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# Color-blind Racism in France: Bias Against Ethnic Minority Immigrants

Leland Ware\*

## INTRODUCTION

Immigration from former colonies in North and sub-Saharan Africa has had a significant effect on France's demographic composition. That nation now has the largest Muslim population in Europe and conflicts involving ethnic minority populations have increased dramatically. In 2004, the French parliament adopted a law prohibiting female students from wearing headscarves in public schools. In 2010, a law was passed that prohibits women from wearing face-covering veils in public places. Both measures have been highly controversial. Many Muslim women interpret their religion to require scarves and veils in public. France's anti-veil laws have, at minimum, a discriminatory effect on Muslim women based on their ethnicity, religion, color, and national origin.

The French veil laws would not be permitted in America, as they would violate American antidiscrimination laws and the First Amendment of the United States Constitution, which protects the free exercise of religion. The French justify the veil law with the doctrine of *laïcité* ("secularism"), which prohibits the display of conspicuous religious symbols in public places. The laws are also grounded in principles of French Republicanism, which discourage the assertion of separate ethnic identities. Social integration for immigrants is conditioned on assimilation and a renunciation of an individual's origins, faith, and customs.

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The effects of discriminatory practices are not limited to Muslim women. A large proportion of France's "visible minorities" are segregated into public housing complexes in the suburban communities, known as *banlieues* (suburbs that surround French cities). The *banlieues* are geographically isolated and ethnically distinct from the surrounding communities. Many public housing complexes in the *banlieues* are neglected and physically deteriorating. Poverty, substandard schools, low-levels of educational attainment, crime, and unemployment are common features of these neighborhoods.

Young *banlieusards* (*banlieue* residents) are stereotyped as gang members, criminals, and potential terrorists. They are otherized as "immigrants" even though many of them are second and third generation citizens born in France. *Banlieusards* are routinely targeted by police who abuse and harass them using the pretext of identity checks. These discriminatory practices treat the young men as second-class citizens and impinge on their rights to freedoms of movement and privacy. Police brutality inflicted on *banlieusards* provoked large-scale riots in 1983, the 1990s, and 2005.

Racial and ethnic categories are not officially recognized in France. The French census does not disaggregate data by race or ethnicity, because French laws prohibit officials from doing so. France is officially color-blind. A similar form of color-blind policymaking has become the ideology to which most American whites subscribe. They acknowledge that there remains some discrimination against African Americans and other minorities, but it is not as severe as it was in the past and is no longer an obstacle to minority progress. Many American whites view conditions in impoverished, inner city communities as a cultural phenomenon resulting from dysfunctional families, a lack of values, and a poor work ethic. Lingering vestiges of Jim Crow, such as all black schools in segregated neighborhoods, are believed to result from the private choices of individuals rather than discrimination in America's housing markets. Scholars have labeled these attitudes "color-blind racism" because African Americans, Latinos, and other racial

minorities still suffer from significant levels of discrimination that is masked by race-neutral justifications.<sup>1</sup>

This Article will show that France's race-neutral policies do not prevent the bias and discrimination caused by "color-blind racism." It examines laws, policies, and practices that disadvantage ethnic minorities in France. Part I examines migration from former French colonies in Northern and sub-Saharan Africa. Part II analyzes the impact of Orientalist stereotypes on the development of immigration policies. Part III discusses the negative reaction to the growth of France's ethnic minority population. Part IV explores the causes and effects of segregation in the suburban communities that surround French cities. Part V examines the causes of riots that erupted in the *banlieues*. Part VI examines the efficacy of French anti-discrimination laws. Part VII explores the "ethnic penalty," which denotes employment discrimination against ethnic minorities. Part VIII discusses the academic achievement problems of children from immigrant families. Part IX traces the development of the headscarf and burqa bans. Part X analyzes religious dress under American Constitutional law. The final section, Part XI, examines the veil controversies that have generated heated debates at national and international levels.

An expanding body of literature is focusing on the veil debates in France. This Article puts those debates in a broader context by analyzing immigration policies; the effects of discrimination in housing, employment, and education; and the influence of internalized stereotypes. Race and ethnicity are important but largely unacknowledged aspects of the immigration debate among French officials who contend that race does not exist in France. However, the term "immigrant" has become a shorthand reference to ethnic minorities who are harshly criticized for failing to assimilate French values and traditions. This is particularly so in the case of Muslims, as many consider Islam to be incompatible with French values. Ethnic minorities are treated as permanent *étrangeres* ("strangers") unworthy of acceptance by the majority population. The problem is

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1. EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* 26 (2003) (discussing color-blind racism in the United States).

not that North and sub-Saharan Africans refuse to integrate into French society—the reality is France won't allow them to do so.

### I. ETHNIC MINORITY IMMIGRATION TO FRANCE

France has a long history of immigration. In the nineteenth century, during the height of the industrial revolution, France experienced severe labor shortages.<sup>2</sup> The first North African migrant workers came to France in 1871.<sup>3</sup> By 1911, three thousand North Africans worked in France.<sup>4</sup> That number rose to thirty thousand in the years before World War I.<sup>5</sup> During World War I, France enlisted over five-hundred thousand sub-Saharan and North African troops in the armed forces, and more than two-hundred thousand colonial workers from Algeria, Morocco, Tunisia, Senegal, and Mali.<sup>6</sup> During World War II, eighty thousand North and sub-Saharan African troops fought for France against Germany.<sup>7</sup> After the war, Algerians were awarded French citizenship.<sup>8</sup>

French perceptions of the North Africans that joined French society as laborers and soldiers are rooted in Orientalism, the country's colonial past, and the independence movements of France's former colonies.<sup>9</sup> The expansion of France into Africa and Asia in the nineteenth century was justified on the grounds of *mission civilisatrice* ("civilizing mission"), which was aimed at educating less

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2. ALEX G. HARGREAVES, MULTI-ETHNIC FRANCE: IMMIGRATION, POLITICS, CULTURE AND SOCIETY 16 (2d ed. 2007); Kimberly Hamilton, Patrick Simon & Clara Veniard, *The Challenge of French Diversity* (Nov. 1, 2004), <http://www.migrationpolicy.org/article/challenge-french-diversity> [hereinafter *The Challenge*]; Shane Cooke, *France for the French: A History of French Immigration Policy*, YOUTUBE (Apr. 23, 2013), <http://www.youtube.com/watch?v=idvK6r97Zlg>.

3. Cathy Lisa Schneider, *Police Power and Race Riots in Paris*, 36 POL. & SOC'Y 133, 141 (2008).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. Quentin Duroy, *North African Identity and Racial Discrimination in France: A Social Economic Analysis of Capability Deprivation*, 69 REV. SOC. ECON. 307, 315 (2011).

civilized people in the far reaches of the world.<sup>10</sup> The colonialist rhetoric promoting the civilizing mission appealed to national pride, the glory of French civilization, and the superiority of Christianity over Islam. Jules Ferry, the influential Minister for Public Instruction in the late nineteenth century, was a prominent proponent of the civilizing missions. In a speech made to the French Chamber of Deputies, he said,

Gentlemen, we must speak more loudly and more honestly!  
We must say openly that indeed the higher races have a right  
over the lower races . . . I repeat, that the superior races have a  
right because they have a duty. They have the duty to civilize  
the inferior races . . . .<sup>11</sup>

The colonial society established by the French in Africa created two distinct communities: a superior caste consisting of French settlers and an inferior one consisting of Africans.<sup>12</sup> One of the underlying assumptions of the republican model is that immigrants should not be culturally different from white French citizens as they gain citizenship.<sup>13</sup> One of the elements of the assimilation strategy consisted of encouraging Muslim women to stop wearing headscarves.<sup>14</sup> The republican model is premised on a concept of citizenship that rejects the notion of individual difference based on religion, ethnicity, or race. Assimilation of colonial subjects required indigenous populations to abandon their origins, faith, customs, and languages.<sup>15</sup> The cultural norms advocated by the republican model

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10. *Id.*; Ellen Wiles, *Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality*, 41 *LAW & SOC'Y REV.* 699, 704 (2007).

11. Paul Halsall, *Jules Ferry (1832–1893): On French Colonial Expansion*, MODERN HISTORY SOURCEBOOK (July 1998), <http://www.fordham.edu/halsall/mod/1884ferry.asp>.

12. Duroy, *supra* note 9, at 315–16.

13. *Id.* at 316; Gary Wilder, *Panafrikanism and the Republican Political Sphere*, in *THE COLOR OF LIBERTY: HISTORIES OF RACE IN FRANCE* 237, 245 (Sue Peabody & Tyler Stovall eds., 2003); see generally ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* (1957) (examined the adverse psychological effects of colonialism on indigenous populations and European colonials)

14. Wiles, *supra* note 10, at 702.

15. Duroy, *supra* note 9, at 316.

consisted of a combination of French language, values, and traditions.<sup>16</sup>

Prior to World War II, non-Europeans were a small proportion of France's foreign-born population.<sup>17</sup> North Africans moved to France where they worked for a few years and then returned home. When they returned they were often replaced by a friend or relative from the same village establishing what became known as the "rotation" system.<sup>18</sup> This changed dramatically after World War II. When the war ended in 1945, the French government capitalized on cheap immigrant labor to reconstruct infrastructure damaged or destroyed during the conflict.<sup>19</sup> France enacted immigration policies that were designed to facilitate the reconstruction of the economy and increase population growth.<sup>20</sup> The National Office of Immigration ("ONI") was created and began authorizing three different types of residence permits: temporary, ordinary, and privileged.<sup>21</sup> Ethnic quotas were not included in a 1945 immigration ordinance, but ONI encouraged European immigration and discouraged African and Asian migrants.<sup>22</sup> Despite these efforts, the fastest growing immigrant populations in France came from the "Maghreb," the western part of North Africa, consisting of Algeria, Morocco, and Tunisia.<sup>23</sup> The Maghrebi population grew from 2 percent of France's foreign population in 1946 to 39 percent in 1982, which made this group the fastest growing immigrant population.<sup>24</sup> The primary "pull" factor for these immigrants was the opportunity for economic advancement through employment in construction and factories in France.<sup>25</sup> In the mid-1950s, France experienced another labor shortage.<sup>26</sup> This led to a dramatic increase in immigrant communities in the 1960s.<sup>27</sup>

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16. *Id.*

17. HARGREAVES, *supra* note 2, at 17.

18. *Id.* at 23.

19. *Id.* at 19.

20. *Id.* at 20; *The Challenge*, *supra* note 2.

21. *Id.* at 19–20; *see also The Challenge*, *supra* note 2.

22. *The Challenge*, *supra* note 2; HARGREAVES, *supra* note 2, at 20."

23. HARGREAVES, *supra* note 2, at 20

24. *Id.*

25. *Id.*; Leland Ware, *A Comparative Analysis of Unconscious and Institutional Discrimination in the United States and Britain*, 36 GA. J. INT'L & COMP. L. 89 (2007).

26. HARGREAVES, *supra* note 2, at 20.

27. Eloisa Vladescu, *The Assimilation of Immigrant Groups in France—Myth or Reality?*,

The independence movements in French colonies also significantly affected the nation's demographics. Independence was granted to French Indochina in 1954 and to French colonies in West and Central Africa in 1960.<sup>28</sup> In 1956, France granted independence to Morocco and Tunisia, leaving Algeria as its only colony in the Maghreb.<sup>29</sup>

During Algeria's colonization, almost one million white persons of French descent resided there. Under President Charles de Gaulle the government granted Algeria independence in 1958. Some of the  *pied noirs*  ("black foot" French citizens of European descent who lived in Algeria) created the Organisation d'Armée Secrète ("OAS") to fight against independence.<sup>30</sup> They wanted Algeria to retain its status as a French colony. The organization mounted an often violent, but ultimately unsuccessful campaign against the French government that included assassination attempts against President de Gaulle.<sup>31</sup> After OAS dissolved, Algerians continued to fight against the remaining French settlers.<sup>32</sup> After a massacre that killed more than three thousand French settlers, the majority of those remaining returned to France.<sup>33</sup> In 1962, Algeria was finally granted independence.<sup>34</sup> By the 1980s, Maghrebis represented approximately

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5 JEAN MONNET/ROBERT SCHUMAN PAPER SERIES 1, 4 (2006), available at <http://www6.miami.edu/eucenter/VladescuWP%20French%20Immigration.pdf>.

28. DAVID BIRMINGHAM, *THE DECOLONIZATION OF AFRICA 1* (David Birmingham ed., Taylor & Francis e-Library, 2009) (1995), available at [http://endbayeh.files.wordpress.com/2011/11/ebooksclub-org\\_\\_the\\_decolonization\\_of\\_africa3.pdf](http://endbayeh.files.wordpress.com/2011/11/ebooksclub-org__the_decolonization_of_africa3.pdf).

29. BIRMINGHAM, *supra* note 28, at 12.

30. MATTHEW CONNELLY, *A DIPLOMATIC REVOLUTION: ALGERIA'S FIGHT FOR INDEPENDENCE AND THE ORIGINS OF THE POST-COLD WAR ERA 3-4* (2003); ALISTAR HORNE, *A SAVAGE WAR OF PEACE: ALGERIA 1954-1962* 480 (2006).

31. CONNELLY, *supra* note 30, at 3-4.

32. *Id.*

33. *Id.*

34. Jim House, *The colonial and post-colonial dimensions of Algerian migration to France*, *History in Focus, Migration*, UNIV. LONDON INST. HISTORICAL RESEARCH: HISTORY IN FOCUS (Autumn, 2006), available at <http://www.history.ac.uk/ihr/Focus/Migration/articles/house.html>; see also Igor Film & Casbah Film, *The Battle of Algiers*, YOUTUBE (1966), <http://www.youtube.com/watch?v=XeMWdueGTZA> (portraying the events that occurred in Algeria's capital city between November 1954 and December 1957 during the Algerian War of Independence).

30 percent of France's total immigrant population, making them the largest non-European minority in France.<sup>35</sup>

## II. ORIENTALISM AND IMMIGRATION

French attitudes about Maghrebian immigrants are rooted in Orientalist stereotypes. In *The Politics of the Veil*, Joan Wallace Scott examined French racism and explained how this racism informs French attitudes about immigrants.<sup>36</sup> These attitudes are derived from colonialist traditions and "Orientalism": ideological biases about cultures in regions designated by Europeans as the Orient.<sup>37</sup> The term "Oriental" in this context denotes generalizations and stereotypes that cross many cultural and national boundaries.<sup>38</sup> It essentializes a prototypical Oriental as one who is biologically inferior, exotic, and culturally backward.<sup>39</sup> A major component of French culture is the conviction that its culture is superior to those of all non-Europeans. In what many consider to be the canonical text, *Orientalism*, Edward W. Said argued that since the beginning of Western civilization,

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35. France still retains some overseas possessions known as the "DOM-TOM." These include Guadelupe, Martinique, and French Guyana in the Caribbean and Réunion in the Indian Ocean. Individuals residing in these territories are French citizens. From 1972 the African immigrant population grew from 2.4 percent in 1979 to 9 percent in 1999. Asian populations went from 3.6 to 12.7 percent during the same period. Prior to World War II, many Magrhebis worked for a few years in France and then returned to their countries of origin. Audrey Célestine, *French Caribbean Organizations and the 'Black question' in France*, 4 AFR. & BLACK DIASPORA: INT. J. 131, 132 (2011); Virginie Guiraudon, *Immigration Policy in France*, THE BROOKINGS INST. (July 2001), <http://www.brookings.edu/research/articles/2001/07/0101france-guiraudon>; HARGREAVES, *supra* note 2, at 21

36. JOAN WALLACE SCOTT, *POLITICS OF THE VEIL*, 42-90 (2007)

37. EDWARD W. SAID, *ORIENTALISM* 21 (1978); EDWARD W. SAID, *CULTURE AND IMPERIALISM* 317 (1994).

38. Historically the "Orient" referred to countries east of the Mediterranean. SAID, *ORIENTALISM*, *supra* note 37, at 1. It denoted a distinction between western nations and those in northern Africa and Asia. "Orientalism" was originally a term used by art historians and other scholars to categorize depictions of Middle Eastern and East Asian cultures by artists and writers from the West. CHRISTINE PELTRE, *ORIENTALISM IN ART* 14 (Jacqueline Decter ed., John Goodman trans., 1998).

39. A major component of French culture is the conviction that its culture is superior to those of all non-Europeans. SAID, *ORIENTALISM*, *supra* note 37, at 39. *See also* Matthew Olmsted, *Are Things Falling Apart? Rethinking the Purpose and Function of International Law*, 27 LOY. L.A. INT'L & COMP. L. REV. 401, 407 (2005); William Lafi Youmans, *Edward Said and Legal Scholarship*, 3 UCLA J. ISLAMIC & NEAR E.L. 107, 110 (2003-2004); *see generally* FRANTZ FANON, *A DYING COLONIALISM* (Haakon Chevalier trans., 1965).

Europeans have regarded Asian and Middle Eastern people as an alien and threatening “other.”<sup>40</sup> This version of the Arab world constructed by British and French scholars provided a justification for the colonization of Africa and the Middle East.<sup>41</sup> Eighteenth and nineteenth century European scholars created a condescending and essentialist view of the Arab world that was not based on any actual knowledge or experience with Arabs, but rather on the product of imaginary constructions.<sup>42</sup>

Attitudes about Orientalism were manifested in various ways. Many nineteenth century Orientalist paintings were propaganda used to support French imperialism. They depicted the East as a place of backwardness, lawlessness, and barbarism tamed by French rule.<sup>43</sup> Antoine-Jean Gros, a painter employed by Napoleon Bonaparte who never traveled to Africa or Asia himself, conveyed these ideas in paintings featuring Eastern architecture and individuals in exotic dress.<sup>44</sup> Artists such as Eugène Delacroix employed themes that portrayed women as objects of violence and cruelty in their Oriental settings.<sup>45</sup>

This subtle indoctrination has profoundly affected modern racism in France. Over the last two decades, a substantial body of empirical and theoretical work in cognitive psychology has confirmed that the causes of discriminatory actions often operate at an unconscious level without the perpetrator’s awareness of the source.<sup>46</sup> Many ideas and beliefs formed during early childhood serve as a basis for judgments

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40. SAID, *ORIENTALISM*, *supra* note 37, at 39–40. SCOTT, *supra* note 36, at 49–57.

41. SAID, *ORIENTALISM*, *supra* note 37, at 39–49.

42. *Id.*

43. TODD PORTERFIELD, *THE ALLURE OF EMPIRE: ART IN THE SERVICE OF FRENCH IMPERIALISM 1798–1836*, 132–34 (1998); Jennifer Meagher, *Orientalism in Nineteenth-Century Art*, THE METROPOLITAN MUSEUM OF ART, [http://www.metmuseum.org/toah/hd/euror/hd\\_euror.htm](http://www.metmuseum.org/toah/hd/euror/hd_euror.htm) (last visited Sept. 14, 2014).

44. PORTERFIELD, *supra* note 43, at 53–58.

45. Laurel Ma, *The Real and Imaginary Harem: Assessing Delacroix’s Women of Algiers as an Imperialist Apparatus*, 19 PENN HIST. REV. 9 (2011).

46. JAMES M. JONES, *PREJUDICE AND RACISM* 425–28 (Beth Kaufman & Larry Goldberg eds., second ed., 1997); Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1473–74 (1998); CHERYL STAATS WITH CONTRIBUTIONS FROM CHARLES PATTON, KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, *IMPLICIT BIAS REVIEW 2013* (2013), [http://kirwaninstitute.osu.edu/docs/SOTS-Implicit\\_Bias.pdf](http://kirwaninstitute.osu.edu/docs/SOTS-Implicit_Bias.pdf) [hereinafter *IMPLICIT BIAS REVIEW*] (contains a comprehensive review of the relevant literature).

about events, groups, and ideas during one's adult years.<sup>47</sup> Socialized beliefs can provoke negative sentiments when individuals' decision-making activates stereotypes.<sup>48</sup> Stereotyping involves the creation of a mental image of a "typical" member of a particular category.<sup>49</sup> Individuals are perceived as undifferentiated members of a group, lacking any significant differences from other individuals within the group.<sup>50</sup> Common traits are assigned to the entire group. When a particular behavior by a group member is observed, the viewer evaluates the behavior through the lens of the stereotype.<sup>51</sup> This process causes the viewer to conclude that the conduct has empirically confirmed his stereotyped belief about the group. Stereotypes can be so deeply internalized that they persist even in the face of information that directly contradicts the stereotype.<sup>52</sup>

The imagery of Orientalism is suffused with stereotypes of European superiority. Oriental men are often depicted as feminine and weak, but dangerous because their hypersexuality poses a threat to white, Western women.<sup>53</sup> Oriental women are depicted as submissive and strikingly exotic. The Orient is seen as eccentric, backward, and sensual.<sup>54</sup> European writers describing the Middle

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47. Susan T. Fiske, *Intent and Ordinary Bias: Unintended Thought and Social Motivation Create Casual Prejudice*, 17 SOC. JUST. RES. 117, 122 (2004); Susan T. Fiske, *Examining the Role of Intent: Toward Understanding Its Role in Stereotyping and Prejudice*, in UNINTENDED THOUGHT, 253, 253–83 (James S. Uleman & John A. Bargh eds., 1989)

48. IMPLICIT BIAS REVIEW, *supra* note 46. Professor Frances Aboud, who conducted research on prejudice in young children, found that stereotypes develop between the ages of three and five. Frances E. Aboud & Maria Amato, *Developmental and Socialization Influence on Intergroup Bias*, in INTERGROUP PROCESSES 65 (Rupert Brown & Samuel Gaertner eds., 2003).

49. Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1246–50 (2002).

50. Blasi, *supra* note 49.

51. *Id.*

52. Robert L. Hayman Jr. & Leland Ware, *The Geography of Discrimination: The Seattle and Louisiana Cases and the Legacy of Brown vs. Board of Education*, in CHOOSING EQUALITY: ESSAYS AND NARRATIVES ON THE DESEGREGATION EXPERIENCE 312, 326 (Robert L. Hayman Jr. & Leland Ware eds., 2009); JAMES M. JONES, PREJUDICE AND RACISM, 10–11, (McGraw-Hill 2<sup>nd</sup> ed. 1997). Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF. L. REV. 733, 741–55 (1995); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 93 (2003).

53. SCOTT, *supra* note 36, at 55–60.

54. *Id.* at 49–60.

East reinforced an image of Arabs and Muslims as uniform, incompetent, and unreflective. This Orient was a creation of the Western imagination.<sup>55</sup>

The Orientalists promoted specific stereotypes about Arabs—including racial inferiority, Islamic fanaticism, and unbridled sexuality—that promoted a caricatured vision of the East.<sup>56</sup> A French study published in 1903 described Algerians as having limited intelligence and being backwards and apathetic.<sup>57</sup> It also said that they were undisciplined, dishonest, untrustworthy, and oversexed.<sup>58</sup> For much of the twentieth century, French advertisements, newspaper articles, and novels emphasized the exoticism of North Africans.<sup>59</sup> As Joan Scott explained “a consensus [emerged] about the inferiority and/or strange customs and behaviors of North Africans.”<sup>60</sup>

During the colonial era and well into the twentieth century, Orientalist representations of Arab women fell into two predominant stereotypes. One consisted of prostitutes and women with loose morals.<sup>61</sup> The second is that of the “harem,” in which multiple women were cloistered and treated as submissive slaves by their husbands.<sup>62</sup> Some of the most popular Orientalist paintings depict harems.<sup>63</sup> Male artists relying largely on their imaginations, depicted opulently decorated interiors with luxuriant odalisques in the nude or in Oriental dress.<sup>64</sup> Jean-Auguste-Dominique Ingres never traveled to the East, for example, but used the harem setting to present an erotic ideal in his voluptuous odalisques.<sup>65</sup>

In French literature, Orientalist fantasies depicted Arab women as being driven by their sexual desires. One example of this fantasy is

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55. *Id.*

56. *Id.*

57. *Id.* at 49–50.

58. *Id.* at 49.

59. Dana S. Hale, *French Images of Race on Product Trademarks During the Third Republic*, in *THE COLOR OF LIBERTY, HISTORIES OF RACE IN FRANCE* 131–46 (Sue Peabody & Tyler Stovall eds., 2003).

60. SCOTT, *supra* note 36, at 50.

61. *Id.* at 49–60.

62. *Id.*

63. *See, e.g.*, Alexandra Jopp, *Romantic Orientalism: The Harem*, available at <http://bestamericanart.blogspot.com/2010/11/romantic-orientalism-harem.html>

64. Meagher, *supra* note 43.

65. *Id.*

demonstrated by postcards that depicted Algerian women and circulated in France in the early decades of the twentieth century.<sup>66</sup> Although the photographs purported to be accurate depictions, they were actually posed in a photographer's studio.<sup>67</sup> The photographs were seen as evidence of the exotic and strange customs of Algerians when, in reality, they reflected colonialist fantasies.<sup>68</sup> The stories and photographs were efforts to peer into Arab women's private spaces.<sup>69</sup> Colonized women were depicted as morally corrupt, ignorant, or promiscuous individuals in need of the colonizers' guidance to carry out their daily activities. Colonizers used these images to legitimize their colonial administration and to control indigenous women.<sup>70</sup>

Orientalist stereotypes of this sort continue to shape French attitudes about North African immigrants and their descendants. As the discussion in subsequent sections of this Article will show, ethnic minorities are routinely denied employment opportunities and are subjected to what has been described by scholars as the "ethnic penalty" that job seekers encounter.<sup>71</sup> Young *banlieusards* are widely regarded as criminals and subjected to harassment and harsh treatment by the French police.<sup>72</sup> Islamic dress such as headscarves and burqas are regarded as threats to French society.<sup>73</sup> These stereotypes are derived from beliefs developed in the late nineteenth and early twentieth centuries during which North Africans were regarded as inferior, dishonest and untrustworthy.<sup>74</sup> Today, these

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66. SCOTT, *supra* note 36, at 55–61; MALEK ALLOULA, THE COLONIAL HAREM, 3–7 (1986); FRENCH ORIENTALISM: CULTURE, POLITICS AND THE IMAGINED OTHER 204 (Desmond Hosford & Chong J. Wojtkowski eds., 2010).

67. *See generally* MALEK ALLOULA, *supra* note 66.

68. *See generally id.*

69. WOMEN AND THE COLONIAL GAZE 1–16 (Tamara L. Hunt & Micheline R. Lessard eds., 2002) (examining gender, imperialism, and the ways in which colonizers used images of women to define colonial relationships); *see generally* ZACHARY LOCKMAN, CONTENDING VISIONS OF THE MIDDLE EAST: THE HISTORY AND POLITICS OF ORIENTALISM (Eugene L. Rogan ed., 2004); *see generally* VISIONS OF THE EAST: ORIENTALISM IN FILM (Matthew Bernstein & Gaylyn Studlar eds., 1997).

70. SCOTT, *supra* note 36, at 46–47.

71. *See infra* Part VII.

72. *See infra* Part VII.

73. *See infra* Part IX.

74. SCOTT, *supra* note 36, at 52.

stereotypes persist and have a profound effect on the lived experiences of ethnic minorities in France.

### III. “TOO MANY IMMIGRANTS IN FRANCE”: EFFORTS TO END MAGHREBIAN IMMIGRATION

[I]f you were a French worker, who worked along with your wife and together earned 15,000 francs and you lived in public housing next to a man with three or four wives, twenty children, who took home 50,000 francs a month from welfare, without working. And if in addition, you had to deal with the noise and the smell, well the French worker goes crazy.

—Jacques Chirac, former President of France<sup>75</sup>

Chirac’s contemptuous comments reflect the sentiments of a large portion of the French population. A majority of French citizens resent the presence of ethnic minority immigrants in France.<sup>76</sup> A 2013 survey showed that 70 percent of the French population believes too many foreigners reside in the country.<sup>77</sup> Since the mid-1970s, France has attempted to stem the tide of immigrants from North and sub-Saharan Africa.<sup>78</sup> This change in policy was adopted after the 1973 oil crisis and the end of the “*trente glorieuses*,”<sup>79</sup> in an economic recession that dampened the need for foreign labor.<sup>80</sup> This resulted in high levels of unemployment.<sup>81</sup> In 1974, under the government headed by Valéry Giscard d’Estaing, France officially suspended

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75. Schneider, *supra* note 3, at 144.

76. Alex Felton, *Too Many Immigrants in France, Sarkozy Says*, CNN (Mar. 7, 2012, 11:52 PM), <http://www.cnn.com/2012/03/07/world/europe/france-politics/>; Joseph Bamat, *Too Many Immigrants in France, Says Ex-PM Fillon*, FRANCE 24 (June 7, 2013), <http://www.france24.com/en/20130607-fillon-france-immigration-presidential-election-2017-ump/>; Ben McPartland, *‘Too Many Foreigners in France’*, *French say*, THE LOCAL (Jan. 25, 2013, 7:35 PM), <http://www.thelocal.fr/20130125/too-many-foreigners-in-france-french-say>.

77. McPartland, *supra* note 76.

78. *The Challenge*, *supra* note 2.

79. Review: Sarah Wilson Art, Artefact, and Empire? Thirty Glorious Years in France *Oxford Art J* (2013) 36 (2): 310-312

80. Hamilton, Simon & Veniard, *supra* note 2.

81. THE REGENTS OF THE UNIV. OF CAL., *1973–74 Oil Crisis*, THE BANCROFT LIBR. (Mar. 7, 2011), <http://bancroft.berkeley.edu/ROHO/projects/debt/oilcrisis.html>.

immigration.<sup>82</sup> There were exceptions to this policy, but it was expected that the immigration of non-Europeans would decrease, but in reality, the policy had the opposite effect.<sup>83</sup> Rather than slowing the influx immigrants, migration shifted from individual male workers to family reunification.<sup>84</sup> Migrants moved to France in large numbers to join family members who were already there, contributing significantly to immigration from 1970 to 2000.<sup>85</sup> The French government attempted to impose a ban on family reunifications, but that effort was declared unlawful.<sup>86</sup> The French government made efforts to reduce the numbers of non-Europeans immigrating to France by encouraging immigrants to return to their home countries; many were forcibly deported.<sup>87</sup> This policy led to an increase in the minority population as many non-European immigrants feared losing access to jobs in France if they left the country. Many who might have left remained and brought their families to live with them in France. The result was an increase in France's ethnic minority population as many workers had large families and, in some cases, multiple wives. The informal "rotation" system ended.<sup>88</sup>

In his 2007 book, Alex Hargreaves reported that approximately one hundred thousand foreigners became French citizens each year.<sup>89</sup> More than half of the foreigners who applied for citizenship were of African origin. About half of the foreigners were admitted through formal citizenship procedures.<sup>90</sup> The remaining foreigners were divided between foreigners who acquired citizenship through marriage to a French spouse and the children of foreign parents born in France who became French citizens when they reach the age of

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82. Sybille Regout, *The Integration of Immigrant Communities in France, the United Kingdom and the Netherlands: National Models in a European Context* 24 (Migration Studies Working Papers No. 2011/09, 2011), available at [http://www.lse.ac.uk/government/research/resgroups/MSU/documents/workingPapers/WP\\_2011\\_09.pdf](http://www.lse.ac.uk/government/research/resgroups/MSU/documents/workingPapers/WP_2011_09.pdf).

83. *Id.*; see also HARGREAVES, *supra* note 2, at 24–25.

84. HARGREAVES, *supra* note 2, at 24–25.

85. *Id.* at 25.

86. *Id.* at 25–26.

87. *Id.* at 26.

88. *Id.*

89. *Id.* at 28.

90. *Id.* at 28–29.

majority.<sup>91</sup> As of 1993, children of immigrants do not automatically become citizens upon reaching the age of majority but are required to formally request citizenship.<sup>92</sup>

Immigration has been a potent political issue since the 1980s through, among other things, the influence of the National Front.<sup>93</sup> This far right political party was founded on October 5, 1972, by activists of the nationalist movement *Ordre Nouveau* (“New Order”), attempting an electoral come-back for the French extreme right.<sup>94</sup> Jean-Marie Le Pen was chosen as president of the new movement, an ex-paratrooper who served in the French Foreign Legion. He was a former president of the Nationalist Students’ Association of Paris.<sup>95</sup>

The National Front’s agenda consists of racist and xenophobic attacks on immigrants.<sup>96</sup> The party has attracted a significant portion of the French electorate with its demagogic demands to deport Muslim immigrants. A cornerstone of its agenda is the “France for the French” slogan. The policies associated with the National Front include ending further immigration and making it increasingly harder for the foreigners already in France to get their citizenship.<sup>97</sup> Le Pen pledged an immediate end to all immigration and to send all foreigners home. Le Pen consistently related the influx of foreigners to unemployment and crime.<sup>98</sup> The success of the National Front is based on its ability to attract and influence voters who support other political parties.<sup>99</sup> This is one of the reasons immigration has remained a hotly contested issue since the 1980s.<sup>100</sup> In April 2002, Le

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91. *Id.*

92. *Id.* at 30; Roya Hajbandeh, “France, Love It or Leave It”: *New French Law Restricts Family Reunification*, 27 WIS. INT’L L.J. 335, 338–40 (2009).

93. PAUL HAINSWORTH, *THE EXTREME RIGHT IN FRANCE: THE RISE AND RISE OF JEAN-MARIE LE PEN’S FRONT NATIONAL*, 40 REPRESENTATION 101, 105–06 (2004); see generally JONATHAN MARCUS, *THE NATIONAL FRONT AND FRENCH POLITICS: THE RESISTIBLE RISE OF JEAN-MARIE LE PEN* (1995); PETER DAVIES, *NATIONAL FRONT IN FRANCE: IDEOLOGY, DISCOURSE AND POWER* (1999).

94. HAINSWORTH *supra* note 93.

95. *Id.*

96. *Id.* at 107; MUSTAFA DIKEC, *BADLANDS OF THE REPUBLIC: SPACE, POLITICS AND URBAN POLICY* 57 (2007).

97. Hajbandeh, *supra* note 92, at 338; MARCUS, *supra* note 93.

98. HAINSWORTH, *supra* note 93, at 106; see also Marcus, *supra* note 93; DAVIES, *supra* note 93.

99. HAINSWORTH, *supra* note 93.

100. See generally *id.*

Pen shocked the political establishment when he won 16.9 percent of the vote in the first round of voting in the French presidential election. This left him only three percentage points behind the incumbent right-wing candidate, President Jacques Chirac, who received only 19.9 percent of the vote. The outcome of Le Pen's performance in 2002 surpassed the 1988 vote, in a clear showing that the National Front has only gained popularity over time.<sup>101</sup>

France's left and right wing political parties have turned immigration into political football since the 1980s.<sup>102</sup> After national elections, each newly installed government has attempted to modify legislation enacted by the previous administration.<sup>103</sup> Major reforms were enacted in the 1980s and 1990s, such as the *loi Bonnet* which was enacted on January 10, 1980 by a right-wing government, the *loi Bonnet* authorized officials to deport undocumented migrants.<sup>104</sup> In 1981, after a new government took office, limited amnesty was granted for undocumented immigrants who entered France prior to January 1, 1981, and had proof of employment.<sup>105</sup> The "Pasqua laws" of 1993, named after interior minister Charles Pasqua, attempted to dramatically limit immigration by prohibiting foreign graduates from accepting French jobs and denying the graduates resident status.<sup>106</sup> The law increased the waiting period for family reunification and denied residency permits to foreign spouses who had been in the country without legal authorization prior to marrying.<sup>107</sup> The laws of 1993 were so restrictive that illegal migration increased. The drastic reduction in legal avenues to immigration caused migrants to resort to extra-legal means to enter France.<sup>108</sup> As a response, the *loi Debré* was implemented on April 24, 1997, but proved to be as restrictive as

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101. Brenna Daldorph, *Historically, Voters Don't Follow the Front National's Advice*, LE FIGARO (Apr. 26, 2012, 11:37 AM), <http://plus.lefigaro.fr/note/historically-voters-dont-follow-the-front-nationals-advice-20120426-905492> (this is the internet cite)

102. Virginie Guiraudon, *Immigration Policy in France: U.S.-France Analysis*, THE BROOKINGS INST. (Jan. 01, 2002), <http://www.brookings.edu/research/articles/2001/07/0101-france-guiraudon>.

103. *Id.*

104. *See generally* Regout, *supra* note 82, at 25. The *loi Bonnet* is named after Christian Bonnet, Minister of the Interior from 1977 to 1981. Regout, *supra* note, 82, at 25.

105. Regout, *supra* note, 82, at 25.

106. *Id.* at 25–26.

107. Hajbandeh, *supra* note 92, at 338.

108. *Id.* at 339.

earlier laws.<sup>109</sup> The right-wing government was defeated in 1997 and, on May 11, 1998, the newly elected leftist government enacted a law governing the status of foreigners that relaxed immigration restrictions imposed by the previous administration.<sup>110</sup> In 2006, an immigration and integration law was enacted, which overhauled France's immigration system and gave the government powers to encourage high-skilled migration, fight illegal migration more effectively, and restrict family immigration.<sup>111</sup> The effort to enact the law was led by Nicolas Sarkozy, the then Interior Minister.<sup>112</sup> The law's objectives were to recruit skilled workers, facilitate foreign students' residencies, tighten the rules on family reunification, and limit access to residence and citizenship.<sup>113</sup>

France's efforts to control immigration have failed. At some point, France will have to accept the reality of an increasingly diverse population. The immigration laws do not recognize the nation's current demographic composition. As one researcher explained, "[i]n 1999, France's resident population of foreign or partially foreign origin (immigrants or persons born in France with at least one immigrant parent or grandparent) represented around 13.5 million people, equivalent to between a quarter and a fifth of the total population."<sup>114</sup> The immigration laws fail to recognize the nation's current demographic composition. France's ethnic minority population does not consist entirely of first-generation immigrants. Many residents with North and sub-Saharan ancestors are second and third-generation French citizens. The government has made continuous efforts to keep North and sub-Saharan African immigrants out while failing to address the needs of the French nationals with African ancestry. The conflicts involving ethnic minorities are as much matters of domestic policy as they are immigration issues. The

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109. Regout, *supra* note 82, at 26.

110. *Id.*

111. Kara Murphy, *France's New Law: Control Immigration Flows, Court the Highly Skilled*, MIGRATION INFORMATION SOURCE (Nov. 2006), <http://www.migrationinformation.org/feature/display.cfm?ID=486>.

112. Murphy, *supra* note 111.

113. *Id.* at 3.

114. Michèle Tribalat, An Estimation of the Foreign-Origin Populations of France in 1999, 59(1) POPULATION, 49 (2004) (Fr.).

French government must recognize and address this if it expects to ameliorate racial tensions in France.

#### IV. BANLIEUES: THE OTHER FRANCE

Paris and other large cities in France are surrounded by suburban communities in which large numbers of ethnic minority families reside. In *Muslim Girls and the Other France: Race, Identity Politics and Social Exclusion*, Professor Tricia Keaton examined the conditions that prevail in Pantin, a *banlieue* adjacent to Paris. To underscore the stark contrast with the romantic connotation of Paris as “the *City of Light*,”<sup>115</sup> Keaton designated *banlieues* symbolically as “the other France.”<sup>116</sup> The ethnically segregated *cités* (public housing complexes) in France are the legacy of government-subsidized housing developed to accommodate workers during Paris’ industrialization in the nineteenth century. From the mid-1950s until the mid-1970s, foreign families living in France were not eligible to reside in public housing.<sup>117</sup> During this time, French authorities treated Africans and Maghrebis as temporary residents and discouraged the reunification of immigrant families in France. Discrimination against immigrants was widespread.<sup>118</sup> Many of them were relegated to the shantytowns on the outskirts of French cities without running water or electricity.<sup>119</sup>

In the late 1950s, a government agency was established that constructed hostels for foreign workers.<sup>120</sup> Sonacotra, the National

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115. The French capital is often referred to as “La Ville-Lumière” (“The City of Light”). The name is said to come from its reputation as a center of education and ideas during the Age of Enlightenment. See e.g., MARY MCAULIFFE PARIS DISCOVERED: EXPLORATIONS IN THE CITY OF LIGHT (2006).

116. TRICA DANIELLE KEATON, *MUSLIM GIRLS AND THE OTHER FRANCE: RACE, IDENTITY POLITICS AND SOCIAL EXCLUSION* (2006); see also Keith Richburg, *The Other France, Separate and Unhappy*, WASH. POST (Nov. 13, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/11/AR2005111102277.html>.

117. Sylvie Tissot, “*French Suburbs*”: *A New Problem or a New Approach to Social Exclusion?* 2 (Ctr. for European Studies, Working Paper Series No. 160, 2008), available at [http://hal.archives-ouvertes.fr/docs/00/28/50/25/PDF/CES\\_160-tissot-frenchSuburbs.pdf](http://hal.archives-ouvertes.fr/docs/00/28/50/25/PDF/CES_160-tissot-frenchSuburbs.pdf) (2008).

118. Sophie Gonick, *Disciplining the Metropolis: Grand Paris, Immigration and the Banlieue*, 24(1) BERKELEY PLAN. J. 26, 30 (2011).

119. AZOUZ BEGAG, *SHANTYTOWN KID* (Alec G. Hargreaves ed., Naïma Wolf & Alec G. Hargreaves, trans., Univ. of Neb. Press) (2007); Gonick, *supra* note 118, at 29–30.

120. Gregory Verdugo, *Public Housing and Residential Segregation of Immigrants in*

Society of Housing for Workers, also constructed accommodations for migrant workers between 1965 and 1975.<sup>121</sup> The “*foyer Sonacotra*” provided accommodations for Maghrebis and sub-Saharan Africans from Senegal and Mali.<sup>122</sup> The housing was designed to accommodate single, male migrants in dormitory-like facilities that were not suitable for families.<sup>123</sup> Working in a similar fashion, the government agency, *Habitations à Loyer Modéré* (housing at moderated rents or “HLM”), demolished shantytowns in the 1970s and encouraged the residents to move into HLM-constructed public housing.<sup>124</sup> Families were eligible to live in HLM housing if the head of the family was authorized to live in France and household income was below a threshold based on the region of the residence.<sup>125</sup> Eligible families could “apply for a HLM [unit] in any city where such public programs exist, regardless of their current place of residence or nationality.”<sup>126</sup>

Many of the original public housing residents in communities surrounding Paris were French citizens who worked in nearby factories.<sup>127</sup> They were hired in large numbers in the 1960s when the factories needed unskilled labor.<sup>128</sup> The HLM provided centralized housing, shopping, education, and recreation in planned communities close to the factories in which residents worked.<sup>129</sup> In the 1960s and early 1970s, HLM created one hundred and ninety-five planned housing complexes, mostly in Paris.<sup>130</sup> Large housing developments were constructed with a minimum of five hundred units in high-rise

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France, 1968–1999, (Inst. for the Study of Labor, Discussion Paper No. 5456, 2011).

121. See generally *id.* at 10.

122. *Id.*

123. *Id.*

124. Tissot, *supra* note 117, at 2.

125. Denis Fougère et al., *Social Housing and Location Choices of Immigrants in France* 4 (Inst. for the Study of Lab., Discussion Paper No. 5557, 2011), available at <http://ftp.iza.org/dp5557.pdf>.

126. *Id.*

127. Paul A. Silverstein & Chantal Tetreault, *Postcolonial Urban Apartheid*, in RIOTS IN FRANCE WEB ESSAYS, SSRN.ORG (June 11, 2006), [http://riotsfrance.ssrn.org/Silverstein\\_Tetreault](http://riotsfrance.ssrn.org/Silverstein_Tetreault) [hereinafter *Postcolonial Urban Apartheid*]

128. *Id.*

129. *Id.*

130. Gonick, *supra* note 118.

towers and low-rise blocks on large land tracts.<sup>131</sup> The intention was to create an attractive, planned community for the working class on the suburban periphery where new factories were being developed and where there was an abundance of open space.<sup>132</sup> The developments were designed to be self-contained neighborhoods with shops, schools, and other services to meet the needs of the residents.<sup>133</sup>

The complexes were inspired by Swiss architect Le Corbusier's "radiant city" designs, in which housing for low-income families consisted of large blocks of individual apartments stacked in a high rise building.<sup>134</sup> The buildings were set on pylons, five meters off the ground, to maximize ground level green space.<sup>135</sup> The floor plans included a living room, bedrooms, kitchen, and garden terrace.<sup>136</sup> Le Corbusier believed his design would provide sunlight and fresh air to city laborers, who had lived in narrow and unsanitary alleys and back streets since the beginning of urbanization in France.<sup>137</sup>

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131. *Postcolonial Urban Apartheid*, *supra* note 127, at 3.

132. *Id.*

133. *Id.*

134. Alexi Ferster Marmot, *The Legacy of Le Corbusier and High-Rise Housing*, 7 BUILT ENV'T 82, 84–85 (1981). The most famous of these buildings, also known as *Cité radieuse* is located in Marseille, France. It was constructed between 1947 and 1952. It was internationally influential and was used as a model for designing public housing projects in Europe and America. *Id.* at 89–93.

135. *Id.* at 88.

136. *Id.* at 85; see also Alexander Gorlin, *The Ghost in the Machine: Surrealism in the Work of Le Corbusier*, 18 PERSPECTA 50–65 (1982), available at <http://www.jstor.org/stable/1567035>. Other photographic depictions can be found at the Le Corbusier foundation's website <http://www.fondationlecorbusier.fr/corbuweb/morpheus.aspx?sysId=13&IrisObjectId=5234&sysLanguage=en-en&itemPos=58&itemCount=78&sysParentId=64&sysParentName=home>.

137. Le Corbusier was hailed as a visionary designer and urban planner, but found his designs problematic for the well-being of the residents. In 1947, a delegation from Glasgow, Scotland, visited Marseille to observe the tower blocks designed by Le Corbusier. A high-rise policy was subsequently implemented in Glasgow. Many of the developments quickly deteriorated into dingy, ill-kempt dwellings that contributed to the occupants' social exclusion. *Id.*; *Post War Housing*, WELCOME TO GLASGOW, <http://www.glasgow.gov.uk/index.aspx?articleid=3471> (last visited Sept. 4, 2014). Le Corbusier's grand vision of lifting workers from unsanitary shantytowns resulted in the created of desolate and dangerous high rise slums. As Witold Rybczynski explained, "[Le Corbusier] called it La Ville Radieuse, the Radiant City. Despite the poetic title, his urban vision was authoritarian, inflexible and simplistic. Wherever it was tried—in Chandigarh by Le Corbusier himself or in Brasilia by his followers—it failed. Standardization proved inhuman and disorienting. The open spaces were inhospitable; the bureaucratically imposed plan, socially destructive. In the United States, the Radiant City took the form of vast urban-renewal schemes and regimented public housing projects that damaged

In the 1970s, the French government began to promote home ownership.<sup>138</sup> The government made low-interest loans available to working-class French families living in public housing. As a result many French families moved out of *cités*.<sup>139</sup> Middle class residents abandoned the housing projects en masse in favor of small bungalows in the suburbs.<sup>140</sup> The “white flight” of French families from the *cités* was also motivated by a desire to distance themselves from immigrants.<sup>141</sup> North and sub-Saharan African immigrant families moved into public housing at a time when the residences were increasingly being seen as undesirable places to live. These new residents were often poorer than their predecessors and had fewer opportunities for advancement.<sup>142</sup> When immigration was halted in 1975, deindustrialization hit the suburbs much harder and lasted much longer than other areas in France.<sup>143</sup> Service positions replaced industrial jobs. As the factories that provided work shut down, significant demographic shifts ensued.<sup>144</sup> The *banlieues* slowly transformed into segregated spaces.<sup>145</sup>

Most of the shopping centers built in the centers of the housing projects closed. Smaller stores in and near the complexes experienced high turnover rates.<sup>146</sup> The concrete and pre-fabricated materials used in the construction of the *cités* deteriorated.<sup>147</sup> By the early 1990s, 80

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the urban fabric beyond repair. Today these megaprojects are being dismantled, as superblocks give way to rows of houses fronting streets and sidewalks. Downtowns have discovered that combining, not separating, different activities is the key to success. So is the presence of lively residential neighborhoods, old as well as new. Cities have learned that preserving history makes a lot more sense than starting from zero. It has been an expensive lesson, and not one that Le Corbusier intended, but it too is part of his legacy.” WITOLD RYBCZYNSKI, *Le Corbusier, in PEOPLE OF THE CENTURY: ONE HUNDRED MEN AND WOMEN WHO HAVE SHAPED THE LAST ONE HUNDRED YEARS* 131 (1999).

138. See generally Fougère, *supra* note 125, at 4.

139. See generally *id.*

140. Jocelyne Cesari, *Ethnicity, Islam, and les banlieues: Confusing the Issues* (Nov. 30, 2005), available at <http://riotsfrance.ssrc.org/Cesari/>.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Postcolonial Urban Apartheid*, *supra* note 127; see generally Graham Murray, *France: the Riots and the Republic*, 47 RACE AND CLASS 26, 30–31 (2006).

146. *Postcolonial Urban Apartheid*, *supra* note 127.

147. *Id.*

percent of the buildings suffered “from some combination of water damage, insulation problems, broken elevators, and similar problems.”<sup>148</sup> From 1982 to 1999, the proportion of French nationals and immigrants from Europe residing in public housing rose by only 1 percent.<sup>149</sup> Residency rates for non-European immigrants increased by 10 percent and, in some cases, 15 percent.<sup>150</sup> In 1999, a 28 percent gap existed between the residency rates of Maghrebis and French nationals.<sup>151</sup> The differences in residency rates across immigrant groups in 1999 were significant, particularly between Europeans (19.7 percent) and non-Europeans (79.3 percent).<sup>152</sup> Within the immigrant population, Maghrebis and Africans had the highest residency rates at 47.9 percent and 43.5 percent, respectively.<sup>153</sup>

From 1990 to 1999, residential segregation of North and sub-Saharan Africans increased.<sup>154</sup> Researchers found that it was more difficult for these groups to move away from disadvantaged neighborhoods than French nationals.<sup>155</sup> In one study focusing on the Paris region, the authors prepared an index of dissimilarity<sup>156</sup> that showed North and sub-Saharan Africans were concentrated to the north of Paris (in the Seine-Saint-Denis district and the southern part of the Val-d’Oise district) and south of Paris (in the western part of the Val de Marne district).<sup>157</sup> Consequently, the researchers determined that these groups were significantly segregated from

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148. *Id.*; Yvonne Yazbeck et al, *The October Riots in France: A Failed Immigration Policy or the Empire Strikes Back?* 44 INT’L MIGRATION 27 (2006).

149. Verdugo, *supra* note 120 at 11.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. Gonick, *supra* note 118, at 30–31.

155. *Id.*

156. An index of dissimilarity is a measure from 0 to 1, in which higher numbers indicated more segregation between two groups. This measure computes the sum total in a larger area of the differences in the relative populations in subareas. RACIAL RESIDENTIAL SEGREGATION MEASUREMENT PROJECT, *Racial Segregation: What it is And How We Measure It*, <http://enceladus.isr.umich.edu/race/seg.html> (last visited Sept. 2, 2014).

157. Laurent Gobillon & Harris Selod, *The Effects of Segregation and Spatial Mismatch on Unemployment: Evidence From France*, NAT’L INST. OF STATISTICS & ECON. STUD. 1, 7 (2007), available at <http://www.crest.fr/images/doctravail/2007-04.pdf>.

French nationals.<sup>158</sup> An even residential mix would require 32 percent of North and sub-Saharan Africans to relocate.<sup>159</sup>

In 2009, France's 4.5 million public housing units represented 17 percent of the country's housing stock.<sup>160</sup> Approximately 55 percent of the public housing was constructed before 1976, including 1.12 million units constructed between 1966 and 1975, when many large HLMs were built on the outer edges of French cities.<sup>161</sup> Immigrant households represented 9.5 percent of the total population in 2002 and they occupied 22 percent of the public housing units.<sup>162</sup> About 29 percent of immigrant households lived in public housing, compared to 14 percent of non-immigrants.<sup>163</sup> Families from Turkey, the Maghreb, and sub-Saharan Africa had much higher percentages: 44 percent, 48 percent and 38 percent, respectively.<sup>164</sup>

The high-rise design of public housing proved to be an urban planning disaster. Since the beginning of the 1980s, the term "*banlieue*" has become synonymous with French suburban neighborhoods.<sup>165</sup> Powerful stereotypes have been attached to the term "immigration" which alludes to unskilled, non-European workers.<sup>166</sup> The non-European immigrant population is regarded as a threat to national unity and identity. These stereotypes are associated with the *banlieues* based on the large numbers of immigrants residing in those areas.<sup>167</sup> However, the majority of young *banlieusards* are French citizens born and raised in France, with little to no connection to the origins of their ancestors.<sup>168</sup>

In *Urban Outcasts: A Comparative Sociology of Advanced Marginality*, Professor Loïc Wacquant compared French *banlieues* to

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158. *Id.* at 7.

159. *Id.*

160. Kathleen Scanlon & Christine Whitehead, *French Social Housing in an International Context* 5 (OECD Economics Department, Working Paper No. 862, 2011), available at <http://dx.doi.org/10.1787/5kged9s0q8f8-en>.

161. *Id.*

162. *Id.* at 8.

163. *Id.*

164. *Id.*

165. Matthew Moran, *Opposing Exclusion: The Political Significance of the Riots in French Suburbs (2005–2007)*, 19 *MODERN & CONTEMP. FR.* 297, 303 (2011).

166. *Id.* (citing HARGREAVES, *supra* note 2, at 26).

167. Moran, *supra* note 165, at 303–04.

168. Moran, *supra* note 165, at 303–04.

America's inner city ghettos. He explained how the decline of America's urban core after the 1960s resulted from private practices and public policies of racial separation and urban abandonment.<sup>169</sup> In France, the spread of *banlieues* is caused by the decline of working-class communities resulting from deindustrialization, high-levels of unemployment, and the spatial concentration of immigrant families in deteriorating public housing.<sup>170</sup> Wacquant concluded that France's *banlieues* were not as vast and mono-racial as America's inner city ghettos, but share many of the same negative attributes and deleterious effects on the residents.<sup>171</sup> In his book, *Algeria in France*, Paul Silverstein observed that public housing originally constructed for factory workers to ease their commutes from home and work "function now as site[s] of spatial isolation, economic exclusion and social containment, reinforcing the physical and mental boundaries between city and suburbs . . . ."<sup>172</sup>

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169. LOÏC WACQUANT, *URBAN OUTCASTS: A COMPARATIVE SOCIOLOGY OF ADVANCED MARGINALITY* 3–4 (2008).

170. *Id.* at 5.

171. *Id.*

172. PAUL SILVERSTEIN, *ALGERIA IN FRANCE: TRANSPOLITICS, RACE, AND NATION* 78 (2004). There may changes on the way for some neighborhoods. Mira Ksamdar, Editorial, *The Other Paris, Beyond the Boulevards*, N.Y. TIMES (Nov. 9, 2013), <http://www.nytimes.com/2013/11/10/opinion/sunday/the-other-paris-beyond-the-boulevards.html?ref=opinion>. A New York Times essay, *The Other Paris, Beyond the Boulevards*, was written by an author who resides in Pantin, where the northeastern *banlieues* begin. *Id.* Many of her neighbors are immigrants from Africa, South Asia, China, and Vietnam. Others are Poles, Ukrainians, Russians, and Serbs. *Id.* She observed that the old mills in Pantin have been transformed into offices for the banking giant BNP Paribas. *Id.* Chanel placed its headquarters nearby and Hermès purchased several blocks for new ateliers. *Id.* Apartment buildings are being constructed with units reserved for affordable housing and canal-side cafes. *Id.* A Chinese supermarket and a high-end art gallery opened in an old warehouse. *Id.* Ksamdar suggests that "the future of this great city is on its periphery" because it is rapidly gentrifying and the housing is far more affordable than it is in Paris . . . . *Id.*

## V. THE FRENCH RIOTS

The only way to deal with an unfree world is to become so absolutely free that your very existence is an act of rebellion.<sup>173</sup>

—Albert Camus

In 2005, three weeks of riots of unprecedented proportions erupted in several French cities. However, rioting in France's *banlieues* has been a regular occurrence over the last three decades. Almost all of the incidents were triggered by police officers' mistreatment of young *banlieuesards*. In the summer of 1981, several women, children, and elderly residents of the *Cité de la Cayolle* in Marseilles were injured during a police raid. Young male residents retaliated by fire-bombing local shopping centers and police stations.<sup>174</sup> During the same period, the Lyon suburb of *Les Minguettes* erupted in a series of violent confrontations between young residents and police that became known as the "rodeo riots."<sup>175</sup> In an estimated two hundred and fifty separate "rodeos," groups of young men would steal a car, engage the police in a high-speed chase, and then abandon and burn the vehicle as an act of defiance.<sup>176</sup>

On June 20, 1983, Toumi Djaidja, the president of *SOS Avenir Minguettes*, was critically wounded by police officers during a police raid.<sup>177</sup> This episode of police brutality inspired the March for Equality against Racism.<sup>178</sup> A handful of marchers (mostly from the *Minguettes*) set out from Marseille on October 15, 1983.<sup>179</sup> By the time they arrived in Paris on December 3rd, the march had grown to include approximately one hundred thousand demonstrators.<sup>180</sup> The

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173. Albert Camus, available at <http://www.worldofquotes.com/author/Albert+Camus/1/index.html>.

174. *Postcolonial Urban Apartheid*, supra note 127; Ahmed Boubeker, *The outskirts of politics: The struggles of the descendants of postcolonial immigration in France*, 24 *FRENCH CULTURAL STUDIES* 184, 186 (2013).

175. *Postcolonial Urban Apartheid*, supra note 127.

176. Mustafa Dikeç, *BADLANDS OF THE REPUBLIC: SPACE, POLITICS, AND URBAN POLICY*, 43–48 (2007) (citing Adil Jazouli, *Les années banlieues* (1992)).

177. Boubeker, supra note 174, at 187.

178. *Id.*

179. *Id.*

180. *Id.*

march received national attention when the President, François Mitterrand, received a delegation of marchers at the Élysée Palace.<sup>181</sup> The violent confrontations between Meghrebi descended immigrants and police in the 1980s resulted in the creation of the *Beur* movement, a nationwide protest against racism.<sup>182</sup> The word *Beur* was coined by reversing the syllables of the word *arabe*, which means Arabic or Arab in French and is frequently used to refer to second generation Meghrbins.<sup>183</sup> The leaders of the *Beur* movement gradually became integrated in the local and national political elites.<sup>184</sup>

Other conflicts erupted in the 1990s. On October 6, 1990, violence broke out in the neighborhood of Vaulx-en-Velin, a suburb of Lyon.<sup>185</sup> A motorbike on which two young men were riding was struck by a police car and one of the young men was killed.<sup>186</sup> Local youths believed that the police intentionally collided with the motorcycle riders and responded by burning cars, looting stores, and throwing rocks and Molotov cocktails at the police.<sup>187</sup> Officers on the scene used tear gas and truncheons to subdue the rioters. The riots continued for two days before calm was restored.<sup>188</sup>

In 1991, a riot was set off in a low-income suburb after a teenager arrested during weekend rioting died of heart failure while he was in police custody.<sup>189</sup> Aissa Ihich became ill while being transferred from the Mantes-La-Jolie Jail to a court appearance in Versailles.<sup>190</sup> Ihich was taken to the hospital in Mantes-La-Jolie, where he died from asthma related asphyxiation. The death exacerbated tensions in the

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181. *Id.*

182. SILVERSTEIN, ALGERIA IN FRANCE, *supra* note 172, at 160–66.

183. *Id.*

184. *Id.*

185. Erik Bleich et al., *State Responses to 'Ethnic Riots' in Liberal Democracies: Evidence from Western Europe*, 2 EUR. POL. SCI. REV. 269, 284 (2010).

186. *Id.*

187. *Id.*

188. *Id.*

189. Patrick McDowell, *Youth Suspected of Riot Dies in Police Custody*, THE ASSOC. PRESS, May 27, 1991, <http://www.apnewsarchive.com/1991/Youth-Suspected-of-Riot-Dies-in-Police-Custody/id-870c5a96c110358b1028cddfd33c170c>; *Postcolonial Urban Apartheid*, *supra* note 127, at 3.

190. *Postcolonial Urban Apartheid*, *supra* note 127.

Paris suburb of Mantes-La-Jolie.<sup>191</sup> Two hours after news of the death circulated, approximately one hundred people gathered at a local shopping center and began hurling rocks at passing police cars.<sup>192</sup> Riot police surrounded the demonstrators but did not intervene.<sup>193</sup> Several young men attacked two journalists leaving the Ilich home after interviewing family members.<sup>194</sup> The journalists suffered minor injuries.<sup>195</sup> Hundreds of youths in the Val Fourre housing project engaged in battles with police.<sup>196</sup> A shopping center was looted and cars were set on fire.<sup>197</sup> Police were attacked with firebombs and baseball bats. Three officers were hurt and eleven alleged rioters were arrested.<sup>198</sup> Similar confrontations took place in Toulouse, Saint-Etienne, Chanteloup-Les-Vignes, and Lyon in a series of *banlieues* riots in 1991.<sup>199</sup>

In 2005, the beginning of what became three weeks of rioting erupted on October 2, 2005 when two youngsters in the Parisian suburb *Clichy sous Bois* were accidentally electrocuted when they entered a transformer house owned by the national electricity company.<sup>200</sup> Nine boys between the ages of fourteen and seventeen were on their way home from a soccer match.<sup>201</sup> They were crossing a construction site when they saw the police Anti-Crime Brigade.<sup>202</sup> The police ordered the boys to stop and show their identification papers.<sup>203</sup> As the boys had not brought their identification papers with them, they knew they would be taken to the police station for questioning. Hoping to avoid detention, the boys took off and the police went after them.<sup>204</sup>

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191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. Schneider, *supra* note 3, at 134–36; Bleich, *supra* note 185, at 286.

201. *Id.* at 135.

202. *Id.*

203. *Id.*

204. *Id.*

The police seized six of the boys. The remaining three were cornered against an eight-foot wall topped with barbed wire and bearing large signs that said, "Caution: the electricity is stronger than you" and "Stop, don't risk your life."<sup>205</sup> Pictures of skulls and crossbones were on the signs.<sup>206</sup> The three boys climbed the wall into the substation and searched for an exit.<sup>207</sup> One of the boys touched a transformer, instantly killing himself and a second boy. The third boy was saved by a power surge that cut electricity to the town. The survivor rescaled the wall. When he emerged, he saw that no one was outside because the police had left the area.<sup>208</sup>

For the next three weeks, riots spread like wildfire from suburb to suburb. The turmoil affected hundreds of towns. Images of flaming cars filled news reports as approximately ten thousand cars were torched. Four thousand rioters were arrested and one hundred and twenty-five police officers were wounded. The rioters, many of them teenagers, were mainly of North and West African descent. The government declared the riots over on November 17th, 2005 after the number of cars torched the night before fell below one hundred.<sup>209</sup>

French officials attributed the riots to negative stereotypes about immigrants. Some officials interpreted the riots as an excuse for "delinquents" to engage in violence and destruction.<sup>210</sup> Nicolas Sarkozy, then the Minister of the Interior, described the *banlieues* as neighborhoods dominated by mafia-like organizations where even the police were afraid to visit.<sup>211</sup> A few days before the 2005 riots,

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205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *French Riots*, BBC (Nov. 14, 2005), <http://news.bbc.co.uk/2/hi/europe/4413964.stm>; *Fresh Violence Hits Paris Suburbs*, BBC (Nov. 3, 2005), <http://news.bbc.co.uk/2/hi/europe/4401670.stm>; Craig S. Smith, *Immigrant Rioting Flares in France for Ninth Night*, N.Y. TIMES (Nov. 5, 2005), [http://www.nytimes.com/2005/11/05/international/europe/05france.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2005/11/05/international/europe/05france.html?pagewanted=all&_r=0); *French Riots Spread Beyond Paris*, BBC (Nov. 4, 2005), <http://news.bbc.co.uk/2/hi/europe/4405620.stm>; Jonathan Laurence & Justin Vaisse, *Understanding Urban Riots in France*, BROOKINGS (Dec. 1, 2005), <http://www.brookings.edu/research/articles/2005/12/01france-laurence>; Keith Richburg, *The Other France, Separate and Unhappy*, WASH. POST (Nov. 12, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/11/AR2005111102277.html>.

210. Moran, *supra* note 165, at 301 (listing examples of French officials connecting "delinquents" with the cause of the riots).

211. *Id.* at 301.

Sarkozy had promised to “clean the suburbs with water hoses” and called the *banlieuesards* “*racaille*,” a term translated in the media as “scum,” but reportedly carries racist connotations.<sup>212</sup> After the riots, the literary theorist Tzvetan Todorov attributed the violence to the dysfunctional sexuality of Muslim youths obsessed with behaving in a “macho” way.<sup>213</sup> One week after the riots, prominent French historian, Hélène Carrère d’Encausse, told Russian media that the riots were caused by the polygamous marital practices of Muslim immigrants from West Africa.<sup>214</sup> The French Employment Minister, Gérard Larcher, agreed with d’Encausse and told British media that it was no surprise that young men from polygamous families experienced difficulty finding jobs.<sup>215</sup> Nicholas Sarkozy said “[t]he central cause of unemployment, of despair, of violence in the suburbs is not discrimination or the failure of the schools—it is drug traffic, the law of bands, the dictatorship of fear and the resignation of the Republic.”<sup>216</sup>

These disparaging comments exposed the stereotypical attitudes that some prominent French citizens have about ethnic minorities in France. These statements were not the product of any thoughtful reflection or careful research. They were angry outbursts that exposed the racial attitudes of the individuals who made the statements. In *Opposing Exclusion: The Political Significance of the Riots in French Suburbs (2005–2007)*, Matthew Moran evaluated the significance of the *banlieue* riots.<sup>217</sup> He argued that political discussions about the riots were dominated by security-oriented interpretations that did not look beyond the acts of violence and destruction inflicted by young *banlieue* residents.<sup>218</sup> The 2005 rioters

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212. Yvonne Yazbeck Haddad & Michael J. Balz, *The October Riots in France: A Failed Immigration Policy or the Empire Strikes Back?*, 44 INT’L MIGRATION 24, 24–30 (2006); Abbey C. Furlong, *Cultural Integration in the European Union: A Comparative Analysis of the Immigration Policies of France and Spain*, 19 TRANSNAT’L L. & CONTEMP. PROBS. 681, 689–90 (2010);

213. Alec G. Hargreaves, *An Emperor with No Clothes?*, SSRC (Nov. 28, 2005), <http://riotsfrance.ssrc.org/Hargreaves> [hereinafter *An Emperor*]; Schneider, *supra* note 3, at 137.

214. Schneider, *supra* note 3, at 137.

215. *Id.*

216. *Id.*

217. *Opposing Exclusion*, *supra* note 210.

218. *Id.* at 299–302.

were not immigrants; many of them were second- and third-generation French citizens.<sup>219</sup> French politicians on the left and the right had long denied that discrimination was a serious problem. Meanwhile, everyday racism persisted with minority citizens being routinely denied jobs, apartments, and access to recreational facilities because of their brown complexions or Middle Eastern names.<sup>220</sup> France's failures resulted from social and economic policies that allowed public officials to fail to address the oppressive conditions of ethnic minorities.<sup>221</sup> Second- and third-generation minority youths are still viewed as "immigrants" and are denied an equal opportunity to participate in French society.<sup>222</sup> Years of police harassment, discrimination and social exclusion generated the acts of rebellion and the intense anger that was reflected in the 2005 riots.<sup>223</sup> The unrest will not end until socio-economic inequalities and ethnic discrimination have been properly addressed.<sup>224</sup>

The 2005 riots bear a remarkable resemblance to American race riots of the 1960s. In 1968, the President's National Advisory Commission on Civil Disorders, popularly known as the Kerner Commission, released a report that identified racism as the primary cause of the surge of riots in several American cities in the late 1960s.<sup>225</sup> In particular, the report blamed the racist attitudes of white Americans for more than one hundred and fifty riots that took place between 1965 and 1968.<sup>226</sup> After finding that segregation and poverty had created destructive ghetto environments in many cities, the Commission's report concluded that "our nation is moving toward two societies, one black, and one white—separate and unequal."<sup>227</sup> The riots in France were triggered by conditions comparable to those in the United States in the 1960s.

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219. *An Emperor*, *supra* note 213.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. REPORT OF THE NAT'L ADVISORY COMM. ON CIVIL DISORDERS (Kerner Commission), (1968), available at <http://www.eisenhowerfoundation.org/docs/kerner.pdf>

226. Kerner Commission, *supra* note 225.

227. *Id.*

One cause of the riots that must be addressed to create lasting change consists of the continuous conflicts involving young *banlieusards* and the police. In the *banlieues*, the relationship between police and residents is rooted in distrust, suspicion, and conflict.<sup>228</sup> For many *banlieusards*, the police represent an oppressive force that poses a constant threat to their well-being.<sup>229</sup> French politicians of both the right and the left have exacerbated the problem by expanding police powers to check identity papers, conduct searches, and detain citizens.<sup>230</sup> Repeated identity checks, insults, provocation, and constant suspicion have become part of the daily routine for young people in these areas.<sup>231</sup> The police are viewed as an opposing force that targets and discriminates against the local population rather than as the representatives of justice.<sup>232</sup> A fundamental change in law enforcement methods is needed.

## VI. FRENCH ANTIDISCRIMINATION LAWS

France has a full array of antidiscrimination laws, but they have been largely ineffective. This may be attributable to the nation's official color-blind policies and its refusal to recognize race and ethnicity as social constructions that influence individuals' interactions. Conflicts involving ethnic minorities are seen as an "immigrant" problem. This masks the ethnic discrimination inflicted on non-white residents and delegitimizes them as "foreigners" who are not part of French society. France's refusal to collect data on race and ethnicity makes it difficult to measure the effects of discrimination, but researchers have found alternative means of collecting data.<sup>233</sup> The primary antidiscrimination provision in French

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228. Kerner Commission, *supra* note 225; *See also* LA HAINE (May 31, 1995) (film portrayal of police treatment of *banlieusards*); *see also* Matt Feeney, *La Haine: The Film that Predicted the French Riots*, SLATE (Nov. 11, 2005), [http://www.slate.com/articles/arts/dvdxtras/2005/11/la\\_haine.html](http://www.slate.com/articles/arts/dvdxtras/2005/11/la_haine.html) (discussing La Haine).

229. Moran, *supra* note 165, at 305.

230. *Id.* at 305; Haddad & Balz, *supra* note 212, at 27.

231. Moran, *supra* note 165, at 305.

232. *Id.*; *see also* Assiya Hamza, *France Struggles to Address Racial Profiling by Police*, FR. 24 (Oct. 4, 2013), <http://www.france24.com/en/20131004-france-manuel-valls-racial-profiling-police-francois-hollande-black-arab> ("Rights groups are calling for a system to monitor the number of individuals police stop on the street, as well as why they are stopped.")

233. France does not collect census or other data on the race or ethnicity of its citizens.

law is Article 225-1 of the Penal Code, which originated with the enactment of a 1972 law that prohibited racial discrimination.<sup>234</sup> The 1972 law modified the freedom of the press statute of 1881, which prohibited attacks in the press against racial and religious groups.<sup>235</sup>

The 1972 statute strengthened the prohibitions against hate speech by criminalizing speech that provokes racial hatred.<sup>236</sup> It also prohibits defamation; racial insults; and groups that provoke discrimination, hatred, or violence based on ethnicity, national origin, race, or religion.<sup>237</sup> In the United States repugnant speech of this sort is protected by the First Amendment.<sup>238</sup> The 1972 law also criminalized discrimination on the basis of a person's origin, ethnicity, nationality, race, or religion.<sup>239</sup> The statute "prohibit[s] public authorities and officials from refusing to provide a benefit or a right on these grounds."<sup>240</sup> "The statute prohibit[s] employers from firing or refusing to hire someone on the basis of" their origin, ethnicity, national origin, race, or religion.<sup>241</sup> The French antidiscrimination laws have been expanded to include discrimination based on sex, pregnancy, familial status, physical appearance, family

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Erik Bleich, *Race Policy in France*, BROOKINGS (May 5, 2001), available at <http://www.brookings.edu/research/articles/2001/05/france-bleich#>. A 1978 law banned the collection and storage of race-based data without the express consent of the interviewees or a waiver by a state committee. *Id.* Researchers use information on the number of foreigners and immigrants in France from the national census data, and second- and third-generation immigrant descendants has been estimated through survey data. David B. Oppenheimer, *Why France Needs to Collect Data on Racial Identity . . . In A French Way*, 31 HASTINGS INT'L & COMP. L. REV. 735, 742 (2008); Rachel Holman, *French Minority Advocates Call For Statistics on Diversity*, FRANCE 24 (July 11, 2011), available at <http://m.france24.com/en/20110724-france-minority-leaders-advocate-statistics-ethnic-diversity-discrimination-anel/>; Bruce Crumley, *Should France Count Its Minority Population?* TIME (Mar. 24, 2009), available at <http://content.time.com/time/world/article/0,8599,1887106,00.html>.

234. For a compilation of French anti-discrimination laws see SOPHI RECHT, ANTI-DISCRIMINATION LEGISLATION IN EU MEMBER STATES (Jan Niessen & Isabelle Chopin eds., 2002), available at [http://www.pedz.uni-mannheim.de/daten/edz-b/eb/02/ART13\\_France-en.pdf](http://www.pedz.uni-mannheim.de/daten/edz-b/eb/02/ART13_France-en.pdf).

235. Julie C. Suk, *Equal by Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. 295 (2007) [hereinafter *Equal by Comparison*].

236. Suk, *Equal by Comparison*, *supra* note 235, at 312–18.

237. *Id.* at 302.

238. *RAV v. City of St. Paul*, 505 U.S. 377 (1992).

239. Suk, *Equal by Comparison*, *supra*, note 235 at 302.

240. *Id.*

241. *Id.*

name, state of health, handicap, genetic characteristics, sexual orientation, age, political opinions and union activities.<sup>242</sup>

A 1982 labor law banned discrimination in hiring, firing, disciplining, training and promotion on the basis of origin, race, sex, familial status, political opinions, union activities, or religious convictions.<sup>243</sup> A 1990 statute outlawed all racist and anti-Semitic acts.<sup>244</sup> The 1990 law prohibits “the denial of the existence of crimes against humanity as defined by the 1945 Treaty of London.”<sup>245</sup> The law also prohibits the denial of the Holocaust in “public places, in writing, print, drawings, inscriptions, paintings, emblems, images, or other speech or image sold or distributed or put on display.”<sup>246</sup>

In 2004, the French Parliament enacted a statute that created the French Equal Opportunities and Anti-Discrimination Commission, (*Haute autorité de lutte contre les discriminations et pour l'égalité* or “HALDE”), an administrative agency whose mission is to fight discrimination in France.<sup>247</sup> Like the US Equal Employment Opportunity Commission,<sup>248</sup> HALDE cannot impose sanctions and “has limited investigatory powers.”<sup>249</sup> “Its main function is to process individual claims, facilitate conciliation, and to assist in gathering evidence for criminal or civil actions.”<sup>250</sup>

The French antidiscrimination laws allow for both criminal prosecution and civil actions for employment discrimination.<sup>251</sup> A law passed in 2001 “modified the Labor Code’s antidiscrimination provision by adding a prohibition against indirect discrimination, and also by easing the burden of proof for plaintiffs in employment

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242. *Id.* at 302–03.

243. *Id.* at 302.

244. *Id.* at 303.

245. *Id.*

246. *Id.* at 302–03.

247. *Id.* at 304.

248. Overview, U.S. Equal Emp. Opportunity Commission, <http://www.eeoc.gov/eeoc> (last visited Sept. 9, 2014).

249. Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil Criminal Divide*, 85 WASH. U. L. REV., 1315, 1347 (2008) [hereinafter Procedural Path].

250. *Id.* (referencing Loi 2004-1486 du 30 décembre 2004 [Law No. 2004-1486 of December 30, 2004], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Dec. 31, 2004, p. 22567).

251. Suk, *Equal by Comparison*, *supra* note 235, at 304.

discrimination cases.”<sup>252</sup> Most of the legal actions challenging employment discrimination have been criminal proceedings.<sup>253</sup> The country’s reliance on criminal law has made it difficult to enforce antidiscrimination laws because of the high burden of proof and the difficulty of proving subjective intent.<sup>254</sup> A conviction requires proof of discriminatory intent.<sup>255</sup> Proof must show guilt beyond a reasonable doubt. The presumption of innocence and the heightened burden of proof in criminal proceedings makes it extremely difficult to prove discrimination.<sup>256</sup> “There were three convictions in 1997, seven in 1999, sixteen in 2000, and twenty-nine in 2002.”<sup>257</sup> Professor Julie Suk has concluded that French antidiscrimination laws have been so ineffective, because:

[the] formal prohibitions of discriminatory hiring have no deterrent effect in France. The reality is that employers clearly discriminate against candidates of North African descent, resulting in this population’s disproportionately high levels of unemployment. The persistence of discrimination in hiring, despite the formal legal prohibition of such conduct, is explained by barriers to the effective enforcement of this prohibition in French criminal and civil procedure . . . Most discrimination cases are brought in criminal proceedings, and convictions are very rare. Antidiscrimination law hardly deters even the most overt forms of discrimination.<sup>258</sup>

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252. *Id.* at 303–04.

253. Suk, Procedural Path, *supra* note 249, at 1332.

254. *Id.* at 1332–34.

255. *Id.*

256. *Id.*

257. Suk, Equal by Comparison *supra*, note 235, at 323; ALEX G. HARGREAVES, HALF MEASURES: ANTI DISCRIMINATION POLICY IN FRANCE, IN RACE IN FRANCE: INTERDISCIPLINARY PERSPECTIVES ON THE POLITICS OF DIFFERENCE 227 (Herrick Chapman & Laura L. Frader eds., 2004).

258. Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73, 105–06 (2007). On May 17, 2013, the French Parliament, supported by the ruling Socialist Party, adopted a bill to drop the word “race” from the country’s laws. From now on, the word “racial,” as well as “race,” will be dropped from relevant articles of the French penal code or replaced by the word “ethnic.” Harvey Morris, *France Fights Racism by Outlawing “Race”*, N.Y. TIMES, (May 17, 2013), [http://blogs.nytimes.com/2013/05/17/france-fights-racism-by-outlawing-race/?\\_r=0](http://blogs.nytimes.com/2013/05/17/france-fights-racism-by-outlawing-race/?_r=0).

As this Professor Suk's observation and the discussion in following sections of this Article indicate, unlawful discrimination against ethnic minorities is not taken seriously in France. Overt discrimination is widespread and tolerated. Discrimination against ethnic minorities is obscured by the French belief that it is color-blind, and by stereotypical attitudes about North and sub-Saharan Africans. Discrimination against these groups is not taken seriously as they are regarded as foreigners rather than French citizens entitled to equal protection of the laws.

#### VII. EMPLOYMENT DISCRIMINATION IN FRANCE: THE "ETHNIC PENALTY"

Ethnic minorities in France are exposed to persistent discrimination in the labor markets. As one researcher explained, "the statistics that have been collected are consistent with the inference that, by most measures, persons of North African descent are disadvantaged in employment relative to other residents of France."<sup>259</sup> During the post-World War II period, many French workers moved from industrial occupations to more desirable occupations in the service sector. Foreign workers replaced them.<sup>260</sup> When immigration was halted in 1975, many foreign workers were deported.<sup>261</sup> The acting administration hoped that French nationals would take the jobs vacated by departing foreign workers, but this did not happen.<sup>262</sup>

France's immigrant labor force has traditionally been overrepresented in the industrial sector.<sup>263</sup> In 1975, two-thirds of immigrant workers held industrial jobs.<sup>264</sup> A significant proportion of them worked in the construction industry.<sup>265</sup> In comparison, the majority of native-French workers were employed in the service sector. In the 1970s, native-French workers left construction jobs

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259. HARGREAVES, *supra* note 2, at 48.

260. *Id.*

261. *Id.* at 41–54.

262. *Id.* at 44–48.

263. *Id.*

264. *Id.*

265. *Id.* at 44.

because the wages in the building trades were low compared to other sectors.<sup>266</sup> The working conditions were unattractive with high accident rates, poor sanitation, and frequent layoffs.<sup>267</sup> Foreign workers became concentrated in low-wage jobs in the construction industry<sup>268</sup> and other sectors where there was high turnover.<sup>269</sup> As jobs were eliminated by de-industrialization, immigrants bore the brunt of the job losses.<sup>270</sup> From the mid-1970 on, immigrants were increasingly concentrated in low-wage, service sector jobs such as domestic work and jobs in hotels, cafes, and restaurants.<sup>271</sup>

These and other employment barriers experienced by immigrants and their children cannot be fully explained by low educational attainment or a lack of social networks. Researchers have labeled this labor market phenomenon as the “ethnic penalty.”<sup>272</sup> Ethnic penalties are the net disadvantages experienced by ethnic minorities after controlling for their educational qualifications and experience in the labor market. Some of the explanations for ethnic disparities in the labor markets include: lack of social networks, “spatial mismatch,” proximity to jobs,<sup>273</sup> and differences in individuals’ aspirations.<sup>274</sup> However, discrimination on the basis of ethnicity, national origin, and religion was the most significant factor.<sup>275</sup>

The results of the ethnic penalty are observable in various employment statistics and situations. The unemployment rates of immigrants are much higher than workers who do not have

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266. *Id.* at 48.

267. *Id.*

268. *Id.*

269. *Id.* at 43.

270. *Id.*

271. *Id.* at 44–48.

272. Roxanne Silberman & Irène Fournier, *Second Generations on the Job Market In French: A Persistent Ethnic Penalty*, in 49 *REVUE FRANÇAISE DE SOCIOLOGIE* 45, 51 (2008).

273. Laurent Gobillon, Harris Selod and Yves Zenou, *The Mechanisms of Spatial Mismatch*, 12 *URB. STUD.* 2401, 2412 (2007).

274. *Id.*

275. E. Cediey and F. Foron, *Discrimination in access to employment on grounds of foreign origin in France: A national survey of discrimination based on the testing methodology of the International Labour Office*. International Labour Office, International Migration Programme.—Geneva: ILO, 67–78 (2008), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---migrant/documents/publication/wcms\\_201429.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_201429.pdf).

immigrant backgrounds.<sup>276</sup> This is especially the case for workers from Algeria, Morocco, and Tunisia.<sup>277</sup> The children of North African immigrants earn about 20 percent less than those of French natives.<sup>278</sup> Given the relatively low degree of earnings inequality in the French labor market as a whole, the ethnic disadvantage represents a large earnings penalty. The earnings disparities between second-generation immigrants from North Africa and other French citizens is largely attributable to the difficulties they experience in obtaining jobs.<sup>279</sup> Some of the barriers to the labor markets are caused by citizenship requirements for a number of public service jobs.<sup>280</sup> Social class distinctions, geographic isolation, and ethnic prejudice also limit employment opportunities for immigrants.<sup>281</sup> High levels of unemployment and overrepresentation in low-skilled jobs combine to lower the average earnings of immigrants as compared to French citizens.<sup>282</sup> In addition to unemployment, these groups also experience more frequent layoffs. Several studies show the descendants of North African immigrants are particularly susceptible to unemployment as a result of their over-representation in low-paying jobs that are subject to frequent layoffs.<sup>283</sup>

One of the main difficulties ethnic minority workers face is obtaining entry-level positions that lead to higher-level positions. In 2006, the Department of Research and Statistics (DARES) of the French Ministry of Labor commissioned the International Labor Office to study discriminatory employment practiced aimed at ethnic minorities in France. . . .<sup>284</sup> The “matched pair” study compared the treatment of individuals with carefully matched attributes (age,

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276. Klaus F. Zimmermann et al., *Study on the Social and Labour Market Integration of Ethnic Minorities*, Institute for the Study of Labor Research Report No. 16, 25–26 (Oct. 8, 2007), [http://www.iza.org/en/webcontent/publications/reports/report\\_pdfs/iza\\_report\\_16.pdf](http://www.iza.org/en/webcontent/publications/reports/report_pdfs/iza_report_16.pdf).

277. Zimmerman et al., *supra* note 275.

278. Arnaud Lefranc, *Unequal Opportunities and Ethnic Origin: The Labor Market Outcomes of Second-Generation Immigrants in France*, 53 (12) AM. BEHAVIORAL SCIENTIST 1851, 1874 (2010).

279. Lefranc, *supra*, note 278 at 1877.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. E. Cediey & F. Foron, *supra* note 275, at 67–71.

education, etc.) as they sought employment.<sup>285</sup> Surveys to collect data were conducted in Lille, Lyon, Marseille, Nantes, Paris, and Strasbourg.<sup>286</sup> The tests covered vacancy notices for low- and medium-skilled jobs in the hotel and restaurants sector; commerce; services to the public, communities, and enterprises; transportation; reception and secretarial services; health and social work; and building and public works.<sup>287</sup> In one test, the applicants who tested the vacancy notices were young French men and women at the early stages of their careers, of either North African, sub-Saharan, or French origin.<sup>288</sup> In another study, the International Labor Office sent two identical curricula vitae (“CV”s) to two hundred and fifty-eight employers, only bearing different candidate names. For example, one CV had a French first and last name; the other a North African name. The same address was given on both CVs. The first CV with the French name received seventy-five requests for an interview while the second received fourteen.<sup>289</sup>

These results taken together with other research has consistently found that immigrant origin has a distinct effect on labor market participation.<sup>290</sup> The disadvantages are reflected in a wide range of constraints that affect the chances of finding employment as well as the types of jobs available to immigrants.<sup>291</sup> These studies show widespread and persistent discrimination against workers with North and sub-Saharan Africa backgrounds.<sup>292</sup>

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285. *Id.* at 51–59.

286. *Id.* at 67–85.

287. *Id.*

288. *Id.*

289. *Id.*

290. See generally Dominique Meurs et al., *The Persistence of Intergenerational Inequalities Linked to Immigration: Labour Market Outcomes for Immigrants and Their Descendants in France Population* 61 (English Ed., 2002), 645–82 (2006), available at <http://www.cairn-int.info/journal-population-2006-5-page-645.htm>, 650-654, 674-675.

291. Meurs, Pailhe and Simon *supra* note 290.

292. *Id.*

### VIII. ETHNIC MINORITY PERFORMANCE IN THE FRENCH EDUCATIONAL SYSTEM

The academic performance of children of North and sub-Saharan African immigrants is consistently lower than that of their French counterparts.<sup>293</sup> The analysis in this section shows that teachers perceive ethnic minority students from immigrant backgrounds differently and less favorably than similarly situated students from French families. Teachers tend to focus on the classroom behavior of ethnic minority students rather than their academic potential. These documented attitudes can interfere with students' academic progress.

Under the French educational system, children from six to eleven years old are enrolled in elementary schools.<sup>294</sup> These preparatory primary schools first develop linguistic abilities and provide civic education. The second curriculum cycle includes the study of foreign and regional languages, mathematics, arts, and physical education.<sup>295</sup> The final cycle adds literature, history, and geography to the curriculum, along with the experimental sciences and technology.<sup>296</sup> The next level in secondary schooling, *college*, enrolls students aged twelve through sixteen years without requiring an entrance examination.<sup>297</sup>

Tracking students in upper secondary school is determined by the *process d'orientation*, which is decided by teachers and inspectors on the basis of students' grades and the families' preferences.<sup>298</sup> Students may follow very different tracks. The *lycée général et technologique* is the most prestigious option. It represents the most direct path to university studies. After two years, students can be eligible for a general or technological *baccalauréat* ("BAC").<sup>299</sup> Another track is

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293. Hector Cebolla Boado, *Primary and Secondary Effects In the Explanation of Disadvantage in Education: The Children of Immigrant Families in France*, 32 BRIT. J. SOC. EDUC. 407, 412 (May 2011); Yaël Brinbaum & Hector Cebolla-Boado, *The School Careers of Ethnic Minority Youth in France: Success or Disillusion?* 7(3) ETHNICITIES 445, 449 (2007).

294. Danielle Ledford, *Is Race Neutrality a Fallacy? A Comparison of the U.S. and French Models of Affirmative Action in Higher Education*, 46 TEX. INT'L L.J. 355, 363–64 (2011).

295. Brinbaum & Cebolla-Boado, *supra* note 293, at 412–14.

296. *Id.*

297. *Id.*

298. *Id.* at 413.

299. *Id.* at 414.

the *lycée professionnel*, which, after two years, provides the *brevet d'études professionnels* (BEP).<sup>300</sup> The *lycée professionnel* differs from the *lycée général et technologique* in that one prepares students for university studies while the other is vocational, preparing students to enter the workforce . . . . The other vocational credential is the *certificat d'aptitude professionnelle* ("CAP"), which prepares the students for a specific occupation.<sup>301</sup> Most French families believe that the *baccalauréat* is the minimum educational level their children should obtain.<sup>302</sup> People of North African descent are more likely to prefer the preparation for university track for their children.<sup>303</sup> They perceive educational attainment at the highest-level as a way to achieve upward mobility.<sup>304</sup>

However, a persistent achievement gap exists between French students and those with immigrant origins. In 2011, Professor Hector Boado published an article that examined the educational outcomes of immigrant students in French schools.<sup>305</sup> He concluded that students with immigrant origins were disadvantaged in the transition from lower to upper secondary school.<sup>306</sup> A 1989 study showed 65.1 percent of the French students went on to the general (upper) track, but only 51.7 percent of foreigners did so.<sup>307</sup> Only 56.4 percent of foreign-born children with two foreign-born parents were invited to proceed to the *Séconde général et technologique*.<sup>308</sup> The French-born children with two foreign-born parents did so in 52.2 percent of the cases. In comparison, 65.5 percent of the children of French parents entered this track.<sup>309</sup> Professors Brinbaum and Cebolla-Boado's study examined immigrant families from Portugal and North Africa and found that immigrant families had higher educational expectations about their children's education than French working-class

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300. *Id.*

301. *Id.*

302. *Id.* at 450.

303. *Id.*

304. *Id.* at 463.

305. *Id.*

306. *Id.*

307. *Id.* at 414.

308. *Id.* at 427.

309. *Id.*

families.<sup>310</sup> North African families were more likely to prefer longer studies in general or more academic tracks.<sup>311</sup> However, the children of immigrant families performed at levels lower than national averages at the secondary education level.<sup>312</sup> The researchers suggested the disparities were caused by the lower educational attainment levels of immigrant parents as compared to French families.<sup>313</sup> The children of immigrant families are more likely to enter the general and technological tracks that can lead to university studies, but their success is limited as they tend to perform at lower levels than other students.<sup>314</sup>

In 1982, a French version of affirmative action was established by the creation of *Zones d'Education Prioritaires* ("ZEP"), in which additional resources were given to public schools in *banlieues* to provide students with enhanced opportunities for academic success.<sup>315</sup> When President Jacques Chirac was re-elected in 2002, the government eliminated this and other policies implemented from 1997 to 2002 by the Socialist Party government of Prime Minister Lionel Jospin.<sup>316</sup> This eliminated the special programs that were put in place under the previous administration.

Researchers have attempted to determine the causes of immigrant students' underperformance. The book, *Muslim Girls and the Other France: Race, Identity Politics and Social Exclusion*, contains a detailed study of socioeconomic exclusion in France, particularly in its educational system.<sup>317</sup> The book is the product of an ethnography conducted by Professor Tricia Keaton in Pantin, the Département of Seine-St-Denis, a Paris suburb.<sup>318</sup> Keaton critiqued the French education system's ideological function for its exclusion of

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310. *Id.* at 464.

311. *Id.*

312. *Id.*

313. *Id.* at 464–65.

314. *Id.* at 464.

315. Michel Wieviorka, *Violence in France* (Nov. 18, 2005), <http://riotsfrance.ssrc.org/Wieviorka/>.

316. *Id.*

317. KEATON, *supra* note 116.

318. *Id.* at 24–25.

Francophone perspectives.<sup>319</sup> The educational curriculum also tends to overlook the nation's history of colonization and slavery.

Keaton described the obstacles the Muslim girls in her study encountered at school.<sup>320</sup> The girls were highly motivated and hoped to obtain *baccalauréat* degrees.<sup>321</sup> Keaton described the ways in which the girls attempted to navigate male supremacist attitudes at school, the constraints imposed by constant policing by their families (Muslim girls cannot go out without a chaperone), and religious intolerance at school.<sup>322</sup> The problems at school included the teachers' misunderstanding of the reasons underlying girls' academic underperformance.<sup>323</sup> Lower academic performance was not so much a function of inadequate written expression skills (as teachers assumed) as it was the result of a lack of cultural resonance for the students. Keaton found that additional problems resulted from inadequate study conditions at home, which were created by overcrowding, heavy domestic responsibilities, and parents' objections to certain aspects of curricula (such as sex education).<sup>324</sup> The workloads, inadequate training, and insufficient support for teachers also contributed to students' academic problems.<sup>325</sup>

Other research observations are similar to Keaton's findings. Since the 1970s, studies have shown how teachers perceive immigrant and French students differently.<sup>326</sup> In one study, teachers were asked to judge children on the basis of their physical

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319. *Id.* at 113.

320. *Id.* at 127–56.

321. *Id.* at 37.

322. *Id.* at 157–92.

323. *Id.* 143–56.

324. *Id.*

325. *Id.* at 144. The problems of Maghrebien women in *banlieues* was explained in the book, *BREAKING THE SILENCE: FRENCH WOMEN'S VOICES FROM THE GHETTO*, which tells the story of the protests sparked by the death of Sohane Benziane, a 17-year-old of Algerian descent living in Vitry-sur-Seine, who was beaten, doused with an accelerant, and burned in full view of a gathered crowd. FADELA AMARA & SYLVIA ZAPPI, *BREAKING THE SILENCE: FRENCH WOMEN'S VOICES FROM THE GHETTO* 16, 36, 106 (Helen Harden Chenut trans., Univ. of Cal. Press 2006) (2003). On March 8, 2003, more than thirty thousand people gathered in the streets of Paris. *Id.* at 4, 35. An organization, *Ni Putes, Ni Soumises* (“Neither Whores nor Submissives”), was subsequently organized to protest the treatment of Maghrebien women in *banlieues*. *Id.* at 15–18.

326. Agnes van Zanten, *Schooling Immigrants in France in the 1990s: Success or Failure of the Republican Model of Integration?*, 28 *ANTHROPOLOGY & EDUC. Q.* 351, 366–67 (1997).

appearance, ways of dressing and talking, politeness, and other personal characteristics.<sup>327</sup> Children of foreign laborers were consistently considered to be the least appealing, followed by children of French working-class families.<sup>328</sup> French children from middle- and upper-class families were described as the most attractive by the majority of teachers.<sup>329</sup>

In another study that examined teachers' comments about different students, researchers determined that teachers evaluated French students on their academic performance and intellectual potential. However, the teachers tended to focus on the classroom behaviors of foreign students, particularly those of North African origin.<sup>330</sup> Another study involving interactions among teachers and North African students showed that teachers often judged the students on the basis of their behavior and gestures describing the students as insolent, voluble, curious, secretive, susceptible, and proud.<sup>331</sup> According to other research, teachers described North African girls as arrogant.<sup>332</sup>

The teachers' focus on behavior, gestures, and attitudes reveals the educational system's unconscious bias against immigrant-population students. As Pierre Bourdieu explained in his study of the French educational system, success in school entails a wide range of cultural behaviors, including non-academic attributes such as comportment, dress, and accent.<sup>333</sup> Children from middle-class families have learned this behavior, as have their teachers. Children from working-class backgrounds have not. Middle-class students' speech, dress, and mannerisms fit the expectations of their teachers. Students from lower income families are often seen as "difficult" and presenting "challenges."<sup>334</sup> However, both groups behave in accordance with the norms of their communities.

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327. Agnes van Zanten, *supra* note 326, at 366.

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. PIERRE BOURDIEU & JEAN-CLAUDE PASSERON, REPRODUCTION IN EDUCATION, SOCIETY AND CULTURE 22 (1990).

334. *See generally id.*

What is seen as the “natural” ability of affluent students is, in reality, the product of their parents’ social and economic status.<sup>335</sup> Privileged children are inculcated with speech patterns, styles of dress, and comportment that facilitate their success in the educational system. Their affluent backgrounds, conditioning, and experiences equip them with the attributes needed to reproduce their parents’ social position. Too often, teachers erroneously interpret these class-based advantages as a reflection of “hard work” or “innate” ability.<sup>336</sup> The teachers’ assumptions and stereotypes about students from immigrant families create obstacles to learning that other, more privileged students do not encounter.

#### IX. THE HEADSCARF AND BURQA BANS

The conflicts involving ethnic minorities in France have been highlighted by the country’s controversial decisions to ban headscarves in schools and burqas in public places. These actions are skirmishes in France’s culture war against Islam. Proponents of the headscarf and burqa bans justify those laws with the doctrine of *laïcité* (“secularism”), which can be traced back to the French Revolution. France’s history of conflict with the Catholic Church that led to an official policy of secularism.<sup>337</sup>

The roots of this break with the Catholic Church can be traced back to the Enlightenment period, a time from approximately 1700 to 1800 that was characterized by dramatic revolutions in science, philosophy, society, and politics.<sup>338</sup> During this period, wealthy members of the French bourgeoisie hoped to gain more significant positions in France’s aristocratic society.<sup>339</sup> Under the “*Ancien Régime*” (old order), the political and social system that existed in France before the French Revolution, the Catholic Church was the

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335. *Id.*

336. *Id.*

337. C.M.A. McCauliff, *Dreyfus, La Cite and the Burqua*, 28 CONN. J. INT’L L. 117 (2012).

338. William Bristow, *Enlightenment*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (June 2011), available at <http://plato.stanford.edu/archives/sum2011/entries/enlightenment>.

339. C.M.A. McCauliff, *supra* note 337, at 119

largest single landowner in France.<sup>340</sup> There was a great deal of resentment of the privileges that were enjoyed by the clergy and aristocracy. The middle class—consisting of professionals, manufacturers, and their allies—began to demand a role in French society consistent with their economic status.<sup>341</sup> French aristocrats and lesser royals, as well as the Catholic Church, rebuffed the middle class no matter how wealthy they were.<sup>342</sup>

The concepts of *liberte*, *egalite*, and *fraternite* (“liberty, equality, and fraternity”) considerably diminished the Catholic Church’s power and influence during the French Revolution.<sup>343</sup> Anti-clerical campaigns included the deportation and execution of clergy, the closing of churches, the destruction of religious monuments, and the outlawing of public and private worship and religious education.<sup>344</sup> In 1789, the Constituent Assembly nationalized church property.<sup>345</sup> The following year, the Assembly enacted the Civil Constitution of the Clergy, which required all priests to swear an oath to uphold the Constitution.<sup>346</sup> These requirements created a sharp divide between Catholic priests who accepted the Civil Constitution and those who did not.

In 1801, Napoleon attempted to heal the division when he negotiated a concordat with the Catholic Church that provided for the collaborative appointment of bishops: the state nominated bishops and the pope appointed nominees.<sup>347</sup> Additionally, priests became civil servants paid by the state. The Church also relinquished its claims to recover property nationalized in the Revolution and ceded control over marriage, family law, and education to the state with the enactment of the Civil Code of 1804.<sup>348</sup>

The French educational system was completely secularized in the late nineteenth century with the enactment of the “Ferry Laws” in the

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340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.* at 123–25; T. Jeremy Gunn, *Religious Freedom and Laicite: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 433–39 (2004).

344. C.M.A. McCauliff, *supra* note 337, at 123–25.

345. *Id.* at 123.

346. *Id.*

347. *Id.*

348. *Id.*

1880s.<sup>349</sup> As Joan Wallace Scott observed in *The Politics of the Veil*, the principles of secularity in schools “made primary education a requirement for boys and girls and . . . effectively banished from the classroom religion as a subject and priests and nuns as teachers.”<sup>350</sup> The French government formally ended relations with the Catholic Church in 1905 when it adopted a law on the separation of church and state, codifying the principle of *laïcité*.<sup>351</sup>

What became known as *l’affaire du foulard* (the headscarf affair) began in October 1989, when the principal of Gabriel-Havez College, a Muslim-majority middle school in the Parisian suburb of Creil, suspended three Muslim schoolgirls of North African descent for wearing headscarves.<sup>352</sup> The Creil incident generated national attention.<sup>353</sup> The headmaster’s decision was later reversed, but the

349. SCOTT, *supra* note 36, at 99.

350. *Id.*

351. *France: The Third Republic and the 1905 Law of Laïcité*, BERKLEY CTR. FOR RELIG., PEACE & WORLD AFFAIRS, available at <http://berkeleycenter.georgetown.edu/essays/france-the-third-republic-and-the-1905-law-of-em-laicite-em>.

352. The three girls suspended were Leila Achaboun, Fatima Achaboun, and Samira Saidani. SCOTT, *supra* note 36, at 21–22; JOHN R. BOWEN, WHY THE FRENCH DON’T LIKE HEADSCARVES: ISLAM, THE STATE, AND PUBLIC SPACE 81 (2006); Nusrat Choudhury, *From the Stasi Commission to the European Court of Human Rights: L’affaire du Foulard and the Challenge of Protecting the Rights of Muslim Girls*, 16 COLUM. J. GENDER & L. 199, 223–24; N.M. Thomas, *On Headscarves and Heterogeneity: Reflections on the French Foulard Affair*, 29 DIALECTICAL ANTHROPOLOGY 373, 382 (2005).

353. The literature on the headscarf and burqa controversies in France is voluminous. See, e.g., Karima Bennoune, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women’s Equality Under International Law*, 45 COLUM. J. TRANSNAT’L L. 367 (2007); Patrick Weil, *Why the French Laicity is Liberal*, 30 CARDOZO L. REV. 2699 (2009); Leora Bilsky, *Uniforms and Veils: What Difference Does a Difference Make?*, 30 CARDOZO L. REV. 2715 (2009); Cyra Akila Choudhury, *Empowerment or Estrangement: Liberal Feminism’s Visions of the “Progress” of Muslim Women*, 39 U. BALT. L.F. 153 (2009); Reuven (Ruvii) Ziegler, *The French Headscarves Ban: Intolerance or Necessity?*, 40 J. MARSHALL L. REV. 235 (2006); Gunn, *supra* note 343; Melanie Adrian, *Laïcité Unveiled: A Case Study in Human Rights, Religion, and Culture in France*, 1 HUM. RTS. REV. 102 (2006); Alia Al-Saji, *The Racialization of Muslim Veils: A Philosophical Analysis*, 36(8) PHIL. & SOC. CRITICISM 875 (2010); Trica Keaton, *Arrogant Assimilationism: National Identity Politics and African-Origin Muslim Girls in the Other France*, 36 ANTHROPOLOGY & EDUC. Q. 405 (2005); Alison Dean, *Comment, Unveiling the Right to Take Part in Cultural Life: The Effect of General Comment No. 21 on the Legality of the French Burqa Ban*, 26 AM. U. INT’L L. REV. 1437 (2011); Britton D. Davis, *Lifting the Veil: France’s New Crusade*, 34 B.C. INT’L & COMP. L. REV. 117 (2011); Oriana Mazza, Note, *The Right to Wear Headscarves and Other Religious Symbols in French, Turkish and American Schools: How the Government Draws the Veil on Free Expressions of Faith*, 48 J. CATH. LEG. STUD. 303 (2009); Jennifer M. Westerfield, *Behind the Veil: An American Legal Perspective on the*

Education Minister, Lionel Jospin, submitted a request to the Conseil d'Etat for an advisory opinion on the matter.<sup>354</sup>

The Conseil held that the principle of secularity and the protection of freedom of religion in France could be reconciled. Students in public schools had a right to religious expression as long as their actions did not interfere with the other student's right to religious freedom. However, schools are permitted to sanction students when their religious expression threatens public health, security, or order.<sup>355</sup> The Conseil's decision stated:

In schools, the wearing by students of signs by which they intend to manifest their religious affiliation is not by itself incompatible with the principle of secularism, insofar as it constitutes the exercise of freedom of expression and freedom of manifestation of religious beliefs, but . . . this freedom would not allow students to sport signs of religious affiliation that, due to their nature, the conditions in which they are worn individually or collectively, or their ostentatious character or display as a protest, would constitute an act of pressure, provocation, proselytism or propaganda, or would jeopardize the dignity or freedom of the student or of other members of the school community, would compromise their health or safety, or would perturb the conduct of teaching activities or the educational role of the teachers, or would disturb order in the establishment or the normal operation of public service.<sup>356</sup>

This is a questionable conclusion as there was no concrete evidence that wearing scarves interfered with classroom instruction or disrupted the operation of the schools. Many of the Conseil's conclusions were speculative. A more credible explanation for the

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*European Headscarf Debate*, 54 AM. J. COMP. L. 637 (2006).

354. The *Conseil d'État* is one of three high tribunals in France. The other two are the *Cour de Cassation*, the highest court for appeals involving private parties, and the *Conseil Constitutionnel*, which decides the constitutionality of laws under consideration by the parliament. These courts serve appellate functions that the Supreme Court performs in the United States. Elisa T. Beller, *The Headscarf Affair: The Conseil d'État on the Role of Religion and Culture in French Society*, 39 TEX. INT'L L.J. 581, 584 (2004).

355. BRONWYN WINTER, *HIJAB & THE REPUBLIC: UNCOVERING THE FRENCH HEADSCARF DEBATE* 168 (2009).

356. *Id.* at 138; see also Weil, *supra* note 353, at 2700.

ban was the display of an Islamic religious symbol that offended school officials. This underscores the substantial differences between the American and French views of freedom of expression and religion. A veil ban would not be permitted in the United States under the First Amendment.<sup>357</sup>

In 1997, following the election of a Socialist Party majority in the Parliament, the Education Minister issued an order prohibiting ostentatious religious symbols in public schools. Two thousand Muslim students refused to comply with the order. This defiance resulted in the presentation of forty-nine cases to the Conseil d'Etat, forty-one of which were concluded with decisions in favor of the Muslim students.<sup>358</sup> Nevertheless, the public controversy continued.<sup>359</sup>

In 2003, President Chirac announced that Bernard Stasi, the ombudsman of the French Republic, would lead a new executive commission to conduct a study of French secularism and the headscarf controversy.<sup>360</sup> The Stasi Commission was composed of twenty members, most of whom were distinguished intellectuals, politicians, and political appointees.<sup>361</sup> Several members of the Commission were members of religious minority groups.<sup>362</sup> On December 11, 2003, the Stasi Commission issued a report that recommended banning the wearing of ostentatious religious symbols—including skullcaps, headscarves, and crosses—in public schools.<sup>363</sup> President Chirac agreed that wearing headscarves was “an

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357. See *infra* Part X for discussion of the freedom of religion and expression under the First Amendment of the United States Constitution are discussed.

358. Wiles, *supra* note 10, at 701–02; Nusrat Choudry, *From the Stasi Commission to the European Court of Human Rights: L’Affaire du Foulard and the Challenge of Protecting the Rights of Muslim Girls*, 16 COLUM. J. GENDER & L. 199, 229 (2007).

359. See, e.g., Keaton, *Arrogant Assimilationism*, *supra* note 253, at 417 (2005); Youssef M. Ibrahim, *Arab Girls’ Veils at Issue in France*, N.Y. TIMES, Nov. 12, 1989, at L5, available at <http://www.nytimes.com/1989/11/12/world/arab-girls-veils-at-issue-in-france.html>; Talal Asad, *French Secularism and the “Islamic Veil Affair”*, 8 THE HEDGEHOG REV. 93, 93 (2006).

360. Choudry, *supra* note 358, at 231–32.

361. *Id.*

362. *Id.* at 232.

363. Commission De Reflexion Sur L’application Du Principe de Laicite Dans la Republique, *Rapport Au President De La Republique* (2004), translated in Robert O’Brien, *The Report of the Committee of Reflection on the Application of the Principle of Secularity in the Republic* (2005).

act of aggression”<sup>364</sup> and recommended a ban on headscarves in public schools and other ostentatious displays of religious faith.<sup>365</sup>

On February 10, 2004, the French lower house of Parliament passed a bill banning headscarves by a vote of four hundred and ninety-four to thirty-six.<sup>366</sup> On March 3, 2004, the French Senate approved the bill by a vote of two hundred and seventy-six to twenty and President Chirac signed the bill into law on March 15, 2004 (“the Act”).<sup>367</sup> The Act prohibits the wearing of “ostentatious religious symbols” in elementary, secondary, and high schools funded by the state. Approximately 70 percent of the French public expressed strong support for the Act in opinion polls. Almost half the Muslim population polled supported the law, and about half of the Muslim supporters were women.<sup>368</sup>

The veil controversy subsequently moved from schools to the streets.<sup>369</sup> An October 14, 2010, a *Mail Online* article reported that:

A female lawyer allegedly ripped another woman’s burka off in a clothes shop—and told her to ‘clear off to your own country’. The 26-year-old Muslim convert said the 60-year-old lawyer made ‘snide remarks’ about her Islamic veil. An argument followed during which the older woman is said to have ripped the veil off, before the Muslim woman allegedly punched her. Both women were arrested. The row happened in Trignac, near Nantes, France, as the country prepares to introduce a ban on the burka. A police officer said: ‘The lawyer said she was not happy seeing a fellow shopper wearing a veil and wanted the ban introduced as soon as possible. ‘At one point the lawyer, who was out with her daughter, is said to have likened the Muslim woman to Belphegor—a horror demon character well known to French television viewers. The

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364. Ziegler, *supra* note 353, at 240.

365. *Id.*

366. Weil, *supra* note 353, at 2701.

367. *Id.* at 2699.

368. *The War of the Headscarves*, THE ECONOMIST (Feb. 7, 2004), available at <http://www.economist.com/node/2404691>.

369. Peter Allen, *Burka rage as female lawyer rips veil off Muslim woman in French clothes shop*, MAIL ONLINE (Oct. 14, 2010), <http://www.dailymail.co.uk/news/article-1279349/Burka-rage-female-lawyer-rips-veil-Muslim-woman-French-clothes-store.html>.

lawyer's use of the name 'Belphegor' was particularly inflammatory, said police, because the demon was portrayed by classical writers as 'Hell's ambassador to France' . . . Police said the incident was still being investigated, and that charges could follow.<sup>370</sup>

This conflict was an example of the strong feelings of many French citizens who were offended by Islamic clothing. On June 22, 2009, President Sarkozy delivered a speech in which he expressed his disapproval of Muslim burqas saying they were a violation of "the French [R]epublic's idea of women's dignity."<sup>371</sup> He also said "[t]he burka is not a sign of religion, it is a sign of subservience. It will not be welcome on the territory of the French republic"<sup>372</sup> The French Parliament subsequently established a commission to investigate the practice of Muslim women in wearing burqas.<sup>373</sup> After a five-month study, the commission issued a report stating that wearing full veils challenged the secular values of the French Republic and condemned what it viewed as an excessive display of religious symbols in public places.<sup>374</sup>

On July 13, 2010, the French lower house of Parliament passed a ban on face covering veils that public.<sup>375</sup> On September 14, 2010, the French Senate followed the lower house's lead and approved the measure.<sup>376</sup> When the law was challenged, the French Constitutional Council concluded that it did not have a disproportionate impact on Muslim women or prevent their free exercise of religion. It ruled that "the law conforms to the Constitution."<sup>377</sup> This conclusion was

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370. *Id.*

371. Davis, *Lifting the Veil*, *supra* note 353, at 118.

372. *Sarkozy speaks out against burka*, BBC NEWS (June 22, 2009), <http://news.bbc.co.uk/2/hi/europe/8112821.stm>.

373. Tony Cross, *France's burka bill—background to a bitter debate*, RFI (June 1, 2010), <http://www.english.rfi.fr/france/20100526-sarkozy-and-burka>; Steven Erlanger, *France Enforces Ban on Full-Face Veils in Public*, N.Y. TIMES (Apr. 11, 2011), <http://www.nytimes.com/2011/04/12/world/europe/12france.html>; *see also* Davis, *supra* note 371.

374. Davis, *Lifting the Veil*, *supra* note 353 (internal citations omitted).

375. *Id.* at 118–19.

376. *Id.* at 119.

377. *French burqa ban clears last legal obstacle*, CNN World (Oct. 7, 2010), <http://www.cnn.com/2010/WORLD/europe/10/07/france.burqa.ban/>; Adam Scott Kunz, Note, *Public Exposure: Of Burqas, Secularism, and France's Violation of European Law*, 44 GEO. WASH. INT'L L. REV. 79, 79–80 (212).

factually inaccurate as Muslim women were affected more than any other group.<sup>378</sup> Prohibiting headscarves and veils will not resolve that nation's conflicts with ethnic minorities. The conditions in which these groups reside, their mistreatment in schools, the discriminatory barriers to employment, and the harassment of young *banlieuesards* are issues that must be addressed.

#### X. RELIGIOUS DRESS AND AMERICAN CONSTITUTIONAL LAW

France's headscarf ban would be unconstitutional in America because it would violate Muslim women's "hybrid right" of religious exercise coupled with religious expression.<sup>379</sup> The United States Supreme Court has consistently held that public school students have constitutionally protected rights to freedom of speech and religious expression.<sup>380</sup> In the seminal case concerning students' speech rights, *Tinker v. Des Moines Independent Community School District*,<sup>381</sup> students wore black armbands on their sleeves to show their opposition to the Vietnam War. The students were suspended and not allowed to return to school as long as they wore the armbands. Ruling in the students' favor, the Supreme Court held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>382</sup> In other cases, the Court has held that a school cannot censor student expression because of its religious content unless the school can demonstrate that the speech causes a material disruption in the school's normal operations, violates the rights of others, is vulgar, or advocates unlawful conduct.<sup>383</sup>

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378. Human Rights Watch, *France: Face Veil Undermines Rights*, July 3, 2014 <http://www.hrw.org/news/2014/07/03/france-face-veil-ruling-undermines-rights>.

379. See generally United States' Memorandum of Law in Support of Its Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment at 15, *Hearn v. Muskogee Pub. Sch. Dist.* 020, No. CIV 03-598-S (E.D. Okla. May 6, 2004), available at <http://www.justice.gov/crt/about/edu/documents/hearnokbrief.pdf>.

380. See generally *Morse v. Frederick*, 551 U.S. 393 (2007); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

381. 393 U.S. 503 (1969).

382. *Id.* at 506.

383. See generally *Morse*, 551 U.S. 393; *Hazelwood Sch. Dist.*, 484 U.S. 260; and *Fraser*, 478 U.S. 675.

Moreover, school officials “cannot suppress expressions of feelings with which they do not wish to contend”<sup>384</sup> or “prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>385</sup>

These principles were tested when a Southern California school district allowed Sikh students to carry dagger-like blades called a kirpan. The kirpan is one of five sacred articles that baptized Sikhs must wear. The students in the Jurupa Unified School District were allowed to wear the approximately 2-inch knives at school after their parents agreed to solder them or sew them into the sheaths so they could not be used as weapons.<sup>386</sup>

In another school district, the dress code was interpreted to bar gang-related apparel, but it did not define “gang-related.” The students were told that they could not wear Catholic rosaries because the school had identified rosaries as gang-related apparel. Students sued the school in *Chalifoux v. New Caney Independent School District*,<sup>387</sup> claiming the dress code infringed upon their free exercise rights. To prevail in *Chalifoux*, the school district was obligated to produce evidence showing that wearing religious garb would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school” or “impinge upon the rights of other students.” The court found that not only did the school district fail to satisfy its burden, but the rosaries were worn for bona fide religious purposes. The ban as applied did not “bear more than a reasonable relation” to regulating gang activity and placed an “undue burden” on the students.<sup>388</sup>

A dispute involving Islamic headscarves arose when Nashala Hearn, an eleven year-old sixth-grade student, was ordered to remove

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384. *Tinker*, 393 U.S. at 511 (citing *Burnside v. Byars*, 363 F.2d 744, 749 (1966)).

385. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

386. Sanjeev Singh, *Sikhs Allowed to Carry Daggers at Calif. School*, WORLD WIDE RELIGIOUS NEWS (Nov. 5, 2012), <http://wwrn.org/articles/38513/?&place=north-america&section=sikhism>.

387. *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 663 (S.D. Tex. 1997).

388. See generally *Discrimination Against Muslim Women*, ACLU, <https://www.aclu.org/sites/default/files/pdfs/womensrights/discriminationagainstmuslimwomen.pdf> (last visited Sept. 10, 2014); *Presumption of Guilt: The Status of Muslim Civil Rights in the United States*, COUNCIL ON AMERICAN ISLAMIC RELATIONS (2007), <http://cairunmasked.org/wp-content/uploads/2010/02/2007-Civil-Rights-Report.pdf>.

her hijab.<sup>389</sup> Hearn continued to wear a hijab and was suspended twice for doing so. The family appealed but the suspensions, were upheld by the school district.<sup>390</sup> Hearn's parents filed suit and presented evidence that showed the district had granted exceptions to the ban on head coverings for costumes worn during school plays. During legal proceedings, the United States Justice Department intervened on Hearn's behalf and argued the district violated the Equal Protection Clause of the Fourteenth Amendment.<sup>391</sup> The United States argued that

the policy is subject to ad hoc exceptions for various secular head coverings and thus is not generally applicable; the policy burdens Nashala's "hybrid right" of religious exercise coupled with religious expression; and the policy has been enforced against Nashala on a discriminatory basis because of her particular religious faith, and thus is not religion-neutral.<sup>392</sup>

The Department of Justice settled the lawsuit under a consent agreement in which the school district allowed Hearn to wear headscarves and agreed to revise its dress code to accommodate religious exceptions.<sup>393</sup>

These American examples show that France's fear of Muslim attire is overblown. The most likely reason for France's ban on

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389. Terry Frieden, *U.S. to defend Muslim girl wearing scarf in school*, CNN (Mar. 31, 2004), <http://www.cnn.com/2004/LAW/03/30/us.school.headscarves/>; Jesse Lee, *Nashala's Story*, WHITE HOUSE BLOG (June 4, 2009, 3:20 PM), <http://www.whitehouse.gov/blog/2009/06/04/nashalas-story>.

390. Frieden, *supra* note 389.

391. The Fourteenth Amendment has been interpreted to prevent states from applying dress codes in a discriminatory manner. For discussions of headscarves and the First Amendment, see Cassandra M. Vogel, Note, *An Unveiling: Exploring the Constitutionality of a Ban on Face Coverings in Public Schools*, 78 BROOKLYN L. REV. 741 (2013); Christina A. Baker, *French Headscarves and the U.S. Constitution: Parents, Children and Free Exercise of Religion*, 13 CARDOZO J.L. & GENDER 341, 354 (2007); Oriana Mazza, *The Right to Wear Headscarves and Other Religious Symbols in French, Turkish and American Schools: How the Government Draws a Veil on Free Expression of Faith*, 48 J. CATH. LEG. STUD. 303, 336–37, 340 (2009).

392. United States' Memorandum of Law in Support of Its Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment, *supra* note 379, at 19.

393. *Justice Department Reaches Settlement Agreement with Oklahoma School District in Muslim Student Headscarf Case*, DOJ (May 19, 2004), [http://www.justice.gov/opa/pr/2004/May/04\\_crt\\_343.htm](http://www.justice.gov/opa/pr/2004/May/04_crt_343.htm).

headscarves and burqas is the negative reaction by many French citizens to the growing Muslim population in that country. To many French citizens, Islamic clothing represents a rejection of French tradition of assimilation. The American cases show that females wearing headscarves in schools do not interfere with the requirements of appropriate discipline in the operation of public schools or impinge on the rights of other students. Headscarves are worn for bona fide religious purposes. The current French ban on headscarves imposes an undue burden on Muslim female students' of what in America would be the "hybrid right" of religious exercise and religious expression. The same reasoning should be extended to allow the wearing of burqas in public.<sup>394</sup>

#### XI. Scarves, Veils, Islam and French Civilization

The controversy concerning conflicts with "immigrants" is based on growing number of Muslims in France and their desire to observe their religious customs. Many French citizens fear that Muslims will undermine their values and traditions. The Islamic veil is perceived as a potent symbol of that threat. The French government apparently believes Islamic head coverings jeopardize the health and safety of French citizens and banning them will eliminate that threat. These fears are exaggerated.

French law-makers should recognize that the question of whether Islamic tenets require all Muslim women to wear headscarves is the subject of differing interpretations. Islamic scholars, feminist scholars, and others continue to debate the question of whether

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394. Adrienne Katherine Wing, *International Law, Secularism, and the Islamic World*, 24 AM. U. INT'L L. REV. 407, 418–20 (2009). It is important to note that France is not unique. "Islamophobia" persists at high levels in the United States. The attitude consists of an exaggerated fear, hatred, and hostility perpetuated by negative stereotypes and results in bias, discrimination, and marginalization of Muslims. *Islamophobia: Understanding Anti-Muslim Sentiment in the West*, GALLUP, <http://www.gallup.com/poll/157082/islamophobia-understanding-anti-muslim-sentiment-west.aspx#1> (last visited Sept. 9, 2014); see also *FBI: Bias Crimes Against Muslims Remain at High Levels*, INTELLIGENCE REPORT (Spring 2013), <http://www.splcenter.org/home/2012/spring/fbi-bias-crimes-against-muslims-remain-at-high-levels> (Hate crimes against perceived Muslims have persisted at high levels).

headscarves are compulsory.<sup>395</sup> The word *hijab*, refers to the practice of modest dress for men and women. It can be traced to four verses in the Qur'an.<sup>396</sup> Verse 24.31 states, for example:

And tell the believing women to reduce [some] of their vision and guard their private parts and not expose their adornment except that which [necessarily] appears thereof and to wrap [a portion of] their headcovers over their chests and not expose their adornment except to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers, their brothers' sons, their sisters' sons, their women, that which their right hands possess, or those male attendants having no physical desire, or children who are not yet aware of the private aspects of women. And let them not stamp their feet to make known what they conceal of their adornment. And turn to Allah in repentance, all of you, O believers, that you might succeed.<sup>397</sup>

Similarly, Verse 33.59 states, "O Prophet, tell your wives and your daughters and the women of the believers to bring down over themselves [part] of their outer garments. That is more suitable that they will be known and not be abused."<sup>398</sup> Many women wear headscarves based on their interpretation of the Qur'an and consider the practice to be an important symbol of their religious values and Islamic identity.

The critical, but unresolved question is whether scarves and burqas are worn as voluntary expressions of Islamic culture and faith or whether they are coerced by the expectations of a paternalistic society that demeans and devalues women. It would be problematic if the coverings are worn as a result of coercion by Islamic men since that would diminish the status and equality rights of women. One way to approach this debate is through the lens of Critical Race

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395. *Religions-Islam: Niqab*, BBC (Sept. 22, 2011), [http://www.bbc.co.uk/religion/religions/islam/beliefs/niqab\\_1.shtml](http://www.bbc.co.uk/religion/religions/islam/beliefs/niqab_1.shtml). The four main schools of Islamic jurisprudence interpret the Qur'an as not requiring women to wear headscarves or veils. *Id.*

396. These four verses are 24:30-31, 24:60, 33:59, and 33:53. QURAN.COM, <http://quran.com/24> (last visited Sept. 9, 2014); Wiles, *supra* note 10, at 717.

397. QURAN.COM, *supra* note 396.

398. *Id.*

Feminism.<sup>399</sup> Mainstream feminism has not paid adequate attention to the roles of white men and women in the oppression of women of color.<sup>400</sup> Though it incorporates some elements of feminist jurisprudence, Critical Race Feminism's analytical perspective is primarily concerned with the oppression of women of color.<sup>401</sup> It addresses, among other things, the intersectionality of discrimination against nonwhite women, which can differ from discrimination experienced by white women or black men.<sup>402</sup>

The headscarf controversy is an example of this phenomenon. Muslim men in France have not been subjected to the stigmatizing and demeaning veil laws that are written in neutral terms but disproportionately impact Muslim women. White, non-Muslim women are not affected. The burden is borne mainly by Islamic women of color. Ethnicity, gender, national origin, and religion intersect to impose a category of discrimination unique to non-white, Muslim women in France. The laws' effect is more burdensome than discrimination based only on ethnic, gender, national origin, or religious considerations. Furthermore, there are no compelling justifications for the headscarf and veil laws. They are not reasonably related to any legitimate governmental interest. Headscarves and burqas do not pose a threat to safety or stability in France. Even assuming, *arguendo*, that veils are signs of "subservience,"<sup>403</sup> they do not pose "a clear and present danger" to French society that would justify bans on religious customs and expressions.<sup>404</sup>

Many Western feminists contend that Islamic headscarves undermine gender equality.<sup>405</sup> Headscarves, they argue, reflect practices developed to maintain male dominance.<sup>406</sup> Even if women

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399. Wing, *supra* note 394, at 412.

400. *Id.* at 413.

401. *Id.* at 412.

402. *Id.*

403. Doreen Carvajal, *Sarkozy Backs Drive to Eliminate the Burqa*, N.Y. TIMES (June 22, 2009) <http://www.nytimes.com/2009/06/23/world/europe/23france.html>; Angelique Chrisafis, *Nicolas Sarkozy says Islamic veils are not welcome in France*, THE GUARDIAN (June 22, 2009), <http://www.theguardian.com/world/2009/jun/22/islamic-veils-sarkozy-speech-france>.

404. *Schenck v. United States*, 249 U.S. 47, 51 (1919) (holding speech cannot be penalized unless it presents a clear and present danger to public safety).

405. The arguments are evaluated in Wiles, *supra* note 10, at 719–22.

406. Bennoune, *supra* note 353, at 388–91.

believe they want to wear headscarves, it is derived from a “false consciousness” as their self-perception and social roles are inculcated by socialization in a highly paternalistic culture.<sup>407</sup> In this context, scarves would be symbols of sexist oppression.<sup>408</sup> They can foster religious extremism and create divisions among Muslim women.<sup>409</sup>

Commenting on the question of headscarves in schools, scholars have argued that the educational environment should provide female students a means of escape from male domination rather than reproduce the patriarchy experienced at home.<sup>410</sup> They also contend that headscarves may inhibit Muslim schoolgirls’ capacity to learn and integrate into mainstream French culture.<sup>411</sup> In opposition to this view, some Muslim feminists associate headscarf banning with colonialist policies of coerced cultural assimilation through prohibitions on indigenous cultural symbols, such as modes of dress.<sup>412</sup>

There are some who disagree with these views. Many Muslim women wear scarves and veils to freely express religious convictions and beliefs, display modesty in dress, comply with family values, or protect themselves from sexual harassment.<sup>413</sup> Some feminist scholars consider Western feminists’ critiques of headscarf wearing to be essentialist value judgments reflecting stereotypical views of Muslim women. This interpretation presumes that Western values have a universal validity rather than being social, ideological, or intellectual

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407. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 115 (1989); see generally Susanna Mancini, *Patriarchy as the Exclusive Domain of the Other: The Veil Controversy, False Projection and Cultural Racism*, 10 INT’L J. CONST. L. 411, 418–22 (2012). ANASTASIA VAKULENKO, ISLAMIC VEILING IN LEGAL DISCOURSE 109 (2012) (discussing the views of Catherine McKinnon and Andrea Dworkin).

408. MacKinnon, *supra* note 407.

409. Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil? Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743, 771–73 (2006); Karima Bennoune, *The Law of the Republic versus the “Law of the Brothers”*: A Story of France’s Law Banning Religious Symbols in Public Schools, in HUMAN RIGHTS ADVOCACY STORIES, 155 (Deena Hurwitz, Margaret L. Satterthwaite & Douglas B. Ford eds., 2009); see generally CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 2003).

410. Keaton, *Arrogant Assimilationism*, *supra* note 353.

411. Wiles, *supra* note 10, at 719–22.

412. See Alia Al-Saji, *The Racialization of Muslim Veils: A Philosophical Analysis*, 38(8) PHILOSOPHY & SOCIAL CRITICISM 875, 886 (2010); FRANTZ FANON, A DYING COLONIALISM (1965).

413. Wing & Smith, *supra* note 409.

constructs. This does not recognize the diversity of cultural practices within Islam.<sup>414</sup> Some Western feminists argue that Western scholarship on Eastern cultures is produced by an Orientalist framework that is distorted by unconscious cultural biases.<sup>415</sup> These scholars believe that reserve and restraint in dress are not always coerced. Rather than reflecting a passive submission to the Islamic community, the headscarf can express an active interest in religious scripture.<sup>416</sup> For many, wearing scarves is a gesture that reaffirms a commitment to Islamic morality and identity.<sup>417</sup> Scholars also argue that a headscarf allows the wearer to interact with society without feeling that she is being perceived as a sexual object.<sup>418</sup> In Western countries, the headscarf can be a politically empowering means of expressing disagreement with Western culture and its sexualization of women.<sup>419</sup> For many Muslim women, headscarves function as a means of cultural identification that is more important than scholarly concerns about its gender implications.<sup>420</sup>

The ways in which Muslim women understand the wearing of headscarves present only a few of the intricate, multilayered, and nuanced questions that scholars will continue to debate. However, it is not necessary to resolve the debate to determine that the French veil laws are problematic. The French government should not have interfered with the religious practices of Muslim women simply because those practices are perceived to violate the French Republic's "idea of women's dignity." The motives for wearing headscarves and burqas vary widely among individual women, ranging from voluntary religious expression, to family obligation, to bold political statement. Whatever the motivation may be for wearing burqas or headscarves, a democratic nation such as France should not impose itself as the arbiter of those decisions. Islamic women should have the freedom and autonomy to make individual choices about their modes of dress without interference from others.

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414. Wiles, *supra* note 10, at 719–22.

415. SAID, *ORIENTALISM*, *supra* note 37.

416. Wiles, *supra* note 10, at 719–22.

417. Choudry, *supra* note 358, at 204.

418. Wiles, *supra* note 10, at 719–22.

419. *Id.*

420. *Id.*

## CONCLUSION

In a 2014 New York Times commentary, an American professor living in Paris recounted an eye-opening experience into French attitudes about race. A taxi driver told the professor as they passed through a black neighborhood, “I hope you got your shots. You don’t need to go to Africa anymore to get a tropical disease.”<sup>421</sup> Casual comments like this confirm that the immigration debate is as much about race and ethnicity as it is about national origin. The labeling of second- and third-generation Maghrebis as “immigrants” shows that they are not considered French, even though they were born there and are French citizens. Since the mid-1970s, immigration has been an emotionally charged issue in French elections with politicians seeking elective offices exploiting the issue for political gain.

Immigrants from North and sub-Saharan Africa have been crowded into public housing in *banlieues* located along the perimeters of French cities. They contain high concentrations of low-income families. Crime is high and the schools are often substandard. Young men are the targets of relentless police harassment. Tensions between police and *banlieuesards* have resulted in countless minor disturbances and a number of major riots.

The children of immigrants perform at a lower academic level than those of native-French schoolchildren. Teachers often assume that the children of immigrants cannot perform at an adequate academic level and view such students as disruptive. Surveys show that teachers focus on the behaviors of immigrant students rather than their academic ability.

Ethnic minorities also suffer from discrimination in the labor markets. They are relegated into the lowest paying and least desirable occupations, if they are hired at all. The “ethnic penalty” results in high levels of unemployment among ethnic minorities. Though several antidiscrimination laws prohibit employment discrimination, studies have shown that the laws are not very effective in protecting ethnic minorities from discriminatory practices.

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421. Justin E. Smith, *Does Immigration Mean ‘France Is Over’?* N.Y. TIMES (Jan. 5, 2014), <http://opinionator.blogs.nytimes.com/2014/01/05/does-immigration-mean-france-is-over/?ref=opinion>.

To many French citizens, headscarves and burqas represent an existential challenge to French identity. In reality, however, scarves have never posed any real threat to the safety or stability of France. Communalism, the apparent rejection of French Republicanism, and the mistreatment of some Muslim women by their male relatives provided a convenient excuse to outlaw religious dress in public spaces. In banishing head coverings from schools and public spaces, France effectively attempted to isolate, denigrate, and marginalize Islamic immigrants. The French approach to policymaking may be cast in race neutral terms, but it has a disproportionate impact on Muslim women. The French government knew this would be the effect of the laws. They are thinly veiled efforts to punish Muslim women for practicing their religion. This sort of color-blind racism has long been a harsh reality for ethnic minorities in France.