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respect

A NEWSLETTER ABOUT LAW AND DIVERSITY

Combatting Racism in the Jury Box

by Cheryl Baisden

When the early English settlers began to colonize America, the British Crown had one court of law — the all-powerful Star Chamber, controlled by the king and authorized to imprison, torture or even put to death anyone found guilty of a crime. Finding suspects guilty was, in fact, easy, since the chamber was comprised of a council, known as the privy council, and judges, who served at the king's discretion and accepted his rulings without question.

"Instead of presenting witnesses to prove a case, written sworn statements were taken from witnesses, and used to prove the prisoner guilty," explains New Jersey criminal defense attorney Alan Zegas. "The prisoner had no means of confronting the witnesses against him, and no person was ever acquitted if the court was seeking to condemn him. Naturally, the English method of trying cases put the colonists in fear — people who were innocent were condemned and punished, sometimes with death."

Fortunately for the colonists, the Star Chamber was abolished in 1641, and from then on kings were forbidden from passing judgment on accused criminals. What took its place was a law granting every "freeman" the right to the "lawful judgment of his peers."

Although these early juries were not truly representative of the general population, they did offer suspects an

opportunity for a more democratic trial. It was the Sixth Amendment to the U.S. Constitution that actually spelled out the right to a trial by a jury of one's peers.

"The right is recognized as one of the most fundamental of all the rights guaranteed under our Constitution," says Zegas, "and it sets our country apart from most other nations in the world, which do not provide for trial by jury. Other important principles that are written into the Constitution include the presumption that all persons [>continued on page 2](#)

Veil Bans: Liberating Women or Oppressing Religious Freedom?

by Barbara Sheehan

Recently, France passed a law that will ban women from wearing full-face Islamic veils in public places. The law has sparked a constitutional debate and caused some to question how far governments should go in restricting personal and religious freedoms.

About the burqa

Usually associated with the Muslim world, burqas and niqabs are defined as full veils, which cover the face, leaving only the eyes and sometimes the forehead exposed. This full-face veil is the type that will be prohibited by the new French law.

More commonly, Muslim women may be seen in a hijab, which refers to loose clothing, which may include a scarf that is worn around the head and under the chin (although some definitions indicate that hijabs may include a face [>continued on page 4](#)

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accused of a crime are presumed to be innocent, the obligation of the government to prove its case 'beyond a reasonable doubt,' the right to be confronted by witnesses and to cross-examine witnesses appearing in court, the right to testify or to not testify, and the right to have the jury render a unanimous decision."

The process of picking a jury

Today's potential jurors are usually selected randomly by a computer from lists of registered voters and licensed drivers, and receive a summons to appear for jury duty on a certain day. Although the process varies from state to state, once a person has served on a jury under New Jersey's law, he or she is automatically excluded from jury selection for at least three years.

"At one time," says Zegas, "people serving in various occupations, such as teaching, were automatically excluded from jury service. In addition, courts had freely excluded from jury duty people who had obligations to their employers. The result led to unemployed and retired people making up a disproportionate number of eligible jurors. In order to promote greater diversity on juries, laws were enacted that reduced the classes of people who were automatically excluded from jury service."

Courts often call hundreds of people on a particular day to serve as potential jurors, ultimately settling on six for a civil case and 12 for a criminal case. Once arriving at the courthouse, these people are randomly listed and called to the courtroom by the judge when a new case is about to begin. There they are told about the case and asked a series of questions to ensure they have the ability to sit for the duration of the case, are qualified to be jurors and can decide the case fairly. If a potential candidate presents a reason why he or she cannot serve as a juror, attorneys for both sides listen to the reason along with the judge, and the judge may choose to excuse that person "for cause."

From this potential pool of jurors each side is then entitled to pursue "peremptory

challenges," eliminating individuals they do not want to serve on the jury for one reason or another. Depending on the type of case and the number of defendants, the number of peremptory challenges available to each side can vary, and in criminal cases defendants are offered more challenges than the state.

"For example, a juror may be involved in a certain line of work that one of the parties disfavors, such as a criminal defendant not wanting a police officer to serve," explains Zegas. "A peremptory challenge can be exercised for completely arbitrary reasons, but a juror may not be excluded solely because of his or her race, sex, ethnicity or religion. If a peremptory challenge has been exercised against a person and the other side believes that the challenge was made for an unlawful reason, such as race, the side contending that the challenge was improper objects to the judge, who makes the final decision on the matter."

The case of race

The inability to remove someone as a potential juror based solely on race was most recently addressed 25 years ago, as a result of the landmark U.S. Supreme Court decision in *Batson v. Kentucky*. In that 1986 ruling, the Court concluded that race-based peremptory challenges violated the Sixth Amendment right to an impartial jury of one's peers and the 14th Amendment Equal Protection Clause guaranteeing equal treatment under the law.

Batson v. Kentucky involved a black man who was convicted by an all-white Kentucky jury of burglary and receiving stolen property. The prosecutor in the case removed all four black potential jurors, and James Batson's attorney asked that the entire jury be removed because the selection process violated his client's rights to a jury of his peers. The judge



refused, and Batson was found guilty. On appeal, the Kentucky Supreme Court upheld the conviction, relying on a 1965 U.S. Supreme Court case, *Swain v. Alabama*.

"In the *Swain* case the Court found that for racial discrimination to be proven, a defendant had to show not only an exclusion of jurors based on race in his case, but that the exclusion was part of a larger process within the community that resulted in juries not representing a cross-section of the community," explains Zegas. "In *Batson*, the Court reversed the decision."

The U.S. Supreme Court in *Batson* ruled that a defendant who was a member of a specific race could simply show racial bias was demonstrated in his case alone.

"Under the Court's ruling, a black defendant's right to equal protection under the Constitution was violated if members of his race were purposely excluded from the jury," says Zegas. "That being said, the Court also ruled that a defendant has no right to a jury that is comprised in whole or in part of members of his race. What was prohibited, the Court held, was the state's deliberate exclusion of members of the defendant's race."

While the *Batson* decision may have appeared to resolve the issue of race-based jury exclusions, Justice Thurgood Marshall predicted in his opinion that the ruling would not end the practice. Instead, he reasoned some prosecutors would just invent fake reasons to remove jurors.

Faking it

Based on a June 2010 report released by the Alabama-based Equal Justice Initiative (EJI), a nonprofit legal advocacy group, Justice Marshall's theory was correct. "In courtrooms across the United States, people of color are dramatically underrepresented on juries as a result of racially biased use of peremptory strikes," the report said. "This phenomenon is especially prevalent in capital cases and other serious felony cases. Many communities have failed to make juries inclusive and representative of all who have a right to serve."

The 60-page report, titled "Illegal Racial Discrimination in Jury Selection: A Continuing Legacy," is the result of a two-year review of court documents in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina and Tennessee, and interviews with over 100 African Americans who were excluded from jury service. These states were specifically selected for the study because racial discrimination was being reported by jurors.

According to the EJI, prosecutors routinely use peremptory challenges to remove blacks from juries, aware that all-white juries are more likely to impose the death penalty. In Jefferson Parish, Louisiana, blacks were removed from juries three times as often as whites. In Houston County, Alabama, nearly 80 percent of blacks who qualified for jury service were removed from capital cases by prosecutors.

The report also alleges that some prosecutors train their lawyers on the wording they should use to avoid charges of racial bias, and provides many examples of race-based peremptory challenges. One Alabama prosecutor, who removed 11 of 14 black potential jurors from the jury pool in a capital

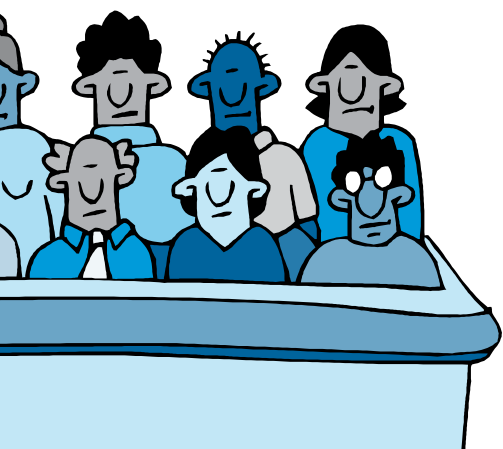
murder case, said one was "arrogant," and another was not "sophisticated." Prosecutors routinely remove possible jurors for supposedly exhibiting "low intelligence," or because they live in high-crime neighborhoods. A Louisiana court let a prosecutor remove a black juror because he thought he "looked like a drug dealer."

Suggestions

The EJI report suggests there are ways to encourage race-neutral jury selection, including fining or penalizing in some other way prosecutors who exhibit a clear pattern of racial peremptory challenges; holding district attorneys accountable through court monitoring; and strengthening policies and procedures so more minorities are included in jury pools. The report also proposes retroactively applying *Batson v. Kentucky* to death row prisoners and others with long sentences who were tried before 1986.

"The underrepresentation and exclusion of people of color from juries has seriously undermined the credibility and reliability of the criminal justice system, and there is an urgent need to end this practice," Bryan Stevenson, executive director of the EJI wrote in the report. "While courts sometimes have attempted to remedy the problem of discriminatory jury selection, in too many cases today we continue to see indifference to racial bias."

Notes Zegas: "Although New Jersey was not one of the states specifically cited in the report as having ongoing problems, there are cases reported here where courts have found violations of a defendant's constitutional rights to a race-neutral jury selection process. The problem is a serious one that, if not fixed, has the capacity to compromise the integrity of the criminal justice system nationwide." ■



Veil Bans *continued from page 1*

veil). Veils that reveal the wearer's face are not restricted by the new French law.

The practice of veiling dates back across centuries and cultures. Today, many Muslim women wear veils because of their Islamic religion, which is said to require that women dress modestly in public. Some proponents of the veil claim that by covering up, women will avoid unwelcome attention to their appearance and may also be taken more seriously.

It has been widely noted, however, that the Quran, or the book of Islam, does not require women to cover their faces. Not everyone agrees that veils, particularly full-face veils, belong in modern-day society.

In some instances, for example, in Afghanistan under Taliban rule, women have been forced to wear the veil against their will. This perceived oppression along with other concerns, such as security (e.g., women hiding weapons under their veils, or even men disguising themselves by wearing veils), has caused some people to question whether women should be allowed to wear veils in certain public settings.

Why was the ban created?

One of the biggest supporters of France's veil ban is French President Nicolas Sarkozy. He and other proponents have consistently held that full-face veils oppress women and are not welcome in the [secular](#) French society. President Sarkozy contends that France's new law is not meant to stigmatize Muslims but to uphold traditional European values.

Imprisonment "behind a mesh . . . is not the French republic's idea of women's dignity," President Sarkozy said in a press statement.

It is reported that fewer than 2,000 women actually wear the full-face veil in France; however, France is said to have the largest Muslim population of any western

European country at an estimated five million people.

Limitations on the burqa already exist in France's public schools, where they have been banned since 2004, after being deemed a religious display. Although the French support religious freedom, France is a secular society, which holds that religion should be kept separate from social and government policies and institutions, including education.

What do opponents of the ban say?

While the French government has cited women's rights as one of the primary reasons to impose the ban—along with concerns about protecting security and safeguarding France's secular values—critics of the ban claim that it may have the opposite effect.

These critics contend that many women in France wear Islamic veils by choice and that the law will revoke their right to dress as they please. Because of this, they say, the law may leave some women confined to their homes to avoid exposing their faces in public.

The ban is also viewed by some as being prejudice against Muslims in France, who have already faced hateful attacks on some of their mosques and religious symbols. Also, there is some concern that the veil ban may fuel extremist Islamic groups that engage in anti-Western sentiment.

What does the U.S. say?

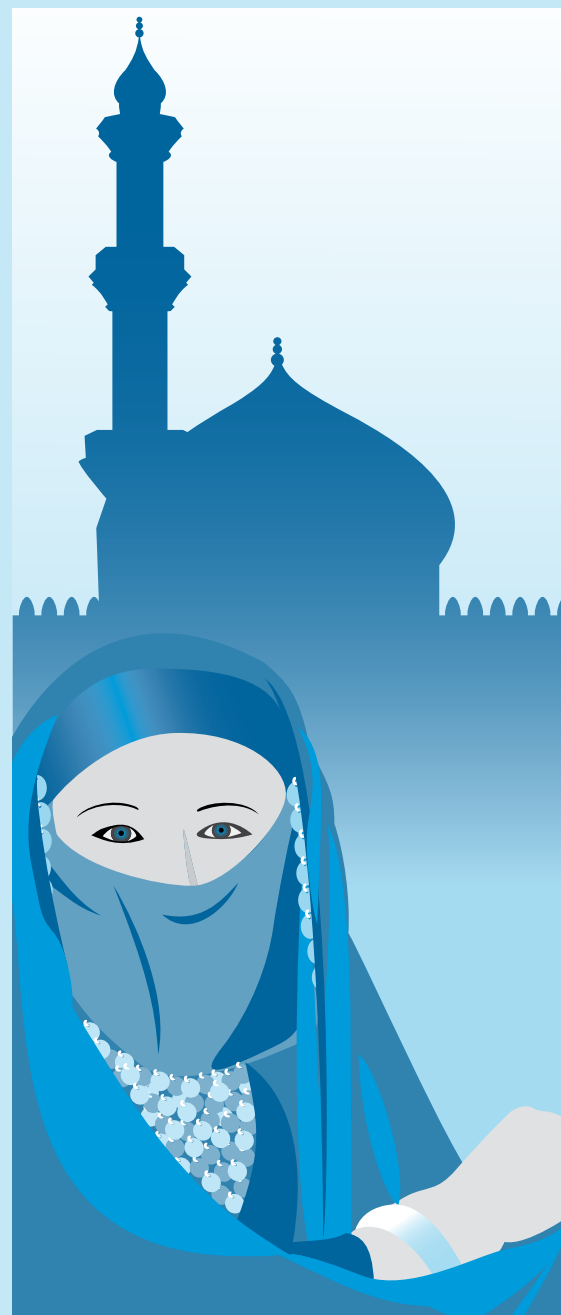
The United States and Great Britain are among the countries that have publicly disapproved of the veil ban. Here in America, the First and Fourteenth Amendments to the U.S. Constitution clearly protect people's rights for free exercise of religion and expression; therefore, a ban such as the one in France would not pass here, notes New Jersey

lawyer Kimberly Yonta Aronow, chair of the Women in the Profession Section of the New Jersey State Bar Association and a former Hudson County assistant prosecutor.

When the veil ban legislation was proposed in France, many people believed that France's constitution similarly would not permit the law to take hold. However, France's Constitutional Council endorsed the law in October 2010.

The legislation is expected to take effect in France in 2011. It will prohibit anyone in France from wearing Islamic veils that fully cover their face in public, including in

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The Right to Free Association or the Right to Discriminate?

by Phyllis Raybin Emert

An African American man is denied membership to an exclusive country club. Women are denied entrance into golf clubs. You would think we are talking about incidents from a bygone era but actually these occurred just last year.

The United States may have come a long way in dealing with the civil rights issues of the 1950s and 1960s, but discrimination and exclusion still exists in private social or country clubs. The courts are addressing this subtle form of discrimination, whether based on race, gender or sexual orientation, one case at a time. At issue is whether the constitutionally guaranteed right to free association can continue to allow private clubs to discriminate.

What is freedom of association?

The U.S. Constitution does not specifically mention the right to free association. This individual right is derived from the guarantees of the First Amendment, which include the rights of free speech, free expression, free assembly and the right to petition government, as well as the Fourteenth Amendment, which guarantees due process and equal protection under the law for all citizens. Free association allows a person to join with other individuals who have similar political, economic, religious, or social views and engage in common activities that promote these views.

The concept of freedom of association has evolved over time. In the 1928 U.S. Supreme Court case *New York ex rel. Bryant v. Zimmerman*, the Court ruled that the Ku Klux Klan had to disclose the names of its members because the Klan was engaged in illegal activities. The Court reasoned that the individual's right to freedom of association was secondary to the interests of the state. In the 1958 case of *National Association for the Advancement of Colored People (NAACP) v. Alabama*, the state of Alabama demanded membership lists from the NAACP because the organization supported and funded civil rights boycotts and protests. The NAACP refused to turn over these lists and the state courts ruled that this refusal infringed upon Alabama law. The U.S. Supreme Court held that the state's action violated the organization's right to free association and ruled in favor of the NAACP.

Forced association

While people have the freedom to associate with like-minded individuals to further particular viewpoints or beliefs, there is also the right of a person not to engage in forced association or associating with those who advocate beliefs or views with which they disagree. The 1990 case of *Keller v. State Bar* dealt with the issue of forced association, centering on membership dues

required by the state bar of California. These dues were being used to promote causes that some members did not support. The U.S. Supreme Court ruled that unless the state bar could show the dues were used to regulate the legal profession or improve legal service, it could not use the money to promote certain causes that some members would not support.

A landmark case involving free association was *Roberts v. United States Jaycees* in 1984, which dealt with the right of an organization to create and apply its own membership rules. The Eighth Circuit Appeals Court in Minnesota had ruled that the United States Jaycees, a national civic and service organization for young men, aged 18 to 35, was allowed to exclude women from full, voting membership. The Minnesota Human Rights Act forbids discrimination in "places of public accommodation," which is defined as a "business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public." The Appeals Court ruled that the Jaycees advocate "political and public causes...[therefore]...the organization's right to select its members is protected by the freedom of association guaranteed by the First Amendment."

The U.S. Supreme Court **reversed** the lower court decision. In the Court's **majority opinion** Justice William J. Brennan Jr. wrote "application of the Act [Minnesota Human Rights Act] to compel the Jaycees to accept women as regular members did not abridge either male members' freedom of intimate association or their freedom of expressive association." The Court also noted "the State's compelling interest in combating gender discrimination justified the law's impact on the Jaycee's First Amendment rights."

Private clubs can discriminate, but no tax break

So, how do these rulings affect country clubs? Country clubs are considered private clubs and are not subject to state civil rights laws because they have the constitutional protection of freedom of association. If a club's goods, services, or facilities are made available to the public, however, then it is no longer considered a private club and is subject to anti-discrimination laws.

A probe into the membership practices of Kentucky private country clubs by the Kentucky Commission on Human Rights led to the 2004 case of *Kentucky Commission on Human Rights (KCHR) v. Pendennis Club, Inc.* According [>continued on page 6](#)

The Right to Free Association *continued from page 5*

to the Kentucky Revised Statutes, “A private club is not ‘a place of public accommodation, resort or amusement,’ if its policies are determined by its members and its facilities or services are available only to its members and their bona fide guests.”

In the Kentucky Supreme Court decision, Chief Justice Lambert wrote, “Bona fide private clubs have the statutory right in this state to discriminate in affording the benefits of membership without fear of legal liability. Private clubs engaged in expressive association also have a constitutional right to be free from ‘forced inclusion of unwanted person[s]’...The Commonwealth of Kentucky has decided...to refuse endorsement of such conduct by disallowing a tax deduction to members of discriminatory clubs. To assure that no such tax deduction is taken, the KCHR has been authorized to investigate.”

If the KCHR determines that a club is discriminatory, that is, the club does not “afford full and equal membership and full and equal enjoyment of its goods, services, facilities,

privileges, advantages or accommodations to any person because of race, color, religion, national origin or sex,” the Revenue Cabinet is notified and “directed to disallow deductions for amounts paid by all members of that club.” Since many private clubs may charge as much as \$50,000 per year in membership fees, this can be a significant amount of money.

In light of tax implications, Kentucky’s country clubs have opened their doors to a more diverse clientele. Founded in 1924, the Idle Hour Country Club, located in Lexington, Kentucky, has an 18-hole golf course, tennis courts, as well as other amenities, and



Prejudice or Expressive Freedom?: An Important New Jersey Case

While having nothing to do with country clubs, but everything to do with discrimination, an important New Jersey case involving the right to free association was the 1999 case of *Boy Scouts of America v. Dale*. At issue was whether the Boy Scouts organization is a business and thus a public accommodation subject to anti-discrimination laws, or a private organization exempt from these laws. James Dale was an openly gay Eagle Scout and Assistant Scoutmaster who was expelled from scouting when his sexual orientation became known.

The New Jersey Supreme Court ruled against the Scouts stating, “the Boy Scouts had violated the state statute prohibiting discrimination on the basis of sexual orientation in places of public accommodation.” The Court also ruled that application of the anti-discrimination law “did not violate the Boy Scouts’ First Amendment right of expressive association because Dale’s inclusion would not significantly affect members’ ability to carry out their purposes.” In addition, the Court noted that New

Jersey “has a compelling interest in eliminating the destructive consequences of discrimination from society.”

In an earlier 1998 case, the California Supreme Court ruled in *Curran v. Mount Diablo Council of the Boy Scouts of America* that the Scouts was not a public accommodation, but an “expressive social organization whose primary function is the **inculcation** of values in its youth members...” and therefore, was not subject to anti-discrimination laws. The high courts of two states had reached different conclusions involving similar facts and claims.

The U.S. Supreme Court settled the dispute in 2000. In a 5-4 decision, the Court reversed the ruling in the New Jersey case. Justice William Rehnquist delivered the opinion of the Court and wrote, “This case presents the question whether applying New Jersey’s public accommodations law in this way violates the Boy Scouts’ First Amendment right of expressive association. We hold that it does...The state interests embodied in New Jersey’s

until November 2009 it had never had a black member. Phil Scott, chairman of Idle Hour's board of directors told *The Washington Post*, "We all have the right under the Constitution to meet with people and be with people we want to be with. On the other hand, there are equal protections under the law...There is no right of membership. It's a privilege."

The first black member to join the Idle Hour Country Club was Sam Bowie, a former University of Kentucky basketball star who also played professionally for the New Jersey Nets and the Los Angeles Lakers. In Louisville, Kentucky, two other country clubs,

the Louisville Country Club and the Pendennis Club, accepted their first black members in 2006.

No girls allowed

One of the last bastions of discrimination seems to be the golf course. The Masters Golf Tournament is held

annually at the Augusta National Golf Club in Georgia. While Augusta **integrated** in 1990, women are still not allowed to play there. The PGA (Professional Golfers Association) and the LPGA (Ladies Professional Golfers Association) can only play on courses that meet non-discrimination regulations. The Masters is exempt because it is not a PGA sponsored event and it claims to be a private organization. Attorney Lynn Hecht Schafran asks in the online publication *Dissent Magazine*, "[If Augusta is private], why is the club hosting the Masters? This is a massively public event attended in person by anyone who can buy a ticket...broadcast to the world by...corporate sponsors...[who] network and promote business..."

Competitive golfer Stephanie Wei played for 10 years in the junior and college ranks and is still an avid golfer. In her online blog "Wei under Par," she wrote about gender-biased golf clubs and described a club in the Washington DC area where women are only allowed once a year in the golf shop to buy Christmas presents for their husbands.

While women can be members of the Phoenix Country Club in Arizona, it had always been the club's practice that female members were not allowed to eat in the men's dining room, relegated to a smaller, less desirable ladies dining room. Long-time club member Logan Van Sittert wanted to have breakfast with his wife in the Men's Grill and asked the board to change the club's policies. After being turned down, [>continued on page 8](#)



public accommodations law do not justify such a severe intrusion on the freedom of expressive association." The Court referred to a 1978 position statement by the Boy Scouts which stated, "The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in Scouting are appropriate. We

will continue to select only those who in our judgment meet our standards and qualifications for leadership."

Dissent strongly disagrees

The Court's **dissenting opinion** noted that homosexuality is not mentioned or connected to any Boy Scout value or creed, and is not among any of the principles taught

to Boy Scouts. Its mission, federal charter, scout oaths and handbooks say nothing about homosexuality. Justice John Paul Stevens wrote in the dissent, "There is no shared goal or collective effort to foster a belief about homosexuality at all — let alone one that is significantly burdened by admitting homosexuals..."

Justice Stevens added "The State of New Jersey has decided that people who are open and frank about their sexual orientation are entitled to equal access to employment as schoolteachers, police officers, librarians, athletic coaches, and a host of other jobs filled by citizens who serve as role models for children and adults alike. Dozens of Scout units throughout the State are sponsored by public agencies, such as schools and fire departments that employ such role models. BSA's affiliation with numerous public agencies that comply with New Jersey's law against discrimination cannot be understood to convey any particular message endorsing or condoning the activities of all these people."

— Phyllis Raybin Emert ■



Veil Bans *continued from page 4*

government buildings, on public transportation, in marketplaces, entertainment venues and other public areas. Women who opt to defy the ban may face a fine or be required to take citizenship lessons. Men who force women to wear a veil face a fine and jail time.

Notably, the Constitutional Council in France ruled that the law would not be enforceable in public places of worship, where it may violate religious freedoms.

Other countries

France is not the only country to impose veil bans, and in fact even some Muslim countries have enforced veil restrictions on students. For example, in universities in Syria full-face veils are prohibited because they are viewed as political and potentially destabilizing; and in Turkey, Muslim headscarves are banned in universities because they are viewed as a threat to secular laws.

Laws similar to France's veil ban are reportedly being considered in a number of other European countries, including Belgium, the Netherlands, Spain and some Italian municipalities. Some countries, such as Pakistan, have expressed sharp criticism of the ban. An Associated Press report in October 2010 stated that Al-Qaida leader Osama bin Laden threatened in an (unauthenticated) audio tape to kill French citizens to avenge their country's support of the veil ban and the U.S.-led war in Afghanistan.

What next?

In a democracy, people must "tread very carefully" when it comes to individual rights, noted Yonta Aronow. She questioned where France's veil ban might lead. What about people who wear ski masks to keep warm in the cold? Will that be prohibited next?

Also, she questioned whether a law banning veils is needed in an established democratic society like France, where the government clearly supports women's rights and where some women have openly expressed that they are wearing Islamic veils by their own choice.

"Just because you're wearing a veil does not mean you're a victim of repression," Yonta Aronow said.

Might there be a better way, she asked, to help women who are in situations of oppression, for instance through education and other outreach efforts?

Striking a balance

As with so many legal issues, debates about the burqa come down to a question of balance: freedom versus protection; individual rights versus government interests. Clearly, this is a matter where both sides have strong opinions and where debate is likely to continue for many years to come. ■

The Right to Free Association *continued from page 7*

The Van Sitterts filed a complaint in 2006 with the civil rights division of the Arizona Attorney General's office. They argued that despite being a private club, it was also a public accommodation since it did business and obtained revenue from non-members, and was therefore subject to anti-discrimination laws. The Attorney General agreed with the Van Sitterts and advised the club to comply with the law.

After the club took no action, the Attorney General's office filed a lawsuit against the Phoenix Country Club in September 2008 requiring that it change its policy of separation of the sexes while

eating. Finally in January 2009, the Club agreed to settle the case, and opened the Men's Grill and the recently renovated Women's Grill to all members and agreed not to discriminate on the basis of gender. There is still some discontent at the Phoenix Country Club, however. Another lawsuit was brought against the 110-year-old club in March 2010, because member tournaments were for men only, and a female member was not allowed to play. The woman, Patricia Alston, wanted her dues money back, but the club refused. Alston's lawsuit is still pending. ■

Glossary

dissenting opinion — a statement written by a judge or justice that disagrees with the opinion reached by the majority of his or her colleagues. **inculcation** — forceful repetition. **integrated** — something that has been made available equally to all races. **majority opinion** — a statement written by a judge or justice that reflects the opinion reached by the majority of his or her colleagues. **peremptory challenge** — the right to challenge a juror without a reason. **reversed** — to void or change a decision by a lower court. **secular** — non-religious.