Secularism Prêt-à-Porter: An Analysis of the Effects of Law 2004-228 Banning Conspicuous Religious Symbols in Public Schools on Freedom of Conscience

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Introduction

In its wording Law 2004-228 is deceptively simple and straightforward. In its entirety, the law provides as follows:

Dans les écoles, les colleges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifest ostensiblement une appartenance religieuse est interdit.¹

Proponents of the law claim it is consistent with "traditional" French Republican principles, a natural and evolutionary progression in what former President Jacques Chirac has described as one of the "pillars of our Republic"²; namely, secularism. As in theory the law applies to all religions equally, the French government maintains that the law upholds customary Republican neutrality towards religions and respects the freedom of conscience the student body.³

Upon closer examination, however, it becomes evident that such assertions are inherently suspect for two primary reasons. First, the origins of the modern French Republic’s educational program can hardly be described as "secular" or non-religious in nature. The official State adoption of the policy of laïcisme and the creation of the école laïque – both of which date to the early period of the Third Republic – were expressly non-secular in nature. In fact, the public school curriculum of the Third Republic mandated instruction on such innately religious subjects as God, the soul, and the universal nature of divine laws.

¹ Law number 2004-228 was passed by the Assemblée Nationale on February 10, 2004 and by the Senate on March 3, 2004. It translates as follows: "In primary schools, secondary schools and public high schools, the wearing of signs or dress by which students conspicuously demonstrate belonging to a religious group are forbidden."
² "Statement made by Jacques Chirac, President of the Republic," Paris, January 28, 2004. According to President Chirac, the law banning conspicuous religious symbols in public schools "respects our history, our customs and our values." See also the communiqué issued by Jean-Pierre Raffarin, Prime Minister, dated December 31, 2003; and the speech by Jean-Pierre Raffarin to the Conseil représentatif des institutions juives de France (CRIF), January 31, 2004: "The roots of secularism are found in our history and our tradition." All statements are available on the French Embassy in the United States web site: www.info-france-usa.org.
³ Freedom of conscience is guaranteed by Article 1 of the Constitution of October 4, 1958: see the Clément Committee Report, infra note 5, Part 1,A,1, p. 7
Second, and perhaps more importantly, la foi laïque represented an attempt to preserve and maintain the freedom of conscience of both student and teacher against the perceived hegemony of the Catholic Church in the realm of morality. Although religious dogma was intentionally avoided in the classroom, a respect for the beliefs of others – even when conspicuously demonstrated - was expressly promoted.

Law 2004-228, by contrast, takes as its starting point the premise that religious beliefs, at least where perceptible, constitute an impermissible attack ab initio on the social fabric of the French Republic. On a fundamental level, the law assumes that freedom of conscience can only be afforded to French citizens in a meaningful manner if State-sanctioned values and beliefs remain unquestioned and unassailable. As conspicuous religious symbols are perceived by the State to represent value systems or philosophies opposed to sacrosanct Republican principals they are actively suppressed, ostensibly in order to preserve the freedom of conscience of others.

The first part of this paper will examine the initial application of the State adoption of the principles of laïcisime in public schools at the beginning of the Third Republic. Specifically, it will examine the State’s primary school curriculum and what was meant by "moral and civic" instruction under the Ferry Law of 1882. The second part of this paper will contrast the fundamentally different approaches to the issue of freedom of conscience exhibited by the Ferry Law and law 2004-228, respectively. I will argue that although on a superficial level the numerous (and somewhat contradictory) purposes put forward by the State to justify the promulgation of law 2004-228 do not per se violate freedom of conscience, legislative intent cannot be determinative of this issue. Borrowing from the test articulated by the Supreme Court of Canada in freedom of conscience jurisprudence, I will argue that irrespective of legislative purpose, the effect of the new law is nonetheless to infringe freedom of conscience.

This paper will argue that while the Republican governments of the 1870-80s went to war against the moral ascendancy of the Catholic Church within the Republic, it did so in a manner that was careful to maintain freedom of conscience and to preserve religious instruction in public schools. Law 2004-228, by contrast, ignores the religious Establishment and instead crosses the threshold to declare war on the religious beliefs and convictions of the individual.

**Part One: The Historical Origins of the École Laïque**

The origins of the official State adoption of the principles of laïcisime within the realm of public education are often traced to the so-called "Ferry Law" of March 28, 1882. In that year, Jules

5 See, for example "Rapport à l’application du principe de laïcité dans les écoles, colleges et lycées publics," Assemblée Nationale, 28 janvier 2004 [hereinafter the “Clément Committee”], at Part I.A.1., p. 8: "Dans le domaine de l’enseignement, qui concerne le present project de loi, le principe de laïcité et de neutralité religieuse a été introduit dans les programmes de l’enseignement primaire par l’article premier de la loi de mars 1882 qui a substitué ‘l’instruction morale et civique’ à la ‘mora religieuse’." See also the decision of the Conseil d’Etat,

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4 This language is not meant to be taken as hyperbole. In his speech to the Conseil représentatif des institutions juives de France (CRIF), Paris, January 31, 2004, former Prime Minister Jean-Pierre Raffarin stated: "Since it is one of our traditions, secularism cannot be called into question" (emphasis added). See footnote one, supra.
Ferry, Minister of Public Instruction, promulgated a law which repealed "moral and religious" instruction in the classroom and replaced it with "moral and civic" instruction.\(^6\)

While it is undeniable that this subtle shift in language represented a significant transition in the State’s approach to education, it was not intended to banish God or religious instruction from public schools altogether.\(^7\) Instead, the aim of the Ferry Law was far less ambitious: namely, to remove the dogma of institutional religion (and ultimately religious personnel) from the public classrooms of France, often without altering the underlying religious message. In this regard, laïcisme may be defined as the process which "occurs when clerical roles are constricted, and authority and leadership once reserved to clergy are transferred to lay people."\(^8\)

Although Ferry himself noted that the "first object" of the law was to "separate the school from the Church,"\(^9\) that did not mean that the law intended to achieve the wholesale removal of religion - or even the Christian message - from the classroom. As the Stasi Committee noted in more recent times: "Pas plus qu'il ne defend un dogme religieux, l'Etat laïque ne promeut une conviction athée ou agnostique."\(^10\)

Under the Ferry law, moral instruction was meant to instill "religious feeling" in pupils, teach them about the nature of the soul and remind them of their duties toward God, "without paying attention to the ordinances peculiar to the different religious beliefs."\(^11\) There was to be nothing radical or innovative in this curriculum.\(^12\) According to the Director of Primary Education, Ferdinand Buisson, the moral syllabus remained dependent on the basic tenets of the Christian tradition:

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\(^7\) See Justin Vaisse, "Veiled Meaning: The French Law Banning Religious Symbols in Public Schools," (Washington D.C.: The Brookings Institution, 2004), at 2, wherein the author notes that the term laïcité "does not equate to secularism, for its aim...[was] not to create a Godless country."


\(^11\) Excerpts from the Official Program for Moral Education of the Lower Primary Schools in France, 1882, reproduced in French Educational Ideals, supra, pages 27-31. The examples cited applied to children ages 7-13 years.

\(^12\) See the comments of Alfred Moulet, Academy Inspector of the Vendée: "The novel, and if you wish, the revolutionary character of its [moral] teaching lies in its non-sectarianism, in its purpose to be independent of every religious system, of every church. There is no novelty in its content nor in the substance itself." Reproduced in French Educational Ideals, ibid, at 215 (emphasis added).
If our adversaries were willing to understand the profound appeal of those non-sectarian schools, instead of attacking us with a harshness that amounts at times to ferocity, they would be tempted to say, "We have here only a radiant unfolding of the Christian idea!" Who gave this formula to men, "Ye are all brethren"? Who made men understand that they should love one another in order to work out their destiny? Who diffused these ideas, so beautiful, so superb? Who, if not the Evangelists? Indeed, those who attack us might truthfully say: "You are disciples of the Gospel without knowing it!"  

In this regard, the moral and civic instruction that students received at public school was meant to compliment any religious education received at home. Indeed, Jules Ferry envisioned moral education as only an "elementary instruction in ethics," something that could be used to augment and enhance religious training received by the pupil outside the school setting.  

(i) The perceived intolerance of the Catholic Church  

The principal motivation for Republican politicians seeking to achieve the separation of Church and State in the educational realm during the Third Republic was not to banish any particular religious message or content from the classroom; instead, it was meant to liberate the student (qua future citizen of France) and teacher from the perceived domination of the Catholic Church in matters of morality.  

Félix Pécaut, a liberal Protestant and director of the woman’s school at Fontenay-aux-Roses, expressed a popular Republican sentiment when he claimed that the non-sectarian movement would not have been necessary in the first place had the Catholic Church been more historically "disposed to tolerance" and had not always exerted an absolute "monopoly and sovereign control of moral teaching." In the classrooms of the école laïque, by contrast, "all religions" were to be "respected and given the

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13 Ferdinand Buisson, Lecture at Rodz, 1991, reproduced in French Educational Ideals, ibid, at 215. See also McIntire, "Religious Liberty Part II," supra at 286; Phyllis Stock-Morton, Moral Education for a Secular Society: The Development of Moral Laïque in Nineteenth Century France (New York: State University of New York Press, 1979) at 88. Félix Pécaut, "Non-Sectarianism," in French Educational Ideals, similarly noted at page 61 that "present society has…retained or appropriated by assimilation a number of precious traits borrowed from Christian and historic ideals[.]"  

14 Under Article 2 of the Ferry Law, public schools were closed one day a week other than Sunday in order to allow parents to provide religious education to their children outside of the public school system: see McIntire, "Religious Liberty Part II", ibid, at 283.  

15 See Jules Ferry, "Letter to the Primary Teachers," supra at pages 10 and 25-6: "The moral teaching of the school is…distinguished from religious instruction without running counter to it. The teacher is neither a priest nor the father of a family; he joins his efforts to theirs to make each child an honest man" (emphasis added).  

16 Félix Pécaut, "Non-Sectarianism," supra at pp. 59-60. See also the words of Pécaut’s contemporary, Edgar Quinet, who stated: "The intention of the sacerdotal castes has always been that they are the only power capable of giving a foundation to civil and political institutions…All the elements of modern society have developed by emancipating themselves from the church": extracted from L’enseignement du people, reproduced in French Educational Ideals, supra at 2-4.
greatest liberty.” Sensitive to the past intolerances of the Church, Ferry made scrupulous efforts to ensure that the école laïque did not fall into the same trap. In his instructions to primary teachers Ferry made a point of noting as follows:

[I]t is hardly necessary to say the teacher should carefully avoid any reflection either by language or expression upon the religious beliefs of the children confided to his care, anything that might betray on his part any lack of respect or regard for the opinions of others. 

To this end, the official primary school curriculum on moral instruction enacted under the Ferry Law expressly dictated that children were to be taught "respect for the belief of others." In other words, the prohibition against endorsing the doctrine or canon of any particular religion was to operate in tandem with an equally significant prohibition against expressing intolerance towards any religious beliefs held by other pupils. Under the Ferry regime neither Protestant, Catholic, Jew or free thinker were to feel excluded from the classrooms of the Third Republic.

(ii) The concept of freedom of conscience in the Third Republic

Embedded in the historical (and often violent) relations between the Catholic and Huguenot communities, the traditional understanding of freedom of religion in France centered on the rights afforded to religious communities to practice their faith unmolested. During the Third Republic the approach to religious freedom experienced a paradigmatic shift. Under the Ferry regime only the individual, not the community, was perceived to enjoy natural rights. Freedom of religion was consequently redefined as the freedom of conscience afforded to the individual from the imposition of religious dogma.

Ferdinand Buisson explains:

[T]he first guarantee of serious development that could be given to lay instruction in the Republic was to establish steadfastly in each [teacher]...the inner authority, or, to express it better, the sovereignty of...conscience.

This sovereignty of individual conscience required tolerance in the classroom of all opinions and beliefs.

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18 Jules Ferry, "Letter to the Primary Teachers of France," supra at 26.

19 The Moral Education at the lower primary school advocates that "children at the intermediate level (ages 9-11) are to "surround the idea of God with the same respect even when it is presented to him in a form different than his own religion. Children at the higher level (ages 11-13) are to learn about "personal freedom" and "liberty of conscience": reproduced in French Educational Ideals, pp. 29-30 (emphasis added).

20 Pécaut, "Non-Sectarianism," supra at 59. Along similar lines, see the comments of Edgar Quinet in L'enseignement du people, supra at 1: "The teacher has a more universal doctrine than the priest, for he speaks to Catholic, Protestant, and Jew alike, and he brings them into the same civil communion."

21 McIntire, "Religious Liberty Part II," ibid, pp. 278 and 290-1.

22 Ferdinand Buisson, "An Experiment in Moral Teaching at Fontenay-Aux-Roses," lecture delivered at the University of Geneva, April, 1900, reproduced in French Educational Ideals, supra at 48.
religious and irreligious alike. In this regard it is important to emphasize that when the contemporary French government speaks of "la liberté de conscience" it means something very different and far more restrictive than the broad and inclusive notion of "the liberty of conscience" adopted in Ferry’s public schools. As will be explored below, with the passage of law 2004-228, sovereignty of conscience can no longer be said to exist in any comprehensive manner in public schools. Under the new law, all varieties of religious expression – not just aggressive proselytism or dogmatic and institutional creeds – are now censored, a development that neither Ferry nor Buisson would have endorsed.

**Part Two: The Treatment of Religious Expression Under Law 2004-228**

The stated purpose of law 2004-228 is clear: to avoid the fragmentation of the Republic into separate and distinct communities that are not sufficiently integrated into the life of the French nation (a process known as "communautarisme"). Underlying this principle is a notion of a Republic that is more than the sum of its parts – a nation or Patrie that exists as an autonomous entity, complete with legal rights separate and apart from those afforded to her citizens. As stated by François Bayrou, former Minister of Education: "La nation n’est pas seulment un ensemble de citoyens détenteurs de droits individuels. Elle est une communauté de destin."

Within this political paradigm, the Republic is envisioned as a living, organic entity, possessed of certain elements and constituent parts – such as laïcism, or the rule of law, or democracy - which are not open to compromise but form fundamental "valeurs communes." The collection of the Republic’s core community values comprises a social contract or "pact" that binds every citizen and from which it is impossible to opt out. Each and every citizen of the Republic is duty bound to uphold the core values of the Republic and expected to sacrifice individual rights to this end, a phenomenon or process described as "accommodements raisonnables." As stated by former Prime Minister Jean-Pierre Raffarin, "I am a believer, but I

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23 Émile Boutroux, Professor of Philosophy at the Sorbonne, opined in "Morality and Religion" that moral "neutrality, far from openly or surreptitiously aiming to ridicule the belief in God, will keep open those avenues of the soul through which religious beliefs penetrate. It will be tolerant, not merely as one is tolerant toward a mind which one considers stunted or misguided and unable as yet to grasp a higher point of view; it will process a sincere respect for all beliefs which show an orientation of the soul toward truth" (emphasis added). Reproduced in French Educational Ideals, supersat at 247.

24 Bernard Stasi, "Lettre de Mission, 3 juillet 2003," The Stasi Committee Report: "La République est compose de citoyens; elle ne peut être segmentée en communautés. Devant le risqué d’une derive vers le communautarisme, plusieurs initiatives ont été prises, comme...le depot de propositions de lois relatives à la laïcité." See also the Clément Committee Report, ibid, part 1.2.2, p. 15: "L’Etat permet la consolidation des valeurs communes qui fondent le lien social dans notre pays...elle [gender equality in this case] est un element du pacte républicain d’aujourd’hui."
affirm that in public buildings the law of the Republic overrides religious rules.\textsuperscript{27}

In sum, where the rights of an individual citizen conflict with a core value of the Republic, the rights of the Republic are paramount. This socio-political paradigm must frame any comprehensive analysis of the effect of law 2004-228 on the freedom of conscience of individual citizens. As the Stasi Committee expressly declared, "comme toute liberté publique, la manifestation de la liberté de conscience peut être limitée en cas de menaces à l’ordre public."\textsuperscript{28} Given such clear and unambiguous constitutional concessions, it is somewhat surprising that many French politicians (including Bernard Stasi), simultaneously attempt to assert that Law 2004-228 does not, in fact, infringe the individual’s freedom of conscience in the public sphere.

(i) Religious expression is tantamount to political expression

In attempting to justify the sweeping ambit of Law 2004-228 the government has emphasized the need to address an increase in the rise of religious fundamentalism, fuelled by contemporaneous international conflicts.\textsuperscript{29} In this framework of increasing international tensions, the State has come to interpret the wearing of clothes or symbols of a religious nature as an action in and of itself demonstrative of divisive or non-assimilative tendencies ("les comportements communautaristes").\textsuperscript{30} Previously, the French government had expressly avoided such a radical position.

In the November 27, 1989 opinion of the State Council, for example, it had been decided that the wearing of religious signs or symbols at school did not conflict with the principle of laïcisme and was a permissible exercise of a student's freedom of religion and conscience, unless and until it could be demonstrated that the impugned clothing or symbol was accompanied by express acts of propaganda or proselytism.\textsuperscript{31} A mere fifteen years later, the Clément Committee of the National Assembly decided that this opinion was no longer valid:

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\item \textsuperscript{27} Interview with \textit{Le Journal du dimanche}, Paris, January 25, 2004. A similar line of reasoning is expressed in the Stasi Committee Report, Part 1.2.3, pp. 16-17: "Par-delà statut des cultes, l’exigence laïque demande aussi à chacun un effort sur soi...L’esprit de la laïcité requiert cet équilibre des droits et des devoirs." See also the comments of Nicolas Sarkozy, Speech to the 20\textsuperscript{th} Meeting of the Union of France’s Islamic Organizations, April 19, 2003: "A faith has no authority above the laws of the Republic."
\item \textsuperscript{28} Stasi Committee, Part 2.2.2, p. 25. The Committee goes on to note that limitations have been historically imposed on personal freedoms in the public sphere: "C’est l’application traditionnelle du régime des libertés publiques."
\item \textsuperscript{29} See, for example, the Clément Committee Report, supra, Part 1.B.1, which concludes that the contemporary political French landscape is "marqué par des revendications communautaires, elles-mêmes influences par la montée de certains fondamentalismes et par les conflits internationaux[.]" See also Part 1.B.3., p. 16 of the same report: "[L]es tensions internationals suscitent l’inquiétude et la recherché d’identité et incident au repli sur soi."
\item \textsuperscript{31} Conseil d’Etat, Assemblée générale (Section de l’intérieur) – decision no. 346.893, 27 novembre 1989: "Le port pare les élèves de signes par lesquels il entendent manifester leur appartenance à une religion n’est pas par lui-même incompatible avec le principe de laïcité...[à moins qu’ il constituerait une acte de pression, de provocation, de prosélytisme ou de propaganda" (emphasis added).
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Le débat sur la laïcité ne se pose plus dans les mêmes termes qu’au début du siècle, ni même qu’en 1989. Alors qu’en 1905 le juge devait assurer la garantie de la liberté de conscience et de sa libre expression face à des comportements anticléricaux, il est aujourd’hui confronté à des comportements identitaires qui perturbent de plus en plus gravement le fonctionnement des établissements scolaires et qui remettent en cause le modèle républicain d’intégration (emphasis added).

The unstated but undeniable rationale behind the concept of "comportements identitaires" (literally, "identity behaviours") is the implicit assumption that the very act of wearing symbols or clothes that are perceptibly religious constitutes an act of provocation or proselytism; the very sight of a hijāb has become political propaganda, the very presence of a turban exerts unacceptable political pressure.

The French State, in other words, is no longer willing to regard the act of wearing conspicuous religious clothing or symbols in schools as expression of personal devotion – instead, they are unilaterally interpreted as socio-political gestures, thereby creating the legal fiction that their regulation is a political measure, separate and autonomous from issues of religious freedoms or individual conscience. Jean-Paul Raffarin, for example, expressed the view that the wearing of the veil in schools was imbued with "political meaning and can no longer be considered simply personal signs of religious affiliation," although the former Prime Minister did not elucidate the precise mechanism by which the act of wearing a veil (or any conspicuous religious attire for that matter) should be considered de facto political, as opposed to innately religious. Former President Jacques Chirac was even more to the point.

According to Chirac, the impermissible political content contained in wearing conspicuous religious symbols is the dissemination of the idea that a person’s cultural heritage or spiritual ethnicity can be their primary means of individual and political self-fulfillment, relegating their identities as citizens of the French Republic to an ancillary status:

[Law 2004-228] protects our schools from breaking down along ethnic lines. School must remain a privileged place for the transmission of republican principles and a melting pot for equal opportunity. Choosing to ban conspicuous signs in schools is a decision that respects our history, our customs and our values.

To do nothing would be irresponsible. It would be wrong. It would leave teachers and principals to face growing difficulties alone. And that would leave open the dangerous path of putting

32 Clément Committee Report, supra, Part 1A.1, p. 10

33 Prime Minister Jean-Pierre Raffarin, “Speech to the National Assembly,” February 3, 2004: “It has to be recognized that certain religious signs, among them the Islamic veil, are now becoming more frequently seen in our schools. They are in fact taking on a political meaning and can no longer be considered simply personal signs of religious affiliation” (emphasis added).
Consequently, the removal of such clothing or symbols is seen as the only course available to prevent the fragmentation of the nation along "ethnic lines" and to preserve legitimate Republican values. Students are only to develop one, pre-approved identity in public schools: that of the future Republican citizen who embraces "le rôle essential de la laïcité, comme [un] instrument de cohesion sociale." As concluded by the Clément Committee:

"Mais, on ne peut pas se contenter d’opposer liberté de conscience et principe de laïcité: la reaffirmation de la laïcité et de la neutralité de l’école, dans ce nouveau contexte, a précisément pour objectif de protéger la liberté de conscience et le respect des convictions de chacun."

The obvious limitation of such a pronouncement is evident: a neutral legislative purpose does not guarantee a neutral result in the implementation or application of any given law. Put another way, even a law with an ostensibly neutral purpose can have a discriminatory or prejudicial effect on.

...it is argued that the law maintains the "spirit of neutrality" that underlies the philosophy of laïcisme. As concluded by the Clément Committee:

"La laïcité ne saurait se réduire à la neutralité de l’Etat."

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34 President Jacques Chirac, Statement to Republic, January 28, 2004. See also Dominique de Villepin, Minister of the Interior, interview with "France Inter," February 24, 2005: "[Prior to the adoption of law 2004-228] there was indeed a risk of splits along ethnic or religious lines." Both documents are reprinted on the Embassy of France in America web site: www.info-france-usa.org

35 See the Clément Committee Report, supra, Introductory Letter: "Dans un context qui a changé il est donc devenu indispensable de clarifier, par la loi, un régime juridique qui ne permet plus de faire face aux revendications identitaires qui se multiplient dans les établissements scolaires."

36 Clément Committee Report, ibid., Part 1.B.3., p. 16

37 See, for example, the remarks of Nicolas Sarkozy, then Minister of the Interior, at the 20th Annual meeting of the Union of France’s Islamic Organizations, Le Bourget, April 19, 2003: "Secularism establishes the principle that the Republic guarantees that religions, all religions, can be practiced without giving any one of them special recognition." Reproduced on the Embassy of France in America web site: www.info-france-usa.org

38 Clément Committee Report, supra, Part 1.A.1, p. 8: The new law represents "la reaffirmation de la laïcité et de la neutralité de l’école."

specific elements of the population when put into practice.

On a more fundamental level, the reasoning adopted by the Clément Committee betrays a notion of freedom of conscience which is profoundly different from the typical North American understanding of the concept. The vision of freedom of conscience articulated by the French government in law 2004-228 is that an individual can only enjoy freedom of conscience in a society where preordained values are maintained and upheld (e.g., laïcisme). The focus of liberty of conscience, in other words, rests squarely within the ambit of State-sanctioned values.

In North America, by contrast, the constitutional inquiry into the principle of freedom of conscience is primarily concerned with the perspective of the individual: it is a freedom from the State, not a freedom of the State. Canadian courts have been very careful to avoid exactly what the French government openly aims to achieve with law 2004-228; namely, to use the individual citizen as a means to an end in achieving legislative policy. As stated by Madam Justice Wilson of the Supreme Court of Canada in the seminal case of Regina v. Morgentaler:

Individuals are afforded the right to choose their own religion and their own philosophy in life, the right to choose with whom they will associate and how they will express themselves...these are all examples of the basic theory underlying the Charter [of Rights and Freedoms], namely that the state will respect the choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life (emphasis added).\(^{41}\)

The right to be "left alone" by the State in relation to an individual's personal decisions was described by the great American jurist Louis D. Brandies as "the most comprehensive of rights and the right most valued by civilized men."\(^{42}\) In the North American context it extends to both the public and private sphere, as the right to individual choice concerning matters of the conscience erects "around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass."\(^{43}\) As the

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40 See, for example, the decision of Justice Dickson (as he then was) in Regina v. Big M Drug Mart Ltd (1985), 18 C.C.C. (3d) 385 (S.C.C.) at 425: "What unites enunciated freedoms in the American First Amendment [and] s.2(a) of the [Canadian] Charter...is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or constrain its manifestation." [Emphasis Added] If the word "governmental" were replaced by "Church," Justice Dickson would also have accurately summarized the views of the educators of the Third Republic (such as Ferry and Buisson) on liberty of conscience.


43 Wilson J., R. v. Morgentaler, supra at 485. Justice Wilson goes on to state at 487: "Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state
metaphysical fence surrounds the individual (as opposed to a place), it accompanies each citizen in both public and private settings.\footnote{Arendt argues that while in the ancient world the demarcation between the public and private sphere was tangibly drawn around the four walls of the domestic household, the rise of mass society in the modern age has blurred the traditional distinction between the public and private spheres so that the only residual sense of privacy afforded to the individual is found in the realm of the intimate – a place where matters close to the heart (such as faith) can be safeguarded and protected from the conformist tendencies of society. This concept of privacy obviously possesses an underlying portability (in the sense that it exists within the realm of the individual, irrespective of their particular location) more closely aligned with the concept of freedom of conscience as expressed in Canadian jurisprudence.}

Within the French Republic, however, the right to freedom of conscience does not survive unadulterated beyond the doorstep of the household or place of worship. The prime difference between the North American and French approach to freedom of conscience is that the former squarely places the onus on the State to circumambulate the sovereignty of the individual to the greatest extent possible, while the latter reverses this obligation, especially in the public sphere.\footnote{This is not to suggest that community considerations are irrelevant to Canadian constitutional inquiries. A law which is found to infringe the constitutional right of an individual may still be saved under section 1 of the Canadian Charter of Rights and Freedoms, which provides as follows: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Nonetheless, under Canadian jurisprudence the focus of the inquiry into freedom of conscience begins with the individual. It is only after the Court has found that an individual’s Charter rights to have been violated that the inquiry shifts to communal considerations.}

Nonetheless, the French government recognizes at least some notion or outline of a metaphysical fence that protects the individual’s freedom of conscience in the public realm, albeit in a diluted form. In drafting law 2004-228 the government did advert to the fact that it could not legislate an omnibus prohibition against all "visible" religious practices. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination.”

To this end, the response of the French government to the accusation that law 2004-228 infringes the individual’s freedom of conscience is to underscore the fact that the law does not regulate what occurs in the privacy of one’s own home or the sanctuary of the Church or mosque.\footnote{That does not mean, however, that the government has no direct involvement in the internal affairs of religious institutions. In justifying the requirement that imams that preach in French mosques be educated in France, Nicolas Sarkozy, then Minister of the Interior, explained “if Islam is to be fully integrated into the Republic, its leading representatives must themselves be perfectly integrated into the Republic and therefore have been trained in France…Islam must show absolute respect for the laws of the Republic...In France we cannot have an Islam which speaks against Republican values” (emphasis added): Speech to the Twentieth Annual Meeting of the Union of France’s Islamic Organizations, April 19, 2003, supra.}
signs in public schools, regardless of size, as this would potentially run afoul of the right to freedom of religious expression as guaranteed by the European Convention on Human Rights. In other words, a French citizen is perceived to have the right, even within République laïc, to express spiritual sentiments in public, provided the mode of expression is sufficiently discreet.

Once the right to freedom of conscience and religious expression is recognized to exist in the public realm - no matter how diluted or fragile in nature - the French government is obliged to ensure that regulation of this right is non-discriminatory in nature in order to pass constitutional scrutiny.

Accordingly, the French government has gone to great lengths to stress the neutral purpose of the law and the fact that it applied to all conspicuous religious symbols equally.

It is, of course, difficult to categorize a law that expressly prohibits a particular kind of individual expression (i.e., religious in this case) as "neutral," regardless of legislative intent.

Nonetheless, even if one takes at face value the government claim that the purpose of the law is not meant to discriminate against a particular message or type of message, the inquiry does not come to an end: the actual effects or application of the law remains to be considered.

(iii) The effects of Law 2004-228

For constitutional purposes, legislative intent or purpose is not the sole (or even the most significant) manner by which the impact of a law on a population is measured. It is easy to assert that a law respects “the

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47 Article 9 of the European Convention on Human Rights guarantees the right to freedom of “thought, conscience and religion...[and] includes...freedom, either alone or in a community with others and in public or private to manifest his religion or belief in worship, teaching, practice or observance.” Article 9(2) permits member states to limit citizen’s freedom to manifest religious beliefs under certain conditions, including public safety and the protection of the rights and freedoms of others. In his speech to the National Assembly of February 3, 2004, Prime Minister Jean-Pierre Raffarin specifically noted that the term “conspicuous” as opposed to “visible” was adopted in law 2004-228 as Marceau Long and Patrick Weil, two members of the Stasi Committee, had expressed concerns about compliance with the European Convention on Human Rights. In their article, "Foulard et islam à l'école et dans Société française: l'état des lieux" [hereinafter "l'état des lieux"], Long and Weil opined, "Si par contre le term ‘visible’ était choisi, sur recours individual, la Cour européenne pourrait invalider la loi comme ne respectant pas le principe de proportionnalité.” Article available online at http://www.aidh.org/laic/pdv-long-weil.htm

48 Discrete religious signs, such as small crosses, Korans, stars of David or hands of Fatima are considered exempt from the ambit of Law 2004-228: Long and Weil, ibid, at 1. See also the Clément Committee Report, supra, Part 2.B.2, p. 19: religious symbols, provided they are "signes discrets," are permissible at public schools.

49 As noted in the Conseil d’Etat’s decision of 27 novembre 1989, no. 346.893, supra note 33. Article 1 of the constitution of October 4, 1958, guarantees equality before the law for all citizens, regardless of origin, race or religion.

50 In legal semantics, it is always a question of degrees. In the case of Irwin Toy v. Quebec (Attorney-General), [1989] S.C.J. No. 36, Chief Justice Dickson of the Supreme Court of Canada laid down the relatively uncontroversial proposition that “if the government’s purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression”: at para. 49. Opponents of law 2004-228 would argue that the law does prohibit “particular meanings” from being conveyed, namely, those that are religious in nature. Supporters of the law would engage in a more particular inquiry and argue that as no specific religious meaning is singled out, the government’s prohibition remains neutral in character.
convictions of all"; it is often a more difficult undertaking to establish that in practice the law avoids discriminating against certain individuals’ freedom of conscience.51

The important distinction between the purpose and effect of legislative initiatives was recognized by the Canadian judiciary in early freedom of expression and freedom of conscience jurisprudence. In the seminal case of Irwin Toy v. Quebec (Attorney-General), the court decided as follows:

When faced with an alleged violation of the guarantee of freedom of expression the first step is to determine whether the plaintiff’s activity falls within the sphere of conduct protected by the guarantee…If the activity falls within the protected sphere of conduct, the second step is to determine whether the purpose or effect of the government action in issue was to restrict freedom of expression.52

When determining whether the effect of law 2004-228 infringes the individual’s constitutional right to freedom of conscience, the actual or concrete impact of the law on members of different religious communities must be examined.53 Does the prohibition against displaying large crosses, for example, affect a pious Christian in the same way that a ban on wearing the hijâb would impact a devout Muslim woman? Or a ban on the pagrî would have on a member of the Sikh community?

In a recent judicial decision, a French administrative tribunal in Melun expelled three Sikh males under law 2004-228 for wearing their turbans, despite the absence of any evidence of proselytism, reasoning that their keshis or "under-turbans" made them "immediately recognizable as Sikhs."54 Presumably, such reasoning assumes that a Sikh male could forgo wearing his turban in public while maintaining his religious identity in the same way that a Christian need not visibly display a cross at all

51 Indeed, a law may have a legitimate or constitutional purpose but still have an unconstitutional effect. An example is provided in the case of Ramsden v. Peterborough, [1993] S.C.J. No. 87, where the Supreme Court of Canada decided that a municipal by-law preventing "posting" on public property had a neutral and therefore constitutionally permissive purpose since "on its face the by-law is content-neutral and prohibits all messages from being conveyed": at para. 38. Iacobucci J. This, of course, is analogous to the French government’s argument concerning Law 2004-228 (i.e., that it is, on its face, "content-neutral"). Nonetheless, the effects of the posting by-law in Ramsden were held to violate the constitutional right to free expression since the absolute nature of the posting prohibition in question "prevents the communication of political, cultural and artistic messages": at para. 39.

52 Irwin Toy, supra, per Dickson C.J.

53 While the purpose and effect of a piece of legislation may be related – i.e., a statute may accomplish its intended objective – even inadvertent effects attract constitutional scrutiny. In other words, "both intended and unintended effects are relevant to the assessment of a statute’s constitutionality": D. Stratas, M. Jamal and M. Taylor, The Charter of Rights in Litigation: Direction from the Supreme Court of Canada (Toronto: Canada Law Book, 1990), p. 5-10.

54 See "Sikh schoolboys lose French case," BBC News Europe, April 19, 2005. See also "French court rules on Sikh Boys," BBC News Europe, October 22, 2004; "Sikhs in Court over Religious Ban," BBC News Europe, October 19, 2004; and L’Internaute Actualite, "La justice administrative confirme l'exclusion de trois élèves Sikhs," 19 avril 2005. The Sikh community had attempted to reach a compromise in the enforcement of the law by having the students wear smaller, less conspicuous under-turbans, or "keshis," a compromise that was ultimately rejected by the French tribunal.
times in order conform to the central
tenets of his or her faith.\textsuperscript{55}

The critical flaw in such reasoning is
the presumption that religious attire
exists separate and apart from the
devotional aspect of one’s faith: in other
words, that the impugned clothing is
really nothing more than a pious (and
optional) fashion statement worn by the
devout. But what an individual chooses
to visibly manifest about their religious
or spiritual beliefs is as much an integral
component of their freedom of
conscience as the thoughts and beliefs
that underlie any such visible
manifestations: the two cannot be
separated or readily distinguished.
Attire that is perceptively religious often
reflects the innermost belief of the
weaver, either as a powerful symbol of
their principles or ethics, or as
demonstrative of membership in a
particular spiritual community.

An analogy from Canadian freedom
of expression and freedom of
conscience jurisprudence may prove of
some assistance in further elaborating
this point. In free expression
jurisprudence, courts must consider
whether both the content and form of an
expression are constitutionally
protected. All content of expression is
constitutionally guaranteed, but some
forms of expression (such as violence,
for example) are not. This is analogous
to the French government’s position on
religious symbols, as the legislature
maintains that law 2004-228 does not
discriminate between religious
messages (i.e., is content neutral) but
does regulate the form of the message
(i.e., conspicuous religious symbols).

\textsuperscript{55} That is not to say that the cross is irrelevant to
a pious Christian’s devotional repertoire or that
displaying a cross is not a powerful symbol of
Christian identity – only that it is not usually
perceived of a \textit{sine qua non} of Christian
spirituality in a non-liturgical context.

In discussing the intricate
relationship between the content and
form of expressive communications,
Justice Lamer of the Supreme Court of
Canada in the \textit{Prostitution Reference}
stated as follows:

\begin{quote}
[F]orm and content are often
connected. In some instances
they are inextricably linked.
One such example is
language. In my view the
choice of language through
which one communicates is
central to one’s freedom of
expression. The choice of
language is more than a
utilitarian decision; \textit{language
is, indeed, an expression of
one’s culture and often one’s
sense of dignity and self-worth.}
\textit{Language is, shortly put, both
content and form.}
\end{quote}

Art may be yet another
example of where form and
content intersect. Is it really
possible to conceive, for
instance, of the content of a
piece of music, a painting, a
dance, a play or a film without
reference to the manner of
form in which it is presented?\textsuperscript{56}

\textsuperscript{56} Reference re ss. 193 and 195.1(1)(c) of the
\textit{Criminal Code (the Prostitution Reference)},
[1990] 1 S.C.R. 1123 at 1181-82, paragraphs 77-78,
Lamer J. (as he then was) [Emphasis Added].
See also the remarks of Chief Justice Dickson in
\textit{Irwin Toy, supra} at paragraph 40: "Expression
has both a content and a form, and the two can
be inextricably linked." The revelation of the
Holy Qur’an in the Arabic language to the
Prophet Mohammad (pboh) is an example of
form and content merging within the religious
context, as the language chosen by Allah cannot
be extracted from the message. As stated in the
Qur’an, \textit{Sūrat XIV}, verse 4: "And We sent not a
Messenger except with the language of his
people, in order the he might make (the
Message) clear for them": \textit{Interpretation of the
Applying such reasoning to an analysis of the turban in the Sikh tradition, it becomes evident that the turban represents an instance where the form and content of religious expression are inextricably linked.

The wearing of a pagrī or turban represents a "form" of a religious expression for the Sikh male which identifies his membership in the khālsā or body of initiated Sikhs. In order to maintain membership in the Sikh community, an initiate must possess or wear five things or items (the so-called "five Ks"), including keš or uncut hair that must be kept clean and orderly. John Bowker identifies the significance of the turban as follows:

Although not one of the Five Ks, the turban distinguishes male khālsā Sikhs [i.e., initiated Sikhs] as the keš (uncut hair) must be covered in this way...To receive a turban is an honour. At death, a father’s turban is conferred on his eldest son. For many Sikhs, the turban is a powerful symbol of their faith.  

Meaning of the Noble Qur’an in the English Language, translated by Dr. Muhammad Muhsin Khān (Riyadh, Darussalam Press, 1998), p. 302. The Oxford Dictionary of World Religions, John Bowker, ed. (Oxford: Oxford University Press, 1997) at p. 996, Emphasis Added. It was the position of the expelled Sikh students in the recent Melun court case that the wearing of their turbans was a requirement of their faith, a claim that was confirmed by the French-Sikh community: United Sikhs Press Release, 21 October 2004: www.unitedsikhs.org/rtt/French_Judgement_day.htm. Somewhat ironically, given the official rationale of the new French law, the observance of wearing of the Five Ks was commanded by Gurū Gobind Siṅgh, the founder of the Sikh religion, in order to "distinguish Sikhs from Muslims and Hindus, strengthening their sense of military discipline": Dictionary of World Religions, p. 348. Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256. According to Justice Charron (McLachlin C.J., Bastarache, Binnie and Fish JJ., concurring) at para. 36, the kirpan, as with the other five Ks, must be worn at all times by the devout Sikh, even in bed. See "French Court Rules on Sikh Boys." BBC News Europe, October 22, 2004, supra: "The French authorities admit that when the law was drafted, nobody consulted France’s small Sikh community."
oppressive religious culture. It is unproblematic to ban the hijāb from public schools if it is assumed, as members of the Stasi Committee did, that women who wear the traditional Muslim dress have no actual desire to do so. As Long and Weil opine:

En 2003, dans le cadre de la commission Stasi, au fil des nombreuses auditions que nous avons conduits, nous avons dû constater que, si le voile restait, pour certaines, un signe individuel d’appartenance librement choisi, il était devenu pour d’autres – plus nombreuses que les chiffres officiels ne l’indiquent – un choix fait sous la contrainte, ou un moyen de pression sure des jeunes filles qui ne souhaitent pas le porter et qui constituent une très large majorité. 60

There is absolutely no analysis of the impact of the law on the Muslim females who do wear the veil willingly and voluntarily, a segment of the population that the Stasi Committee begrudgingly acknowledges, even while simultaneously dismissing it as a marginalized minority. Yet as the testimony before the Stasi Committee revealed, many young Muslim women choose to wear the hijāb as a fundamental expression of their religious faith in a manner similar to Sikh males wearing the turban.

This is a profoundly different situation than that which confronts Christian students. While potentially offensive to the pious individual’s right of religious expression, a prohibition against "large" crucifixes does not infringe a Christian’s sense of religious belief in the same manner as a prohibition against the pagrī does for the Sikh initiate or the veil for the devout Muslim. Unlike the turban or kirpan for a Sikh, wearing or displaying a cross is not a sine qua non of membership in the Christian community. 61

It can be seen, therefore, that the effect of law 2004-228 impacts members of various religious communities in profoundly different ways. It has a far more severe effect on communities (such as Sikhs or Muslims) that exhibit religious symbolism or clothing as an essential part of the

60 Marceau Long and Patrick Weil, "L’état des lieux,” supra, page 1. A separate and supplementary justification proffered for banning the hijāb from public schools is that the wearing of the veil violates the Republic’s guarantee of equality between men and women. Thus although Nicolas Sarkozy, then Minister of the Interior, in his Speech to the Union of France’s Islamic Organizations, April 19, 2003, supra, expressly disavows the Republic’s interest in matters of "internal debates” within a religion, both the Clément Committee and the Stasi Committee have no difficulty concluding that the hijāb violates gender equality and as such should be abolished by the Republic in public places: see the Stasi Committee, supra, Part 1.2.2., page 15; the Clément Committee, Part 2.B.1, page 19: "On interdire la manifestation ostensible des appartenance religieuses à l’école a pour objet de garantir à la fois un principe constitutionnel aujourd’hui menace, la laïcité, un droit fondamental: la liberté individuelle des élèves, notamment des jeunes filles, de ne pas porter de signes religieux, mais aussi le principe constitutionnel d’égalité entre hommes et femmes[."

61 It is uncontroversial, of course, that wearing a cross can and does have a profound spiritual significance for devout Christians. It is worth noting that in analyzing the exact parameters of the meaning of "les signes religieux ostensibles” in law 2004-228, the Clément Committee expressed the opinion that its application would capture the Islamic veil, the kippah or yarmulke, and "les grandes croix”: see Clément Committee Report, supra, Part 2.B.2, p. 19. The exact dimensions or parameter of a cross that would be prohibited from being displayed by a student under the law is not defined in the legislation.
content of their religion faith; its impact is mitigated for communities where symbols can be extricated from the underlying content of the religion, without fundamentally altering its basic tenets.

In its decision of 14 April 1995, the Conseil D’Etat specifically recognized that the constitutionally protected guarantees of freedom of religion and equality before the law required access to State education without discrimination, finding as follows:

Les principes de valeur constitutionnelle que sont la liberté religieuse et l’égalité des citoyens devant la loi...implique la prohibition de toute discrimination dans l’accès des élèves de toutes confessions à l’enseignement public.\(^{62}\)

If the effects of law 2004-228 are examined in good faith, it seems doubtful that the legislation would pass constitutional muster on the basis of this standard.

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\(^{62}\) Conseil D’Etat, Assemblée, 14 avril 1995, Consistoire des israélites de France et autres, et Koen. Under the French civil law system, the Conseil D’Etat reviews all executive actions to ensure their conformity with the Constitution: see Mary Glendon, Michael Gordon and Christopher Osakwe, *Comparative Legal Traditions*, 2nd Ed. (Minnesota: West Publishing Company, 1994), pp. 119-20
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