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'Act Normal or Leave': When Law and Culture Collide

Heidi R. Gilchrist

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‘ACT NORMAL OR LEAVE’: WHEN LAW AND CULTURE COLLIDE

Heidi R. Gilchrist *

*I am German when we win, but I am an immigrant when we lose.*¹

-Mesut Ozil, former member of German national soccer team winner of 2014 World Cup

*Nobody has the right to not be offended. That right doesn't exist in any declaration I have ever read. If you are offended it is your problem, and frankly lots of things offend lots of people.*²

-Salman Rushdie

INTRODUCTION	55
I. LEGISLATING “NORMAL”	56
A. Background - Head Scarf Bans.....	56
B. Criminal Dress – The Burqa.....	59
C. The Burkini Debacle	65
II. THE UNITED STATES EQUIVALENT - ‘SAGGY PANTS’	67
III. FORCED ASSIMILATION, INTEGRATION, AND NATIONAL SECURITY	73
IV. DO IMMIGRANTS AND REFUGEES HAVE A DUTY TO INTEGRATE INTO THEIR HOST COUNTRY?.....	75
V. DIVERSITY AND INCLUSION	79
CONCLUSION	82

* Associate Professor of Legal Writing at Brooklyn Law School; Lecturer-in-Law at Columbia Law School. The author would like to thank Heidi Brown, Tuneen Chisholm, Maryellen Fullerton, Susan Hazeldean, Susan Herman, Ted Janger, Zachary Kaufman, Christopher Lund, Dwayne Shivnarain, Milena Sterio, and the participants in the IVR World Congress: Dignity, Diversity, Democracy at the University of Lucerne; the V International Scientific Conference at the University of Deusto, the Protection of Economic, Social, and Cultural Rights in an Age of Exits Conference at the Hague University of Applied Sciences, and the SEALS Conference for their incredibly thoughtful and helpful comments. She would also like to thank Gabriella Manduca for excellent research assistance.

¹ Isaac Stanley-Becker, *Mesut Özil: World cup player says he is “a German when we win” but “an immigrant when we lose,” quits national team*, WASH. POST (July 23, 2018, 4:16 AM), https://www.washingtonpost.com/news/morning-mix/wp/2018/07/23/quitting-national-team-world-cup-player-says-he-is-a-german-when-we-win-but-an-immigrant-when-we-lose/?utm_term=.1cf2dcfc8b5d.

² Robin Banerji, *Sir Salman Rushdie: Pakistan on the Road to Tyranny*, BBC WORLD SERVICE (Sept. 18, 2012), <https://www.bbc.com/news/world-asia-india-19624100#:~:text=%22Nobody%20has%20—the%20right%20to,unattractive%20in%20what%20they%20say.>

INTRODUCTION

“‘There’s something wrong with our country,’ began an open letter to the Dutch people published last year before their election as a full page advertisement in newspapers and promoted on social media platforms.”^{3,4} It griped about those who “abuse our country’s freedom to cause havoc, when they came to our country precisely for that freedom”, and warned them to “act normal or leave.”⁵ Geert Wilders, leader of the anti-Muslim Freedom Party, did not author the letter; rather, it was written by Mark Rutte, leader of the free-thinking Liberals “and prime minister of a country that presents itself as one of the most tolerant in the world.”⁶

In this article, I examine instances when governments legislate what is “normal” in terms of dress. In Europe, Belgium and France ban the wearing of the burqa⁷ in public with laws that criminalize the covering of one’s face in public. In both countries, women face monetary penalties for wearing the burqa in public and in Belgium, in repetitive instances, a woman can even go to jail for wearing the burqa in public. Notably, the European Court of Human Rights (“ECHR”) has upheld all of these laws under the justification of ‘living together.’ I analyze their opinions and explore the idea that they have created a ‘right not to be offended’ for the majority population. Last year, the United Nations Human Rights Committee (“UNHRC”) found that these bans violate international law. However, since then, further bans have gone into effect, such as the one in the Netherlands banning ‘face coverings’ in public buildings or transport. These bans, when viewed as forced assimilation, do not help with integration and actually have the reverse effect of making immigrant communities feel unwelcome. On the other hand, when viewed as ‘Muslim bans’⁸ – telling Muslims to ‘get out,’ – unfortunately, they may be more successful in their aim. The COVID-19 pandemic has highlighted this injustice because even when governments, including France, have required face coverings due to expert’s guidance that covering your face will help slow the virus, burqas have remained banned in France.⁹

This article is the first to compare these laws with local laws in the United States that prohibit ‘saggy pants’ as another example of the majority legislating and criminalizing dress for a minority population. Although most ‘saggy pants’ laws come with monetary fines, a few also involve possible jail time of up to six months.

³ *The Netherlands’ Election is This Year’s First Test for Europe’s Populists*, ECONOMIST (Feb. 11, 2017), <https://www.economist.com/news/europe/21716643-geert-wilders-dragging-all-dutch-politics-nationalist-direction-netherlands>.

⁴ *Read Mark’s Letter Here*, VVD (Jan. 22, 2017), <https://www.vvd.nl/nieuws/lees-hier-de-brief-van-mark/>.

⁵ *The Netherlands’ Election is This Year’s First Test for Europe’s Populists*, ECONOMIST (Feb. 11, 2017).

⁶ *Id.*

⁷ I use the term burqa referring generally to loose clothing Muslim women wear that cover their bodies and most of their face except for their eyes. It is also referred to as a niqab.

⁸ Some of the laws examined also apply to Sikh men wearing Turbans or Jewish men wearing yamakas, but I focus mostly on the laws prohibiting face coverings which only apply to Muslim women.

⁹ James McAuley, *France Mandates Masks to Control the Coronavirus. Burqas Remain Banned.*, WASH. POST (May 10, 2020, 8:00 AM), https://www.washingtonpost.com/world/europe/france-face-masks-coronavirus/2020/05/09/6fbd50fc-8ae6-11ea-80df-d24b35a568ae_story.html.

Critically, these laws have become a vehicle for racially targeted law enforcement, arming law enforcement officials with the legitimacy to target mostly young African American men who wear ‘saggy pants’ by stopping them at anytime.

While I argue that legislating ‘normal’ dress – which generally means whatever the majority population prefers – is wrong, and violates international law (especially when there are criminal sanctions)¹⁰, I also raise the question of what duties newcomers to a country have to integrate or conform to the norms of their host country. I use the United Nation’s Global Compact for Safe, Orderly and Regular Migration as a starting point for this discussion. Additionally, I look at the role of popular culture and its role in bringing customs into the mainstream, such as the burkini appearing on the cover of *Sports Illustrated*. I also explore how fashion can influence these discussions in interesting ways. *Vogue* has said that the headscarf is making a comeback. Thus, if you are wearing a headscarf for fashion, you should be able to wear it in a French school prohibiting ‘conspicuous religious symbols,’ but not to your Abecrombie & Fitch interview, as it would no longer be a religious accommodation under Title VII.

In Section I, I examine the idea of legislating what ‘normal’ dress is in Europe. For background, I first look at laws banning head scarves, or ‘conspicuous religious symbols,’ in schools. I then look specifically at criminal laws that regulate dress in Europe. The laws all center around ‘burqa bans’ or laws that criminalize covering one’s face in public. These laws have been upheld in the European Court of Human Rights under the idea of ‘living together’ and I question whether the Court created a new doctrine of a right not to be offended. Although the UN Human Rights Committee has recently ruled these laws violate international law – specifically Articles 18 & 26 of the International Covenant on Civil and Political Rights (ICCPR) – the Netherlands had its own burqa ban go in effect in August, 2019. Choices of dress and fashion are incredibly personal decisions and tied with a person’s identity and, in some cases, religion. Criminalizing dress takes ‘act normal or get out’ to a whole new level.

In Section II, I explore the United States’ equivalent – local laws criminalizing ‘saggy pants.’ In Section III, I argue that criminalizing dress, aside from simply being wrong, may create a national security threat. In Section IV, I raise the question of whether immigrants and refugees do have some duty to integrate into their host country. Finally, in Section V, I explore how popular culture can play a role in helping the integration process and bring about the cultural understanding that is necessary to make such integration successful.

I. LEGISLATING “NORMAL”

A. *Background - Head Scarf Bans*

Although the focus of this article is on laws that criminalize dress, laws in Europe and other places, including Canada, that restrict girls or women from wearing ‘religious symbols’ also limit a Muslim woman’s or girl’s ability to attend school or work. When Muslim women or girls who choose to wear a hijab are unable to attend

¹⁰ Laws mandating masks for public health or requiring identity checks for reasons of national security, such as at airports or to obtain a driver’s license, are exceptions.

school or work, they are unable to engage with others in places where vital integration takes place. In 2004, France prohibited wearing “conspicuous religious symbols” in French public schools.¹¹ Muslim and Sikh students who went to school wearing a headscarf or turban were expelled from school for violating the law. When the students then sought relief in the ECHR, the Court dismissed the case explaining that the students could take a “correspondence course.”¹² In its reasoning, the Court emphasized that the expulsion could be justified as fulfilling the legitimate aim of protecting the rights and freedoms of others and maintaining public order.¹³ School is a key place for integration and learning to accept others. Expelling students for wearing a headscarf or turban indicates to those students to act normal [like us] or get out.

The ECHR has accepted most restrictions on Muslim attire as part of keeping ‘neutrality’ in schools; however, in *Lautsi*, the same court allowed a crucifix on the wall in a school as a passive symbol. In *Dahlab v. Switzerland*, a teacher was not allowed to continue teaching wearing a head scarf.¹⁴ The ECHR accepted that “it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children.”¹⁵ The Court worried that as the students were between four and eight, they might be easily influenced by the head scarf as they are impressionable:

In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.¹⁶

The fear of Islam and its influence is palpable. If the same Court had not also decided *Lautsi*, it might have appeared that the Court accepted absolute religious neutrality in schools.

However, in *Lautsi v. Italy*, the ECHR allowed a crucifix to remain on a wall in a school. The Court emphasized that “a crucifix on a wall [was] an essentially passive symbol” and therefore still allowed under the principle of “neutrality. . . . It cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities.”¹⁷ The Court did note that the school did not forbid students from wearing “Islamic headscarves or other symbols or apparel having a religious connotation.”¹⁸

¹¹ Code de l'éducation [C. éduc.] [Education Code] art L141-5-1 (Fr.).

¹² *Aktas v. France*, app. no. 43563/08, CE:ECHR:2009:0630DEC004356308.

¹³ *Id.*

¹⁴ *Dahlab v. Switzerland*, app. no. 42393/98, CE:ECHR:2001:0215DEC004239398.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Lautsi v. Italy*, app. no. 30814/06, CE:ECHR:2011:0318JUD003081406, ¶ 72.

¹⁸ *Id.* ¶ 74.

Furthermore, although the ECHR has found education, including higher education,¹⁹ to be a human right²⁰, the Court allowed a ban on wearing an Islamic headscarf in an institution of higher learning even though it meant that a student wearing a headscarf would no longer be able to attend school.²¹ In *Sahin v. Turkey*, the Court found that the ban on wearing an Islamic headscarf in an institution of higher education pursued the “legitimate aims of protecting the rights and freedoms of others and maintaining public order. . . . The obvious purpose of the restriction was to preserve the secular character of education institutions.”²² As a result, a Muslim woman who wears a head scarf can no longer attend medical school in Turkey. Notably, the court does not explain how exactly wearing a veil impinges on the rights and freedoms of others, nor does it explain how it would disrupt public order.

The court’s problematic reasoning is nicely captured in the only dissenting opinion by a female judge, Judge Tulkens. In her dissent, she points out that using “sexual equality” to prohibit a woman from following a practice that “in the absence of proof to the contrary, she must be taken to have freely adopted” was a poor justification.²³ She emphasized that “[e]quality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them. ‘Paternalism’ of this sort runs counter to the case-law of the Court, which has developed a real right to personal autonomy on the basis of Article 8.”²⁴ She then explained how, by excluding the Muslim student in the name of secularism and equality, “the majority have accepted her exclusion from precisely the type of liberated environment in which the true meaning of these values can take shape and develop. University affords practical access to knowledge that is free and independent of all authority.” Bans may only force women further into exclusion, “[a]s we are all aware, intolerance breeds intolerance.”²⁵

And the issue of the veil keeps coming up. The Quebec government recently passed a bill that bars public employees, including public school teachers, judges, and police officers, from wearing any religious symbols including Muslim head scarves while at work.²⁶ Unsurprisingly, this law would mostly affect Muslim women who wear the hijab.²⁷ As Gerard Bouchard, a historian and sociologist pointed out, “[a]n

¹⁹ See Heidi Gilchrist, *Higher Education is a Human Right*, 17 WASH. U. GLOB. STUD. L. REV. 645, 657–58 (2018).

²⁰ See European Convention on Human Rights, protocol no. 1, art. 2, Nov. 4, 1960 [hereinafter ECHR] (“No person shall be denied the right to education.”).

²¹ See *Sahin v. Turkey*, app. no. 44774/98, CE:ECHR:2005:1110JUD004477498, ¶ 122–23 (finding a ban on head scarves in schools to not violate the ECHR).

²² *Id.* ¶ 158.

²³ Dissenting Opinion, *Sahin*, CE:ECHR:2005:1110JUD004477498, ¶ 12.

²⁴ *Id.*

²⁵ *Id.* ¶ 19.

²⁶ See *Quebec Passes Religious Symbols Secularism Bill*, BBC NEWS (June 17, 2019), <https://www.bbc.com/news/world-us-canada-48477086>; Dan Bilefsky, *Quebec Proposes Bill Barring Public Employees from Wearing Head Scarves at Work*, N.Y. TIMES (Mar. 28, 2019), <https://www.nytimes.com/2019/03/28/world/canada/quebec-head-scarves.html>.

²⁷ See Selena Ross, *Quebec Ban on Religious Symbols Would Fall Heavily on Hijab-Wearing Teachers*, WASH. POST (Apr. 28, 2019, 5:00 AM) https://www.washingtonpost.com/world/the-americas/quebec-ban-on-religious-symbols-would-fall-heavily-on-hijab-wearing-teachers/2019/04/26/44cfd560-5633-11e9-aa83-504f086bf5d6_story.html?utm_term=.1621f9905802.

insecure majority is not the ideal bedfellow for minorities.”²⁸ Although current public sector workers would get an exemption, they would need to stay in the same position. Therefore, a teacher would not be able to change schools or be promoted if she decides to continue wearing her hijab.²⁹ Consequently, women will be denied employment or possible promotions. In the words of Maha Kassef, a teacher from Quebec, “I’m still a teacher who has to teach my kids that you can be anything.” And another teacher, Naqvi, questioned “[w]hat message does that send to my students? We’re supposed to teach them to stand up for their beliefs.”³⁰

Employment³¹ and schools are key arenas for integration and women or girls with hijabs can legally be banned from both in Europe and increasingly beyond. Andrea Pin has examined case-law from the Court of Justice of the European Union (“CJEU”) that has also legitimized workplace bans on headscarves. And while states can comply with ECHR rulings, they must comply with CJEU rulings.³² Andrea notes that by “legitimizing a business policy of neutrality[] and justifying religious bans in the workplace, the CJEU gave favor to the most rigid political philosophy of secularism”³³ and that the court has “stricken a blow to the possibility of integrating Islam in the field where most social relationships start, deepen, and broaden: the workplace.”³⁴

B. *Criminal Dress – The Burqa*

Criminalizing Muslim women’s dress takes ‘act normal or get out’ to a new level. Laws have been enacted in countries across Europe, including France, Belgium, Austria and Denmark, that ban “garments that hide the face in public.” They are generally known as ‘burqa bans,’ but most are written more broadly to appear facially non-discriminatory. In order to appear neutral, law enforcement officials in countries which have ‘burqa bans’ have made highly questionable arrests utilizing such laws, which demonstrate how ill-conceived these laws are and how difficult enforcement really is. In Austria, for example, in the first year since the enactment of a ‘burqa ban,’ a man was fined for wearing a shark costume, another for wearing a rabbit costume, and Asian tourists were stopped for wearing anti-pollution masks, as well as a leukemia patient wearing a mask to protect his immune system.³⁵ Most of the laws come with fines of approximately 150 Euros. The powerful effect of these criminal laws on Muslim women who wear the veil is evident in the words of one woman,

²⁸ Bilefsky, *supra* note 24.

²⁹ See Dan Bilefsky, *She Wears a Head Scarf. Is Quebec Derailing Her Career?*, N.Y. TIMES (Apr. 2, 2019), <https://www.nytimes.com/2019/04/02/world/canada/quebec-montreal-head-scarf-religion.html>.

³⁰ Ross, *supra* note 25.

³¹ See Elizabeth A. Clark, *Headscarf Bans, Equal Treatment, and Minority Integration in the Workplace*, 93 NOTRE DAME L. REV. ONLINE 69, 69 (2018) (“One significant arena for such integration is the workplace, where immigrants can interact on a regular basis with citizens and longer-term residents and learn local, social, and cultural norms.”).

³² See Andrea Pin, *Is There a Place for Islam in the West? Adjudicating the Muslim Headscarf in Europe and the United States*, 93 NOTRE DAME L. REV. ONLINE 35, 39 (2017).

³³ *Id.* at 41–42.

³⁴ *Id.* at 43.

³⁵ Sigal Samuel, *Banning Muslim Veils Tends to Backfire – Why Do Countries Keep Doing It?*, ATLANTIC (Aug. 3, 2018), <https://www.theatlantic.com/international/archive/2018/08/denmark-burqa-veil-ban/566630/>.

Sabina from Copenhagen, who declined to give her last name out of fear for her safety: “I haven’t been out all day because I really have to consider if it’s worth going out and worth me getting a fine, because I’m at risk of that now—every time I step out of my front door, I’m a criminal.”³⁶ And in Belgium, a woman may even go to jail for repetitive offenses. The number of women who these laws target may be small, but it has a huge impact on their life – their choice of dress, based on religious beliefs or culture, may expose them to criminal sanctions.

Before the French law was enacted, then President of France Sarkozy announced that burqas were not welcome in France as they were offensive to their ideas of freedom and women’s rights.

The problem of the burqa is not a religious problem, it’s a problem of liberty and women’s dignity. It’s not a religious symbol, but a sign of subservience and debasement. I want to say solemnly, the burqa is not welcome in France. In our country, we can’t accept women prisoners behind a screen, cut off from all social life, deprived of all identity. That’s not our idea of freedom.³⁷

The idea of a right not to be offended emerges from his words and is echoed in the words of the ECHR. As Sarkozy announced, women in a burqa are offensive to French or Western ideals.

Despite being a human rights court,³⁸ the ECHR has consistently upheld these bans using the state’s justifications of ‘living together’ and the ‘protection of the rights and freedoms of others.’ Sarkozy and the ECHR use the same ideas of identity, women’s rights, and dignity that the very women who opt to wear a veil use. But where the veiled women also use the language of religious or cultural rights and personal choice, the majority uses the language of neutrality and ‘living together,’ which can equate to a right not to be offended and a message to ‘act normal,’ ‘be like us, or get out,’ or perhaps even ‘you are not welcome here at all.’ The discrimination has been highlighted by the COVID-19 pandemic as the burqa is still banned in France, even as face coverings are mandated by the government to control the spread of the virus.³⁹

France enacted the first ‘burqa ban’ in 2010 with a law that made it a criminal offense to cover one’s face in public. The law reads, “No one may, in public places, wear clothing that is designed to conceal the face.”⁴⁰ The punishment is a fine of 150

³⁶ *Id.*

³⁷ Angelique Chrisafis, *Nicolas Sarkozy Says Islamic Veils Are Not Welcome in France*, GUARDIAN (June 22, 2009, 2:35 PM), <https://www.theguardian.com/world/2009/jun/22/islamic-veils-sarkozy-speech-france>.

³⁸ The ECHR was established in 1959. It rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights as to the 47 Member States of the Council of Europe that have ratified the Convention. *See The Court in Brief*, EUROPEAN COURT OF HUMAN RIGHTS, https://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf (last visited Sept. 8, 2020).

³⁹ McAuley, *supra* note 7.

⁴⁰ Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l’espace public [Law 2010-1192 of October 11, 2010 Prohibiting the Concealing of the Face in Public Spaces], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344; S.A.S. v. France, app. no. 43835/11, CE:ECHR:2014:0701JUD004383511, ¶ 28.

Euros, and/or the obligation to follow a citizenship course.⁴¹ The law also criminalized, “[a]ny person who forces one or more other persons to conceal their face, by threat, duress, coercion, abuse of authority or of office, on account of their gender, shall be liable to imprisonment for one year and a fine of 30,000 euros.”⁴² Additionally, “[w]here the offence is committed against a minor, such punishment shall be increased to two years’ imprisonment and a fine of 60,000 euros.”⁴³ Exceptions to the law include “if the clothing is prescribed or authorised by primary or secondary legislation, if it is justified for health or occupational reasons, or if it is worn in the context of sports, festivities or artistic or traditional events.”⁴⁴

A French citizen who said she voluntarily wore the burqa, and acknowledged the need to undergo necessary identity checks, challenged the law as a violation of her right to private life, freedom of religion, freedom of expression and her right not to be discriminated against. However, the ECHR in that case, *S.A.S. v. France*, upheld the French law under the theory that “the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier.”⁴⁵ Although the ECHR found that France was justified in creating the law “as an element of the ‘protection of the rights and freedoms of others’” and as a guarantee of the conditions of “living together,”⁴⁶ it never explained in its opinion what that meant or entailed. Accordingly, I question whether the court created a right not to be offended⁴⁷ – others are offended by the burqa, so they want to ban it. The court stated that “[p]luralism, tolerance and broadmindedness are hallmarks of a ‘democratic society’”⁴⁸ and continued,

The Court takes into account the respondent State’s point that the face plays an important role in social interaction. It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question.⁴⁹

As the dissent pointed out, “the criminalization of [wearing] a full-face veil is a measure which is disproportionate to the aim of protecting the idea of ‘living together’ – an aim which cannot readily be reconciled with the Convention’s restrictive catalogue of grounds for interference with basic human rights.”⁵⁰ Making someone a

⁴¹ See *S.A.S.*, CE:ECHR:2014:0701JUD004383511, ¶ 28.

⁴² *Id.* ¶ 29.

⁴³ *Id.*

⁴⁴ *Id.* ¶ 28.

⁴⁵ *Id.* ¶ 122.

⁴⁶ *Id.* ¶ 157.

⁴⁷ Others have examined a “right not to be offended in one’s religious feelings” and the right to free speech, especially on college campuses. Ilias Trispiotis, *The Duty to Respect Religious Feelings: Insights From European Human Rights Law*, 19 COLUM. J. EUR. L. 499, 548–50 (2013); see also Azhar Majeed, *Defying the Constitution the Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 GEO. J.L. & PUB. POL’Y 481 (2009).

⁴⁸ *S.A.S.*, CE:ECHR:2014:0701JUD004383511, ¶ 128.

⁴⁹ *Id.* ¶ 122.

⁵⁰ Dissenting Opinion, *S.A.S.*, CE:ECHR:2014:0701JUD004383511, ¶ 25.

criminal because of a choice of dress based on religion and culture does not promote ‘living together’ or integration, even if one can argue that wearing a burqa may not be the best way to integrate into a new society. But integration takes time and understanding on both sides, not simply making newcomers conform.

A chorus of voices after the decision in *S.A.S. v. France*, including that of Eva Brems, have observed that the ECHR “tolerated highly paternalistic claims of control by authorities over social behaviour in the public sphere and legitimized a dominant majority group’s monopolizing of the entire public sphere and using the criminal law to force expressions of minority identity to conform to majority preference.”⁵¹ In addition, Torbisco-Casals explored the judges’ own biases as part of the dominant culture “automatically privileging the conception and forms of interpersonal exchange that are accepted as ‘normal’ and as an expression of ‘tolerance and broadmindedness’ by the dominant culture to which the judges themselves belong.”⁵² Hakeem Yusuf also argued that the decision is retrogressive jurisprudence for women and undermines the socio-cultural rights and freedoms of minorities.⁵³

The bans keep coming and, in the Belgium case, getting worse with the added threat of jail time for wearing a burqa. Belgium’s law, similar to France’s, prohibits the wearing of any clothing entirely or substantially concealing the face and it came into force on 23 July 2011.⁵⁴ The ECHR again upheld the ban under the theory of the “margin of appreciation” that “national authorities have direct democratic legitimation in so far as the protection of human rights is concerned” and are “better placed than an international court to evaluate local needs and conditions.”⁵⁵ The court found that the ban could then “be regarded as ‘necessary in a democratic society.’”⁵⁶ Remember women may go to prison for violating this law for one to seven days in repetitive cases.⁵⁷ In a concurring opinion, the court also noted that “the core subject of the protections guaranteed by the Convention is the individual human person as reflected in his or her human dignity. At the same time, some restrictions on a person’s individual rights are a natural precondition for the harmonious co-existence of a group

⁵¹ Eva Brems, *SAS v France: A Reality Check*, 25 NOTTINGHAM L.J. 58, 71 (2016); see also Brett G. Scharffs, *Islam and Religious Freedom: The Experience of Religious Majorities and Minorities*, 93 NOTRE DAME L. REV. ONLINE 78, 98 (2018) (“I have argued that the experience with religious freedom by a religious minority can affect how coreligionists view religious freedom in a place where that religion is a majority. . . . The experience of Muslims in countries where they are a minority, especially in Europe, does not bode well for the prospect of European Muslims becoming a force for advocating the benefits of religious freedom that will be persuasive to their coreligionists in places where Muslims represent a majority.”); Lucy Vickers, *Religious Freedom: Expressing Religion, Attire, and Public Spaces*, 22 J.L. & POL’Y 591, 602 (2014) (“It is clear that policies which do not accommodate religious differences ensure there is no equal participation in public life; instead there is exclusion. Thus, if we exclude the personal from the public sphere, we exclude the person as well.”).

⁵² Neus Torbisco-Casals, *Multiculturalism, Identity Claims, and Human Rights: From Politics to Courts*, 10 L. & ETHICS HUM. RTS. 367, 398 (2016).

⁵³ See Hakeem Yusuf, *S.A.S v France: Supporting “Living Together” or Forced Assimilation?*, 3 INT’L HUM. RTS. L. REV. 277, 301–02 (2014) (comparing the French law to Chinese policies forcing assimilation on ethnic minorities).

⁵⁴ *Dakir v. Belgium*, app. no. 4619/12, CE:ECHR:2017:0711JUD000461912, ¶ 16.

⁵⁵ *Id.* ¶ 54.

⁵⁶ *Id.* ¶ 61.

⁵⁷ See Concurring Opinion, *Dakir*, CE:ECHR:2017:0711JUD000461912, ¶ 10.

of human beings in a democratic society.”⁵⁸ Once again, the court uses the language of dignity which can give wide latitude to judges.⁵⁹

In practice, as few women actually wear full face veils that are subject to the bans, even in *S.A.S.* the woman who brought the petition only sometimes wore it such as during Ramadan,⁶⁰ some argue that it is a symbol⁶¹ and can be seen as a warning to get out. Professor Michaels argues that banning an article of clothing “merely to establish a way of living together, is the opposite of liberal.”⁶²

Face-veil bans stand in tension with the Western secular and liberal state. Of course, neither religious freedom, nor general freedom, are granted without limits--in Europe or in the United States. The state cannot tolerate every act merely because it is religious, and the state feels justified to restrict liberty where its own preservation is at stake. But the ban on face veils appears implausible because it is so purely symbolic, so clearly ineffective at fending off a real danger. Even if political Islam is viewed as a real risk for the Western state, that danger lies with terrorists with bombs and preachers with hate speech, not with women who wear a veil.⁶³

As for the argument that the veil violates women’s rights, Professor Sital Kalantry points out that “policymakers in migrant-receiving countries should be open to the possibility that even if they perceive that a practice is oppressive to women in the foreign country, they should not automatically assume that the practice undermines women’s rights in the migrant-receiving country.”⁶⁴

Proponents of burqa bans argue, as seen in the case-law of the ECHR, that they will promote integration, or public safety - not sure I fully understand this argument - or that burqas are inconsistent with national values like gender equality. There are ideas of identity and dignity, as well as women’s rights, on both sides. However, the ECHR, a regional court, has consistently upheld these bans in the face of arguments about women’s rights, individual choice, discrimination, minority rights and the right to religion and culture. The ECHR has given each country significant leeway in determining what it needs to ensure public safety and social cohesion under their theory of “margin of appreciation” even if it tramples on the rights of one minority group.

Recently, after a woman was convicted in France for wearing a *niqab* and took her case to the UN’s Human Rights Committee (HRC), the HRC concluded that the

⁵⁸ *Id.* ¶ 13.

⁵⁹ See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655, 724 (2008) (“Rather than providing substantive meaning, a significant use [of the word dignity] is institutional: providing a language in which judges can appear to justify how they deal with issues such as the weight of rights, the domestication and contextualization of rights, and the generation of new or more extensive rights.”).

⁶⁰ *S.A.S.*, CE:ECHR:2014:0701JUD004383511, ¶ 12.

⁶¹ See Ralf Michaels, *Banning Burqas: The Perspective of Postsecular Comparative Law*, 28 DUKE J. COMP. & INT’L L. 213, 243–44 (2018).

⁶² *Id.* at 244.

⁶³ *Id.* at 242.

⁶⁴ Sital Kalantry, *The French Veil Ban: A Transnational Legal Feminist Approach*, 46 U. BAL. L. REV. 201, 202 (2017).

criminalization of wearing the niqab violated articles 18 and 26 of the Covenant on Civil and Political Rights.⁶⁵ Article 18 guarantees the “freedom of thought, conscience and religion” and article 26 guarantees “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”⁶⁶ In its opinion, the HRC noted that:

Even assuming that the concept of living together could be considered a “legitimate objective” in the sense of article 18 (3), the Committee observes that the State party has failed to demonstrate that the criminal ban on certain means of covering of the face in public, which constitutes a significant restriction of the rights and freedoms of the author as a Muslim woman who wears the full-face veil, is proportionate to that aim, or that it is the least restrictive means that is protective of religion or belief.⁶⁷

As Yuval Shany, the Chair of the Committee, said: “the decisions represented the position of the Committee that a general criminal ban did not allow for a reasonable balance between public interests and individual rights.”⁶⁸ Once again, it seems that the ‘public interest’ refers to the majority’s interest, their apparent right not to be offended by a particular type of clothing. The difference between the ECHR and the HCR reflects the regional nature of the ECHR and its predisposition to the norms and ideals of the region it represents.

Even though one of the claims is that the laws were made to ‘protect’ women, ironically, the women themselves were not consulted. In the words of one Belgium woman, “[t]hey have not asked for our advice . . . they have not asked our opinion, they have not asked the proposals we could make on this, they have forbidden us.”⁶⁹ And it is women who are being prosecuted under the burqa bans.⁷⁰ The argument that the fines are minimal, 150 Euros, are disingenuous especially if they tend to affect a poorer population. Imagine getting fined for what you are wearing – stilettos, for example, somebody probably finds those offensive.

Telling people not to wear a headscarf or burqa, and prosecuting them for doing so, is similar to the Saudi’s Commission for the Promotion of Virtue and Prevention of Vice that have fined and arrested women for “indecent” dress.⁷¹ The Commission for the Promotion of Virtue and Prevention of Vice is basically a religious police that

⁶⁵ Hum. Rts. Comm., Views Adopted by the Comm. Under Article 5 (4) of the Optional Protocol, Concerning Commc’n No. 2747/2016, U.N. Doc. CCPR/C/123/D/2747/2016, ¶ 9 (2018) [hereinafter *Shany*].

⁶⁶ International Covenant on Civil and Political Rights, art. 18, 26, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁶⁷ *Shany*, supra note 64, ¶ 8.11.

⁶⁸ Press Release, Human Rights Committee, France: Banning the Niqab Violated Two Muslim Women’s Freedom of Religion - UN Experts (Oct. 23, 2018).

⁶⁹ Maleiha Malik, *The Return of a Persecuting Society? Criminalizing Facial Veils in Europe*, in *THE EXPERIENCES OF FACE VEIL WEARERS IN EUROPE AND THE LAW* 232, 248 (Eva Brems ed., 2014).

⁷⁰ See Steven Erlanger & Elvire Camus, *In a Ban, a Measure of European Tolerance*, N.Y. TIMES (Sept. 1, 2012), <https://www.nytimes.com/2012/09/02/world/europe/tolerance-eases-impact-of-french-ban-on-full-face-veils.html>.

⁷¹ See Matthew Weaver & Mona Mahmood, *Saudi Police Question Woman Accused of Wearing “Indecent” Clothing*, GUARDIAN (July 18, 2017, 10:55 AM), <https://www.theguardian.com/world/2017/jul/18/saudi-arabia-video-of-indecently-dressed-woman-at-heritage-site-prompts-investigation>.

patrols public spaces in Saudi Arabia to enforce bans on alcohol, music, and the mixing of unrelated men and women.⁷²

These 'religious policemen' also impose strict modesty requirements on women's dress, including the covering of the entire body and face.⁷³ They gained the attention of human rights groups for beating women who did not comply with the dress code, along with other human rights violations. In 2018, the young Crown Prince Muhammad bin Salman announced the religious police would no longer have power to enforce public morality, although they will still report offenses to the police.⁷⁴ However, the imagery is striking – women being prosecuted in one country for wearing too much clothing, and in another for wearing too little.

C. *The Burkini Debacle*

After terror attacks in France, Muslim women were the target of absurd legislation prohibiting them from wearing 'burkinis' on the beach. However, after 25 towns and cities imposed "burkini bans" that prohibited women from wearing full-bodied bathingsuits or dresses on the beach, the Conseil d'Etat, France's highest administrative court overturned the bans after intense international scrutiny and outrage.⁷⁵ The court found that the burkini ban insulted "fundamental freedoms," including "the freedom to come and go, the freedom of conscience and personal liberty."⁷⁶

It is nearly impossible to draft a law prohibiting burkinis on the beach in a way which does not sound ludicrous, indicating how problematic the law itself is. In Villeneuve-Loubet, a small town on the Côte d'Azur, about 17 km away from Nice, the mayor of the commune modified the administrative regulations regulating the use of public beaches on the commune's territory with a decree adopted on the 5th August 2016. The decree stated that

the access to beaches is prohibited on the territory of the commune, from the 15th of June till the 15th of September, to anyone not wearing adequate clothes in accordance with the usual standards of behaviour and with the principle of secularism, as well as respecting the hygiene and safety rules governing the use of public sea waters. It is strictly prohibited to wear, while bathing on the territory of the

⁷² *Saudi Shura Council to Vote on Curbing Autonomy of Morality Police*, REUTERS (Sept. 18, 2017, 1:41 PM), <https://af.reuters.com/article/worldNews/idAFKCN1BT294>.

⁷³ *Id.*

⁷⁴ *Radical reforms in Saudi Arabia are changing the Gulf and the Arab World*, THE ECONOMIST (June 21, 2018), <https://www.economist.com/special-report/2018/06/21/radical-reforms-in-saudi-arabia-are-changing-the-gulf-and-the-arab-world>.

⁷⁵ Conseil d'Etat [CE] [highest administrative court] ordonnance burkini, Aug. 26, 2016, n°402742, 402777

<https://www.doctrine.fr/d/CE/2016/CETATEXT000033070536>; James McAuley, *France's top administrative court overturns burkini ban*, WASH POST (Aug. 26, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/08/26/frances-top-administrative-court-overturns-burkini-ban/?utm_term=.fac383b67bed.

⁷⁶ Conseil d'Etat [CE] [highest administrative court] ordonnance burkini, Aug. 26, 2016, n°402742, 402777.

commune, clothing whose connotation violates the above-mentioned principles.⁷⁷

After the terror attack in Nice that killed 85 people, Cannes enacted a law that anyone wearing swimwear deemed not to “respect good customs and secularism” would be barred from visiting the resort’s beaches or swimming.⁷⁸ In explaining the law, the mayor said he wanted to prohibit “beachwear ostentatiously showing a religious affiliation while France and places of religious significance are the target of terror attacks” to avoid “trouble to public order.”⁷⁹

In addition to being almost impossible to draft, there are real problems with enforcing these laws telling women what they can and cannot wear on a beach. As a result of these laws, women were arrested and fined⁸⁰ for wearing too much clothing on a beach. These problems dramatically came to life when photos surfaced of a woman being forced to undress by armed police with her daughter crying next to her.⁸¹ The similarities to the Saudi Religious police are especially resonant here.

The prevalence of burkini bans on the beach and the lack of any sound justifications for them has been commented on by other scholars. Often, the reasons behind the bans appear to be invented on the spot – ‘if neutrality does not work, let’s invoke hygiene.’⁸² Unfortunately, as a few academics have noted, “[i]t seems that faced with Muslim women’s religious dress, banning has become a default option, rather than an exceptional measure that requires sound reasons.”⁸³

The deputy mayor of Nice has repeatedly referred to the “covering of women on the beach — whether in a burkini or a large T-shirt, pants and hijab — as a “provocation,” suggesting a challenge to the French order.”⁸⁴ Some mayors have also said they would still enforce the bans even after the high court ruling overturning them.⁸⁵ One mayor summed his position up as follows: “if you don’t want to live the way we do, don’t come. . . . You have to behave in the way that people behave in the

⁷⁷ Philippe Cossalter, *The French burkini case: “Uncover this breast that I cannot not behold,”* Revue Generale du Droit (Aug. 26, 2016), <https://www.revuegeneraledudroit.eu/blog/2016/09/05/the-french-burkini-case-uncover-this-breast-that-i-cannot-not-behold/>.

⁷⁸ Lizzie Dearden, *Burkini ban: Why is France arresting Muslim women for wearing full-body swimwear and why are people so angry?* INDEPENDENT (Aug. 24, 2016), <https://www.independent.co.uk/news/world/europe/burkini-ban-why-is-france-arresting-muslim-women-for-wearing-full-body-swimwear-and-why-are-people-a7207971.html>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Harry Cockburn, *Burkini ban: Armed police force woman to remove swimwear on Nice beach*, INDEPENDENT (Aug. 24, 2016), <https://www.independent.co.uk/news/world/europe/burkini-swimwear-ban-france-nice-armed-police-hijab-muslim-a7206776.html>.

⁸² Eva Brems et al., *‘Burkini’ Bans in Belgian Municipal Swimming Pools: Banning As a Default Option*, 36 NETH. Q. OF HUM. RTS. 270, 288 (2018).

⁸³ *Id.*

⁸⁴ Alissa Rubin, *From Bikinis to Burkis, Regulating What Women Wear*, N.Y. TIMES (Aug. 27, 2016), <https://www.nytimes.com/2016/08/28/world/europe/france-burkini-bikini-ban.html>.

⁸⁵ Sheena McKenzie & Antonia Mortensen, *French mayor on burkini ban: They must accept our way of life*, CNN (Aug. 30, 2016), <https://www.cnn.com/2016/08/30/europe/french-mayor-cogolin-burkini-ban/index.html>.

country that accepted you, and that is it.”⁸⁶ Once again, the message is clear – be like us, or get out, or do not come at all.

Others have pointed out that nuns are often seen on Italian beaches in their habit, and other places in the world, and so these bans are particularly odd.⁸⁷ “Today the French seem to believe as strongly that such undress is mandatory as Italy, under the Vatican’s influence, felt it was necessary to hide women’s bodies,” said Hanane Karimi, a graduate student of sociology at the University of Strasbourg.⁸⁸ She is the leader of a feminist Muslim collective that wants mosques in France to make more space for women at prayers and to be more respectful of their involvement in religious affairs.

In Algeria, in contrast, there is a ‘bikini revolution’ where women are trying to make wearing swimwear, such as a bikini, socially acceptable on a beach.⁸⁹ Currently, although there is no law against wearing a bikini, there is immense social pressure not to wear them⁹⁰ or any other ‘immodest’ dress. It is 2020, but again women in some parts of the world are being punished for wearing too much clothes, while others are still being punished for wearing too little.

II. THE UNITED STATES EQUIVALENT - ‘SAGGY PANTS’

The United States does not have laws criminalizing the burqa, but instead ‘saggy pants.’ These laws are wrong and violate both international and Constitutional law. Local laws in Louisiana, South Carolina, Mississippi, Georgia, Florida, Alabama, outlaw ‘saggy pants.’ Most of the laws are fairly similar banning “indecent exposure of that person or that person’s undergarments due to sagging pants.”⁹¹ Others have tried to justify their laws, to humorous effect:

Wearing pants or skirts more than three inches below the hip bone is hazardous, both to the person wearing the garment and to the general public, as walking when pants are three or more inches below the hip decreases the length of the stride and thereby increases the likelihood of tripping and falling and injuring oneself or others in the process.⁹²

One is reminded of comments by scholars on the justifications for the burkini ban which seems to have been “made up on the spot.”⁹³ Many of these ordinances come with penalties of \$100-\$600, and/or community service, but some involve possible jail

⁸⁶ *Id.*

⁸⁷ Sarah Bond, *What Not to Wear: A Short History of Regulating Female Dress from Ancient Sparta to the Burkini*, FORBES (Aug 31, 2016), <https://www.forbes.com/sites/drsarahbond/2016/08/31/a-short-history-of-regulating-female-dress/#223f19558f12>.

⁸⁸ Alissa J. Rubin, *From Bikinis to Burkinis, Regulating What Women Wear*, N.Y. TIMES (Aug. 27, 2016), <https://www.nytimes.com/2016/08/28/world/europe/france-burkini-bikini-ban.html>.

⁸⁹ David Chazan, *Algerian women campaign for bikinis on beach*, THE TELEGRAPH (Aug. 3, 2017), <https://www.telegraph.co.uk/news/2017/08/03/algerian-women-campaign-bikinis-beaches/>.

⁹⁰ *Id.*

⁹¹ See NEW IBERIA, LA. CODE OF ORDINANCES §58-123 (2020).

⁹² UNION POINT, GA. CODE OF ORDINANCES §50-10 (2019).

⁹³ Brems et al., *supra* note 81, at 288.

time of up to six months.⁹⁴ Imagine, six months in jail for wearing saggy pants. The penalties are strikingly similar to those for the burqa bans. Although a different minority is targeted, these laws share the same flaw of using the force of criminal law to regulate dressing styles. These laws enable law enforcement to stop individuals who are doing absolutely nothing wrong, other than supposedly ‘offending’ the majority population by their dressing habits.

In Shreveport, Louisiana, the saggy pants law was recently repealed after the death of a young black man, who was killed after an officer attempted to stop him for a violation of the ordinance.⁹⁵ The officer shot at him three times and, at some point in the pursuit, the man shot himself in the chest.⁹⁶ Since 2007, the law in Shreveport banned people from appearing in public “wearing pants below the waist which expose the skin or undergarments.”⁹⁷ Ninety-six percent of the 726 citations since it was enacted involved black men.⁹⁸ The individuals could be fined between \$100 and \$250 or sentenced to community service.⁹⁹

In a 2008 interview with MTV, even then President Obama commented on how absurd these laws are and how lawmakers should focus on real problems. He stated:

Here’s my attitude: I think passing a law about people wearing sagging pants is a waste of time. We should be focused on creating jobs, improving our schools, getting health care, dealing with the war in Iraq. Any public official who is worrying about sagging pants probably needs to spend some time focusing on real problems out there.¹⁰⁰

Although in the same interview he did admonish, “[h]aving said that, brothers should pull up their pants.”¹⁰¹ When asked about a proposal to ban saggy pants in South Carolina, one man summed up personal issues of dress, “You can say what you want, I’m still gonna bust the sag, I bust the sag every day.”¹⁰² It is his personal choice how he would like to dress.

⁹⁴ NEW IBERIA, LA. CODE OF ORDINANCES §58-123 (2020).

⁹⁵ Sara MacNeil, *Sagging pants law abolished in Shreveport*, SHREVEPORT TIMES (June 11, 2019), <https://www.shreveporttimes.com/story/news/2019/06/11/sagging-pants-law-abolished-shreveport/1425135001/>.

⁹⁶ Michelle Mark, *Officials in a Louisiana city are rethinking their ‘saggy pants’ ordinance after a man died during a police chase*, BUSINESS INSIDER (May 31, 2019), <https://www.businessinsider.com/saggy-pants-ordinance-under-scrutiny-in-shreveport-2019-5>.

⁹⁷ SHREVEPORT, LA. CODE OF ORDINANCES §50-167 (repealed 2019).

⁹⁸ Sara MacNeil, *Sagging pants law abolished in Shreveport*, SHREVEPORT TIMES (June 11, 2019), <https://www.shreveporttimes.com/story/news/2019/06/11/sagging-pants-law-abolished-shreveport/1425135001/>.

⁹⁹ “According to ordinance 50-167 sponsored by Calvin Lester in 2007, violators of the law can be cited and summoned to court, but the legislation was passed with an amendment. The amendment specified that violation of the law ‘shall itself not be grounds for an arrest or for a full search of the persons cited.’” *Id.*

¹⁰⁰ SHREVEPORT, LA. CODE OF ORDINANCES §50-167 (repealed 2019).

¹⁰¹ Chris Harris, *Barack Obama weighs in on sagging-pants ordinances: ‘Brothers should pull up their pants’*, MTV (Nov. 3, 2008), <http://www.mtv.com/news/1598462/barack-obama-weighs-in-on-sagging-pants-ordinances-brothers-should-pull-up-their-pants/>.

¹⁰² *Id.*

¹⁰³ Joshua Rett Miller, *Lawmakers propose bill to ban saggy pants*, N.Y. POST (Feb. 22, 2018), <https://nypost.com/2018/02/22/lawmakers-propose-bill-to-ban-saggy-pants/>.

A few notes have explored constitutional issues with saggy pants laws,¹⁰³ including one that argued the more promising constitutional challenge is under the Due Process Clause's protection of individual liberty.¹⁰⁴ Professor Gowri Ramachandran has advocated more broadly for protection of freedom of dress.¹⁰⁵ She acknowledged her argument is uniquely American¹⁰⁶ and essential for ideas of human dignity.¹⁰⁷ She argued that we should not be forced to cover or uncover ourselves against our will.¹⁰⁸

Criminal laws banning saggy pants or burqas in public violate both international and likely constitutional law.¹⁰⁹ In *Kelley v. Johnson*, the Supreme Court held a county regulation limiting the length of county policemen's hair did not violate any right guaranteed by the Fourteenth Amendment.¹¹⁰ However, the Court stressed as "highly significant" the fact that the petitioner was a police officer¹¹¹ and noted that the liberty interest in the 14th Amendment would be treated differently for a member of the public at large.¹¹² In his dissent, Justice Marshall wrote: "I think it clear that the Fourteenth Amendment does indeed protect against comprehensive regulation of what citizens may or may not wear."¹¹³ He then emphasized, "[t]o say that the liberty guarantee of the Fourteenth Amendment does not encompass matters of personal appearance would be fundamentally inconsistent with the values of privacy, self-identity, autonomy, and personal integrity that I have always assumed the Constitution was designed to protect."¹¹⁴

Other courts have also found that the Constitution does provide "an individual some measure of protection with regard to his choice of appearance."¹¹⁵ In *City of Chicago v. Wilson*, the Illinois Supreme Court held that a total ban against cross-dressing in public was unconstitutional and found the justifications of curbing criminal activity or protecting public morals unconvincing.¹¹⁶ The court contrasted the case with *Kelly* because the law in this case affected the general public, not simply policemen.¹¹⁷

¹⁰³ Most of these have looked at issues of the First Amendment. See Angelica M. Sinopole, "No Saggy Pants: A Review of the First Amendment Issues Presented by the State's Regulation of Fashion in Public Streets," 113 PENN. STATE L. REV. 329 (2008); Onika K. Williams, *The Suppression of a Saggin' Expression: Exploring the Saggy Pants Style within a First Amendment Context*, 85 IND. L. J. 1169 (2010).

¹⁰⁴ William C. Vandivort, *The Constitutional Challenge to Saggy Pants Laws*, 75 BROOK. L. REV. 667, 668 (2009).

¹⁰⁵ Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 17 (2006).

¹⁰⁶ *Id.* at 18.

¹⁰⁷ *Id.* at 36.

¹⁰⁸ *Id.* at 34.

¹⁰⁹ I do not look at dress codes in schools or elsewhere, but limit my discussion to what people wear in public.

¹¹⁰ *Kelley v. Johnson*, 425 U.S. 238 (1976).

¹¹¹ *Id.* at 245.

¹¹² *Id.* at 249.

¹¹³ *Id.* at 250.

¹¹⁴ *Id.*

¹¹⁵ *City of Chicago v. Wilson*, 389 N.E.2d 522, 524 (Ill. 1978).

¹¹⁶ *Id.* at 524–25.

¹¹⁷ *Id.* at 531–32.

Similarly, the Eleventh Circuit has also indicated that the Fourteenth Amendment protects an individual's liberty interest in personal dress. In *DeWeese v. Town of Palm Beach*, the Eleventh Circuit held that an ordinance was unconstitutional that prohibited its citizens "from appearing downtown without a garment covering the upper portion of their bodies" as it applied to DeWeese, a shirtless jogger, because it was not "rationally related to any legitimate Town interest."¹¹⁸ The court stated, "[w]e think it is clear that the corresponding liberty interest in personal dress is similarly protected" by the fourteenth Amendment."¹¹⁹ The Eleventh Circuit compared the legislation to a regulation requiring citizens to wear a brown shirt in public or prohibiting women from wearing pants or skirts above the knee.¹²⁰ The court stated that "[w]e are satisfied that such intrusions on the liberty interests of citizens at large would not pass constitutional muster, absent identification of some rational basis which has not yet been brought to our attention and which is beyond our present imagination."¹²¹ The court noted that no case has ever "sustained, or even addressed, the authority of a state or municipality to regulate the dress of its citizens at large," that dicta in several cases suggested that a "state has no legitimate interest in the personal dress of its citizens at large."¹²²

In looking specifically at the burqa or the veil, there are no laws banning burqas or veils in public in the United States. Freedom of religion is a fundamental principle in the United States.¹²³ The situation is different in Europe, and each country has its own unique history. The same with immigration – we are a nation of immigrants and for many of us, that is what defines us. In the words of Justice Murphy dissenting in *Korematsu v. United States*, "[a]ll residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution."¹²⁴

In contrast to Europe, wearing a headscarf in the United States is protected precisely because of its religious nature. In *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, the Supreme Court held that a retail store had an affirmative duty to accommodate a woman's religious belief of wearing a headscarf. The E.E.O.C. sued the store on behalf of a Muslim woman who wore a headscarf and was not hired because it violated the store's Look Policy that prohibits "caps."¹²⁵ Title VII of the Civil Rights Act of 1964 "prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue

¹¹⁸ *DeWeese v. Town of Palm Beach*, 812 F.2d 1365 (1987).

¹¹⁹ *Id.* at 1367. *But see* *People v. Duyck*, 559 N.Y.S.2d 79 (N.Y. App.Term 1990) (conviction for refusing to wear shirt in village in accordance with ordinance upheld).

¹²⁰ *Id.* at 1369.

¹²¹ *Id.* at 1369–70.

¹²² *Id.* at 1368. *See also* *Hodge v. Lynd*, 88 F. Supp. 2d 1234, 1239 (D.N.M. 2000) (finding exclusion from fair for wearing baseball cap backwards was unconstitutional).

¹²³ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." U.S. Const. amend. I. The free exercise of religion has been called America's "first freedom." Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1244 (2000).

¹²⁴ *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting).

¹²⁵ *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 771 (2015).

hardship.”¹²⁶ Although the store did not have “actual knowledge” of the applicant’s need for an accommodation, the Court stated “an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has not more than an unsubstantiated suspicion that accommodation would be needed.”¹²⁷ Therefore, a store can prohibit a “look,” but not if the look relates to an individual’s religious beliefs and there is no “undue hardship.”

However, in an earlier case, with similar language to language used by the ECHR, the Third Circuit held that a school did not violate Title VII when they refused to employ a Muslim woman who insisted on wearing a veil to school.¹²⁸ The court accepted that “the wearing of religious attire by teachers while teaching as a significant threat to the maintenance of religious neutrality in the public school system” and therefore concluded that it would impose an undue hardship to require the Commonwealth to accommodate the teacher and others similarly situated.¹²⁹ If this case was brought today, it would be interesting to see if there is a different outcome after *Abecrombie and Fitch*.¹³⁰

In the United States, as in Europe and elsewhere, laws have been upheld, as they should be, that require a woman to not cover her face for identification purposes or security checks. These laws are generally accepted as security and safety measures. A Florida Court of Appeals held that a Muslim woman had not shown that the photo requirement for a driver’s license substantially burdened her free exercise of religion.¹³¹ The court noted expert testimony that even in Islamic countries there are exceptions to the practice of veiling for safety and security.¹³² Consistent with Islamic law, women are required to unveil for medical needs, passports, and for certain photo ID cards, such as photo ID cards to be displayed to police and to enter and take professional exams.¹³³ However, the court emphasized that the taking of the photograph needed to accommodate the Muslim woman’s beliefs by using a female photographer with no other person present.¹³⁴

Courts have recognized that accommodating a police officer’s religious beliefs by allowing the officer to wear a headscarf or other religious symbol would unduly burden a police department’s “impartiality, religious neutrality, and uniformity.”¹³⁵ However, some police forces have softened these rules in order to encourage the hiring of more officers. For example, the NYPD now allows officers to wear turbans in place

¹²⁶ *Id.*

¹²⁷ *Id.* at 2033.

¹²⁸ *United States v. Bd. of Educ. for Sch. Dist. of Philadelphia*, 911 F.2d 882, 891 (3d Cir. 1990).

¹²⁹ *Id.* at 894.

¹³⁰ See *Nichol v. ARIN Intermediate Unit*, 268 F. Supp. 2d 536, 541 (W.D. Pa. 2003) (holding policy barring public school employees from displaying religious garb violated Free Exercise Clause).

¹³¹ *Freeman v. Dep’t of Highway Safety & Motor Vehicles*, 924 So. 2d 48, 56–57 (Fla. Dist. Ct. App. 2006).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See *Webb v. City of Philadelphia*, 562 F.3d 256, 261 (3d Cir. 2009) (holding that a police department accommodating an officer’s religious headscarf would unduly burden the department’s essential values of impartiality, religious neutrality, and uniformity); see also *Daniels v. City of Arlington*, 246 F.3d 500, 506 (5th Cir. 2001) (holding a “police department cannot be forced to let individual officers add religious symbols to their official uniforms.”).

of traditional police caps.¹³⁶ In addition, the police departments in Madison, Wisconsin, as well as St. Paul, Minnesota, allow their officers to wear head scarves.¹³⁷ However, many police forces still do not allow religious symbols, while others do not have a clear policy.

Examples of issues of dress and women or minority groups are endless and beyond the scope of this article, although I will highlight a few. National outrage broke out over the image of a young black man's dreadlocks being cut off before a wrestling match.¹³⁸ A white referee told him to cut his hair or forfeit the match.¹³⁹ Jordan Burroughs, an Olympic medalist tweeted after the incident, "[i]n high school, as you're growing and you're developing, you're establishing who you are, you're creating an identity. I know, as a young black man, how much my hair meant to me."¹⁴⁰ A mom wrote a letter to the editor for a Notre Dame newspaper begging girls to stop wearing leggings, "[l]eggings are so naked, so form fitting, so exposing. Could you think of the mothers of sons the next time you go shopping and consider choosing jeans instead?"¹⁴¹ She admitted it was their right to wear them, but urged them to use their right to choose not to instead.¹⁴² Again, national outrage ensued. Serena Williams outfit choice for the French Open, designed to help prevent blood clots after a near-death experience giving birth, caused the French Open to implement a stricter dress code.¹⁴³ The president of the French Tennis Federation, told *Tennis* magazine, "[i]t will no longer be accepted. One must respect the game and the place. I think that sometimes we've gone too far."¹⁴⁴ When women in Japan protested the requirement of wearing heels at work, Japan's health and labour minister responded, "[i]t is socially accepted as something that falls within the realm of being occupationally necessary and appropriate."¹⁴⁵

Issues of dress and appearance are personal and touchy subjects. A person's dress, and control of it, is part of their identity. There are issues of personal dignity and choice, religion, gender, culture, custom and personal preference. The government should not be able to dictate what ordinary citizens can and cannot wear, with the

¹³⁶ Charles Lam & AP, *NYPD to Allow Officers to Wear Turbans, Grow Beards for Religious Reasons*, NBC NEWS (Dec. 29, 2016), <https://www.nbcnews.com/news/asian-america/nypd-allow-officers-wear-turbans-grow-beards-religious-reasons-n701141>.

¹³⁷ Stephanie Smith, *Police departments begin to recognize the need to include religious practices in the force*, SPECTATOR NEWS (April 12, 2017), <https://www.spectatornews.com/opinion/2017/04/12/police-departments-begin-to-recognize-the-need-to-include-religious-practices-in-the-force/>.

¹³⁸ Jason Bogage, *Attorney for wrestler made to cut dreadlocks condemns referee's 'outrageous conduct'*, WASH POST (Dec. 24, 2018), https://www.washingtonpost.com/sports/2018/12/23/african-american-wrestlers-fighters-civil-rights-leaders-come-defense-wrestler-made-cut-his-dreadlocks/?utm_term=.95cde65528d5_.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *The legging problem*, THE OBSERVER (Mar. 25, 2019), <https://ndsmcobserver.com/2019/03/the-legging-problem/>.

¹⁴² *Id.*

¹⁴³ Lauren Alexis Fisher, *Serena Williams Wears Empowering French Open Outfit One Year After Her Catsuit Ban*, HARPERS BAZAAR (May 28, 2019), <https://www.harpersbazaar.com/fashion/designers/a27611577/serena-williams-off-white-outfit-us-open/>.

¹⁴⁴ *Id.*

¹⁴⁵ Janice Williams, *Women in Heels at Work is 'Necessary and Appropriate,' Japan's Labor Minister Claims*, NEWSWEEK (June 6, 2019, 12:49 PM), <https://www.newsweek.com/japan-high-heel-petition-ban-1442617>.

exceptions of public health and national security. There is no right not to be offended. Being forced to cloth or unclothed are equally bad. But criminalizing dress is the most egregious and does not solve any of the problems it sets out to. Unless, of course, the real purpose of the burqa ban is to send a message to “get out” or not come at all; and the saggy pants is a pretext for law enforcement to stop people for no reason or any reason at all. Then, they may unfortunately be successful in their discriminatory aims.

III. FORCED ASSIMILATION, INTEGRATION, AND NATIONAL SECURITY

In addition to being unproductive, forcing assimilation onto Muslims may also be a national security threat in itself. A Stanford researcher has shown what may seem obvious on its face – laws that try to force assimilation often have the exact opposite effect.¹⁴⁶ Professor Fouka found that German students who grew up in schools where the German language was banned after World War I were more likely to marry another German, give their children German names, and were less likely to voluntarily fight the Axis powers in WWII.¹⁴⁷ In short, Professor Fouka observed that “[r]ather than facilitating the assimilation of immigrant children, the policy instigated a backlash, heightening the sense of cultural identity among the minority.”¹⁴⁸ In looking specifically at the headscarf ban in French schools, she and researcher Aala Abdelgadir found, after analyzing both quantitative and qualitative data, that the law increased the likelihood that Muslim women would drop out of secondary school and the workforce.¹⁴⁹ In fact, they observed that the “ban operates through increased perceptions of discrimination and that it reduces assimilation by casting religion and national identities as incompatible.”¹⁵⁰ Similarly, Professor Laurence has also argued that these policies are counterproductive, and that “[p]aradoxically, people for whom religion is otherwise not all that important become more attached to their faith’s clothing, symbols and traditions when they feel they are being singled out and denied basic rights.”¹⁵¹

In fact, some young Muslim women who did not previously wear a full-veil began to wear one as an expression of resentment of French society after the ban criminalizing the veil went into effect.¹⁵² “It’s my way of fighting, to say no to the government, who took away my liberty,” said a woman who began veiling herself after the 2010 law banning it.¹⁵³ According to the only empirical studies done in France and Belgium, most of the women who wear the face veil say that they wear it as a

¹⁴⁶ Vasiliki Fouka, *Backlash: The Unintended Effects of Language Prohibition in US Schools after World War I*, 87 *REV. OF ECON. STUDIES* 204–05 (2020).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Aala Abdelgadir & Vasiliki Fouka, *Political Secularism and Muslim Integration in the West: Assessing the Effects of the French Headscarf Ban*, 114 *AM. POL. SCI. REV.* 707–23 (2020), available at <https://vfouka.people.stanford.edu/sites/g/files/sbiybj4871/f/abdelgadirfoukajan2019.pdf>.

¹⁵⁰ *Id.* at 707.

¹⁵¹ Jonathan Laurence, *How to Integrate Europe’s Muslims*, *BROOKINGS* (Jan. 23, 2012), <https://www.brookings.edu/opinions/how-to-integrate-europes-muslims/>.

¹⁵² Sigal Samuel, *Banning Muslim Veils Tends to Backfire—Why do Countries Keep Doing It?*, *THE ATLANTIC* (Aug. 3, 2018), <https://www.theatlantic.com/international/archive/2018/08/denmark-burqa-veil-ban/566630/>.

¹⁵³ *Id.*

personal and autonomous choice, without family or social pressure to do so.¹⁵⁴ Further, women who choose to wear the veil were resentful that they were not consulted during the process of creating laws that were supposed to ‘help’ them.

As Professor Beydoun has pointed out, these policies that pit ‘French identity’ against Islam, perpetuates the ‘clash of civilizations’ idea that terror groups such as ISIS promote and use in their propaganda.¹⁵⁵ Notably, Osama bin Laden and al-Qaeda also used Bush’s ‘crusade’ language as a rallying call to his supporters and to appeal to a broader audience.¹⁵⁶ In the UK, an Imam who has been working to build bridges between communities in Leeds (and who was honored by the Queen for doing so¹⁵⁷) also emphasized the dangers of segregating the Muslim population. He stated, “[i]t is not by choice that the vast majority of European Muslims live in social enclaves, rather this segregation is largely a product of social and economic exclusion. Isis offer these disenfranchised young people a highly seductive subculture – a cultural community and a new life that is emotionally rewarding.”¹⁵⁸ Although it is not possible to fully understand the lure and power of ISIS recruiting tactics, “ISIS tactically use[s] powerful religious ideology to induce recruits to accept a life that in all probability will include martyrdom. The ultimate truth, ISIS maintain[s], lies not in this world with all the frustrations and disappointments, but in another realm not of this earth.”¹⁵⁹ Although this is an extreme example, it highlights broader problems of segregating and antagonizing populations of people. Crucially, the Muslim community is a powerful ally in the ‘war against terror,’ and law enforcement should work with them, not against them.¹⁶⁰

Attacks on women who wear veils reportedly increased after the law criminalizing the niqab went into effect in France.¹⁶¹ These measures embolden those on the right and fuel anti-immigration sentiments. This, in turn, further deepens the sense that the Muslim population is under attack. Especially when the ‘Muslim’ bans in Europe keep coming up – first head scarves in schools or at work, then burqas on the street, even minarets. In the United States, the Supreme Court, after some non-Muslim countries were added to the list, upheld Trump’s ‘Muslim ban.’ Trump issued a Presidential

¹⁵⁴ Emmanuel Bribosia & Isabelle Rorive, *Insider perspectives and the human rights debate on face veil bans*, in THE EXPERIENCES OF FACE VEIL WEARERS IN EUROPE AND THE LAW 175 (Eva Brems ed., 2014). The study involved a sample of 27 women in Belgium who wore the face veil out of approximately a total of 200 to 300 who wear it in the country.

¹⁵⁵ Khaled A. Beydoun, *Beyond the Paris Attacks: Unveiling the War Within French Counterterrorism Policy*, 65 AM. U. L. REV. 1273, 1334 (2016).

¹⁵⁶ *Transcript of Bin Laden’s October Interview*, CNN (Feb. 5, 2002, 8:50 PM), <http://edition.cnn.com/2002/WORLD/asiapcf/south/02/05/binladen.transcript/>.

¹⁵⁷ *Leeds Imam Qari Asim honoured by Queen*, BBC NEWS (June 16, 2012), <https://www.bbc.com/news/uk-england-leeds-18461420>.

¹⁵⁸ Imam Qari Asim, *This is Why Young European Muslims are Joining ISIS*, INDEPENDENT (Aug. 20, 2017), <http://www.independent.co.uk/voices/barcelona-spain-terrorism-young-european-muslims-joining-isis-a7903026.html>.

¹⁵⁹ *Id.*

¹⁶⁰ See Beydoun, *supra* note 156, at 1321–22 (“the cultural assimilationist counterterrorism philosophy [of France] frames Muslims as counterterrorism pariahs . . . The Headscarf and Face Concealment Bans disenfranchised Muslim women, dissuading them from being useful as prospective counterterrorism partners. The Headscarf and Face Concealment Bans severely diminish law enforcement’s capacity to recruit French Muslim women as informant and interlocutors.”).

¹⁶¹ Angélique Chrisafis, *France’s burqa ban: women are effectively under house arrest*, THE GUARDIAN (Sep. 19, 2011), <https://www.theguardian.com/world/2011/sep/19/battle-for-the-burqa>.

Proclamation, referred to as “Muslim Ban 3.0,”¹⁶² that indefinitely blocks the entry for certain individuals from eight countries: Iran, Libya, Chad, North Korea, Syria, Somalia, Venezuela, and Yemen.¹⁶³ Trump may have been more direct in his Muslim ban.

When these bans are viewed, not as forced assimilation, but rather simply telling Muslims to “get out” or “you’re not welcome here,” they are probably more successful in their unfortunate aim. Other than ‘saggy pants,’ which target a different minority, the laws criminalizing dress largely target Muslims. Some Syrians and others have even made the dangerous trek back to Syria rather than stay in a country where they say they are treated like terrorists.¹⁶⁴ “The minute you have a beard, they call you Bin Laden or Ali Baba,” explains Bilal, a Palestinian Syrian. “If they don’t think we are terrorists, they take us for thieves.”¹⁶⁵

IV. DO IMMIGRANTS AND REFUGEES HAVE A DUTY TO INTEGRATE INTO THEIR HOST COUNTRY?

Although there is currently no obligation to integrate or assimilate into host countries under international law, refugees and migrants have a duty to observe the laws and regulations of their host country. Article 2 of the Convention Relating to the Status of Refugees states that “[e]very refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.”¹⁶⁶ The Migrant Workers Convention goes further, stating that migrant workers and their families have, “the obligation to comply with the laws and regulations of any State of transit and the State of employment” and “the obligation to respect the cultural identity of the inhabitants of such States.”¹⁶⁷ The New York Declaration, adopted at the United Nations in 2016 noted the “obligation for refugees and migrants to observe the laws and regulations of their host countries.”¹⁶⁸ The Global Compact for Safe, Orderly and

¹⁶² See Shoba Sivaprasad Wadhia, *National Security, Immigration, and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475, 1487–88 (2018) (“In my view, “Muslim ban” is an accurate description of the first three bans the President signed; two as executive orders and one as a presidential proclamation. In all three versions, the bulk of nations targeted have Muslim populations of more than 90%, and the bans have had devastating impacts on nationals from these countries.”).

¹⁶³ Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,163 (2017).

¹⁶⁴ *Refugee Crisis: The Syrians abandoning Europe*, BBC NEWS (May 25, 2018), <https://www.bbc.com/news/av/world-europe-44240903/refugee-crisis-the-syrians-abandoning-europe>.

¹⁶⁵ Dominique Soguel, *No haven from hardship: Why some Syrians return from Europe*, CHRISTIAN SCIENCE MONITOR (Dec. 10, 2018), <https://www.csmonitor.com/World/Europe/2018/1210/No-haven-from-hardship-Why-some-Syrians-return-from-Europe>.

¹⁶⁶ Convention Relating to the Status of Refugees, art. 2, July 28, 1951, 189 U.N.T.S. 137.

¹⁶⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 34, Dec. 18, 1990, 30 I.L.M. 1517, 1523 (entered into force July 1, 2003) [hereinafter Migrant Workers Convention], available at <https://www.ohchr.org/en/professionalinterest/pages/cmw.aspx>.

¹⁶⁸ New York Declaration for Refugees and Migrants, G.A. RES. 71/1, ¶ 39 (Sept. 19, 2016), <http://www.unhcr.org/en-us/events/conferences/57e39d987/new-york-declaration-refugees-migrants.html> [<https://perma.cc/PY2A-PLW5>] (archived Jan. 19, 2019) [hereinafter New York Declaration].

Regular Migration¹⁶⁹ also discusses the rights and obligations of both host country and migrants:

We commit to foster inclusive and cohesive societies by empowering migrants to become active members of society and promoting the reciprocal engagement of receiving communities and migrants in the exercise of their rights and obligations towards each other, including observance of national laws and respect for customs of the country of destination.¹⁷⁰

Therefore, it is understood that migrants must obey the laws of the land in which they migrate to and there is also some duty to respect the ‘customs’ and the ‘cultural identity’ of the land.

Some countries have mandatory integration programs. In Denmark, “[s]tarting at the age of 1, “ghetto children” must be separated from their families for at least 25 hours a week, not including nap time, for mandatory instruction in “Danish values.”¹⁷¹ This instruction includes learning about the traditions of Christmas and Easter, and Danish language lessons. Noncompliance may result in a cessation of welfare payments.¹⁷² The government believes that if families are not going to assimilate naturally, they must be forced to.¹⁷³ Kurt Westergaard, a cartoonist who has drawn what many Muslims considered the most offensive cartoon, argued that Danish citizens pay more than half their income to maintain a welfare state providing generous support to newcomers, so it is only natural to expect integration in return.¹⁷⁴ As one woman said, “[t]hey want us to get more assimilated or get out.”¹⁷⁵ The language used is also significant - calling the children ‘ghetto children’ does not help with inclusion and integration.

The dissent in *Yaker v. France*¹⁷⁶ equated assimilating with the majority culture as the only way to integrate. “When one encounters a given society, the need for respecting its habits and customs should be a natural concern, as well as respect for social predominant values. Even more so, when one has a standing relationship with

¹⁶⁹ 164 of the 193 members of the United Nations adopted the Global Compact in December, 2018. In its preamble, the Global Compact defines itself as follows: “Global Compact presents a non-legally binding, cooperative framework that builds on the commitments agreed upon by Member States in the New York Declaration for Refugees and Migrants. It fosters international cooperation among all relevant actors on migration, acknowledging that no State can address migration alone, and upholds the sovereignty of States and their obligations under international law.” Global Compact for Safe, Orderly and Regular Migration, Objective 16, G.A. RES. 73/195 (Dec. 19, 2018), https://refugeesmigrants.un.org/sites/default/files/180711_final_draft_0.pdf.

¹⁷⁰ *Id.*

¹⁷¹ Ellen Barry & Martin Selsoe Sorensen, *In Denmark, Harsh New Laws for Immigrant ‘Ghettos’*, N.Y. TIMES (July 1, 2018), <https://www.nytimes.com/2018/07/01/world/europe/denmark-immigrant-ghettos.html>.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Lorenz Langer, *Panacea or Pathetic Fallacy? The Swiss Ban on Minarets*, 43 VAND. J. TRANSNAT’L L. 863, 936 (2010) (arguing that the Swiss ban on construction of minarets violates international human rights law).

¹⁷⁵ *Id.*

¹⁷⁶ The Human Rights Committee case that concluded that the criminalization of wearing the niqab violated articles 18 and 26 of the Covenant on Civil and Political Rights (see discussion on page 15).

such a society, as is the case for both authors. Yet the authors refuse to accept this.”¹⁷⁷ However, integration takes time and understanding on both sides and does not require assimilation.

Rather than forced assimilation, a better approach would be one that balances the need for a newcomer to understand the norms and customs of a country they have migrated to, while still allowing them to retain their own unique identity. Norway, for example, has provided nationwide programs since 2013, offering classes on sexual and other forms of violence to migrants.¹⁷⁸ The Global Compact advocates for these softer approaches, and recommends “[e]stablish[ing] comprehensive and needs-based pre-departure and post-arrival programmes that may include rights and obligations, basic language training, as well as orientation about social norms and customs in the country of destination.” In addition, the Global Compact supports the increase of “evidence-based communications with host societies to counter illegitimate public perceptions of migrants.”¹⁷⁹ They point out that in many countries it is perceived, not based on data, that migrants abuse social assistance programs and have a “higher propensity to criminality.”¹⁸⁰ Integration is a two-way process that involves mutual respect for each one’s culture.¹⁸¹

I leave the exploration of the contours of the duty to integrate on the part of immigrants, as well as a duty on the part of the host country to respect a newcomer’s culture, for future scholarship. However, two concrete examples I will analyze are first, whether students need to participate in mandatory mixed-gender swimming and second, whether a newcomer should shake hands with people of the opposite gender during citizenship hearings or ceremonies.

For one, the ECHR held that mandatory mixed-gender swimming classes in schools overrode the religiously-grounded objections of Muslim parents in *Osmanoglu and Kocabas v. Switzerland*. Crucial to the court’s decision was the incredible importance of integration, “the children’s interest in an all-round education, facilitating their successful social integration according to local customs and mores, takes precedence over the parents’ wish to have their daughters exempted from mixed swimming lessons.”¹⁸² The Court noted that “school plays a special role in the process of social integration, one that is all the more decisive where children of foreign origin

¹⁷⁷ *Sonia Yaker v. France*, Hum. Rts. Comm., CCPR/C/123/D/2747/2016 (Dec. 7, 2018) (Dissent of Jose Manuel Santos Pais, ¶ 7).

¹⁷⁸ Andrew Higgins, *Norway offers migrants a lesson in how to treat women*, N.Y. Times, (Dec. 19, 2015), <https://www.nytimes.com/2015/12/20/world/europe/norway-offers-migrants-a-lesson-in-how-to-treat-women.html>.

¹⁷⁹ International Organization for Migration, Global Compact Thematic Paper, *The Responsibilities and Obligations of Migrants Towards Host Countries*, https://www.iom.int/sites/default/files/our_work/ODG/GCM/IOM-Thematic-Paper-Responsibilities-and-obligations-of-migrants.pdf.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* See also Lindsay M. Harris, *From Surviving to Thriving? An Investigation of Asylee Integration in the United States*, 40 N.Y.U. REV. L. & SOC. CHANGE 29, 43 n.47 (2016) (suggesting the possibility of whether integration could be viewed as a human right).

¹⁸² *Osmanoglu and Kocabas v. Switzerland*, app. no. 29086/12, CE:ECHR:2017:0110JUD002908612, ¶ 97, <https://hudoc.echr.coe.int/eng#%7B%22languageisocode%22:%5B%22ENG%22%5D,%22appno%22:%5B%2229086%2F12%22%5D,%22documentcollectionid%22:%5B%22CHAMBER%22%5D,%22itemid%22:%5B%22001-170436%22%5D%7D>.

are concerned.”¹⁸³ As the parents did not send their daughters to the class, they were fined CHF 1,400.¹⁸⁴ However, they were offered flexible arrangements such as being allowed to wear a burkini.¹⁸⁵ Is there some duty to integrate and work with school officials? On the one hand, this clearly did not help integration as the girls did not go to the swimming lessons, but at the same time, one could also see how it would be beneficial to the girls if their parents allowed them to participate in these swimming lessons, as this affords them the opportunity to integrate with their classmates.

In France, a French appellate court upheld a ruling denying an Algerian woman citizenship after she refused to shake the hand of a senior official at her French naturalization ceremony.¹⁸⁶ In its decision, issued on April 11, 2018, the court, known as the Council of State, said that the woman’s refusal “in a place and at a moment that are symbolic, reveals a lack of assimilation.”¹⁸⁷ The ruling was based on a law that gives the government two years, after a foreign spouse files for naturalization, to oppose the request on grounds of “lack of assimilation, other than linguistic.”¹⁸⁸ In Switzerland as well, the Swiss citizenship process was suspended for a family of Muslim boys who did not shake the hands of their female teachers.¹⁸⁹ Another Muslim couple’s citizenship was denied after they declined to shake hands of interviewers of the opposite sex. The Mayor stated that “their behavior during the interview signaled to the three-person commission interviewing them that they had not adequately integrated into Switzerland.”¹⁹⁰

Although not about dress, the ‘handshake cases’ are illustrative of another way the state, this time as a prerequisite for citizenship, tells newcomers to be like them or get out. States do have more ability to decide exactly who, and what kind of behavior they would like in their country and acquiring citizenship, but again, the example is directed at Muslims in Europe. Interestingly, the CDC recommends against shaking hands during outbreaks of certain viruses, as the coronavirus has highlighted. These cases illustrate the tension between the ‘duty’ to integrate with the ‘duty’ to respect a newcomer’s culture or religion.

¹⁸³ *Id.* at ¶ 96.

¹⁸⁴ Approximately \$1400.

¹⁸⁵ Osmanoglu and Kocabas, CE:ECHR:2017:0110JUD002908612 ¶ 101.

¹⁸⁶ *Algerian woman denied French citizenship over handshake*, BBC NEWS (Apr. 20, 2018), <https://www.bbc.com/news/world-europe-43839655>.

¹⁸⁷ Aurelien Breeden, *No Handshake, No Citizenship, French Court Tells Algerian Woman*, N.Y. TIMES (April 21, 2018), <https://www.nytimes.com/2018/04/21/world/europe/handshake-citizenship-france.html>.

¹⁸⁸ *Id.* See CODE CIVIL art. 21-4, available at <https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006070721&idArticle=LEGIARTI000006419796&dateTexte=&categorieLien=cid>.

¹⁸⁹ *Swiss citizenship process suspended for family of Muslim ‘no handshake’ boys*, BBC NEWS (Apr. 19, 2016), <https://www.bbc.com/news/world-europe-36083347>.

¹⁹⁰ Siobhan O’Grady, *After refusing handshake, a Muslim couple was denied citizenship*, WASH. POST (Aug. 1, 2018), https://www.washingtonpost.com/world/2018/08/18/after-refusing-handshake-muslim-couple-was-denied-swiss-citizenship/?utm_term=.73c9be31db10. Interestingly in Sweden, a Muslim woman who said she was discriminated against in a job interview for refusing to shake hands with a man on religious grounds has been awarded financial compensation by a labor court. Christina Anderson, *Muslim Job Applicant Who Refused Handshake Wins Discrimination Case in Sweden*, N.Y. TIMES (Aug. 16, 2018), <https://www.nytimes.com/2018/08/16/world/europe/sweden-muslim-handshake.html>.

After an incident in Ohio where a business man in traditional clothing – a robe and head scarf – was confronted by police at gunpoint because a hotel clerk thought he might be a terrorist based on his dress, the United Arab Emirates warned their citizens in a travel advisory to avoid wearing traditional clothing when traveling abroad. Relatives of a front desk clerk at the hotel where the man was staying called 911 because the clerk panicked after seeing a man in robes and “full head dress” in the hotel lobby, speaking on a phone and “pledging his allegiance or something to ISIS.”¹⁹¹ The imagery of officers with guns drawn, pinning the man to the ground and handcuffing him for wearing traditional clothing and speaking Arabic is horrific. Police body-camera video of the encounter showed the man, who appeared to speak limited English, saying: “[w]hat is this?” “I’m tourist,” and “[n]ot good,” while he was on the ground.¹⁹²

Many Arab and Muslim airline passengers are familiar with the idea of hiding or ‘covering’ their identity on board an airplane.¹⁹³ In *Farag v. United States*, two Arab men were basically arrested for speaking Arabic loudly on a plane.¹⁹⁴ In that case, when the men got off the airplane, they were greeted with at least ten armed police officers in SWAT gear with guns and police dogs, they report they were ordered “to raise their hands, frisked, handcuffed and taken to a police station, where they were placed in jail cells” where they were stayed for four hours and were interrogated about “suspected terrorist surveillance activity aboard the plane. The investigation yielded absolutely no evidence of wrongdoing.”¹⁹⁵ The court acknowledged the fear that 9/11 has caused, but held that “fear cannot be a factor to allow for the evisceration of the bedrock principle of our Constitution that no one can be arrested without probable cause that a crime has been committed.”¹⁹⁶

V. DIVERSITY AND INCLUSION

Eliminating unjust laws is crucial, but of equal importance is the need for people to get to know and understand each other, even with differences. Fortunately, popular culture can help bring about this needed understanding. Martin Luther King Jr. in his speech *The Ethical Demands for Integration* spoke about the fact that “[t]rue integration will be achieved by true neighbors who are willingly obedient to unenforceable obligations.”¹⁹⁷ He discussed how the law can enforce desegregation,

¹⁹¹ Yonette Joseph, *Emirates Warn Against traditional Clothing Abroad After Man Is Mistaken for Terrorist in Ohio*, N.Y. TIMES (July 3, 2016), <https://www.nytimes.com/2016/07/04/world/middleeast/emirates-issues-travel-warning-after-man-in-robe-is-mistaken-for-isis-terrorist-in-ohio.html>.

¹⁹² *Id.*

¹⁹³ See Khaled Beydoun, *Acting Muslim*, 53 HARV. C.R.-C.L. L. REV. 1, 58 (2018) (“For Othman, Covering Islam by ceasing her Arabic prayer ritual and exclusively speaking English onboard clashed with her Free Exercise rights but augmented her sense of ease while flying. Particularly because of her conspicuous Muslim appearance, the act of speaking English toned down and countered the stereotypes of foreignness and extremism ascribed to the headscarf. The high incidence of plane ejections during each era of the War on Terror has made “code switching fully into English . . . a common phenomenon for Arab and Muslim airline passengers.”). See also KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006).

¹⁹⁴ *Farag v. United States*, 587 F. Supp. 2d 436 (2008).

¹⁹⁵ *Id.* at 442.

¹⁹⁶ *Id.* at 468.

¹⁹⁷ MARTIN LUTHER KING, JR., *Ethical Demands of Integration*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.*, (James M. Washington ed., 1986).

but that alone is not enough. Rather, in order to be truly integrated, the unenforceable obligations are needed and “they concern inner attitudes, genuine person-to-person relations, and expressions of compassion which law books cannot regulate.”¹⁹⁸ In order to truly integrate, people must actually get to know one another and understand their common humanity. As Mark Twain said of travel, “[i]t is fatal to prejudice, bigotry, and narrow-mindedness, and many of our people need it sorely on these accounts. Broad, wholesome, charitable views of men and things cannot be acquired by vegetating in one little corner of the earth all one’s lifetime.”¹⁹⁹

Individuals at local stores, at work, and at school can make this integration process happen simply by speaking to one another. Through that simple process, we get to know one another and learn to appreciate our similarities and differences. Celebrities and sports stars reach a broader audience and are thus able to facilitate such understanding on a massive scale. Fans of Egyptian-born soccer star Mohamad Salah, who plays professional soccer in England, have created a song, “[i]f he scores another few, then I’ll be Muslim, too.”²⁰⁰ Although the chant has attracted criticism, Anwar Uddin, a former player who now works for the Football Supporters’ Federation on its diversity programming, said he thinks it is well intentioned. “Things like that can break down barriers,” he said, pointing out that the simple sight of seeing Mr. Salah bow and reflect after scoring a goal can help to “remove the stigma” that some may attach to the sight of a Muslim praying.²⁰¹

Sports, the arts, and even baguettes, expand the understanding of Muslims and other immigrants. Ibtihaj Muhammad is the first Olympian woman to compete wearing a hijab and win a medal. In 2017, Nike began selling a sports hijab.²⁰² The best baguette maker in France is Muslim.²⁰³ Sports Illustrated featured model Halima Aden wearing a burkini in its 2019 swimsuit issue. Aden advocated that the burkini can be for everyone, not just Muslims. “Burkinis are open for all,” Aden said, even suggesting it for those who sunburn easily. “Just like how women can get a one-piece or a two-piece. It’s one of those things that I would recommend every girl to try, dress up, and wear to the beach.”²⁰⁴

Objective 16 of the Global Compact on Migration, “[e]mpower[s] migrants and societies to realize full inclusion and social cohesion,” and recognizes the importance of inclusion and social cohesion and the power of sports and the arts to facilitate that

¹⁹⁸ *Id.*

¹⁹⁹ MARK TWAIN, *INNOCENTS ABROAD* (1869).

²⁰⁰ Rory Smith, *Mo Salah of Liverpool Breaks Down Barriers One Goal at a Time*, N.Y. TIMES (May 2, 2018), <https://www.nytimes.com/2018/05/02/world/europe/mo-salah-liverpool-champions-league.html>.

²⁰¹ *Id.*

²⁰² Doug Stanglin, *Nike begins selling sports hijab for Muslim female athletes*, USA TODAY (Dec. 20, 2017), <https://www.usatoday.com/story/news/world/2017/12/20/nike-begins-selling-sports-hijab-muslim-female-athletes/970226001/>.

²⁰³ Adam Nossiter, *Sons of Immigrants Prop Up a Symbol of ‘Frenchness’: The Baguette*, N.Y. TIMES (May 14, 2018), <https://www.nytimes.com/2018/05/14/world/europe/france-paris-baguette-immigration.html> (“Nearly half the bakers had names that were distinctly un-French. Immigrants were disproportionately represented.”).

²⁰⁴ Samantha Sutton, *SI Swim Model Halima Aden Says Anyone Can Wear a Burkini*, INSTYLE (May 10, 2019), <https://www.instyle.com/fashion/halima-aden-sports-illustrated-swimsuit-2019-interview>.

cohesion.²⁰⁵ They specifically endorse the support of multicultural activities, “through sports, music, arts, culinary festivals, volunteering and other social events that will facilitate mutual understanding and appreciation of migrant cultures and those of destination communities.” In addition, the United Nations has started the show, *Refugees Got Talent*, to change the majority’s perception of migrants.²⁰⁶

The interplay of fashion and culture is powerful and fashion can be a tool for normalizing certain minority dress styles and bringing them into the limelight. *Vogue* has said that head scarves are making a comeback.²⁰⁷ Then, if you are wearing a head scarf for fashion, and not religion, you might be able to wear it in a French school that has banned ‘conspicuous displays of religion,’ but you would not be able to wear it to your Abercrombie & Fitch interview, as the Supreme Court explained it was the protection of a religious belief that allowed a young woman to violate their ‘no caps’ policy. As bans for face coverings proliferate in Europe, “high-fashion brands turned face-covering into the new trend.”²⁰⁸ In fact, in 2018, face masks were termed the year’s hottest high-fashion trend.²⁰⁹ Ski masks, surgical masks, balaclavas when made by a designer label cost hundreds of dollars and come with no negative cultural stigma.²¹⁰ Runways were lined with masked models. In Italy, Gucci designed a 2018 blockbuster accessory: the designer balaclava.²¹¹ A balaclava is basically similar to a ski mask. If balaclavas, ski masks, and surgical masks become the fashion that is predicted by European designers, there will be a very interesting clash with the law banning face coverings.

Deciding what is ‘normal’ is a dangerous game. This can be seen in many different contexts. When years and years of abuse by a couple was finally discovered, people questioned how that was possible. “The problem, one Minnesota welfare worker noted, according to documents, was that Jennifer and Sarah Hart ‘look normal.’”²¹² They were two white women. As Professor Beverly Daniel Tatum has pointed out “the dominant group is seen as the norm for humanity.”²¹³

²⁰⁵ Global Compact for Safe, Orderly and Regular Migration, Objective 16, G.A. RES. 73/195 (Dec. 19, 2018).

²⁰⁶ Lorenzo Tondo, *Refugees Got Talent: UN-backed show aims to change perceptions*, THE GUARDIAN (June 23, 2019), <https://www.theguardian.com/world/2019/jun/23/refugees-got-talent-un-backed-event-challenges-perceptions>.

²⁰⁷ Zoe Ruffner, *The Head Scarf Makes a Comeback*, VOGUE (June 7, 2018), <https://www.vogue.com/article/how-to-tie-a-head-scarf-hair-resort-2019-valentino-gucci-missoni>.

²⁰⁸ Joanna Fu, *Face Masks Return as Fashion Week's Biggest Trend*, HYPEBEAST (Jan 31, 2018), <https://hypebeast.com/2018/1/face-mask-trend-fall-winter-2018>.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Joanna Fu, *Gucci Releases a Knitted Logo Balaclava Mask*, HYPEBEAST (Sept. 22, 2018), <https://hypebeast.com/2018/9/gucci-knitted-logo-balaclava-face-mask>.

²¹² Matt Stevens, *Hart Family, Before Driving Off Cliff, Hid Dark Home Life From View*, N.Y. TIMES (April 27, 2018), <https://www.nytimes.com/2018/04/27/us/hart-family-crash.html?rref=collection%2Fsectioncollection%2Fus&action=click&contentCollection=us®ion=rank&module=package&version=highlights&contentPlacement=5&pgtype=sectionfront>.

²¹³ Beverly Daniel Tatum, *The Complexity of Identity: “Who Am I?”*, in READINGS FOR DIVERSITY AND SOCIAL JUSTICE: AN ANTHOLOGY ON RACISM, SEXISM, ANTI-SEMITISM, HEETEROSEXISM, CLASSISM AND ABLEISM, 9–14 (M. Adams et al. eds., 2000).

CONCLUSION

Legislating the majority population's idea of 'normal' by criminalizing dress is not only wrong, it violates international law. There is no right to not be offended. The majority should not be able to force people to dress the way they want – whether Muslim women with burqas in Europe or men wearing 'saggy pants' in the United States.²¹⁴ Citizens in certain countries may find the sight of a woman in a burqa offensive to their values as a society, and even have strong arguments why wearing a burqa does not help women integrate into a new society. However, making that woman a criminal is not the answer. Forced assimilation breeds resentment and drives society apart. True integration takes time and understanding on both sides. Newcomers do need to adjust to a new society and respect its customs and laws, but they should not be deemed criminals because of their fashion choices. The imagery in 2019 of women in some countries being forced to cover up, while at the same time in other countries being forced to uncover is striking. Meanwhile, a young man dies being chased by police because of 'saggy pants' – these examples illustrate that we have not come as far as we need to as a society. Issues of dress are personal and part of a person's identity and should be respected as such.

The United Nations, with a goal of creating a harmonious society for all, has defined social integration as "the attempt not to make people adjust to society, but rather to ensure that society is accepting of all people."²¹⁵ Robert Putnam, a Harvard political scientist addressing whether immigration should require assimilation said, "[m]y hunch is that at the end we shall see that the challenge is best met not by making 'them' like 'us,' but rather by creating a new, more capacious sense of 'we.'"²¹⁶ Criminalizing the dress of a minority population, whether burqas in Europe, or 'saggy pants' in the United States, is wrong and discriminatory. Pretending these laws are to 'promote integration' or for public health and safety only adds to the injustice. Our laws should seek to create a society inclusive of all rather than imperil some for the benefit of others.

²¹⁴ Once again, with the exception of public health requirements (i.e. wearing a mask during COVID 19) and national security (i.e. needing to show your face at an airport, etc. for security purposes).

²¹⁵ Dep't of Econ. and Soc. Affs. of the U.N. Secretariat, *Participatory Dialogue: Towards a Stable, Safe and Just Society for All*, at 1 (2007), [https://www.un.org/esa/socdev/publications/prtcprtry_dlg\(full_version\).pdf](https://www.un.org/esa/socdev/publications/prtcprtry_dlg(full_version).pdf).

²¹⁶ Tom Gjelten, *Should Immigration Require Assimilation?*, THE ATLANTIC (Oct. 3, 2015), <https://www.theatlantic.com/politics/archive/2015/10/should-immigration-require-assimilation/406759/>.

