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DEFINING THE PUBLIC ORDER: RELIGIOUS FREEDOM IN FRANCE

SAMANTHA POST
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Reviewed and approved* by the following:

ROGER FINKE
Distinguished Professor of Sociology, Religious Studies, and International Affairs
Thesis Supervisor

JONATHAN E. ABEL
Associate Professor of Comparative Literature and Japanese
Honors Adviser

* Signatures are on file in the Schreyer Honors College.

ABSTRACT

The French principle of *laïcité*, solidified by the Law of 9 December 1905, ensures freedom of consciousness and freedom of religion so long as the public order is not disturbed. Applying *laïcité* as a French societal ideal and as a legal principle thus requires the understanding of the public order concept. Crucially, however, the Law of 9 December 1905 fails to define public order.

This thesis raises three important questions about public order in the context of *laïcité.* Chapter 1 follows the definition and usage of public order since the December 1905 law was enacted by reviewing French and European civil codes from 1905 onwards, and concludes that the term neglects to be defined and its usage becomes broader. Chapter 2 develops how public order is understood and defined today. This section evaluates legal and political decisions and publications, finding that there is no clear definition of public order, but the term is used to protect French moral standards, public safety, and democracy. Chapter 3 discusses implications of the contemporary usage of public order in France. This section reviews contemporary examples of *laïcité* in application, demonstrating that the lack of a definition for public order allows *laïcité* to impact religious minorities.

TABLE OF CONTENTS

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Introduction

Laïcité, or the French version of secularism, is both a legal principle and societal ideal. By separating the church and the state, and allowing freedom to practice religion so long as such practice did not disturb the public order, the Law of 9 December 1905 can be considered the root of *laïcité* as both a legal principle and societal ideal.

The ways *laïcité* has recently been used to restrict religious freedoms, most notably with the 2010 burqa ban, underlines the significance of the term in both the law and in French society. As disturbance of the public order is provided in the 1905 Law as the only means upon which the free practice of religion can be restricted, the definition of public order remains essential to both legal and societal understandings of religious freedom in France.

The scholarship on *laïcité* is vast and profound, and often critical of the negative impact that *laïcité* has on religious minorities. However, publications on this subject fail to question what allows *laïcité* to legally be used in controversial ways. Upon my failure to find a definition of public order in the context of *laïcité* in any legal, governmental, or cultural documents, I analyzed the ways that legal, cultural, and governmental institutions have cited and continue to cite public order in the context of *laïcité* in an attempt to uncover a definition or understanding of the term. My findings, and lack thereof, attempt to demonstrate that the lack of definition for public order renders *laïcité* elastic in the sense where it can legally be used to protects sameness, comfort, and unity of French dominant society while infringing upon the rights of those who threaten such comfort with difference.

Chapter 1

Historical Evolution of Public Order and *Laïcité*

Laïcité: A Societal Ideal and Legal Principle

The societal ideal of *laïcité* remains extremely influential to the way the legal principle of *laïcité*, reflected by the 1905 Law, is understood. It is critical to understand *laïcité* as an ideal, as the ideal provides a framework through which public order in the context of *laïcité* developed and continues to develop. In order to construct this essential framework, this section provides a background of *laïcité* before it solidified into a law in 1905.

Laïcité finds its deepest roots in the 1789 Declaration of the Rights of Man and the Citizen (Baubérot, 2000). Prior to the Declaration, Canon law[1] ruled France along with the rest of Western Europe until the mid-eighteenth century when ideas from the Enlightenment provoked questions about the Church and its role in society (Baubérot, 2000). The Declaration of the Rights of Man and the Citizen was approved by the National Assembly in France in 1789, and was one of the first documents in history which promoted human rights, including the right to religious freedom limited only in function of public order (Baubérot, 2000). Article 10 of the Declaration states:

> No man may be disturbed for his opinions, not even on account of his religious opinions, provided his avowal of them does not disturb the public order established by law. [2]

[1] Legal principles of the Catholic Church
[2] *France: Declaration of the Right of Man and the Citizen*, 26 August 1789, available at: https://www.refworld.org/docid/3ae6b52410.html [accessed 11 March 2019]

Though the Declaration granted religious freedom, the Catholic Church retained political power and influence in the Republic (Baubérot, 2000). In early nineteenth century France, two camps hotly debated the role of the Catholic church: where one side believed that Catholicism was the heart of France's national identity and should remain a vital component to French citizenship, the other side recognized the rise of different religious identities on French soil (Baubérot, 2000). They maintained that French people should be united by their relationship with the Republic, and *not* their religious affiliations. The latter camp – the seedling of French republicanism – won.

The victory of the French Republican camp had three significant effects, all of which integral to the significance of contemporary *laïcité*. *First*, moral education became the responsibility of the Republic (Baubérot, 2000). The Republic began to replace the role of the Catholic church in educating children by training teachers and opening up public schools. The Republic's engagement in moral education continued to evolve until the laws of Jules Ferry were passed in 1882, rendering education to be both obligatory and secular (Baubérot, 2000).

Second was the development of the French Republicanism ideal (Pena-Ruiz, 2004). French Republicanism stresses the promotion of structures which unite everybody and the dismissal of structures which divide them (Pena-Ruiz, 2004). As it was accepted that there were different religious affiliations among French citizens, the Republic focused on what united everyone: French citizenship. By centralizing education, culture, and the French language, the Republic aimed to unite everybody living in the nation by their French identity and *not* by their religious affiliations (Pena-Ruiz, 2004).

Third was the conception itself of *laïcité*. In order to ensure French Republicanism's success in unifying French people through citizenship, education, culture, and language, it was

essential to move religion to the private sphere to prevent it from being part of national identity. The Law of 9 December 1905 effectively established secularism and religious freedom, known as *laïcité*, in France. The law states:

> "The [French] Republic ensures freedom of consciousness. It guarantees freedom of worship, limited only by restrictions established below in the interest of public order". [3]

The Law of 9 December 1905 provides a legal definition of secularism and religious freedom, however, the term *laïcité* itself is larger than the law. *Laïcité*, and the process by which the Republic secularized, have developed into an essential component of the French identity (Scott, 2009). French people are to receive a French education by the state in secular or private institutions; to reject racial, religious, social, gendered, and economic differences; and to confine their religious practices in the private sphere. The way *laïcité* is defined, therefore, is influential on many different levels: it is a part of French law, but also of French politics, culture, and identity. The societal ideal of *laïcité* is therefore integral to the analysis of public order.

Evolution of the Implied Meaning of Public Order

Public order is an integral component of the French secularism law, as it justifies restriction of religious freedom. Despite the multiple citations of public order since the 1905 Law, public order fails to be defined. This section intends to uncover the implied meaning of public order in the context of *laïcité*, in order to understand how the 1905 Law has been used to restrict religious freedoms. In order to recognize how the understanding and application of public order within the context of *laïcité* has evolved since the enactment of the 1905 Law on religious

[3] Loi du 9 décembre 1905 concernant la séparation des Eglises et de l'Etat.

freedom, this section reviews significant French and European civil codes, declarations, and court decisions concerning *laïcité* from 1905 onwards (for complete list of sources, see Appendix B). This section demonstrates that while public order fails to ever be defined, public order disruption themes of religious signs, democratic values, and integration.

After the enactment of the Law of 9 December 1905, the understanding of *laïcité* remains relatively stagnant for the first half of the century (Ardagna, 2016). Jean Zay, minister of Education in the 1930s, published two circulars of 31 December 1936 and 15 May 1937. His circulars prohibited political signs and religious proselytism from public schools in order to protect children and adolescents from "audacious exploitation", but failed to mention public order (Ardagna, 2016). Despite this, Zay's circulars demonstrate the beginning of the French passion for secular education which persists today. Zay emphasized that school is meant for intellectual development, and it is in the best interest of society that such development occurs free from bias, exploitation, and religious proselytism (Ardagna, 2016).

Though French secularism was born with the 1789 Declaration of the Rights of Man and the Citizen, the term *laïcité* is first mentioned only in the Constitution of 1958. It stands today as France's constitutional prohibition of religious discrimination. Making no reference to public order, Article 1 of the 1958 Constitution states:

> France shall be an indivisible, *laïque*, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organized on a decentralized basis (France, 1958).

The 1958 Constitution also fails to mention public order; however, it solidifies the societal ideal of *laïcité* in French constitutional law. The following law concerning religious freedom and education was the Law of 31 December 1959, which assured that education would

equally respect all religious denominations, and take every action to ensure that education was free from religious influence and instruction[4]. Private educational institutions remained free to teach what they like, however, were required to observe the clause of religious freedom and accept any student regardless of religious denomination, if they had signed a contract with the state[5]. Additionally, the 1959 Law states that though private institutions are not subject to the entirety of the law, they are required to respect the public order. Most generally, the 1959 Law prioritized individual liberties and indicated no constraints to religious manifestation (e.g., proselytism).

The 27 November 1989 decision in response to the *affaire du foulard*, or the headscarf affair, was particularly significant in that it provides a deeper understanding of public order without explicitly mentioning it (Appendix A). The decision enounced that students do indeed have the right to wear religious signs that manifest their religious denominations, which is defended not only by the principle of *laïcité*, by that of freedom of expression[6]. The council provides, however, a list of limitations for the manifestation of religious signs and symbols:

- Religious signs must not constitute acts of pressure, provocation, proselytization, or propaganda;
- Religious signs must not harm the liberty or dignity of the students, and other members of the educative community;
- Religious signs must not create health or security problems;

[4] Loi n°59-1557 du 31 décembre 1959 Dite Debre sur les rapports entre l'etat et les établissements d'enseignement prives.
[5] Loi n°59-1557 du 31 décembre 1959 Dite Debre sur les rapports entre l'etat et les établissements d'enseignement prives.
[6] Conseil d'Etat, Section de l'intérieur, 27 novembre 1989, n° 346893, Avis "Port du foulard islamique".

- Religious signs must not disrupt the educative activities and the educational role of the teachers;
- Religious signs must not disrupt order of the establishment in its normal function of public service.[7]

Public order is not explicitly mentioned; however, as public order is the only justification by which religious freedoms can be restricted according to the 1905 Law, each limitation to religious freedom provided in the 1989 decision can be considered an additional component of the term. According to the decision, public order includes: a public space free from pressure, provocation, proselytization, and propaganda; free from anything which harms others' liberty or dignity; free from health or security risks; free from disruption which prevents civil servants from doing their job; and free from disruption which prevents public institutions from doing their job. The 1989 understanding and application of public order within the context of *laïcité* at public schools demonstrates that the lack of definition of public order permits vague ideals such as liberty and dignity to justify infringements on religious freedoms at school.

The Jospin circular, published shortly after, on 12 December 1989, corresponds directly to the aforementioned 1989 decision. Written by socialist Lionel Jospin during his time as Minister of National Education, the circular stated that the educative team, school directors, and principal were responsible for evaluating whether or not a religious sign "posed a problem"[8]. The circular also included that the attitudes of other students and parents should be considered in such an evaluation, and if the conflict persisted after dialogue with the student and their parents,

[7] Conseil d'Etat, Section de l'intérieur, 27 novembre 1989, n° 346893, Avis "Port du foulard islamique".
[8] Circulaire du 12 décembre 1989 du ministre d'Etat, ministre de l'éducation nationale, de la jeunesse et des sports. JORF du 15 décembre 1989 p 15577.

the circular permitted the school to take disciplinary action against the student. The circular added that:

> The observations and considerations which precede must be applied in the same manner to signs and conduct of political nature. Also prohibited are all signs which, by calling for political, philosophical, religious, gender, or ethnic discrimination, contradict the principles, values, and laws of our democratic society. [9]

The Jospin circular went one step further by opening public order up to individual interpretation. Though a set of limitations was provided by the 1989 Council decision, the Jospin circular rendered the limitations suggestions. Implied by the Jospin circular is that public order, or the means upon which religious freedom may be restricted, may also be defined by the teachers, directors, and parents. The circular also implied that the comfort of the general public overweighed individual freedom of expression. Finally, the circular forbids contradiction of principles and values of the Republic, which directly violates natural freedoms of expression and consciousness.

The unconstitutionality of the Jospin circular quickly became obvious, and a new State Council decision was enacted on 2 November 1992 to counter the negative implications of the circular (Ardagna, 2016). The Decision of 1992 made it illegal for public establishments to create internal rules which forbid religious symbols[10]. Rules which explicitly forbid the Islamic headscarf, or any other religious symbols, were considered illegal in public entities unless the symbol violated any of the limitations previously set forth in the 1989 Council decision. In order to prohibit religious symbols, institutions were required to prove how the symbol violated the

[9] Circulaire du 12 décembre 1989 du ministre d'Etat, ministre de l'éducation nationale, de la jeunesse et des sports. JORF du 15 décembre 1989 p 15577.
[10] Conseil d'Etat, 4 / 1 SSR, du 2 novembre 1992, 130394, publié au recueil Lebon.

1989 limitations. While the radical Jospin circular was nullified by the 1992 decision, the 1989 limitations in function of public order remained in vigor.

The concept of integration at school was introduced by Francois Bayrou during his time as Minister of Education, and adds another aspect to public order in function of *laïcité*. The Bayrou circular of 1993 was the first legal document which required public schools to facilitate "integration", which would be done by implementing a new rule preventing abstention from obligatory education[11]. Prior to the circular of 1993, students were allowed to abstain from school for religious occasions. After Bayrou, abstention from physical education courses was only allowed for medical reasons. The 1993 circular says:

> "*Laïcité* should be practiced in schools in order to bring all young French together, not separate them."[12]

Here, the public order becomes about integration, as Bayrou's circular expresses that freedom of religious expression should not result in the separation of French schoolchildren. More controversial and extreme, however, is Bayrou's circular of 1994, in which "ostentatious" religious signs were said to be, in and of themselves, elements of proselytism[13]. The 1994 circular noted that "discreet" religious symbols – those which demonstrated a personal religious belief – were allowed in public schools, but any signs which were "ostentatious" – or influenced differentiation and discrimination between groups – were forbidden. The Bayrou circular said that "ostentatious" signs "break up the nation into separate communities which are indifferent to one another, and which only follow their own rules and laws"[14].

[11] Circulaire n°93-316 du 26 octobre 1993 du ministre de l'Éducation nationale.
[12] Circulaire n°93-316 du 26 octobre 1993 du ministre de l'Éducation nationale.
[13] Circulaire n°1649 du 20 septembre 1994 du ministre de l' Éducation nationale.
[14] Circulaire n°1649 du 20 septembre 1994 du ministre de l' Éducation nationale.

Though the State Council reaffirmed in 1995 that the Islamic headscarf in and of itself was not a sign of proselytism, the message was clear: public order meant an united Republic, where each and every individual was properly integrated, and no individual or community differed from another (Scott 2009). The Bayrou understanding of public order is linked directly to French republican ideals, which rejects difference to promote sameness (Pena-Ruiz, 2004).

The Law of 15 March 2004 and the circular of 18 May 2004 that followed repealed the 1993 and 1994 Bayrou circulars, the 1989 Jospin circular, and the State Council Decision of 27 November 1989[15]. Enacted under President Jacques Chirac, following the findings of the Stasi investigative commission which was set up to determine practical applications of *laïcité*, the Law of 15 March 2004 solidified the ban of religious symbols in schools. Transposed in the Education Code, the 2004 law states:

> In public primary and secondary schools, it is forbidden to wear signs or clothing by which a religious belief is ostentatiously manifested.[16]

The circular of 18 May 2004 specifies the modes of application for the 2004 law. It is the 2004 circular that specifically forbids the Islamic veil, the kippa, and a large cross from being worn in all public schools[17]. The circular authorized discreet religious signs, and abstention from school for big religious holidays. There is no explicit reference to a public order – in fact, the only justification for the restriction on religious freedoms provided is that religious signs, in

[15] LOI n° 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. JORF n°65 du 17 mars 2004 page 5190.
[16] LOI n° 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. JORF n°65 du 17 mars 2004 page 5190.
[17] Circulaire du 18 mai 2004 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 de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics. JORF n°118 du 22 mai 2004 page 9033.

being worn, results in the bearer's immediate recognition based on their religious affiliation. This justification, in addition to the context through which the law and circular developed, again supports the understanding of public order as sameness.

In the function of *laïcité*, public order holds a unique and unspecified meaning. In order to best understand public order within the context of *laïcité*, it is essential to also recognize the function of public order outside the context of *laïcité*. The most obvious and visible function of public order in French law is that of public security, in which public order is maintained by surveilling and protecting people and property. The Interior Minister is responsible for maintaining public order in function of public security, and does by verifying identities, fighting against urban violence and terrorism, and providing aid to people in case of disaster. This general function of public order can be considered similar to the anglophone term "public policy", which can be best understood as "the principle of law that holds no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good" [18]. These functions of public order emphasize public safety and security, and are most visible in policy regarding terrorism, police, and national defense.

Though public order is a key term in both the Declaration of the Rights of Man and the Citizen and the Law of 9 December 1905, it fails to be defined even as *laïcité* becomes more and more integral to French society. In the laws, circulars, and decisions following 1905, *laïcité* is characterized by several trends. First, *laïcité* is exclusively debated within the sector of public education. Second, public order fails to be cited in any of the legal sources which reference

[18] Herndon v. TIAA-CREF Individual & Institutional Servs., LLC, 654 F. Supp. 2d 400, 405 (W.D.N.C. 2009)

laïcité. Third, “religious signs”, “democratic values”, and “integration” reappear as public order disruption themes.

Based on the three main public order disruption themes, the definition of public order can best be understood as sameness, or the privatization of individual differences to conform to the dominant French community. This understanding is apparent in my analysis of legal sources, and reflected by the societal ideal of *laïcité*. However, the primacy of European law since the establishment of the European Union raises questions about how European laws on religious freedom may impact the French national understanding of public order within the context of *laïcité*.

Public Order in European Law

As a member of the European Union (EU), France is bound to European law and therefore required to abide by European regulations, decisions, and directives (Monnier, 2017). Given the missing definition of public order as it relates to *laïcité* in French law and the primacy of European Law, EU conventions and charters on human rights provide essential context by which French application of public order can be understood.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in 1950 and entered into force in 1953, was the first legally binding international instrument of Human Rights (Monnier, 2017). The ECHR is interpreted by the European Court of Human Rights, and focuses on *specific* aspects of human rights (Monnier, 2017). Article 9 on the freedom of thought, conscience and religion states:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance (European Union, 1950).
>
> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others (European Union, 1950).

Explicitly stated in the ECHR are the limits by which freedom of religion may be restricted: public order, but also public safety, health, morals, and others' rights and freedoms (European Union, 1950). The ECHR, like the Law of 9 November 1905, does not provide a definition for public order, rather, public order is left to be contextualized. However, the usage of public order as separate from public safety, health, morals, and protection of rights and freedoms implies that public order does not encompass any of such constructs and is entirely independent of them.

The European Charter of Fundamental Rights (EUCFR) is another critical document to EU Human Rights law. Introduced in 2000, and legally binding since the 2009 Treaty of Lisbon, the EUCFR is different than the ECHR in that it is interpreted by the Court of Justice of the EU, and that it provides a general framework for *all* human rights (Monnier, 2017). Article 10 on the freedom of thought, conscience and religion states:

> Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
>
> The right to conscientious objection is recognized, in accordance with the national laws governing the exercise of this right (European Union, 2010).

Article 52 of the EUCFR elaborates on the scope of guaranteed rights:

> Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others (European Union, 2010).

The EUCFR, like the ECHR, permits limits on religious freedom for the protection of rights and freedoms of others. However, the EUCFR also permits limits on religious freedom if they are necessary for the general interest, which is defined by the European Union as "services that public authorities of the EU member countries classify as being of general interest and, therefore, subject to specific public service obligations. They can be provided either by the state or by the private sector" (European Commission, 2018). General interest in European Law and public order in French law are used in the same way, as they both are vague justifications for limitations on religious freedom. This fails to narrow down the understanding of public order in French and European religious freedom laws as it raises additional questions, particularly, if public order and general interest can be considered to hold the same meaning.

The ECHR and EUCFR demonstrate two key themes. First, religious freedom is mentioned in the context of human rights. This is in stark contrast to the focus of religious freedom in French law, which is exclusively in the context of public education. Second, the EU justifies restrictions on religious freedom if they are to protect the rights and freedoms of others. This is similar to the public order disruption theme of democratic values in French law, yet in contrast to the public order disruption themes of integration and religious symbols.

Chapter 2

Defining the Public Order Today

As I demonstrate by chronological analyses of *laïcité* in French and European law, public order fails to be defined, though public order disruption themes of religious signs, democratic values, and integration are consistently observed. The historical evolution of public order within the function of *laïcité* was exclusive to the domain of public education, and the sources were exclusive to laws, circulars, state council decisions, and EU treaties. This section seeks to widen the frame of analysis by examining contemporary French executive, social, and legal interpretations of public order within the function of *laïcité* (for complete list of sources defining public order, see Appendix C).

This section has three key findings. First, the function of *laïcité* has expanded from applying solely to public education to being applied in public institutions involved in missions of public service, religious associations, and public spaces. Second, the *conseil constitutionnel* provides a working, though vague, definition of public order. Third, public order disruption themes have expanded from religious signs, democratic values, and integration to also include security. The following analysis on executive, social, and legal institutions attempts to explain these findings in detail.

In Executive Government Institutions

Executive institutions within the French government interpret legislation and the constitution without legal status or judicial function. The *observatoire de la laïcité* and the *conseil constitutionnel* are two executive institutions which serve to interpret legislation to

ensure that they conform to *laïcité* and the French constitution. Both institutions hold powers of jurisdiction and consultative competence, and are an accurate representation of the executive government and their understanding of *laïcité*. The way the *observatoire de la laïcité* and the *conseil constitutionnel* public order in function of *laïcité* provide essential context to the historical, legal, and cultural interpretations of the term.

The *observatoire de la laïcité* is an executive governmental institution in the service of the Prime Minister, whose mission is to ensure the government observes and respects the principle of *laïcité* (Observatoire de la Laïcité, n.d.). Most central to the *observatoire de la laïcité's* published resources on *laïcité* is their *Declaration for Laïcité* (2016). The document intends to recall the contemporary meaning of *laïcité* based on the Law of 1905, particularly because it has recently been the subject of much controversy and inspection (Observatoire de la laïcité, 2016). The Declaration is one of the few documents which summarizes the *laïcité* legal principle and interprets what *laïcité* does and does not permit. It states that "in the public interest, there are limits set to the freedom to manifest one's convictions" before continuing to list the following restrictions prevented by *laïcité*:

- Religion from imposing its beliefs on the state,
- Students from being submitted to proselytization by staff, parents, or other students in primary and secondary schools,
- All private schools under government contract from not following the National Education program and from discriminating against students on the basis of religion,
- Public administration agent and public service manager from displaying their religious convictions by proselyte signs or behavior, and
- Institutions which do not exercise any mission of public service from limiting manifestation of religious convictions *unless* previously established in the institution's rules and regulations, *unless* the nature of the

> job justifies limitation, and *unless* the limitation is proportionate to the job (Observatoire de la laïcité, 2016).

Though none of these conditions are established in the 1905 law, the *observatoire de la laïcité* justifies them on the basis of public order. In addition, the Declaration of *Laïcité* reflects the public order disruption theme of religious signs that are proselyte. Finally, the Declaration reflects *laïcité* in function of *all* public institutions, including that of education, in addition to the private sector.

The *conseil constiutionnel*, another council serving executive governmental functions, is responsible for ensuring conformity of laws with the French constitution (Le Conseil constitutionnel, n.d.). In a 2003 public notice, the *conseil* states public order is a notion that everybody understands without needing a precise definition (Mazeaud, 2003). Nevertheless, the *conseil* describes public order as a democratic necessity, and compares it to a similar notion in administrative law of "order, security, health, and public peace" (Mazeaud, 2003). In addition, Mazeaud (2003) explains that public order has constitutional value as it guarantees security of person and property, and is a "shield" from certain fundamental rights and liberties.

The *observatoire de la laïcité* states that the "heart" of public order is a concept described in the Declaration of the Rights of Man and the Citizen: "freedom is impossible in a society where individuals are afraid for their individual safety" (Observatoire de la laïcité, 2018). In other words, maintaining public order is essential for society to exercise their fundamental rights and liberties. Most generally, public order can be understood as a function of maintaining democracy.

The way both executive institutions understand and explain public order in the context of *laïcité* demonstrate that public order is understood by the executive government as democratic

necessity of order, security, health, and public peace in the public space. Additionally, these institutions support public order disruption themes of religious signs, democratic values, and security. Finally, they expand the application of public order in function of *laïcité* to include public institutions involved in public service missions, and private institutions which can justify their restrictions.

In Social Institutions

The dominant social opinion on both politics and policy are reflected by the democratic nature of the French Republic. The social understanding of public order within the context of *laïcité* is thus integral, as it not only influences legal and political systems, but it further contextualizes legal and political discourse and offers speculation on why legal and political discourse use public order to justify restrictions on religious freedom. This section examines the The Guyard Report, which was an influential event in the public understanding of *laïcité* as it resulted in a long period of religious discrimination and controversy known as the "anti-sect movement" (Palmer, 2011).

The Guyard Report was released in 1996 by a commission headed by Deputy Jacques Guyard after a religious cult experienced a mass suicide (Palmer, 2011). The Report called into question the freedom of religion, and justified its restriction on the basis of public order (Palmer, 2011). In addition, Palmer (2011) suggests that the Guyard Report influenced a radical popular understanding of what public order is, and was accompanied by a rise in the anti-sect movement.

The anti-sect movement was founded on the belief that freedom of thought was more important than freedom of conscience (Palmer, 2011). According to Palmer (2011), the former is

the promulgation of beliefs which prevent a person from being critical of them, where the latter is the Constitutional, natural right to freedom of worship. In other words, the anti-sect movement believed dangerous religious sects and cults were guilty of religious brainwashing, and their members were unable to be critical of their own beliefs. Additionally, Palmer (2011) suggests that the anti-sect movement did not believe that the Christian or Jewish faith was guilty of violating freedom of thought, notably due to the assimilation of these faiths into the core of the French upper-class hegemony. Additionally, Palmer (2011) demonstrates that anti-sect movement emphasized collective freedom over individual freedom – in other words, they believed in protecting society and not the individual. In order to protect society, the Guyard Report argued, the individual right to form a belief must be protected even if it is against an individual's own wish (Gest & Guyard, 1995).

The Guyard Report justified its denouncement of 173 minority religious groups on the basis of disturbance of the public order (Palmer, 2011). The report acknowledges that "every spiritual movement….is protected by the principle of religious freedom, the freedom of assembly, and freedom of association… These three freedoms can, however, only be exercised within certain limits" (Gest & Guyard, 1995). The report continues by listing the limits by which religious freedoms can be restricted, notably, that of respect of the public order:

> "The respect of the public order, that is to say, in every sense, public peace, security, health, and morality. Thus, Article 3 of the Law of 1 July 1901 aforementioned includes that "any association founded upon a cause or in anticipation of criminal action, breaking the law, going against moral standards, or with the goal to harm the integrity of the national territory and the republican national government, is null and void". Thus, in the May 14, 1982 decision on the International Association for the Conscience of Krishna, the State Council estimated that the restrictions which the Krishna worship violated were public peace, health, and security in their public establishments." (Gest & Guyard, 1995).

The Guyard Report demonstrates public order in function of *laïcité* applies to private religious associations. It also implies that lawbreaking is a disruption of public order and justifies the restriction of religious freedom. The public order disruption themes observable in the report include criminal action, rejection of French moral standards, and harm to the national territory.

Despite the lack of legal status of the Guyard Report, its publication and the anti-sect movement popularized controversial ideas about religion and religious freedom (Palmer, 2011). Freedom of thought versus collective freedom entered the framework by which religious freedom was considered, and challenged the rights of religious minority groups. The emphasis on collective freedom relates directly to the general understanding of public order: in valuing the wellbeing of society over the wellbeing of individuals, natural rights are legally permitted to be restricted on the basis of protecting the public.

In Legal Institutions

French and European legal systems provide the most tangible contemporary understanding of public order within the context of *laïcité,* as their rulings have legal jurisdiction. This section reviews the most extreme examples of French and European court decisions which cited public order in their rulings on *laïcité,* which focus mostly on wearing religious symbols in public spaces. This analysis demonstrates how *laïcité* has been applied to public spaces and spaces assigned a public service. Additionally, this section introduces the public order disruption theme of security and gender equality in function of democratic values, in addition to demonstrating how the public order disruption theme of religious signs and general democratic values persist.

On 14 September 2010, a law was adopted which forbade concealment of the face in public spaces (Shahid, 2010). This law is best known as the "burqa ban", though it also prohibited masks, helmets, balaclavas, and other accessories which covered the face from being worn in public (Shahid, 2010). The president at the time, Nicolas Sarkozy, claimed the law enabled gender equality as it would "protect women from being forced to cover their faces and to uphold France's secular values" (Shahid, 2010). The principle controversy over the law was that it disproportionately targeted Muslim women (Shahid, 2010). Despite this, the law received majority support in both the government and the public (Shahid, 2010).

The 1st and 2nd Articles of the 14 September 2010 law state:

> No one can, in the public space, wear clothing intended to cover the face.
>
> In the application of the 1st article, public space includes public routes as well as spaces open to the public or assigned a public service.
>
> The ban noted in article 1 does not apply if the intention is prescribed or authorized by legislative dispositions or regulations; if it is justified by health or professional reasons; or if it is part of athletic, artistic, or traditional practices, celebrations, or demonstrations.[19]

The *conseil constitutionnel* ruled on the constitutionality of the above law on 7 October 2010. Citing public order of Article 10 in the Declaration of the Rights of Man and the Citizen and the Preamble of the 1946 Constitution which guarantees equal rights to men and women, the *conseil* ruled that the law conformed with the French constitution[20]. The *conseil* defended that objects which obstruct the face can constitute a danger to public security and "disregard the minimal standards of society"[21]. Additionally, the *conseil* explained that women who conceal

[19] LOI n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public.
[20] Décision n° 2010-613 DC du 7 octobre 2010 interdisant la dissimulation du visage dans l'espace public.
[21] Décision n° 2010-613 DC du 7 octobre 2010 interdisant la dissimulation du visage dans l'espace public.

their faces, voluntarily or involuntarily, demonstrate principles gender exclusion and inferiority which are incompatible with constitutional principles of freedom and equality[22]. The gender inequality assumed by the act of covering of one's face (presumably by wearing a burqa and not a regular mask) is therefore considered disruption of the public order. This law, and the support of the *conseil*, demonstrate the introduction of the public order disruption themes of security and gender inequality as function of democratic values. The European Court of Justice (ECOJ) also supported the public order disruption theme of democratic values.

In a 2017 ruling on "G4S Secure Solutions" and "Bougnaoui and ADDH", both concerning bans of religious symbols in the workplace, the ECOJ used both the ECHR and EUCFR aforementioned to defend that religious freedom could be limited if it was necessary to democratic society (Howard, 2017). To the ECOJ, this meant it was in the "interests of public safety, the protection of the public order, health and morals, or the protection of the rights and freedoms of others", as well as "proportionate and necessary" (Howard, 2017). The ECOJ goes on to include "preserving the secular nature of the state" as a mechanism of public order, implying that the secularity of the Republic, as well as other EU member-states, can be threatened by religious symbols in the workplace (Howard, 2017). In the 2017 case, the ECOJ ruled that internal company rules prohibiting the bearing of religious signs did not constitute as religious discrimination (Court of Justice of the European Union, 2017).

The ECHR's limitations of religious freedom justified by public order were also used in three French cases that reached the European Court of Human Rights: Dogru v. France, Kervanci v. France, and Atkas v. France (Howard, 2017). Each case involved student expulsion from a

[22] Décision n° 2010-613 DC du 7 octobre 2010 interdisant la dissimulation du visage dans l'espace public.

public school in response to their refusal to remove Islamic veils or Sikh turbans. The European Court of Human Rights defended all three decisions on the basis of public order evoked in aforementioned Article 9 of the ECHR (Howard, 2017). They ruled that the school was acting to "protect the rights and freedoms of others, and of public order", and not in response to the student's religious convictions[23]. The public order disruption themes of religious signs, democratic values, and gender equality in function of democratic values are clarified by the way that French national and European courts have handled recent cases.

Chapter 3

Implications of Public Order

The sectors in which *laïcité* has been applied, the unclear definitions of public order, and the reoccurring public order disruption themes of religious signs, democratic values, integration, and security raise critical questions about the implications of such a nonspecific and undefined term, particularly when it has constitutional jurisprudence to restrict fundamental freedoms. This section reviews how national and international institutions perceive and assess the implications of public order.

Concerns regarding the implications of public order in function of *laïcité* have been raised by the National and European appeals court, the UN Human Rights Committee, and the French Muslim community. These institutions perceive public order in function of *laïcité* and the way in which it is understood to have violated human rights by restricting religious freedoms,

[23] CEDH, 4 décembre 2008, Kervanci c. France, affaire numéro 31645/04

disproportionately targeting Muslim women, and increasing Islamophobia through institutionalized discrimination.

The United Nations Human Rights Committee ruling in response to a complaint filed by a French Muslim women in response to the 2010 Burqa Ban suggests that interpretations of public order violated human rights and targeted Muslim women. The ruling, holding no jurisprudence or executive function, provides essential context as well as an international human rights perspective independent from the European political community.

The 2010 "Burqa Ban" aforementioned prohibited concealment of the face in the public spaces. It was not until 2018 that the United Nations Human Rights Council responded to a complaint by a French Muslim woman who was prosecuted under the "Burqa Ban" for wearing a niqab in public. On 6 October 2011, Sonia Yaker was convicted for wearing a niqab in public and fined 150 euros (Yaker, 2018). Yaker (2018) reports to have appealed the decision, and the case went to the French Appeals Court which supported the decision and reiterated that Yaker had violated the 2010 law forbidding the concealment of one's face in public. Yaker (2018) details filing a complaint to the Office of the High Commissioner of the United Nations Human Rights (OHCHR), arguing that the French Republic was infringing upon the religious freedom of Muslim women who wear the niqab, which constitutes an extremely small minority of Muslim women in France. In her complaint, Yaker (2018) states:

> Wearing the niqab or burqa amounts to wearing a garment that is customary for a segment of the Muslim faithful. It is an act motivated by religious beliefs. Consequently, it is the performance of a rite or practice of religion, and freedom to manifest that religion is guaranteed by article 18 of the Covenant.

According to the UN Human Rights Committee (2018), human rights are both rights and obligations. The simple act of existing guarantees each and every human being – regardless of

national origin, race, religion, socioeconomic status – human rights, and each state is obliged to protect these rights by law (UNHR, 2018). On 23 October 2018 in response to Yaker's complaint, the United Nations Human Rights Council ruled that France's 2010 law was in clear violation of the right to religious freedom and to manifest religious beliefs (UNHR, 2018).

In their ruling in response to Yaker's complaint, the UN Human Rights Committee stated that the 2010 law was neither "necessary nor proportionate to the objective" of public order (UN Human Rights, 2018). They considered that the law of September 2010 not only failed to clearly define its objective of maintaining public order, but that it imposed a dress code on Muslim women who would normally wear a burqa/niqab (Yaker, 2018). Finally, the committee stated the law had no legitimate objective, only a political one (Yaker, 2018). The UN Human Rights Committee added that the "prohibition against concealing the face in public is not necessary to protect public order and safety", and recognizes that for the state to be able to identify all individuals when necessary, more specific and proportionate measures than the 2010 ban can be taken (Yaker, 2018).

This ruling demonstrates a significant implication of the lack of definition of public order by recognizing that the objective of public order failed to be clearly defined in the 2010 "Burqa Ban". Additionally, the ruling challenges the public order disruption theme of gender equality in function of democratic values by emphasizing the superiority of religious freedom as a human right. The committee also challenges the public order disruption theme of security, arguing that security may apply to restricting human rights *only if* the restriction is specific and proportionate. The ruling states that the 2010 "Burqa Ban" was neither of those two things. The European Court of Justice, however, has maintained support of veil bans in France and other European states for reasons of public safety and gender equality.

Human rights organizations in France have also aligned themselves with the UN Human Rights Committee's perspective on the Burqa Ban, and believe that related French laws permit and perpetuate institutionalized discrimination against French Muslims. One vocal organization, the *Collectif Contre l'Islamophobie en France* (Community Against Islamophobia, CCIF), suggests that institutionalized discrimination permitted by law create and perpetuate stigmatization, exclusion, social fractures between French Muslims and the rest of French society, and Islamophobia (CCIF, 2019).

The CCIF publishes annual reports discussing Islamophobia in French society, and the reports continue to discuss institutionalization of Islamophobia. In their 2019 report, the CCIF states:

> Institutional discrimination is, among others, the result of an ideological and radical understanding of the concept of *laïcité*. Mostly lead by both right and left political groups, *laïcité* legitimizes the most discriminatory behavior and most passionate dialogue against Muslims. Within French institutions, *laïcité* has become an instrument of stigmatization and exclusion (CCIF, 2019).

According to the CCIF (2019), institutional discrimination can be defined as discrimination against Muslims which is built into the structures of the French state and society. The CCIF (2019) states that the radical interpretation of *laïcité*, which can be considered as made possible by the lack of definition of public order, has allowed for the writing and passing of laws that permit French legal and political systems to discriminate on the basis of religion. The CCIF (2019) notes that since the law of 15 March 2004 forbidding students from wearing religious signs, the phenomenon of Islamophobia has both strengthened and expanded. The CCIF (2019) attributes this to the state-authorized stigmatization of Muslim women by focusing on the veil.

Since 2015, however, the state of emergency also increased Islamophobia on the basis of public security (CCIF, 2019).

In France today, the CCIF (2019) reports a 52% increase in Islamophobic acts from 2017 to 2018, most of which are discriminatory but also include physical aggression and hate speech. Institutions and legal entities were reported most responsible for committing acts of Islamophobia, as only 8% of Islamophobic acts were committed by individuals. Women have been found to be the principle victims of Islamophobia, with 70% of reported acts being towards women (CCIF, 2019).

The CCIF (2019) emphasizes that *laïcité* is a principle which organizes the state and ensures equality between different religious groups, but is *not* an elastic concept which can mean anything and everything. Most importantly, the CCIF (2019) states that *laïcité* should *not* be principle of exclusion which prevents religion from being part of the public space, as that would be incompatible with the freedoms guaranteed by law. However, the CCIF (2019) believes that lack of definition of public order in the 1905 law of *laïcité* has influenced stigmatization, exclusion, and social fractures between French Muslims and the dominant French society.

The ways in which the CCIF considers *laïcité* and the public order directly challenge the public order disruption themes of religious signs, integration, and democratic values. While some would argue that the public order in function of *laïcité* relates back to Republican ideals of a culturally unified society, the CCIF defends that the laws which require French Muslims to shed their Muslim identity (e.g., religious signs) in order to "integrate" or "maintain democratic values" result in a deepening of societal fractures by rejecting the reality of multiculturalism. Additionally, and similarly to the UN Human Rights Committee, the CCIF expresses the danger of the vague definitions provided by the law for public order in function of *laïcité*.

Both examples seek to demonstrate that the historical and contemporary understanding of public order in function of *laïcité* has been contradicted and disputed on the basis of serious implications. These examples also suggest that the public order disruption themes uncovered through historical and contemporary analysis are vague and disproportionate.

Conclusion

Laïcité based in the Law of 9 December 1905 has been and will continue to be a central controversy in the French republic, particularly due to the fact that it legally allows what other institutions have denounced as restrictions on religious freedom. My analysis has been an attempt to uncover the meaning of public order, the only construct cited by the 1905 Law which justifies restriction of religious freedoms in its disruption.

As public order fails to ever be clearly defined, this analysis attempts to develop an understanding of the term by determining the contexts in which it has been applied, and collecting public order disruption themes. My research found public order has mainly been applied in the context of public education, however, it has also been applied in public institutions, public spaces, or private spaces effectuating missions of public service, private institutions, and religious associations. The most common public order disruption themes include religious signs, democratic values, integration, and security. This analysis attempted to then develop different perspectives on public order disruption themes by examining the ways in which they have been disputed.

Where my analysis focused solely on the laws, documents, and institutions which public order in function of *laïcité* appeared, it is equally essential to note where public order in function of *laïcité* did not appear. Public order was not present in any situations seeking to protect minority rights and freedoms, nor was it used to dispute anything (e.g., religion, culture, behaviors) in dominant French society. In contrast, public order appeared to justify restriction of religious freedom in order to ensure laws are obeyed, French moral standards (e.g., gender equality, democracy, secularism) are maintained, and safety is ensured. Socially, public order appears in situations of multiculturalism, where the dominant French Republican society is faced with cultural differences manifested by religious symbols of which they are unfamiliar, uneducated, and uncomfortable.

The implied meaning, and constructed understanding of the public order today raise additional critical questions about the rights of religious groups which manifest their religion in a way seen as incompatible with French public order. Who defines the French moral standards and democratic values which public order seeks to protect? Are such moral standards and democratic values truly French, in other words, representative of the true French population? How do collective freedoms compare to individual freedoms in their efficiency in maintaining public order, and is one more effective? More generally, my analysis suggests that it may be essential for public order to be defined. As public order is the basis upon which *laïcité* can be applied, it should be first considered integral to develop a legal definition. Second, it should be considered essential to develop a definition which maintains French core values, yet accepts and protects the natural rights of religious minorities without perpetuating institutional discrimination against such groups.

Appendix A

The Headscarf Affair

The *affaire du foulard*, or the headscarf affair, was a landmark controversy regarding the manifestation of religious symbols in public schools. In 1989, three girls were expelled from their middle school in Creil, France, for wearing hijabs to school (Scott, 2009). The independence gained by the French colonies and protectorates of Algeria, Morocco, and Tunisia coupled with labor migration programs resulted in mass immigration from the Maghreb[24] to metropolitan France in the 1950s and 1960s. Regrouping policies in the 1970s allowed families from the Maghreb to join their relatives working in France and by 1982, the number of Algerian immigrants living in France rose to 800,000, and the number of Tunisians and Moroccans were smaller yet still significant (Hamilton, Simon, & Veniard 2004). The visibility of Maghrebian immigrants and their children increased in French society in the 1980s and 90s was coupled by the rise of right-wing nationalism lead by National Front party leader Jean-Marie Le Pen, who possessed a strong anti-immigration rhetoric (Borne, 2004). Muslim girls wearing a headscarf, or *foulard*, in public schools became the central controversy of *laïcité*.

Scott (2009) explains that the principal believed the girls violated *laïcité* by bringing their private religion into the public space. The decision was defended by right-wing politics, which argued that secularism was essential to a French education and all religious symbols should be excluded from the classroom (Scott, 2009). Scott (2009) also argues that headscarves represented non-integration of Muslim immigrants into society, and that for immigrants to integrate, they had

[24] Region of North Africa encompassing Algeria, Morocco, and Tunisia

to assimilate to French culture. This dialogue finds its roots in the founding principles of the French state, particularly republicanism (i.e., citizenship through assimilation).

Appendix B

Sources on Public Order in Education

Date	Source	Repealed
1905	Law of 9 December 1905 concerning the separation of church and state	
1936/37	Jean Zay Circular prohibiting political signs and religious proselytism from public schools	
1958	Constitution of 1958, declaring that France is a *laïque* Republic	
1959	Law of 31 December 1959 "Debre" on the relationship between the state and private educational institutions	2000
1989	State Council Opinion of 27 November 1989 on the bearing of the Islamic veil	2004
1989	Circular of 12 December 1989 of the Minister of State and Minister of Education on youth and sports	2004
1992	State Council Decision of 2 November 1992	
1993	Circular of 26 October 1993 of the Minister of Education on *laïcité* as a function of integration	2004
1994	Circular of 20 September 1994 of the Minister of Education on the prohibition of ostentatious religious signs	2004
2004	Law of 15 March 2004 on, and in application of the principle of *laïcité*, the bearing of signs or manifesting a religious appearance in public schools	
2004	Circular of 18 May 2004 relative to the implementation of the law of 15 March 2004	

Appendix C

Sources Defining Public Order

Year	Domain	Source	Institution
2016	Public education; public institutions involved in missions of public service; private institutions	Declaration for *Laïcité*	Observatoire de la *laïcité*
2003	Constitutional jurisprudence	Mazeaud Public Notice	Conseil constitutionnel
1996	Religious associations and institutions	Guyard Report	Commission d'enquête sur les sectes
2010	Public spaces; spaces assigned a mission of public service	Law of 11 October 2010 forbidding concealment of the face in public spaces	National Assembly and Senate
2017	Public and private workplaces	Judgments in Cases C-157/15 Achbita, v G4S Secure Solutions, and C-188/15 Bougnaoui and ADDH v Micropole Univers	Court of Justice of the European Union
2017	Public education	Judgements in case Dogru v. France, Kervanci v. France, and Atkas v. France	European Court of Human Rights

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ACADEMIC VITA

samantha.m.post@gmail.com · www.samanthapost.weebly.com

EDUCATION

Pennsylvania State University, Schreyer Honors College (University Park)

- B.S. Honors in Global and International Studies; Enhanced Minor in Psychology
- Honors Thesis: Religious Discrimination and *Laïcité* in France
- **Deans List** 8/8 Semesters

University of Geneva (Global Studies Institute), Switzerland ***Sept. 2017 – Feb. 2017***

- Completed 5 introductory courses following International Relations track (Political Science, Economics, History of Globalization, and International law) during semester abroad

IAU College (Humanities and Social Sciences), France ***Jan. 2017 – May 2017***

- Completed 4 courses in Psychology, Sociology, and International Culture; volunteered at a French school in Aix-en-Provence to assist English teaching during semester abroad

IES Paris (Business and International Affairs), France ***Sept. 2016 – Dec. 2016***

- Completed 5 courses in Business Management and Leadership, and Political Science during semester abroad

EXPERIENCE

International Sales Development Intern ***April 2017 – Aug. 2017***

PopUp House, Aix-en Provence, France

- Supported 10-person sales team in their expansion into the international/European market as an intern
- Connected with 30 international clients and construction professionals to expand client network
- Converted leads into opportunities using CRM
- Communicated with team members from different departments to create website, brochures, communications, etc.

Undergraduate Research Assistant ***Sept. 2018 – Dec. 2018***

Developmental Psychology research Lab, University Park, PA

- Assisted 10-person research lab with qualitative data preparation and coding for effective analysis
- Transcribed interviews and wrote coding manuals for researchers to better understand qualitative data

Legal/Administrative Assistant ***Jul. 2018 – Aug. 2018***

Law Offices of Brian Cige Esq., Somerville, NJ

- Assisted 1 lawyer in drafting legal documents and correspondence for trials and consults
- Coordinated with approx. 20-person client base, 3 district courts, and other lawyers for trial preparation
- Organized and upheld legal documents in paper filing system for billing and legal purposes

Teaching Assistant ***Jul. 2016 – Aug. 2016***

International Center of Photography, New York, NY

- Guided 11 young students to develop their photography, printing, and creative thinking skills
- Supported 1 teacher in organizing and facilitating student trips, activities, discussions, and workshops
- Provided instruction and technical expertise with analog photography process, artist statements, curation, and portfolio presentation

English as a Second Language Tutor ***Sept. 2018 – Dec. 2018***

Litcorps at Penn State, University Park, PA

- Taught English as a second language 3h/week to beginner English, native French speaker
- Adapted to learners' learning style to effectively improve English reading, writing, and speaking skills
- Organized daily lessons, and created new materials that matched learners learning style and skills

SKILLS AND AWARDS

- **Languages:** English (native), French (fluent)
- **Virginia Todd Chapel Executive Intern Scholarship**: enrichment funding awarded for high academic achievement to supplement Internship