, that no discrimination can be made between citizens on grounds of religion, gender or race. But public services must also display outward signs of neutrality: they must be *seen* to be neutral. Thus public agents have a '*devoir de réserve*' (obligation of restraint): they must not display any sign of religious allegiance, so as to show equal respect to all users of public services. Thus French law has been very strict about banning religious symbols in public services. On 3 May 2000 (*Marteaux* decision), the Conseil d'Etat re-asserted that 'the principle of *laïcité* puts limits on the right [of state agents] to express their religious convictions while engaged in public functions'.[54] Recently, for example, a Muslim tax inspector was prevented from wearing a headscarf while on duty. While there have been debates in other countries about the compatibility of state uniforms with religious dress,[55] in France, the ban on the wearing of religious symbols by public agents is an uncontroversial one and applies regardless of whether state agents must wear official uniforms or not (as in the case of tax inspectors). The second *laïque* value which can override duties of faith is that of the state's interest in the application of a uniform rule to all its agents. Thus exemptions from the normal rules of organisation of public service to allow functionaries to perform duties associated with the exercise of their religious duties (daily prayers, weekly day of rest) are granted parsimoniously by administrations and courts, although the latter have been more tolerant of demands for leave for annual religious holidays. What is called in France 'the ethos of public service', in sum, imposes fairly stringent limits on the exercise of religious freedoms in the *laïque* public sphere.

[51]Pierre Mazet, 'La construction contemporaine de la laïcité par le juge et la doctrine', *La laïcité, valeur d'aujourd'hui*, ed. Portier, pp. 263–83, at p. 270.

[52]Gauchet, *La religion dans la Democratie*, p. 84.

[53]Gilles Pellissier, *Le principe d'égalité en droit public* (Paris: Librairie Générale de Droit et de Jurisprudence, 1996), p. 54.

[54]Cited in Stasi Report, p. 2.

[55]See, for example, the debate about the wearing of Sikh turbans by the Royal Canadian Mounted Police.

III. *LAÏQUE* SCHOOLS AND REPUBLICAN CITIZENSHIP

It is in state schools that the doctrine of *laïcité* has found its fullest application. Given the centrality of education to the republican project, it is in that area that the obligations both of the state and of citizens (*laïcité* as separation doctrine [section III.A] and *laïcité* as doctrine of conscience [III.B]) apply most strictly. Together, they justify the ban on Muslim headscarves in schools.

A. State Obligations: Civic Schools, Neutral Schools

The Educational Laws of the 1880s are, with the Separation Law of 1905, the building blocks of the institutional architecture of *laïcité* in France. In fact, the ideals of *laïcité* were fully implemented in state schools nearly twenty years before formal separation of church and state, an indication of the utmost urgency with which republicans considered educational reform. The primary objective was to take primary education out of the hands of the Catholic Church. Schools were to be *civic* institutions whose chief mission was to 'create citizens' imbued with the republican ethos; this mission could be achieved only if schools were *neutral* towards religious and other particular allegiances.

Schools, then, were central to the civic project of the Third Republic. The monopoly on primary education enjoyed by the Catholic Church meant that most children were socialised into a culture that was anathema to the liberal principles of 1789. Where religiously-controlled schools had taught deference towards traditional authorities, tolerance of natural and social inequalities and encouraged cultural and political divisiveness, republican schools would promote principles of equality, mutual respect and national unity. The republican school, therefore, was conceived as a microcosm of republican political society: within its walls, children would learn to become citizens, a shared public identity that transcended their local, cultural and religious affiliations. A law of 1884 established the principle of free and compulsory primary education both for boys and girls. All were to be subjected to a nation-wide uniform curriculum: in the interests of national unity, the equal right to education was construed as the right to a rigorously identical provision of educational goods to all children, with few accommodations for variations in language, culture, religion and even (remarkably for the time) gender. Throughout the country, republican schools competed with parish churches as the symbolic focal point of village life, and teachers — the *hussards noirs de la République* — were dispatched from their training colleges with a proud sense of the importance of their civilising mission, that of making 'peasants (and Catholics) into Frenchmen'.[56] As a result, official republican educational philosophy gives little scope for parents' choice and

[56]Eugen Weber, *Peasants into Frenchmen* (Stanford, Calif.: Stanford University Press, 1976). For wonderful testimonies of teachers' experiences, see Jacques and Mona Ozouf, *La République des Instituteurs* (Paris: Gallimard, 1992).

involvement in the education of their children. The state's interest in education is constructed expansively: schools are seen as paradigmatically public spaces, not as extensions of the family or local community. In contrast to the conception prevalent in Britain, for example, where schools are broadly responsive to the needs and demands of local communities, sometimes along religious and cultural lines, in France, the 'detached school' is seen as promoting specific civic values which cut across communal divisions and even diverge from values prevalent in other spheres of social life, such as the family and the marketplace.[57] As prominent official republican intellectuals grandly put it in a 1989 Open Letter urging the Minister for Education to press for a ban on headscarves, 'in our society, the school is the only institution which is devoted to the universal'.[58] It affirms the independent ethic of *laïcité* and requires all children to be socialised into it. In 1882, Jules Ferry — the main inspirer, with Ferdinand Buisson, of the *laïque* educational laws — substituted 'moral and *civic* instruction' for traditional 'moral and *religious* instruction'. Civic education was thus a new subject in the recently designed republican textbooks: children were to be taught about basic principles of universal morality, the great principles of the 1789 revolution and their rights and duties as citizens of the French republic. State schools were openly anti-monarchical and pro-republican: as Ferry put it, republicans could not, lest they give up on their civic mission altogether, promise political neutrality. The one thing they could promise, he said, was religious neutrality.

The religious neutrality of schools was achieved through the scrupulous avoidance of any reference to religion in the content of education and the removal of any religious signs such as Christian crosses from classrooms.[59] While this was denounced as an openly anti-religious affront by many Catholics, republicans insisted that the fact that schools refrained from either endorsing or criticizing religious values meant that they could be truly inclusive and respect the diversity of private beliefs; in the words of the 1884 law, they could be open to all 'with no distinction made on the basis of opinion or religion'. Ferry insisted that teachers be sanctioned if they disturbed the 'fragile and sacred conscience' of children or offended parental beliefs. Here are his precise instructions, as he laid them down in a famous *Letter to Teachers* in 1883:

> The republic stops where conscience begins. . . . When you propose a precept or maxim, ask yourself if you know a single honest person who could be offended by what you are going to say. Ask if the father of a family . . . could in good faith

[57]For an instructive comparison along those lines see Meira Levinson, 'Liberalism versus democracy? Schooling private citizens in the public square', *British Journal of Political Science* 27 (1997): 333–360, and on 'detached schools', see her *The Demands of Liberal Education* (Oxford: Oxford University Press, 1999), pp. 65–82.

[58]Elizabeth Badinter, Régis Debray, Alain Finkielkraut, Elisabeth de Fontenay, Catherine Kintzler, 'Profs, ne capitulons pas', *Nouvel Observateur*, 27 October 1989.

[59]For a legal analysis of neutrality in schools, see Agnès Thiriot, 'Le principe de neutralité et l'enseignement', *Savoir — Education — Formation*, 3 (1993), 403–23.

> refuse his consent to what he would hear you say. If yes, refrain from saying it; if no, speak out. . . . You are in no way the apostles of a new religion.[60]

Schools should eschew morally controversial topics and concentrate on the inculcation of so-called 'elementary' notions based on morally neutral, scientific truths. The purpose of public education was to diffuse a corpus of objective knowledge, while neutralising all 'partisan' or 'metaphysical' opinions. It was crucial that schools be neutral in this sense, as attendance was compulsory, intake was mixed and young children were particularly vulnerable to external influence and indoctrination. Furthermore, because the purpose of civic education was to foster a sense of civic commonality and mutual respect between children, it was crucial that schools be insulated from the divisive sectarianism that threatened to tear apart civil society. This conception of the school as a 'sanctuary' — still widely shared by official republicans today — was further entrenched in the 1930s when, to counter the rise of fascist and communist propaganda, Education Minister Jean Zay explicitly banned all forms of 'proselytism' — both political and religious — in state schools. In the — almost Arendtian — words recently used by the Stasi report, because children in a republic are 'expected to live together beyond their differences', schools must be 'protected from the furore of the world'.[61]

Naturally, teachers have a special duty to embody this neutrality of the state: the '*devoir de réserve*' applies to them more strictly than it does to other public agents. There is, for example, a *prima facie* incompatibility between the function of primary school teacher and any ecclesiastical function. While teachers cannot be discriminated against on grounds of their private religious beliefs, they should not express them in schools. Thus a Versailles administrative court recently ruled that the wearing of a Muslim headscarf by a teacher was in breach of *laïcité*, as it would violate the freedom of conscience of the children entrusted to her care.[62] Her religious rights were therefore limited by the state's interest in the preservation of a non-sectarian, non-discriminatory public square.

B. Demands on Pupils: the Ban on Muslim Headscarves

The law promulgated on 15 March 2004 stipulates that 'in primary and secondary public schools, the wearing of signs or clothes through which pupils ostensibly express a religious allegiance is forbidden'. The law's targets are Muslim headscarves, though Jewish yarmulkas and large-sized Christian crosses are also banned in state schools. The law is intended to put an end to the 15-year long 'headscarf affair' which started in Creil in the autumn of 1989 when

[60]Jules Ferry, 'Lettre aux instituteurs' (27 November 1883); reprinted in *Pouvoirs*, 75 (1995), 109–16, at p. 111 and passim.
[61]Stasi Report, p. 7.
[62]Delafaye, *Laïcité de combat*, p. 80.

two girls came to class wearing Muslim scarves. This raised a legal challenge for *laïcité*: there are no school uniforms in French state schools, and it was unclear whether there was an explicit rule preventing pupils from wearing religious symbols. Asked by the Education Minister Lionel Jospin to provide legal advice, the Conseil d'Etat laid out general principles and guidelines in its 27 November 1989 *avis*. It argued that headscarves were not in themselves in breach of *laïcité*: the exercise of religious freedoms by pupils could only be limited when it was an obstacle to the implementation of the statutory mission of state education. This happened when the display of religious insignia involved pressure, proselytism, propaganda or provocation, when it disturbed the good order of the school, or posed a threat to health and safety.[63] This nuanced ruling proved difficult to implement in practice, as it left it to heads of schools to settle issues locally, on a case-by-case basis. It is this legal uncertainty that provided the most immediate incentive for the convening of the Stasi Commission and the drafting of the 2004 law. However, back in 1994, Education Minister François Bayrou had already published more specific instructions banning all 'ostentatious' signs in schools. Although this general regulation was neutralised (though not formally annulled) by the Conseil d'Etat, its principles were broadly those which inspired the recent law, and so it is worth quoting at length:

> The school is the space which more than any other involves education and integration, where all children and all youth are to be found, learning to live together and respect one another. If, in the school, there are signs of behaviour which show that they cannot conform to the same obligations, or attend the same courses and follow the same programs, it negates this mission. All discrimination should stop at the school gates, whether it is sexual, cultural, or religious discrimination. . . . In schools, freedom of conscience, combined with respect of pluralism and the neutrality of public service, requires that the 'educational community' be insulated from any ideological or religious pressure . . . It is not possible to accept the presence and multiplication of ostentatious signs in school, signs whose meaning involves the separation of certain students from the rules of the common life of the school . . . Such signs are in themselves part of proselytism.[64]

If we elucidate the meaning of this document carefully, in light of the general principles of *laïcité* both as separation doctrine and as doctrine of conscience, and of republican educational philosophy, we are in a position to articulate the secular argument against the wearing of Muslim headscarves in schools. A preliminary point to clarify is the sense in which pupils should be in any way subjected to a *devoir de réserve* similar to that which applies to teachers and other public agents. Although no such stringent demand can apply to *users* of public service who do not represent the neutrality of the state in an official

[63]See Jean-Claude William, 'Le Conseil d'Etat et la laïcité. Propos sur l'avis du 27 novembre 1989', *Revue Française de Science Politique*, 41 (#1) (February 1991), 28–57, and, for an analysis in English, see Sebastian Poulter, 'Muslim headscarves in school: contrasting legal approaches in England and France', *Oxford Journal of Legal Studies* 17 (1997), 43–74.

[64]Circulaire Bayrou, reprinted in William, 'Le Conseil d'Etat et la laïcité', 51–7.

capacity, republicans argue that state school pupils are no ordinary users of an ordinary public service. Because schools are miniature 'communities of citizens', where pupils learn the principles of *public* citizenship, the principles of toleration of civil society do not apply with full force in them, and *laïcité* makes demands of religious restraint on the part of pupils too.[65] Headscarves, as ostensible signs of religious belief, infringe on the neutrality and civic purpose of schools in five different but interconnected ways.

1. *Muslim headscarves introduce signs of private difference and religious divisiveness into the public sphere*. They constitute an 'ostensible' intrusion of religious identities into public schools, which should be protected from sectarian divisions. In the public space, the wearing of headscarves can be considered an illegitimate act of propaganda and an aggressive act of proselytism. The best way to deal with the destabilising impact of religious differences in civil society is not to accommodate them, but to exclude them from the public sphere. This draws on *laïcité* as an 'agnostic' principle and on the 'neutral schools' arguments adduced in sections I.C and III.A.
2. *Muslim headscarves symbolise the primacy of the believer over the citizen*. In so far as the wearing of headscarves is a religious obligation for Muslim girls and is 'non-detachable from the person as a believer',[66] it symbolises the refusal by Muslims to separate their identity as citizens from their private religious identity. The ban on headscarves thus signals to the Muslim community that, like other religious groups in the past, it must make greater efforts to reconcile its interpretation of its faith with the demands of *laïcité* as an ethic independent of, and superior to, particular religious prescriptions. This draws on *laïcité* as an 'individualistic' and as an 'independent' public ethic, and on the 'laicisation of religions' argument adduced in sections I.D, I.G and II.A.
3. *Muslim headscarves infringe on equality between pupils*. Schools are non-discriminatory and show respect to all pupils as individuals, regardless of their private affiliations and beliefs. Headscarves infringe on such difference-blind equality in two ways. First, they introduce ostensible distinctions that should be irrelevant within the school: between believers and non-believers, Muslims and non-Muslims, 'good' Muslims and 'bad' Muslims, and men and women. Second, to tolerate headscarves would be to create an unjustified exemption from a general requirement of religious restraint on the part of all believers. It is not in itself unjust that a uniform law (a ban on religious symbols) is more burdensome for some individuals than for others. This draws on the 'fairness' argument articulated in section I.E.

[65]For forceful arguments to this effect, see Catherine Kintzler 'Aux fondements de la laïcité scolaire. Essai de décomposition raisonnée du concept de laïcité', *Les Temps Modernes* 527 (1990), 82–90, and Pena-Ruiz, *Dieu et Marianne*, p. 285.

[66]Alain-Gérard Slama, 'La peur du conflit engendre la violence', *L'Islam en France*, ed. Zarka, pp. 151–7, at p. 157.

4. *Muslim headscarves undermine the civic mission of schools*. The Muslim demand for girls to be allowed to wear headscarves to school is often accompanied by other requests (referred to in the Bayrou *circulaire* above) for exemptions from classes, such as physical education or biology. This raises the worrying prospect of *à la carte* schooling, whereby parents' organisations and local and religious communities seek to re-shape the universal curriculum to accommodate their particular needs. This argument against parental and community involvement and *à la carte* schooling is derived from the 'civic schools' argument adduced in section III.A.
5. *Muslim headscarves undermine the overall scheme of religious freedoms*. By wearing headscarves in the public square, Muslim pupils infringe on the liberty of conscience of others. Given compulsory attendance requirements and the mixed intake of schools, it is crucially important that children, at an age when they are particularly vulnerable, not be exposed to the ostentatious religious behaviour of others, lest their freedom of conscience be infringed. Therefore, restrictions on the exercise of religious rights in the public sphere help secure a system of equal religious rights for all. In this sense, the ban on headscarves can be seen as a 'universal non-monetary tax imposed on Muslims for the maintenance of the secular state'.[67] This sums up the principle of *laïcité*, which makes the protection of equal religious rights conditional on the maintenance of a neutral public sphere. It draws on a combination of the general separation doctrine and the 'religious restraint' argument in sections I and II.B above.

Thus, to sum up, official republicans believe that the ban on Muslim headscarves in schools helps further five central values of the secular philosophy of *laïcité*: the preservation of a shared, non-sectarian public sphere; the distinction between the private and the public identities of individuals; equality before the law and non-discrimination; universal civic education in common schools; and the guarantee of equal religious rights for all. The ban can therefore be said to be compatible with one interpretation of the 'secular core' of liberalism.

So what are we to make of the pro-ban argument? In response, two argumentative strategies are open to defenders of Muslim headscarves in schools. Firstly, they can retort that headscarves-wearing does not infringe the principle of *laïcité* correctly understood. *Laïcité* was intended as a guarantee of, not a limit to, religious freedom, and only public officials and teachers, not pupils, are bound by the requirements of neutrality. *Laïcité* was intended to promote civic inclusion, and it is hard to see how excluding veiled pupils from school will further this objective. *Laïcité* was intended as a principle of equality, yet it can be argued that the ban on headscarves constitutes a case of indirect

[67]Catriona McKinnon, 'Democracy, equality and toleration: a comment on Wilkins', forthcoming in the *Journal of Ethics*.

discrimination and thus infringes on equality. Secondly, critics can object that, in practice, the separation between state and religion is far from complete in France, and the pervasive influence of Catholic culture makes it all the more crucial to ensure that religious minorities, such as Muslims, are treated in fair and even-handed fashion. Secularism must be re-conceptualised, not as a principle of absolute separation between state and religion, but as a principle of even-handed treatment by the state of all religions. It is my belief that both versions of the critique can be successfully constructed, but such a task falls outside the remit of this article.[68]

[68]I develop these arguments, and offer a revised theory of republican secularism, in my *Critical Republicanism*, under preparation for Oxford University Press.

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