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A THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENTS
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VEILED THREATS?

Islam, Headscarves and Religious Freedom
in America & France

by Herman Salton

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❧ Abstract ❧

For a variety of historical, cultural and political reasons, the Islamic headscarf has become an increasingly controversial matter in Europe. This is particularly the case in France, where the Parliament passed, in March 2004, a piece of legislation that prohibits students from wearing the Muslim veil—together with any other ‘conspicuous’ religious sign—in the classroom.

Although Statute 228/2004 proved highly controversial and attracted unprecedented media attention, it was overwhelmingly supported by French MPs as a response to popular opposition towards religious insignia at school and was heralded as a ‘liberating’ piece of legislation that faithfully reasserted the beloved French principle of *laïcité*. Overseas, the new law was less favourably perceived and was often accused of being discriminatory and of violating the students’ freedom of religious expression.

This thesis compares the French and American attitudes towards religious symbolism in general and the Islamic veil in particular. As in other matters, at first sight these two countries seem to adopt a very different—if not opposite—approach to religion and the Muslim veil, and so much so that their positions are often described as ‘irreconcilable’.

This thesis will argue that this is hardly the case. Indeed, it will show that, at least before the passage of Statute 228-2004, the French and American legal systems adopted a substantially similar approach that appeared respectful of a veiled student’s right to wear religious insignia. This, the work will also suggest, is not surprising, for contrary to popular belief, the American conception of secularism is in many respects stricter than the French idea of *laïcité*, with the result that French ‘exceptionalism’ on matters of religion is hardly a convincing ground for justifying the new piece of legislation.

The fundamental value of a Franco-American comparison, this work will suggest, ultimately lies with the fact that such a comparison demolishes a good portion of the popular myths surrounding the *affaire des foulards*: that the French legal system is fiercely secular; that the American one is strongly ‘religious’; and that France was, in 2004, confronted with a veritable ‘veil emergency’ that rendered the passage of the new statute all but inevitable.

to Juni

**with love and gratitude
for the best three years of my life**

“And say to the believing women...that they should draw their veils over their bosoms and not display their beauty except to their fathers, their husband’s fathers, their sons, their husband’s sons, their brothers or their brothers’ sons, or their sisters’ sons, or their women, or the slaves their right hands possess, or male servants free of physical needs, or small children who have no sense of the shame of sex. And that they should not strike their feet in order to draw attention to their hidden ornaments.”

THE HOLY QUR’AN, Surah 24:31
New York: Tahrike Tarsile, 2002, 230.

“The chief of the woman is the man. If the woman does not wear the headscarf, she should be punished. As for the man, he must not wear headscarves: he is the image and glory of God, while the woman is the image and glory of the man. The man has not been created for the woman; it is the woman who has been created for the man. This is why she must wear on her head the symbol of her dependence to him.”

THE HOLY BIBLE, 1st Epistle of Paul to the Corinthians
Nashville: Thomas Nelson Publishing, 1982, 604.

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Introduction

France, America & The Muslim Veil

Introduction

France, America & the Muslim Veil

INDIVIDUAL CONSCIENCE v THE STATE,
YESTERDAY AND TODAY

In 442 b.C. the Greek dramatist Sophocles wrote *Antigone*, one of the most popular tragedies of the ancient world. Antigone, daughter of Œdipus, was a woman caught between her civic duty to follow the Theban king Creon's edict prohibiting the burial of her dead brother Polyneices and the divine law which required her to give proper funeral honours to her brethren.¹ The king had no authority to overrule a higher norm, Antigone concluded, and she thus disobeyed the edict, buried the body and was brought before a furious Creon, with whom she argued unflinchingly, in the play's most famous exchange, about the importance of human decrees vis-à-vis those of divine law.²

"But you tell me", the king asked, "did you know of the proclamation forbidding this [burial]?"

"I knew. How could I not? It was public knowledge".

"And yet you dared to break this law?"

"Yes", she replied, "for it was not Zeus who made this proclamation to me; nor did Justice, who dwells with the gods below, lay down these laws for mankind. Nor did I think that your human proclamations [νομοί] had sufficient power to override the unwritten, unassailable laws of the gods [αγραπτα θεων]. They live not just yesterday and today, but forever, and no-one knows when they first came to light. I was not going to incur punishment from the gods, not in fear of the will of any man".³

Outraged that someone (a woman, at that)⁴ disobeyed his orders, Creon condemns Antigone to death—yet the people of Thebes pity the brave girl who is merely following her conscience and the king's prophet warns that a sorrowful fate awaits him because of his decision. Frightened, Creon reverses the death sentence but it is too late: the woman has already killed herself and so has Creon's own son (who was Antigone's fiancé), as well as Creon's wife. The law and order that Creon valued so highly is maintained and he remains King of Thebes, but he has overstepped his authority and is punished for this through the loss of his spouse and offspring. "No irreverence must be shown to the gods",⁵ Sophocles concludes.

What makes this play immortal is the fact that Antigone invokes divine law [αγραπτα θεων]⁶ as a defence for her actions, yet implicit in her position is faith in the discerning powers of her individual conscience.⁷ By choosing to sacrifice her life out of devotion to principles which she regards as higher

¹ Respect for one's family was particularly emphasised in Sparta but was very important throughout Ancient Greece. In Athens, for example, anyone who neglected this duty was liable to a fine and to partial deprivation of citizen rights. However, the most stringent obligations were those concerning burial: close relatives had to bury their family members according to a prescribed ritual and the closest relatives were responsible for laying out the body of the deceased for the funeral. See S M Burnstein (et al) *Ancient Greece: A Political, Social, and Cultural History* (Oxford University Press, New York, 1999) 53. Interesting observations are also offered by D Felton, *Haunted Greece and Rome: Ghost Stories from Classical Antiquity* (University of Austin Press, Austin, 1999). With a few exceptions mainly related to the French materials, the footnote referencing used in this thesis is based on P Myburgh, *Legal Research & Writing Guide* (Auckland University Law School, Auckland, 2003).

² On the point, see P C Rivoltella, *Antigone, Tra Senso del Tragico e Tragedia. Un'Analisi di Struttura*, in A Ghiglione & P C Rivoltella (eds), *Altrimenti il Silenzio: Appunti sulla Scena Femminile* (Euresis Edizioni, Milan, 1998) 29.

³ Sophocles, *Antigone*, transl. by D Franklin & J Harrison (Cambridge University Press, Cambridge, 2003) 33-5.

⁴ "...a woman will never rule me while I am alive!". Sophocles, above at note 3, 41 (lines 488-9).

⁵ Sophocles, above at note 3, 103 (lines 1322-3).

⁶ As one author underlined, *αγραπτα θεων* [agraptá theon] are opposed to *νομοί* [nomoi] or *ψηφισματα* [psēphismata] or *κηρυγματα* [kerugmata], which are normally written down and always subject to cancellation. Sophocles, *Antigone*, edited by M Griffiths (Cambridge University Press, Cambridge, 1999) 201. See also E Hall (ed) *Antigone, Oedipus the King and Electra* (Oxford University Press, New York, 1994); and E Hamilton, *Mythology* (New American Library, New York, 1969).

⁷ See also Sophocles, *Antigone*, Griffiths (ed), above at note 6, 200. On the point see also D Grene, *Introduction to Sophocles I: Three Tragedies* (University of Chicago Press, Chicago, 1991) 145.

than human law [νομου], Antigone represents a threat to the status quo of Thebes, but she also conveys Sophocles' potent admonition to those kings who believe they are almighty only because their decrees are backed by the strength of their armies.⁸ Although Sophocles is not unsympathetic towards Creon, who is trying to avoid anarchy and establish his newly-acquired position in the wake of war,⁹ Sophocles seems to suggest that the monarch has been rightly chastised because his order invaded an area over which royal decrees have no authority: human conscience.¹⁰

Two thousand five hundred years after Antigone, the conflict between the individual and the state—and between one's own conscience and the law—is as topical as in Sophocles' Greece. Times have changed, of course, kings have been substituted by democratic governments and the latter are increasingly detached from religion. Yet it is debatable whether such developments have reduced the potential for conflict between the rules of the state and the conscience of the individual, especially if one considers the escalating scale of public intervention over private matters. The veil issue is, *mutatis mutandis*,¹¹ a good example of this: do states have a right to deal with it, perhaps on the basis of women's rights, as France did in 2004? Or are they interfering, like a modern-day Creon, into a private area over which they have no authority? By the same token: should citizens object to their government's intervention into matters of faith, like Antigone did so fearlessly? And what are the legal instruments at their disposal, should they decide to do so?

This thesis looks at the conflict between national laws and religious conscience in 21st-century France and America. By considering how these two countries deal with the symbolic and highly sensitive matter of the Muslim headscarf, it analyzes the way these two modern and mature democracies with an illustrious past and a common penchant for regarding themselves as the land of human rights¹² are managing the ever-present conflict between the rules of the land and those of the spirit—between, in other words, Antigone's conscience and Creon's laws.

It might be asked why focus on the Muslim veil, and why concentrate on the school environment. For a variety of historical, political and legal reasons that will soon become apparent, looking at the contemporary treatment of this religious sign at school is a good way to ascertain how a polity deals with questions of conscience in general and religious belief in particular.¹³ It is also, as we shall see at

⁸ "Antigone", one author wrote, "represents here the emblem of the divine, unwritten law...while Creon...represents rationality and human law". A Stroppa, *Sofocle: La Genesi del Mito, L'Ineluttabilità del Nòmos*. In Ghiglione & Rivoltella, above at note 2, 49.

⁹ As one author observed, "neither Creon nor Antigone is a villain, neither a saint". Sophocles, *Antigone*, Griffiths (ed), above at note 6, 34.

¹⁰ For a more extensive analysis of the point see J P Vernant, *Mythe et Pensée chez les Grecs: Études de Psychologie Historique* (Librairie François Maspero, Paris, 1966) 44.

¹¹ Religion in Ancient Greece obviously differed in important respects from religion in 21st century France and America. Also, conscience and religion do not of course necessarily coincide, as this thesis will make clear in subsequent sections.

¹² On 18 May 2001 US President George W. Bush declared that "[o]ppressed peoples around the world should be assured that the United States will always be the world's human rights champion". On 17 December 2003, French President Jacques Chirac declared that "[e]verywhere in the world, France is known as the human rights country". B Chélini-Pont & T J Gunn, *Dieu en France et Aux États-Unis* (Berg International, Paris, 2005) 14-15.

¹³ The breadth and depth of the existing literature on the veil issue is the best possible indicator of its complexity and interdisciplinary nature. Interesting comments on this from an Islamic perspective are offered by A Abu-Rabia, "The Veil and Muslim Women in France: Religious and Political Aspects", (2006) 1 *Anthropology of the Middle East*, n.2, 89-107; F Mernissi, *Beyond the Veil: Male-Female Dynamics in Modern Muslim Society* (Indiana University Press, Bloomington, 1987); F Mernissi, *Women in Islam: A Historical and Theological Enquiry* (Basil Blackwell, Oxford, 1991) (especially 85-101); A Najimabadi, "Veiled Discourse, Unveiled Bodies", (1993) 19 *Feminist Studies*, n.3, 487-518; F Shirazi, *The Veil Unveiled* (Florida University Press, Orlando, 2001); F E Guindi, *Veil: Modesty, Privacy and Resistance* (Berg, Oxford, 1999) (esp.152ff); N Ahmad (ed), *Women in Islam* (APH Publishing, New Delhi, 2003) vol.I (especially 23-45 & 197-212); L Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (Yale University Press, New Haven, 1992) (especially 144-168); F Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam* (Addison-Wesley, Reading, 1991); and M Sunder, "Piercing the Veil", (2003) 112 *Yale Law Journal* 1399 (especially 1436-8). For a Western perspective, see G Jasser, *Le Voile en Deux Maux*, in (2005) *Nouvelles Questions Féministes*, 16/4, 31-45, translated into English as "The Twin Evils of the Veil", (1999) 5 *Social Identities*, n.1, 41-45; P Mule & D Barthel, "The Return of the Veil: Individual Autonomy v Social Esteem", in (1992) 7 *Sociological Forum*, 2, 323-32; N Keddie & B Baron, *Women in Middle Eastern History: Shifting Boundaries in Sex and Gender* (Yale University Press, New Haven, 1991); C Nordmann, *Le Foulard Islamique en Questions* (Éditions Amsterdam, Paris, 2004); R Roded, *Women in Islam and in the Middle East*, (Tauris Publishers, London & New York, 1999); B F Stowasser, *The Hijab: How a Curtain Became an Institution and a Cultural Symbol*, in A Afsaiddin & M Zahniser (eds), *Humanism, Culture and Language in the Near East* (Eisenbrauns, Wina Lake, IN, 1997); G M

length in this thesis, an excellent means of measuring the impact of religious history upon a given country's legal system, as well as a reliable thermometer of its approach to larger issues of migration, multiculturalism and diversity.

Irrespective of the theological disquisitions over the compulsory character of the Islamic headscarf,¹⁴ the act of wearing this piece of cloth can be regarded as a highly visible and symbolic test of a secular system's flexibility in dealing with matters of individual conscience—and of the conundrum highlighted by Sophocles two thousand five hundred years ago. "I was not going to incur punishment from the gods, not in fear of the will of any man", Antigone said in front of Creon. While a number of French people and politicians would disagree with this standpoint, this is the reason why a majority of Muslim students wears the headscarf—because they regard it (or have been taught to regard it) as a form of divine law [αγραπτα θεων] that is higher and morally superior to human law [νομοι]. In the same way as Antigone represented a threat to the status quo of Thebes, these veiled students today are challenging—albeit silently and, it must be said, in most cases unwillingly so—the secular state in a variety of different ways, and analysing the position of national governments on this issue means studying the extent to which these systems and their laws are willing to accommodate individual conscience and religious beliefs into public life.

Yet why choose France and America as comparators? Because the debate on the Muslim veil can be regarded as a discussion on multiculturalism that touches a series of raw nerves including national identity, liberalism and religious fundamentalism—and since France and America seem to have diametrically opposed ways of approaching these issues—it is posited here that this odd couple represents an interesting laboratory when it comes to understanding the mechanics through which modern democracies adapt (or fail to adapt) their secular laws to individual conscience in general and religious belief in particular. In this respect, it is my conviction that the two (apparently)¹⁵ opposed approaches adopted by France and America on the Islamic veil are interesting departure points to comprehend this process of adaptation and that they will serve us well when it comes to understanding how mankind has evolved in its centuries-long quest to reconcile spiritual needs—including what Sophocles called 'the unwritten, unassailable laws of the gods'—and secular laws.

With these broad objectives in mind, I shall now briefly introduce the nature of the differences between the French and American approaches, before outlining the three main hypotheses that will form the basis of this work and, finally, dealing with practical issues of methodology, structure and contents.

FRANCE LEGISLATES: THE MUSLIM VEIL AS A POLITICAL SYMBOL

"It is in the name of the principle of *laïcité*,¹⁶ cornerstone of the Republic, common ground of our shared values of respect, tolerance and dialogue, that I urge all Frenchwomen and Frenchmen to unite.

Vogelsang Eastwood, *For Modesty's Sake?* (Syntax, Rotterdam, 1996); A Kayani & M Zein, *Sólo Las Diosas Pasean Por El Infierno: Retrato de la Mujer en Los Países Musulmanes* (Flor del Viento Ediciones, Barcelona, 2002); J Bowker & J Holm (eds) *Women in Religion* (Pinter, London, 2004); A S Roald, *Women in Islam: The Western Experience* (Routledge, London, 2001) (especially 254-294); J Mabro (ed) *Veiled Half-Truths: Western Travellers' Perceptions of Middle Eastern Women* (Tauris Publishers, London, 1991) (especially 1-97); N Awde (ed) *Women in Islam: An Anthology from the Qur'an and Hadiths* (Curzon, Richmond, 2000) (especially 46-50 & 86-159); and E R Wolfson (ed) *Rending the Veil* (Seven Bridges Press, New York, 1998) (especially 1-116). Also interesting are the proceedings of the conference *Islam, Women, the Veil and the West* organized by the University of Montana on April 28-30, 2005.

¹⁴ As the two quotations mentioned at the beginning of this thesis suggest, not only do both the Bible and Koran mention the veil—the former seems to do so more uncompromisingly than the latter.

¹⁵ As we shall see below, one of the hypotheses of this book will be that the differences in the Franco-American approaches to the veil are not, legally speaking, as strong as the two countries' religious histories and political philosophies would suggest. For further comments, see below in this introduction.

¹⁶ Although partly conveying an idea of 'secularism', for a variety of reasons that will become apparent in Part 2 (and especially 2.1.), *laïcité* is a particularly difficult word to translate and so I leave it in French throughout the book. This has also been the wise position of a majority of authors. For the most recent examples, see T J Gunn, "Religious Freedom and *Laïcité*: A Comparison of the United States and France" (2004) *Brigham Young Law Review* 419 (esp. 428ff); B Chélini-Pont & T J Gunn, *Dieu en France et Aux États-Unis: Quand Les Mythes Font la Loi* (Berg International, Paris, 2005) 11; E Tawil, *Norme Religieuse et*

I proclaim it very solemnly: the Republic will oppose anything that divides, anything that segregates, anything that excludes”.¹⁷

It is with these words, pronounced at the Elysée Palace on 17 December 2003, that French President Jacques Chirac banned, after months of fierce debates, the Muslim headscarf from French public schools. Mr Chirac’s speech was greeted with an extended and enthusiastic applause by the more than four hundred guests invited to attend his televised address on laïcité and was, in several respects, a remarkable performance. After urging his countrymen and women to make a “sursaut laïque”,¹⁸ the President announced that, following wide consultation and thorough analysis of the *Rapport sur la Laïcité* produced by a commission chaired by Mr Bernard Stasi, he too was in favour of a new law forbidding all ‘clothes or symbols that conspicuously manifest a religious allegiance’ (‘tenues ou signes qui manifestent ostensiblement l’appartenance religieuse’)¹⁹ in French public schools. These signs, he said, included the Jewish kippa, the Muslim headscarf and large Christian crosses, whereas the use of discreet symbols (‘signes discrets’)²⁰ such as small crosses, the David star and small Korans “remains of course possible”.²¹ Mr Chirac justified the unprecedented move by emphasizing that “laïcité is the neutrality of the public space which allows a harmonious coexistence among different religions”²² and added that he was not, with this measure, targeting any specific religion: laïcité is a historical legacy belonging to all Frenchmen and women no matter which faith they embraced, he concluded. “That is why it is non-negotiable”.²³

The announcement of the French President puzzled the world but came as no a surprise in France itself, where it was widely expected and widely applauded. Well before this speech, a survey had shown that more than 70% of French people²⁴ were in favour of a law banning headscarves at school and clearly the French President was encouraged by this groundswell of public opinion.²⁵ Indeed, it was partly because of popular hostility towards the Muslim veil that, in the midst of the controversy caused by the expulsion of two veiled schoolgirls, Mr Chirac had appointed the Stasi Commission—a body of twenty eminent intellectuals who were given the task of analyzing the laïcité matter, interviewing the public and coming up with recommendations.²⁶ After taking into account, in the Commission’s words, “[t]he largest number of opinions expressed on this issue”,²⁷ the Stasi Commission concluded that “laïcité is not a simple rule of the institutional framework, it is the fundamental value of the republican pact that makes possible the coexistence of common rules, pluralism and diversity”²⁸ and recommended the enactment of a statute prohibiting “conspicuous [political and] religious clothes and symbols such as big crosses, headscarves and kippas”.²⁹

Droit Français, (PUAM, Aix-Marseille, 2005) (especially 29-52); J R Bowen, *Why The French Don't Like Headscarves: Islam, the State and the Public Square* (Princeton University Press, Princeton, 2006) 2; D McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing, Oxford, 2006) 34.

¹⁷ J Chirac, *Discours Prononcé par Monsieur Jacques Chirac, Président de la République, Relatif au Respect du Principe de Laïcité*, 17 December 2003, in *Journaux Officiels, Application du Principe de la Laïcité dans les Écoles, les Collèges et les Lycées Publics* (Éditions des Journaux Officiels, Paris, 2005) 2. See also *Le Monde*, *Le Discours de Jacques Chirac sur la Laïcité*, 18 December 2003. Unless otherwise stated, all translations from French, Spanish, Italian, Ancient Greek and Latin into English are mine—and so are the mistakes.

¹⁸ “Secular jump” or “secular burst of energy”. In Chirac, above at note 17, 1-2.

¹⁹ *Id.* 7.

²⁰ *Ibid.*

²¹ *Ibid.* See also *Le Monde*, *M. Chirac Prône le ‘Sursaut Républicain’ et Interdit le Voile à l’école*, 19 December 2004.

²² *Id.* 5.

²³ *Ibid.*

²⁴ Quoted in *The Economist*, *The War on the Headscarves*, 5 February 2004. For further statistics on French people’s aversion to the Muslim headscarf, see Section 2.3.

²⁵ “The national will cannot be ignored”, his Education Minister declared to the weekly *Le Point*. See *Le Monde*, *M. Chirac Prône le ‘Sursaut Républicain’ et Interdit le Voile à l’école*, 19 December 2004.

²⁶ Between July and December 2003, the Commission conducted one hundred public hearings and forty private hearings, and audited politicians, religious leaders, trade unionists, businessmen, academics as well as heads of hospitals, clinics and prisons. See Chapter 2.3. for details.

²⁷ B Stasi et al, *Rapport de la Commission de Réflexion sur l’Application du Principe de Laïcité dans la République* (Documentation Française, Paris, 2004) 9. See also *Le Monde*, *Le Rapport de la Commission Stasi sur la Laïcité*, 12 December 2003.

²⁸ *Ibid.* See also ‘Conclusion’ (145ff).

²⁹ Stasi, above at note 27, 129.

On 17 March 2004, only three months after these recommendations were submitted to the President, the French Parliament (partly)³⁰ complied: “In elementary, intermediate and high schools”, Statute 228 reads, “the wearing of clothes or symbols through which pupils conspicuously manifest a religious affiliation is prohibited”.³¹ To give a sense of the overwhelming support for this measure, the statute—which entered into force at the commencement of the 2004/2005 school year—was approved by a majority of 494 to 36 in the *Assemblée Nationale* and 276 to 20 in the *Sénat*, and was supported not only by Mr Chirac’s centre-right party (the UMP, ‘Union pour un Mouvement Populaire’) but also by the opposition.³² It “meets the expectations and worries of the Socialists”,³³ one prominent left-wing politician commented.

As we shall see at length later in this thesis, Mr Chirac’s (partial) endorsement of the Stasi Commission’s core recommendation—and the French Parliament’s decision to give the go-ahead to the religious side of the proposed ban—is only the latest act in an ongoing civic debate in France that at times has turned into a national drama. “Few things seem to scare the French as much as the sight of Muslim schoolgirls wearing headscarves”,³⁴ one author observed. As for the official arguments given in favour of the ban, they were common to the Stasi Report, Mr Chirac’s speech and the commentary accompanying the new legislation, and invariably revolved around two issues: the defence of the ideal of *laïcité* and the protection of women’s rights.

As far as the first point is concerned, France’s momentous decision to ban headscarves in public schools must be understood in the light of the country’s political history. In France, the principle of *laïcité* is venerated at least as much as that of religious freedom in the United States—and the curious parallels between the two form the basis of this thesis. From the Renaissance to the Enlightenment, from the Lutheran Reform to the Nantes Edict, French history is strewn with examples of the constant struggle between a religious (read Catholic) vision of the state and public affairs and a secular, rationalist movement upholding the principle of separation between spiritual and worldly matters.³⁵ Needless to say, France was not alone in facing this problem as virtually every polity had sooner or later to deal with the distinction between the spiritual and the secular (it was, after all, Christ himself who, in the Bible, is reported as saying “Render to Caesar the things that are Caesar’s, and to God the things that are God’s”)³⁶. France’s history and political culture, however, combined with the presence on her territory of a strong and historically powerful Catholic Church, ensured the peculiarity of the country’s response to the dilemma, which the 1905 Law on Separation of Church and State tried to resolve. Part 2 and 3 of this thesis will cover these issues in detail.

The necessity to protect women from discriminatory pressures resulting from certain religious practices is, as we shall see, the other official justification given for the new French legislation—and one that resonates in virtually every page of both the Stasi Report and President Chirac’s speech. As for the former document, after having warned of “a resurgence of sexism that translates into pressures and verbal, psychological and physical violence”,³⁷ it made a direct reference to the Muslim headscarf and overtly denounced the ‘compulsory’ character of such a veil—which, according to the Stasi members, can all too easily turn into a veritable object of violence: “Young people force girls to wear oppressive and asexual clothes and lower their gaze when they see a man—and, if they do not obey,

³⁰ While the Stasi Commission recommended a ban against all conspicuous symbols, religious and political, Mr Chirac concentrated only on the former and the French Parliament followed suit. See Section 2.3. for details.

³¹ *Journal Officiel*, Loi 2004-228 du 15 Mars 2004 Encadrant, en Application du Principe de Laïcité, le Port de Signes ou de Tenues Manifestant une Appartenance Religieuse Dans les Écoles, Collèges et Lycées Publics, *Journal Officiel* n. 65 du 17 Mars 2004, 5190.

³² See *Analyse du Scrutin*, in *Assemblée Nationale*, *Laïcité: Le Débat à l’Assemblée Nationale*, Séances Publiques du 3 Au 10 Fevrier 2004 (Première Lecture) (Documentation Française, Paris, 2004) 325-6.

³³ *Le Monde*, M. Chirac Prône le ‘Sursaut Républicain’ et Interdit le Voile à l’école, 19 December 2004.

³⁴ N Alsayyad & M Castells (eds), *Muslim Europe or Euro-Islam? Politics, Culture and Citizenship in the Age of Globalization* (Lexington, Oxford, 2002) 9.

³⁵ These matters will be dealt with in chapters 2.1. and 3.1. Good introductory overviews of the issue are offered by J L Ormières, *Politique et Religion en France* (Editions Complexe, Bruxelles, 2002) (esp. 11-23); M Agulhon, « Républicain à la Française », (1992) 13 *Revue de Tocqueville*, n.1, 107-118 (esp. 107-112); et H Pena-Ruiz, *Dieu et Marianne: Philosophie de la Laïcité* (PUF, Paris, 2005) (esp. 17-111).

³⁶ “Reddite quae sunt Caesaris Caesari, et quae sunt Dei Deo”. The New Testament, The Gospel According to Matthew, 22:21.

³⁷ In Stasi, above at note 27, 101. See also *Le Monde*, *Le Rapport de la Commission Stasi*, above at note 27, § 3.3.2.1.

are stigmatized as whores”, Mr Stasi wrote. “The Republic cannot ignore their distress call”.³⁸ Interestingly, these words are very similar to those that, a few days later, resounded within the lavishly-decorated salons of the Elysée: “We cannot accept”, President Chirac warned, “that some people, taking as an excuse a biased interpretation of the secularist principle, try to imperil these long-won values of our Republic that are the equality of sexes and the dignity of women”.³⁹ For this reason, he concluded, a new piece of legislation banning from French schools conspicuous religious symbols in general—and the Muslim veil in particular—was “obviously necessary”.⁴⁰

AMERICA DISAGREES:
THE MUSLIM VEIL AS A RELIGIOUS SYMBOL

On 30 March 2004, thirteen days after the French Parliament passed Statute 228, the US Department of Justice (DoJ) issued an urgent press release announcing its intervention in a lawsuit brought by a Muslim student who had been suspended from a public school for wearing an Islamic headscarf.⁴¹ The Oklahoma School District had twice excluded the pupil on the ground that her veil infringed the Benjamin Franklin Science Academy’s dress code prohibiting headgear inside the Muskogee, Oklahoma, institution.⁴² “Once you move the [hijab] into school”, the superintendent was reported to say, “it would bring religion into the school”.⁴³

The US government emphatically disagreed. “As a matter of equal protection, free exercise of religion and free speech, the school district cannot do so”,⁴⁴ it wrote in defence of the girl, while at the same time emphasizing that the dress code had to give way to the student’s right to visibly express her faith. “Nashala’s claim involves free exercise rights coupled with expressive rights”, the DoJ submitted, “and therefore heightened scrutiny is warranted...”.⁴⁵ Moreover, it observed, “[t]he hijab is a pure symbol, such as the cross, the Star of David, the crescent, the swastika...or the black armband in *Tinker* [and] any individualized activity with regard to it...is bound to convey a message of fealty or revulsion and is ‘closely akin to pure speech’”.⁴⁶ Contrary to France, where it is precisely the religious nature of students insignia—and, it should be noted, nothing else—that is currently singled out for prohibition, in America such spiritual connotation contributes to strongly ensuring the highest possible legal protection, as well as its stringent enforcement by the federal government.⁴⁷

As mentioned, the Oklahoma School District at first rejected the girl’s claims, but after the matter gained national and international prominence it changed its stance, accommodated the veil and added a religious exception to its dress code—a development that, as we shall see in Chapter 1.3., is typical of the few veil incidents that have arisen in the United States.⁴⁸ “Head coverings of any sort whatsoever will not be worn by students to class or within school buildings”, the revised policy reads, “unless...previously approved by the School Board upon written application for bona fide religious reason...”.⁴⁹ Following a Department of Justice suggestion, the District also agreed to implement a training programme on the amended dress code for its entire teaching and administrative staff,⁵⁰ implying that the school had learned its lesson and that a very different stance was going to be adopted in the future by school authorities.

³⁸ Stasi, above at note 27, 101.

³⁹ Chirac, above at note 17, 6.

⁴⁰ *Ibid.*

⁴¹ US Justice Department, Justice Department Files Complaint against Oklahoma School District Seeking to Protect Student’s Right to Wear Headscarf to Public School, Washington: US Justice Department Press Release, 30 March 2004.

⁴² “Students shall not wear...hats, caps, bandannas, plastic caps or hoods on jackets inside the [school] buildings”, the regulation read. See Hearn and *USA v Muskogee Public School*, Defence Briefings, Ex A, 4.

⁴³ *Id.* § 2.

⁴⁴ *Id.* § 1.

⁴⁵ *Id.* (“Argument”).

⁴⁶ *Id.* Part III (quoting Chalifoux and Coughatta Tribes).

⁴⁷ For a detailed analysis of the point, see Chapter 1.2.

⁴⁸ For details on the matter, see Chapter 1.3. See also Associated Press, *Case Settled Over Headscarves in the Classroom in Oklahoma*, 19 May 2004; and Dallas Morning News, *Muslim Girl in Oklahoma Public School OK’d to Wear Headscarf*, 12 November 2004.

⁴⁹ Hearn and *USA v Muskogee Public School District*, Consent Order, 3 (emphasis added).

⁵⁰ *Id.* 4.

As for the government's intervention, it was unusually vigorous and left little doubt as to the importance attached by federal authorities to individual conscience and religious freedom. The Department declared the Oklahoma lawsuit one of "general public importance"⁵¹ because it concerned the crucial issue of "whether a school district can bar a Muslim student from wearing a religious scarf, known as a hijab, under the district's dress code".⁵² "[It] cannot do so", the memo confidently stated, in what sounded like an oblique condemnation of the new French legislation, because "[n]o student should be forced to choose between following her faith and enjoying the benefits of a public education. We certainly respect local school system's authority to set dress standards and otherwise regulate their students", the American government concluded, "but such rules cannot come at the cost of constitutional liberties. Religious discrimination has no place in American schools".⁵³

What France had prohibited as a sign promoting 'division', 'segregation' and 'exclusion',⁵⁴ American authorities seemed to vigorously protect with the full strength of the law—and it should be noted that this had also been the position of past US administrations, which on the matter (like their French counterparts) do not appear to split along political lines.⁵⁵

FIRST HYPOTHESIS:
RELIGIOUS HISTORY AS FIRST REASON BEHIND THE FRANCO-AMERICAN DIVIDE

As this concise synopsis suggests, the French and American approaches to the Islamic headscarf graphically highlight one of the most daunting problems facing rulers and political leaders ever since the times of Sophocles and Creon: the need to balance belief and non-belief—or, otherwise put, the need for a democratic state to make accommodations so that the rights of believers can effectively be squared with the laws of a secular state. Yet France and America also seem to have different—if not contrasting—attitudes on how to achieve that goal, for there is no doubt that Mr Chirac's speech on laïcité would have been met with incredulous faces had it been delivered in front of an American audience, while a good portion of French people would regard the US government's commitment to religion as one more example (if not result) of that country's defective separation between Church and State.⁵⁶

This brings us straight to the core questions addressed in this thesis: what are the reasons behind this difference? Why is the same religious sign interpreted and treated in such strikingly different ways? And, moreover, how can this happen in two countries that regard themselves as secular democracies⁵⁷ and claim the moral high ground when it comes to individual rights and civil liberties? France and the United States share the honour of having created two of the world's oldest human rights instruments—La Déclaration des Droits de l'Homme et du Citoyen (1789) and the Bill of Rights (1791)—both of which date back to the end of the eighteenth century and are universally perceived as

⁵¹ US Justice Department, Complaint-in-Intervention in *Hearn v Muskogee Public School District*, Ca N CIV 03 598-S, 30 March 2004, 3; Motion to Intervene as Plaintiff-Intervenor in *Hearn v Muskogee Public School District*, 30 March 2004, 2.

⁵² US Justice Department, Memorandum of Law in Support of Its Cross-Motion for Summary Judgment in *Hearn v Muskogee Public School District*, 6 May 2004, 1.

⁵³ *Ibid.* As an indirect confirmation that this was a matter of principle as well as a point of law, the authorities made sure that their 'pro-veil' message was spread far and wide, insofar turning the divide between Washington and Paris into a matter of national pride. See e.g. US Justice Department, Letter to State Governors on Religious Symbols at School, Washington: Justice Department, 20 August 2004, 2.

⁵⁴ Chirac, above at note 17, 2.

⁵⁵ For details on the matter, see Chapters 1.3. & 2.3.

⁵⁶ This was for instance conveyed in graphic terms during the parliamentary debates on Statute 228/2004: "It is paradoxical that our current debate is criticized by some Western leaders like those of...the USA, where a number of decisions of the Bush administration are taken in the name of God and where certain politicians with educational responsibilities recommend, for school programs, the suppression of Darwin's theory because it rejects the truth of the Genesis. These practices are worthy of a theocracy..." See H Nayrou (PS, in favour). In *Assemblée Nationale, Laïcité: Le Débat à l'Assemblée Nationale. Séances Publiques du 3 au 10 Février 2004* (Documentation Française, Paris, 2004) 107. "France is a laïque nation", another MP, this time belonging to the centre-right ruling party, agreed. "Here, the President does not swear on the bible. Here, everyone is submitted to the laws of the Republic, not to those of God". B Bourg-Broc (UMP, abstention), In *Débats*, above at note 56, 86.

⁵⁷ Secular democracies in the sense that their founding constitutions (the US Bill of Rights and the French Human Rights Declaration and Constitutions) are regarded by them and by the world as the archetypes of a secular state. See Chapters 1.2 & 2.2. for details.

luminous models of freedom and liberalism.⁵⁸ So, one cannot help wondering, why such different perspectives?

While answering this question is no easy task, this thesis suggests that the answer lies partly in the two countries' religious past. As we shall see, history teaches that European nation-states in general—and the French one in particular—have often seen religion as an obstacle (sometimes even a threat) to their own authority. The very ideas of civic polity and social contract of the European Enlightenment did not require much commitment to a transcendental belief—and, on the contrary, somewhat feared it,⁵⁹ while European nation-states also very much disliked the significant temporal power still held by the Church, which in turn often condemned those states' unprecedented concentration of power and wealth. The maxim *Homo Proponit, Sed Deus Disponit*⁶⁰ (“Man proposes, but it is God who decides”) may have been a popular dictum within clerical circles of the time, but it hardly sat well with newborn European nation-states trying to increase their authority in a fragmented and conflict-torn world. As Thomas of Kempis pointed out, “religions are inherently revolutionary [because] they are capable of providing the ideological resources for an alternative view of public order”⁶¹—and history shows that European nation-states frequently grew uncomfortable with such an ability.

Because of a number of historical circumstances that will be considered at length in this thesis, the United States largely ignores the highly confrontational paradigm that has historically characterized Church-State relationships in Europe in general and France in particular. Whereas the French revolutionaries thought that only when religion was out of the public realm (and school) could the State flourish,⁶² the American Founding Fathers were convinced—and, as we shall see, made it quite clear—that the exact opposite was the case and thought that religion was among the most powerful means of developing the self-governing morality required to maintain a free nation. In stark opposition to France, religious feelings have been in the past and are still today so strong in the new world that they have become embedded in the nation's identity, while in France, courtesy of the endless religious wars between the Catholic Church and the secular State, there was (and partly still is) the widespread belief that *l'égalité* can only be achieved through *laïcité*. “No law, no [religious] practice is superior to that of the République, nor can or should become an obstacle to it”,⁶³ France's Interior Minister (and currently President) Nicolas Sarkozy pointed out, in a sentence that sounded like a warning to religions. As we shall see, nothing could be further from the truth in the United States' history, practice and law.⁶⁴

Nowadays the situation is of course different. This is because the balance of power between religion(s) and states has changed considerably, as have the challenges faced by modern European polities in regulating their balance. As the veil issue suggests, today's multi-cultural and multi-religious societies in both Europe and America face the challenge of having to accommodate, within one territory, the sometimes extremely varied expectations of people belonging to different faiths, while at the same time guaranteeing the respect for negative rights of non-belief such as those of atheists and agnostics. Yet there is one thing which has not changed—and this, from the point of view of European governments, is both the importance as well as the problematic character of religion. As one scholar observed, even today “[r]eligion remains one of the problems that every

⁵⁸ It is interesting to note that the two reasons given by French authorities for the adoption of Statute 228/2004—secularism and women's rights—are also widely shared principles of the American legal system and political establishment. For details, see Chapters 3.2. & 3.3.

⁵⁹ See e.g. C Tilly, *Reflections on the History of European State-Making*, in C Tilly (ed) *The Formation of National Western States in Western Europe* (Princeton University Press, Princeton, 1975) 42.

⁶⁰ Originally in Thomas of Kempis, *Imitatio Christi*, I, 19, 2. Quoted in P Mastellarò, *Il Libro delle Citazioni Latine e Greche* (Mondadori, Milan, 1994) 96.

⁶¹ *Id.* at xii.

⁶² See e.g. E Burke, *Reflections on the Revolution in France* (Regnery, Chicago, 1955) 33.

⁶³ *Le Monde*, *Vers une Nouvelle Citoyenneté Française*, 2 May 2003.

⁶⁴ “The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual”, the US Supreme Court wrote for example in 1946. “The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State”. See *Girouard v USA*, 328 US 61, 64 (1946).

[European] nation-state ha[s] to face, [for] it is not so easy to deal with people, whether citizens or not, who think that religion is the ultimate and absolute source of morality, more ultimate and more absolute than even the state".⁶⁵

This thesis will argue that French history is a prime example of the controlling tendency of European nation-states over religion—and that this is precisely what distinguishes it from the United States, where religion is an inherently 'private' matter. "There is no country in the world where...religion retains a greater influence over the souls of men than in America", Alexis de Tocqueville wrote in 1831, "and there can be no greater proof of its utility and of its conformity to human nature than that its influence is powerfully felt over the most enlightened and free nation of the earth".⁶⁶ This historically different (public versus private) role of religion in the two contexts, I will further suggest, is one of the reasons behind the passage of Statute 228/2004 and also partly explains the startling differences between the anaemic numbers of contemporary religious allegiance in Europe⁶⁷ (and particularly in France)⁶⁸ vis-à-vis the buoyant ones in the United States.⁶⁹

The legacy of the two countries' religious histories should not be underestimated, therefore, and the first hypothesis of this book is that such inheritance plays an important role when it comes to the Franco-American divide over the veil. Yet one point should be made here as an extension of my first hypothesis: France's recent ban and strong, almost obsessive emphasis on *laïcité* should not be taken as a symbol of the almighty power of the secular state over religion but rather as the product of centuries of frustration and fierce battles between the two. Religion is—and always has been—central not only to French culture but also to French national history, and far more fiercely and dramatically than in America. This is why, I will argue, the French Establishment feels the need to rally behind the principle of *laïcité*—and this is also why, in my opinion, a comparison with the United States is so illuminating. Although for opposite reasons, in both countries religion is essential and, *pace* Mr Chirac, firmly cast in their genetic heritage—yet this leads one system to ban religious expression in public schools and fear its influence on civic life, and the other one to acknowledge its importance and protect it at all levels. The obvious and irresistible question that this thesis will try to address is: why?

SECOND HYPOTHESIS: ISLAMOPHOBIA AS SECOND REASON BEHIND THE FRANCO-AMERICAN DIVIDE

As if religion alone were not daunting enough, its relationship with Islamophobia risks being another, more subtle but equally demanding, source of problems—particularly for France. For if it is true, as Creon discovered more than two thousand years ago, that accommodating the spiritual and secular components of a society is one of the main challenges facing nation-states, it seems accurate to say that this is especially the case when the religion in question is Islam. There are at least two reasons for this. The first is Western (and particularly European) countries' historical uneasiness

⁶⁵ G Baumann, *The Multicultural Riddle* (Routledge, London, 1999) 52.

⁶⁶ A de Tocqueville, *De La Démocratie en Amérique* (Gallimard, Paris, 1986) Vol. I, 431 ("L'Amérique est pourtant encore le lieu du monde où la religion...a conservé le plus véritables pouvoirs sur les âmes; et rien ne montre mieux combien elle est utile et naturelle à l'homme, puisque le pays où elle exerce de nos jours le plus d'empire est en même temps le plus éclairé et le plus libre"). Translating Tocqueville's intelligence is no easy task and I have long hesitated on whether to do so or simply reproduce the French original. For the sake of readability, I have translated, but I have left the original in the footnotes because much of his message's beauty and refinement is lost in translation.

⁶⁷ According to one source, the United States possesses a 'religiosity index' of almost 70%, while France has little more than 30% and other EU nations score somewhere in between. See S Huntington, *Who Are We? America's Great Debate* (Free Press, London, 2005) 91. Interesting comments are also offered by G Gallup & J Castelli, *The People's Religion: American Faith in the 90s* (MacMillan, London, 1989) 18 & 91; A Greeley, *Religious Change in America* (Harvard University Press, Cambridge, MA, 1989) 115-6.

⁶⁸ *Ibid.*

⁶⁹ "Overwhelming majorities of Americans affirm religious beliefs. When asked in 1999 whether they believed in God or a universal spirit, or neither, 86 percent of those polled said they believed in God, 8 percent in a universal spirit, and 5 percent in neither. When asked simply whether they believed in God or not, 92 percent said yes". *Id.* 86. Together with other figures of religious allegiance in the world, this leads the author to conclude that "[a]n almost global resurgence of religion [is] under way, manifest in almost every part of the world—except in Western Europe". See Huntington, above at note 67, 360.

about this faith, while the second is that, in spite of France and America being multi-cultural and multi-religious in composition, they remain preeminently Christian at heart.

No one should be in any doubt about the historical persistence of Western Islamophobia—and as we shall see shortly, the French parliamentary debates on Statute 228/2004 are an eloquent reminder of this.⁷⁰ As early as 1110 the renowned French epic *Chanson de Roland* described Arabs as “[t]he authors of all evil, hating God and actively seeking Satan. They eat their prisoners, betray their oaths, buy and sell their own womenfolk”.⁷¹ The poet Petrarch, writing some time later, did not have a significantly better opinion when he portrayed them as “a naked, cowardly and lazy people who never grasp the steel but entrust all their blows in the wind”.⁷² Nor, for that matter, had Ludovico Ariosto, who, in his *Orlando Furioso*, defined Muhammad as “falso e fallace”.⁷³ As time passed by and Europeans plummeted from invading power (in the Middle East) to ‘invaded’ people (in their own Europe),⁷⁴ contempt turned into fear—and soon became panic, nowhere better depicted than in the title of a pamphlet published in London in 1916. “Mohammed or Christ”, it reads, “An account of the rapid spread of Islam in all parts of the globe, the methods employed to obtain proselytes, its immense press, its strongholds, and suggested means to be adopted to counteract the evil”.⁷⁵

This hostility is perhaps less surprising when one considers that Europe itself was made through the encounter with—and fight against—religions, particularly Islam. “It was largely in response to the Muslim threat”, one author underlined, “that Europe drew together. For centuries, the only European enterprises were joint actions against Muslims, from the Crusades of the Middle Ages to the defence of the Habsburg Empire against the Turks in the late seventeenth century”.⁷⁶ Despite the undeniable cultural and religious roots shared by medieval Islam and Christianity, therefore, the relationship between Islam and the West remains tense—and recent events in France and the United States bear witness to this tension. Yet in this respect, too, there seems to be a divide between France and America—a divide that, as we shall see, is important when it comes to explaining the difference over the veil issue.

In France, critics of the new legislation wondered whether the ban on conspicuous religious symbols at school is really for all religions.⁷⁷ “Secularism asks all religions to make an effort of adaptation”,⁷⁸ Mr Stasi wrote in his Report. Yet how many schoolchildren turn up to class wearing crucifixes or David stars of a “manifestly excessive dimension”?⁷⁹ Lila and Alma—the two girls expelled from school in 2003 because of their clothing—were Muslim, and before the new statute came into effect in 2004 no Christian or Jewish schoolboy or schoolgirl had ever been expelled for similar reasons by a French school. As the official documents accompanying the new legislation explicitly recognize (and as we shall see at length later in this thesis), the problem is therefore the Islamic headscarf, not religious symbols in general. “The important thing is to protect young girls who are obliged to wear the [Muslim] headscarf”,⁸⁰ one MP declared in the *Travaux Préparatoires*.⁸¹

⁷⁰ See Chapter 2.3. for details.

⁷¹ M Frassetto & D Blanks (eds), *Western Views of Islam in Medieval and Early Modern Europe: Perception of Other* (St Martin, New York, 1999) 57-8.

⁷² “Turchi, Arabi e Caldei/Popolo Ignudo, Paventoso e Lento/Che Ferro Mai Non Strigne/Ma Tutt’i Colpi Suoi Commette al Vento”. R M Durling (ed) *Petrarch’s Lyric Poems* (Cambridge University Press, Cambridge, 1976) 76-7.

⁷³ ‘False and fallacious’. L Ariosto, *L’Orlando Furioso* (Garzanti, Milan, 1992) 12.

⁷⁴ In the 16th century, at the height of its power, the Ottoman Empire spanned three continents (including Southeastern Europe) and was widely perceived by Europeans as a significant threat to their civilization. See e.g. J F Guilmartin, “Ideology and Conflict: The Wars of the Ottoman Empire, 1453–1606”, (1988) 18 *Journal of Interdisciplinary History* 4, 721–747.

⁷⁵ Frassetto & Blanks, above at note 71, 16.

⁷⁶ Alsayyad & Castells, above at note 34, 55.

⁷⁷ As we shall see in Chapter 2.3., not all veils are the same. The Catholic veil, for instance, does not seem to worry the French people and their politicians, and it was often accommodated in the public sphere and at school—at least before the 2004 statute on religious symbols somewhat changed the climate.

⁷⁸ Stasi, above at note 27, 36.

⁷⁹ See Chirac, *Discours*, above at note 17, 2.

⁸⁰ In *Analyse des Discussions Législatives et des Scrutins Publics de la Loi Encadrant, en Application du Principe de Laïcité, le Porte des Signes ou de Tenues Manifestant une Appartenance Religieuse dans les Écoles, Collèges et Lycées Publics*, available at http://www.senat.fr/dossierleg/tc/ana_pjl03-209.html (at 17 May 2006).

Similarly, the Circulaire explaining the new law justified the ban with the fact that “[t]he school’s mission is to transmit the Republic’s values, among which is the equality between men and women”⁸² (something obviously seen as irreconcilable with the Muslim veil). Finally, the Stasi Report made it crystal clear that the purpose of the ban was to redress “a number of fundamental rights of women which in our country are infringed on a daily basis”⁸³ by the Muslim headscarf, which the document explicitly defined as the expression of a “communalist’ withdrawal [repli communautaire] that is forced upon women rather than chosen”.⁸⁴

Many people of Islamic faith remain sceptical about the French ban, therefore, and while they recognize that Mr Stasi spared no effort in condemning all forms of discrimination against Muslims, they are also concerned that he exclusively criticized Islam.⁸⁵ In addition, they point out that while the French President lectured Muslims on the importance of women’s rights⁸⁶ and Mr Stasi did the same in his Report,⁸⁷ the new law—explicitly passed in order to secure women’s equality in French society—was voted by a devastating majority of men⁸⁸, none of whom was Muslim.⁸⁹ When it comes to understanding the veil issue in France, therefore, religion alone does not tell the whole story and it is the second hypothesis of my work that Islamophobia played a considerable role in the adoption of Statute 228/2004 and hence partly contributes to the Franco-American divide on the veil.

Needless to say, France is not alone in establishing a connection between racism and Islam, for such association has recently proved to be even more visible in America. To quote only the most noticeable example of this, in a country where racial profiling was, until 9/11, unanimously regarded as abhorrent, within weeks of the 2001 events people of Arab origins became the object of officially enforced religious and racial screening at national airports;⁹⁰ racial attacks against them increased threefold;⁹¹ the issuing of visas to them collapsed by almost 60%;⁹² 1,200 immigrants of either Arab extraction or Muslim faith were detained by the Justice Department for anti-terror investigations;⁹³ 5,000 young men with Middle Eastern traits were questioned in connection with the September 11 events (and were subsequently released because no such connection existed);⁹⁴ and, more generally, Muslims were accused of being terrorists, fanatics and extremists, while the Koran was often condemned as a dangerous book preaching intolerance.⁹⁵

⁸¹ The parliamentary debates on Statute 228/2004 confirm this impression. Indeed, one very clear point of convergence among MPs was that although the new law officially dealt with religious symbols at school, the real problem concerned the Muslim headscarf. See Part 2 for details.

⁸² Journal Officiel, Circulaire Relative à la Mise en Oeuvre de la Loi n.2004-228 du 15 Mars 2004 Encadrant, en Application du Principe de Laïcité, le Port des Signes ou de Tenues Manifestant une Appartenance Religieuse dans les Écoles, Collèges et Lycées Publiques, in *Journaux Officiels, Application du Principe de Laïcité*, above at note 17, 324-5.

⁸³ Stasi, above at note 27, 101.

⁸⁴ Ibid, Title of § 3.3.1. “Today, secularism is indivisible from the principle of equality of sexes”, the Report insisted. Ibid.

⁸⁵ See e.g.: “In certain communities, particularly the Turkish, African and Pakistani ones, marriages are imposed” (Id. 101); “Young girls are also victims of other forms of violence such as sexual mutilations, polygamy, repudiation” (Id. 101).

⁸⁶ “...these long-won values of our Republic which are the equality of sexes and the dignity of women...” See Chirac, above at note 17, 8.

⁸⁷ “The French Republic cannot accept attempts to undermine the equality of sexes”. See Stasi, above at note 27, 128 (§4.1.2.2).

⁸⁸ Women make up only 13% of the total number of French MPs, and when it comes to sexual equality in parliament, France ranks 21st out of the 25 EU countries—and 84th in the world, behind Niger. See *L’Express, Femmes Politiques de Tous Pays*, 28 November 2006. Also, it should be recalled that, in France, until 1960 married women could not issue cheques without their husband’s assent. See J Baubérot, *Voile, École, Femmes, Laïcité*, in J Baubérot, D Bouzat, J Costa-Lascoux & A Hounziaux, *Le Voile, Que Cache-t-il?* (Éditions de l’Atelier, Paris, 2004) 59.

⁸⁹ Out of an Islamic population of five million (or 10%) and a 800-strong legislature, the French parliament has only two Muslim MPs, both of whom were elected in 2004. See S Giry, “France and Its Muslims”, in (2006) *Foreign Affairs*, September-October Issue, 97.

⁹⁰ See *The Guardian*, *Arabs and Muslims to be Fingerprinted at US Airports*, 2 October 2002.

⁹¹ F Ajami, *America and the Arabs, in 9/11 and After*, (2002) *Foreign Affairs*, November/December Issue, 22.

⁹² *The Economist*, *Beware Students*, 23 August 2003.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ W J Perry, *Preparing the Next Attack*, (2002) *Foreign Affairs*, November/December Issue. For a detailed analysis of post-9/11 anti-Islamic attacks in America, see Council on American-Islamic Relations (CAIR), *Unequal Protection: Executive Summary* (CAIR, New York, 2005); Arab-American Institute, *Healing the Nation: The Arab American Experience After September 11* (AAI, Washington, 2005); Arab-American Institute, *Profiling and Pride: Arab American Attitudes and Behaviours Since September 11*, (AAI, Washington, 2002). Interesting academic insights are in D A Ramirez, J Hoopes & T L Lai Quinlan, “Defining Racial Profiling

Despite all this, as I will endeavour to show in Part 1 of this thesis, it is noteworthy that the events of 9/11 appear to have had little or no negative impact in America on the question of the Muslim veil. Contrary to France, where the 2001 events seem to have accentuated—but by no means initiated⁹⁶—various forms of anti-Muslim tensions that, critics argue, together with domestic events consciously or unconsciously contributed to the 2004 law,⁹⁷ in America the Muslim headscarf has been—even during the legal chaos that followed 9/11—the object of a forceful and committed protection by US law and policy.⁹⁸ This, it will be argued, is directly related to America’s unwavering attachment to religious freedom.⁹⁹

THIRD HYPOTHESIS:
LEGAL v HISTORICO-POLITICAL DIVIDE ON VEIL ISSUE

As the previous pages suggest, France and America seem to offer different—if not opposite—approaches to the issue of the Muslim veil and it is precisely such divergence that makes the comparison intriguing. Not only does this apparent asymmetry—prohibition of the veil in French schools versus protection in American ones—allow us to understand the way two modern democracies deal with individual conscience, it also suggests that different outcomes are indeed possible and that conciliation between human and divine law could well depend on the side of the planet one lives on. Historically, politically and legally, therefore, America and France seem to be ideally positioned to highlight this potential contrast—yet caution must be exercised at all times, because it is the very nature of comparisons (as well as their most important asset) to generate unexpected results and unearth similarities where differences had at first been apparent.¹⁰⁰

This thesis is in many respects an example of the potentially surprising effects of comparisons—and of what Professors Zweigert and Kötz called “the basic rule of comparative law”: the *praesumptio similitudinis* according to which “different legal systems give the same or very similar solutions, even as to detail, to the same problems of life, despite the great differences in their historical development, conceptual structure and style of operation”.¹⁰¹ Although this may sound surprising given that the Muslim headscarf is currently prohibited in French schools but allowed in the US, the veil issue is, I will argue, a startling example of this rule. Despite the fundamental historical and political differences between the two countries—differences that, as we shall see, invest the very role of religion as well as the ways France and America deal with ‘diversity’—their legal attitudes towards the veil have much in common, particularly in the period preceding the passage of French Statute 228 on religious symbols

in a Post-September 11 World”, (2003) 40 American Criminal Law Review 1195; D A Harris, “An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001”, (2004) Utah Law Review 913; L Braber, “Korematsu’s Ghost: A Post-September 11th Analysis of Race and National Security”, (2002) 47 Villanova Law Review 451; K R Johnson, “Racial Profiling After September 11: The Department of Justice Guidelines”, (2004) 50 Loyola Law Review 67; L Cainkar, “Special Regulation: A Fervour for Muslims”, (2003) 7 Journal of Islamic Law and Culture 73; M Wolfe, “As the Smoke Began to Clear: Reflections on Islam in America after September 11th”, (2002) 7 Journal of Islamic Law & Culture 165.

⁹⁶ By saying that 9/11 has had a different impact on the Muslim veil issue in America and France I do not mean to say that Statute 228/2004 would not have passed without the September 2001 events—my impression is that it would have done. The point I will make is that 9/11 contributed to France’s veillophobia (and inflated this country’s scepticism towards religion) but did not affect America’s commitment to religious freedom.

⁹⁷ For details, see Chapter 2.3.

⁹⁸ As we shall see in Chapter 1.3., one of the few exceptions seems to have been the much-criticized *Freeman v Florida*, Case 2002-CA-2828 (2003), 13, where a Florida judge forbade a woman to appear in a burqa on a driving licence picture on the ground that “[t]oday is a different world than it was 20-25 years ago” and “[i]t would be foolish not to recognise that there are new threats to public safety, including both foreign and domestic terrorism, and increased potential for ‘widespread abuse’”. On the case, see P T Currier, “Freeman v State of Florida: Compelling State Interests and the Free Exercise of Religion in Post September 11th Courts”, (2004) 53 Catholic University Law Review 913; K A Sukinik, “Civil Liberties in the Face of 9/11: The Case of Sultaana Freeman”, unpubl.paper (2004). This case was confirmed in 2005 by the Fifth District of the Florida Court of Appeal. See *Sultaana Lakiana Mike Freeman v Department of Highway, Safety & Motor Vehicles*, Case n. 5D03-2296, July Term 2005 (unreported).

⁹⁹ See, in particular, Part 1 and Conclusion.

¹⁰⁰ As has been observed, “[c]omparative law procures the gradual approximation of viewpoints, the abandonment of deadly complacency and the relaxation of fixed dogma. [I]t permits us to catch sight, through the differences in detail, of the grand similarities and so to deepen our belief in the existence of a unitary sense of justice”. K Zweigert & H Kötz, *An Introduction to Comparative Law* (Clarendon Press, Oxford, 1995) 3.

¹⁰¹ *Id.* 36.

at school—a piece of legislation that, I will maintain, is responsible for a good portion of the French and American split on the issue. While the two countries' historical heritage and political outlooks are remarkably dissimilar, this thesis will argue that their laws are not as far apart as Statute 228 would suggest, and display, at least in the pre-2004 era, a number of interesting similarities.

Be that as it may, several words of caution are necessary. Comparing the French and American approaches to religion and the veil is no easy task, because the French seem to take pleasure in distancing themselves from the Americans—and vice versa. In particular, the French politicians refer to the 2004 legislation as an *exception française* and have happily used popular opposition against the veil to achieve a change in law that according to a number of observers goes against settled legal principles to the point of being constitutionally doubtful.¹⁰² The headscarf issue possesses, in other words, such a strong political significance—and, as I have suggested, is so intimately connected with the different religious histories in France and America¹⁰³—that the comparativist must take into account a wide variety of non-legal factors, particularly history and politics. So, in addition to the well-known and 'traditional' risks of comparative law—language barriers,¹⁰⁴ errors in law, civil versus common law divide,¹⁰⁵ different institutional and legal practices and different degrees of litigiousness—one should also add the peril of being superficial, for one cannot possibly deal with all the issues involved in the matter of the Muslim veil in an exhaustive manner. This is particularly the case since comparative law has itself been accused of vagueness. When, in 1993, Professor Alan Watson published his controversial book on comparative methodology, for example, he included a chapter on the "Perils of Comparative Law"¹⁰⁶ and prominently listed among them the fact that "a comparative lawyer is bound to be superficial".¹⁰⁷

In a certain sense, therefore, I find myself in the unenviable position of being obliged to take into account a plethora of different perspectives (because it is impossible to understand the veil matter without considering a number of non-legal factors) while at the same time being acutely aware that, given the interdisciplinary character of the subject, the time constraints,¹⁰⁸ the limited financial resources,¹⁰⁹ the geographical restrictions¹¹⁰ and the tight word-limit assigned to it, this work will not and cannot be a comprehensive treatment of the veil issue in France and America but rather an introduction to it.¹¹¹

¹⁰² See Chapter 3.1. (and especially Sections 3.3.6. & 3.3.7.)

¹⁰³ "History clarifies the legal rules", one author observed. See B S Markesinis, *The Comparatist (or a Plea for a Broader Legal Education)*, in B S Markesinis, *Foreign Law and Comparative Methodology: A Subject and a Thesis* (Hart Publishing, Oxford, 1997) 27.

¹⁰⁴ The art of translation is always a dangerous one, but this is particularly the case when an author, whose mother tongue is neither English nor French, is carrying out a difficult comparison between a common law and a civil law country concerning a statute, the language of which is highly ambiguous even in the French original. While extra care has been taken, therefore, mistakes are perhaps unavoidable. I have tried to keep them to a minimum by using as much French as I could.

¹⁰⁵ I was educated in a civil law system at the undergraduate level and in common law countries in my postgraduate studies. This, of course, by no means solves the 'comparative riddle'—it just means that I am acutely aware of it.

¹⁰⁶ A Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, Athens, 1993) 10.

¹⁰⁷ F H Lawson, *The Field of Comparative Law*, in Watson, above at note 106, 10. Professor Watson also added the likelihood of errors in law and emphasized that "at times it is as if a comparative anatomist were to say that lions and ants are similar and are at a comparable level of development since both are warm-blooded, have six legs and are always winged". Watson, above at note 106, 12. To this, one could respond with the words of another famous (and more enthusiastic) comparativist (couple): "Watch out, be brave and keep alert". Zweigert & Kötz, above at note 100, 33.

¹⁰⁸ Thirty six months.

¹⁰⁹ I have greatly benefited from a University of Auckland International Doctoral Scholarship covering tuition fees and living expenses. I was also lucky enough to be provided with a travelling grant from the University of Auckland Faculty of Law which covered travelling and living expenses during my stay at the Institut d'Etudes Politiques in Paris. Because of time, financial and other limits—and because most US materials are, unlike the French ones, readily available in New Zealand—I did not conduct primary research in America. This, together with the fact that it is France which is the 'odd-one-out' when it comes to Muslim headscarves, partly explains this thesis's emphasis on the French over the American context.

¹¹⁰ Although every effort has been made to locate materials anywhere they could be found, and with the exception of my research trip to Paris, this thesis was carried out on the basis of the materials available in New Zealand during the years 2004-2007. It is updated to March 2007.

¹¹¹ As a consequence of the time and space constraints (mentioned in the previous footnote) and of the fact that this is largely a legal endeavour, the thesis will regrettably ignore highly interesting issues such as the religious and political significance and meanings of the veil and other practices of veiling in Islam and Christianity; the relevance of the Muslim headscarf in political Islam (especially in Afghanistan and Turkey); the theological discussions on whether the Muslim veil is religiously mandated by the Koran vis-à-vis the Bible; and the question of whether veiling is an inherent symbol of sexual inferiority and is irreconcilable with women's rights.

While this is certainly a drawback, the answer to the multidisciplinary issue may lie in acknowledging that legal developments do not happen *in vitro*—and that, as it has been observed, “the craft of law is not practiced, and should not be studied, in a vacuum”.¹¹² Moreover, an interdisciplinary approach is nowhere more necessary than in the issue of the Islamic headscarf, an area where history, law and politics converge in a complex but fascinating manner. Consequently, I make no apology for taking into account the historical and political components of the matter alongside the legal ones, for, as we shall see, it is precisely the relationship between these three that make the whole comparison worthwhile.

THE VOYAGE

The issues highlighted in this introduction lie at the heart of my work. As the reader will appreciate, they present formidable difficulties. Formidable, firstly, because religion can easily sound absolute and has the potential to make everyone an outsider, to make everyone a target. Formidable, secondly, because religion is not based on ‘reason’ but on ‘revelation’, so the law cannot but have problems in dealing with the dilemmas of the spirit, as Sophocles presciently cautioned more than two thousand years ago. And formidable, lastly, because religion is often the first victim of politicization—and, historically, has been used to achieve goals that had very little to do with the delights of the spirit and the message of the holy books (the Crusades, the Inquisition and 9/11 are cases in point). The Muslim veil, this thesis will argue, is a further example of such politicization and this is precisely what makes it so complex but at the same time so interesting.

The structure of the book will reflect both this complexity as well as the inter-disciplinary nature of the headscarf issue. After this “Introduction”, “Part One”—dedicated to the American experience—will begin with a historical overview of the salience and substance of religion in the formation of the United States as a nation-state (1.1.). As we shall see, this historical perspective is indispensable in order to understand and put into context the various problems of religious freedom that so often arise in American law as well as to appreciate the extent to which US religious law reflects such historical developments (1.2.). After carrying out this analysis, attention will be drawn to the treatment of the Muslim headscarf within the US legal system and to the politico-legal issues connected to it (1.3.).

“Part Two” deals with the French experience and follows the same pattern: an opening historical part (2.1.) followed by a discussion of the place of religion in French law (2.2.) and a systematic treatment of the veil issue (2.3.). The third and last part will be devoted to a comparison between the American and French systems (3.1.) and, in particular, to an analysis of their similarities and differences before (3.2.) and after (3.3.) the passage of the 2004 French statute on religious symbols at school. The “Conclusion” contains a general assessment of the differences and similarities between these two countries’ treatment of the veil. It will argue that it is at the level of the law (as opposed to religious history and political philosophy) that the two nations’ attitudes are the most alike. That a veritable French Revolution intervened in 2004—and that the two legal systems have since taken an opposite path to the veil matter—does not make their pre-2004 points of convergence less momentous and indeed renders the comparison even more intriguing.

Before commencing, a word on ‘personal viewpoint’ should be mentioned—both as a disclaimer and out of intellectual honesty. Although I was originally brought up as a Catholic, I regard myself as neither a ‘religious’ nor an ‘irreligious’ person—agnostic is the (admittedly artificial) category that perhaps best describes my approach to spirituality. As a consequence, my interests in the issues raised in this thesis do not stem from personal circumstances or religious commitment but from a ‘holistic’ approach to human rights that regards spirituality in general and religion in particular as two of mankind’s most fundamental freedoms, while at the same time acknowledging that the Church-State separation offers the best—if regrettably imperfect—way to guarantee such freedoms. Furthermore, as a cosmopolitan who has studied and lived in several countries in Europe, America and Asia and who has conducted this research on France and America while based in New Zealand, I

¹¹² B S Markesinis, *Foreign Law and Comparative Methodology: A Subject and a Thesis*, above at note 103, 7.

cannot help seeing the question of the Muslim headscarf through the prism of multiculturalism and national identity, and this work will partly reflect such an outlook.

Approaching religion as an ‘outsider’ may have its advantages, but it also has a number of drawbacks—the most obvious of which being perhaps that a ‘religious’ person is likely to disagree with certain parts of this work or even perceive—despite all efforts to the contrary—a certain lack of understanding of (or even ‘sensitivity’ toward) religious feelings. This may or may not be inevitable (i.e. it may or may not be my fault) but the reader should rest assured that, whatever its shortcomings, this thesis has been carried out in good faith and with as open an outlook as my abilities allow.

As we begin to consider and put side by side the American and French approaches to religion and the Muslim veil, it is suggested that the reader starts this journey by keeping in mind Antigone’s last words in front of Creon: “If I now seem to you to have acted foolishly, perhaps I am convicted of folly by a fool”.¹¹³ It will figuratively be the purpose of this thesis to see whether it is Antigone’s (religious) conscience or Creon’s (worldly) edict that two secular and liberal democracies like the United States and France regard as foolish—and the first place to look for answers is history.



¹¹³ Sophocles, above at note 3, 35 (lines 431-2).