

Forced to be Free: The Limits of European Tolerance

Liav Orgad*

ABSTRACT

Under which circumstances is it legitimate to force people to be free? Focusing on recent cases in Europe—handshaking, gender-mixed swimming lessons, and burkini bans—the Article exposes two types of moral hypocrisy in the European approach to this question. First, there is an increasing appeal to the notion of “forcing people to be free” in Europe; this is often justified based on conformity with the “general will” and the avoidance of self-imposed “harm.” The Article shows how the concepts of the general will and harm are employed to legitimize the submission of the minority to the majority culture. Second, the Article indicates the double standard of European policies. While religious symbols and ways of life of the majority are first culturalized and then universalized, symbols and ways of life of the minority, even when seen as cultural, are often religionized and politicized. This legal façade enables the majority group to frame social reality as a direct conflict between universal morality and religious fundamentalism.

INTRODUCTION

Whoever refuses to obey the general will {shall} be constrained to do so by the whole body {politic}, which means nothing else but that he will be forced to be free.

—Jean-Jacques Rousseau¹

* Director, “Global Citizenship Governance,” Robert Schuman Centre for Advanced Studies, European University Institute; Head, “International Citizenship Law,” WZB Berlin Social Science Center; Associate Professor, Lauder School of Government, Interdisciplinary Center (IDC) Herzliya; Distinguished Scholar in Residence, Peking University School of Transnational Law. I am grateful to Fabienne Bretscher and Maya Gazit for their excellent research assistance, and to Eva Ersbøll for her clarifications on Danish law. Thanks are also due to Rainer Bauböck, Jean-Thomas Arrighi de Casanova, Johanna Hase, Ashley Mantha-Hollands, Christian Joppke, Will Kymlicka, Jules Lepoutre, Ines Michalowski, Niklas Sievers, and Shelly Simana for their helpful comments and criticisms, as well as to the participants at the WZB Migration and Diversity Colloquium and the WZB Center for Global Constitutionalism. I am indebted particularly to Stephanie Gullo, Managing Editor of the *Harvard Human Rights Journal*, whose comprehensive suggestions tremendously improved the Article. The study is supported by the European Research Council Starting Grant (# 716350). © Liav Orgad.

1. JEAN-JACQUES ROUSSEAU, *THE MAJOR POLITICAL WRITINGS OF JEAN-JACQUES ROUSSEAU* 175 (John T. Scott ed. and trans., University of Chicago Press 2012) (1762).

The principle of freedom cannot require that he should be free not to be free. It is not freedom, to be allowed to alienate his freedom.

—John Stuart Mill²

What are the circumstances under which the state should force people to be free? For Rousseau—whenever individuals act against “the general will”; for Mill—whenever individuals relinquish freedom, as in the case of selling themselves into slavery. At the heart of the matter are fundamental questions on the conception of the state, the meaning of freedom, and the legitimacy of using state power to force freedom on people.

International immigration revives this debate. Immigrants travel with different conceptions of state authority, morality, and freedom, and these often lead to conflicts between a majority group and minority communities.³ In Europe, policies toward migrant and minority groups have already been labeled “illiberal liberalism” (defending liberal values and institutions by illiberal means), “theological liberalism” (expecting people to arrive at similar conclusions about the good life), and “muscular liberalism” (moving beyond passive obedience to the law to promote faith in liberal values actively).⁴ All these labels intend to convey a simple message—an illiberal spirit is floating in Europe, one which, on behalf of protecting freedom, is threatening freedom. By distinguishing liberal from illiberal, Europeans often frame the challenge in terms of liberal values that must stand firm against people holding illiberal values, who should either be removed or transformed into “good liberals.” Framing the challenge “in existentialist terms allows them [the militant liberals] to justify policies that might otherwise be seen to contravene liberal principles of toleration and equality.”⁵

Focusing on recent cases concerning handshaking, mixed swimming lessons, and burkini bans, Part I shows the limits of European tolerance.⁶ The legalization of handshaking to the point that a person cannot get married or become a citizen without shaking hands with strangers, the imposition of a duty of gender-mixed swimming lessons in public schools, and the actions of armed police officers forcing women wearing burkinis to take off some of their clothes all demonstrate a troubling trend of an intolerant spirit across the continent. This is particularly astonishing because at the peak of the

2. JOHN STUART MILL, ON LIBERTY, UTILITARIANISM AND OTHER ESSAYS 99–100 (Mark Philp & Frederick Rosen eds., Oxford University Press 2015) (1859).

3. LIAV ORGAD, THE CULTURAL DEFENSE OF NATIONS: A LIBERAL THEORY OF MAJORITY RIGHTS 51–84 (2016).

4. See, e.g., Christian Joppke, *The Retreat is Real—but what is the Alternative? Multiculturalism, Muscular Liberalism, and Islam*, 21 CONSTELLATIONS 286 (2014) (“muscular liberalism”); Philip Hamburger, *Illiberal Liberalism: Liberal Theology, Anti-Catholicism, & Church Property*, 12 J. CONTEMP. LEGAL ISSUES 693 (2002) (“theological liberalism”); Liav Orgad, *Illiberal Liberalism: Cultural Restrictions on Migration and Access to Citizenship in Europe*, 58 AM. J. COMPAR. L. 53 (2010) (“illiberal liberalism”).

5. Triadafilos Triadafilopoulos, *Illiberal Means to Liberal Ends? Understanding Recent Immigrant Integration Policies in Europe*, 37 J. ETHNIC & MIGRATION STUD. 861, 861 (2011) (Triadafilopoulos uses the term “Schmittian liberalism.”).

6. The term “European” stands neither for EU policies nor for policies shared by all states.

Covid-19 crisis, when most governments adopted a “no-handshake policy,” a German court rejected a citizenship application of a Lebanese man for refusing to shake hands with women.⁷ Part II claims that the official justifications for these policies often hide that the issue is sectorial—the policies are aimed at Muslims in Europe, rather than universal morality; they constitute “legal white lies” (Section II.A). It then presents the abuse of the concept of freedom to force individuals—in particular, members of a minority group—to be free because their actions are seen as incompatible with freedom as perceived by the majority, analyzes the theoretical roots of this idea in the writings of Rousseau, Mill, and Kant, and explains the normative concerns it raises (Section II.B). Part II further reveals how the legal discourse has veiled itself in a universal language as a pretext for protecting a national way of life; one technique for doing so is the universalization of the particular—a legal façade that allows the majority to promote its own way of life and limit other groups’ ways of life (Section II.C). Finally, Part II presents the double standard applied to the religion of the majority vis-à-vis that of the minority. While Christian symbols are culturalized and then universalized—thereby making them easier for legal protection in the liberal state—Islamic symbols are politicized and classified under the religious umbrella, even if at least some of them can be seen as cultural—making them harder for legal protection in a liberal state committed to principles of secular humanity and state neutrality (Section II.D). It is at this point that the Article highlights what can be termed as “Western hypocrisy.”

I. THE DICTATORSHIP OF REASON

This Part presents three case studies that illustrate a threat to freedom promoted on behalf of a mild form of a “dictatorship of reason”⁸—pressure for conformity to conventional standards of behavior imposed by state coercion on behalf of reason. The cases are somewhat peculiar—handshaking, gender-mixed swimming, and wearing a burkini—yet this is why they are so powerful; it is exactly in their comic side that one can see their tragic side.

A. *Handshaking*

Madame B.A., an Algerian citizen, married a French citizen in Algiers in 2010. She moved to France and, after five years, filled out an application for

7. See *infra* Section I.A.

8. The idea of a “dictatorship of reason” has many origins and meanings, but one is related to Sigmund Freud. See Letter from Sigmund Freud to Albert Einstein (Sept. 1932), in ALBERT EINSTEIN & SIGMUND FREUD, *WHY WAR?* 50 (Stuart Gilbert trans., Paris, Int’l Inst. of Intellectual Co-operation, League of Nations 1933). It is not precisely clear whether Freud meant that people would be able to subordinate their instinctual drives to reason by themselves, or that state power had to be used for this purpose. For the “dictatorship of reason” as an administrative method, see JOHN RALSTON SAUL, *VOLTAIRE’S BASTARDS: THE DICTATORSHIP OF REASON IN THE WEST* 14 (1992).

citizenship.⁹ She fulfilled all the requirements for citizenship acquisition, yet in the citizenship ceremony at the *Prefecture de l'Isère* in the city of Grenoble, there was an unexpected twist—she refused to shake hands with male officials. Madame B.A.'s behavior was justified by religious beliefs. As a devout Muslim, she was not permitted by her faith to shake hands with non-relative men. Although she apologized for the incident and explained that she had daily social contacts with men and women—for example, during her driving lessons with a male teacher or her job as a caterer¹⁰—the French Prime Minister objected to her acquiring citizenship because of her lack of assimilation into the French *communauté*.¹¹ Madame B.A. challenged the decision in the highest French administrative court, the *Conseil d'État*, but lost. The court held that a refusal to shake hands in such “a symbolic place and at a symbolic moment reveals lack of assimilation.”¹²

A few months later, in August 2018, a similar decision was rendered in Switzerland. The city of Lausanne rejected an application for citizenship by two Swiss residents, whose nationalities remain unpublished, because of their refusal to shake hands with members of the other gender, presumably based on religious grounds.¹³ The Mayor of Lausanne supported the decision, announcing that the couple had shown disrespect for gender equality and that “religious practice does not fall outside the law.”¹⁴ The Vice Mayor of Lausanne, a member of the committee that rejected the application, added that “equality between men and women prevails over bigotry.”¹⁵ Apparently, the couple also had difficulty answering questions posed by officials of the opposite sex¹⁶ and, as a result, could not demonstrate successful integration.

These decisions, which might seem odd to outsiders, are not only confined to newcomers asking for citizenship. In 2016, two boys born in Switzerland refused to shake the hand of a female teacher in a public school in

9. Subject to certain conditions, a foreigner who has married a French citizen may apply for French citizenship after two years from the date of the marriage. See CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 21–22 (Fr.).

10. Conclusions of the Public Rapporteur, Mr. Xavier Domino, in the procedure before the Conseil d'État [CE] [Council of State] Apr. 11, 2018, 412462 (Fr.).

11. CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 21–24 (Fr.) provides that the government may object to the acquisition of citizenship for “lack of assimilation other than linguistic.”

12. Conseil d'État [CE] [Council of State] Apr. 11, 2018, 412462, ¶ 4 (Fr.). The case was widely reported in the international media. See, e.g., Aurelien Breenen, *No Handshake, No Citizenship, French Court Tells Algerian Woman*, N.Y. TIMES (Apr. 21, 2018), <https://www.nytimes.com/2018/04/21/world/europe/handshake-citizenship-france.html>.

13. *Décision négative d'octroi de la bourgeoisie communale* [Negative decision to grant the communal bourgeoisie], VILLE DE LAUSANNE (Aug. 17, 2018), https://www.lausanne.ch/apps/actualites/?actu_id=47900.

14. *Muslim Couple Denied Swiss Citizenship over Handshake Refusal*, THE GUARDIAN (Aug. 18, 2018), <https://www.theguardian.com/world/2018/aug/18/muslim-couple-denied-swiss-citizenship-over-handshake-refusal>.

15. *Id.*

16. *Id.*; Siobhán O'Grady, *After Refusing a Handshake, a Muslim Couple Was Denied Swiss Citizenship*, WASH. POST (Aug. 18, 2018), <https://www.washingtonpost.com/world/2018/08/18/after-refusing-handshake-muslim-couple-was-denied-swiss-citizenship/>.

the city of Therwil, in the Canton of Basel-Landschaft.¹⁷ The two teenagers—whose father, a Syrian imam, had been granted asylum in Switzerland in 2001—based their refusal on religious grounds: the belief that a Muslim man should not have physical contact with a non-relative female. At first, the school tolerated their behavior subject to the condition that they would not shake the hands of male teachers either, to ensure gender equality. But after the story was reported by Swiss TV, the school policy came under attack.¹⁸ The Federal Minister of Justice, Simonetta Sommaruga, took a strong stance on the issue, claiming that the behavior of the children should not be tolerated because handshaking was “part of [the Swiss] culture.”¹⁹ The case quickly turned into a national debate over Islam in Switzerland.²⁰ It did not take long before the Ministry of Education of the Canton Basel-Landschaft overruled the school policy and advocated a “civic duty” to shake hands with teachers in schools.²¹ Students, it was argued, should follow general rules of common decency, which, according to the prevailing understanding of “Swiss culture,” included being polite and showing respect by means of an oral greeting and a handshake.²² A refusal to shake hands contradicted the prevailing Swiss value system, conveyed a message that women were not equal in society, and undermined respect for basic social manners.²³ In 2017, an amendment to the Cantonal Constitution—according to which “religious obligations cannot exempt people from the fulfillment of civil duties”—was suggested.²⁴ However, all these developments did not help in reality. The students continued to refuse to shake

17. See, e.g., <<Niemand kann uns zwingen, Hände zu berühren>>, [“Nobody can force us to touch hands”] TAGES-ANZEIGER (Apr. 10, 2016), <https://www.tagesanzeiger.ch/panorama/vermischtes/niemand-kann-uns-zwingen-haende-zu-beruehren/story/21674547>.

18. See, e.g., Video Interview with Jürg Lauener, School Principal, in François Roulet, *A Genève, un élève musulman a refusé tout contact physique avec une prof* [In Geneva, a Muslim student refused all physical contact with a teacher], RTS (Apr. 10, 2016), <http://www.rts.ch/info/regions/geneve/7637397-a-geneve-un-eleve-musulman-a-refuse-tout-contact-physique-avec-une-prof.html>.

19. *Dispens vom Händedruck: <<Das geht nicht>>* [Dispensation from handshakes: “That doesn’t work”], SRF (Apr. 4, 2016), <https://www.srf.ch/news/regional/basel-baselland/dispens-vom-haendedruck-das-geht-nicht>.

20. See, e.g., <<Arena>>: *Ein handfestes Problem zwischen Staat und Religion?* [“Arena”: a tangible problem between state and religion?], SRF (Apr. 9, 2016), <https://www.srf.ch/news/schweiz/arena-ein-handfestes-problem-zwischen-staat-und-religion>; Fabian Eberhard, <<Sind wir radikal, weil wir die Gebote des Islam befolgen?>> [“Are we radical because we obey the commandments of Islam?”], TAGES-ANZEIGER (Apr. 10, 2016), <https://www.tagesanzeiger.ch/schweiz/standard/sind-wir-radikal-weil-wir-die-gebote-des-islam-befolgen/story/14312156>; Mélanie Faure, *Suisse: des élèves musulmans devront serrer la main de leurs enseignantes* [Switzerland: Muslim students will have to shake hands with their teachers], LE FIGARO (May 26, 2016), <https://www.lefigaro.fr/actualite-france/2016/05/25/01016-20160525ARTFIG00370-suisse-des-eleves-musulmans-devront-serrer-la-main-de-leurs-enseignantes.php>.

21. Bildungs-, Kultur-, und Sportdirektion Kanton Basel-Landschaft [Directorate of Education, Culture, and Sport, Basel-Landschaft Canton], No. 2015/287, RECHTSABKLÄRUNG: SCHÜLER VERWEIGERN LEHRERINNEN DEN HANDSCHLAG (2016) (Switz.).

22. *Id.*

23. *Id.*

24. Änderung der Kantonsverfassung betreffend Vorbehalt der bürgerlichen Pflichten und Änderung des Bildungsgesetzes betreffend Aufnahme einer Meldepflicht bei Integrationsproblemen [Amendment of the cantonal constitution regarding the reservation of civil obligations and amendment

hands with female teachers and, consequently, the school authorities imposed a fine of CHF 5,000 on their parents.²⁵ “A teacher has the right to demand a handshake,” said the education authorities.²⁶ An appeal to the cantonal government was rejected because a handshake is a common gesture in Swiss society and the public interests in its enforcement “are extremely substantial.”²⁷ The Federal Government did not interfere with the decision, stating that it was for the canton to decide on the subject.²⁸

These are not rare cases; European officials have come to view a refusal to shake hands as a litmus test for refusing to accept gender equality. In 2016, a civil registrar in Brussels, Belgium, refused to perform a wedding because of the bride’s refusal to shake his hand during the ceremony. The registrar did not deny the accusation and justified his decision on the ground of lack of respect. In the City Hall, he explained, “there is no place for religion,” and added that the couple was informed in advance that the civil registrar would not perform the ceremony if they did not shake his hand.²⁹ For the registrar, the refusal to shake hands was not just a sign of disrespect, but a matter of principle: “Women have fought for their rights for centuries, so now is not the time to give up on this issue.”³⁰ The legal ground for such behavior is unclear—civil registrars can refuse to conduct weddings only when they suspect a case of forced marriage or a marriage of convenience.³¹ Thus, in 2017, the Mayor of Brussels introduced a rule that bans lack of respect (and aggressiveness) toward law enforcement officials and civil servants exercising their duties. This rule does not allow officials to refuse to conclude a wedding, but it enables the imposition of administrative fines.³²

of the Education Act regarding the inclusion of an obligation to report in the event of integration problems] (Basel-Landschaft Canton) (June 27, 2017), <https://edudoc.ch/record/131507?ln=en>.

25. Siobhán O’Grady, *Switzerland to Muslim Students: Shake Your Teacher’s Hand or Pay \$5,000*, FOREIGN POL’Y (May 25, 2016), <https://foreignpolicy.com/2016/05/25/switzerland-to-muslim-students-shake-your-teachers-hand-or-pay-5000/>.

26. *Swiss Ruling Overturns Muslim Pupils’ Handshake Exemption*, THE GUARDIAN (May 25, 2016), <https://www.theguardian.com/world/2016/may/25/switzerland-ruling-overturns-muslim-pupils-handshake-exemption-religion>.

27. AUSZUG AUS DEM PROTOKOLL DES REGIERUNGSRATES DES KANTONS BASEL-LANDSCHAFT [Excerpt from the Minutes of the Government Council of Basel-Landschaft Canton], May 16, 2017, Decision on Complaint No. 0683, ¶ 8/e/dd (Switz.) [on file].

28. Bundesrates (Federal Council), Aug. 31, 2016, GESETZLICHE GRUNDLAGE FÜR DEN HANDSCHLAG, Motion 16.3392 (Switz.), available at <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20163392>.

29. Karim Fadoul, *Refus de serrer la main de l’échevin: huit mariages annulés à la Ville de Bruxelles [Refusal to shake hands with the alderman: eight marriages annulled at the City of Brussels]*, RTBF (Dec. 14, 2016), https://www.rtbf.be/info/regions/detail_refus-de-serrer-la-main-de-l-echevin-huit-mariages-annules-a-la-ville-de-bruxelles?id=9480611; Yvan Mayeur: “Un employé a refusé de serrer la main d’une échevine, il a été licencié,” [Yvan Mayeur: “An employee refused to shake the hand of an alderman, he was dismissed”], RTBF (Dec. 18, 2016), https://www.rtbf.be/info/dossier/la-votre-avis/detail_yvan-mayeur-un-employe-a-refuse-de-serrer-la-main-d-une-echevine-il-a-ete-licencie?id=9484054.

30. Fadoul, *supra* note 29.

31. C.Civ. (Belg.), arts. 146bis and 146ter.

32. Press Release (*Communiqué de Presse*), Yvan Mayeur, Mayor of Brussels (Jan. 16, 2017) [on file].

Handshaking also made headlines in the Netherlands. In 2004, an imam from Tilburg refused to shake the hand of Rita Verdonk, then the Dutch Minister of Integration. The image of Verdonk facing the bearded imam became a symbol of the failure of multiculturalism.³³ Shortly afterward, in 2006, the Dutch Equal Treatment Commission (today called the Netherlands Institute for Human Rights) handled dozens of religious discrimination complaints. For example, in 2006, a female, Muslim teacher was suspended from teaching at a public school after refusing to shake hands with men. The school, Vader Rijn College in Utrecht, put forward two claims: First, as a teacher, she was a role model for students and refusing to shake hands with the opposite gender was incompatible with her profession. Second, schools had to be free of religious influences; religious beliefs had to remain in the private sphere. After the Utrecht District Court rejected her claim,³⁴ the teacher appealed to the Central Appeals Court for Public Service and Social Security Matters, which upheld the suspension, holding that handshaking was a “standard form of greeting that is compatible with common good manners in the Netherlands.”³⁵ Examining this case (and others³⁶), the Equal Treatment Commission issued a non-legally binding opinion stating that the school wrongly focused on norms and values of only the majority population in the Netherlands, which are not shared by minority communities, and thus found the school to have discriminated against the teacher.³⁷ Nevertheless, the topic remained controversial. In 2016, an application for a bus-driver position was rejected on the grounds of the applicant’s refusal to shake hands with female passengers and colleagues. The bus company explained that the refusal undermined “accepted social forms of conduct.”³⁸

Following the outbreak of Covid-19, governments in Europe adopted a “no-handshake policy” and people found other ways to greet one another,

33. IAN BURUMA, *MURDER IN AMSTERDAM: THE DEATH OF THEO VAN GOGH AND THE LIMITS OF TOLERANCE* 8 (2006).

34. Rb. Utrecht 30 augustus 2007, LJN 2007, BB2648 m.nt L.C. Groen en B.P. Vermeulen (eiseres/de Stichting voor Openbaar Voortgezet Onderwijs Utrecht) (Neth.); see also Marc Hertogh, *What’s in a Handshake? Legal Equality and Legal Consciousness in the Netherlands*, 18 SOC. LEG. STUD. 221, 232 (2009).

35. CRvB 7 mei 2009, LJN 2009, BI2440 m.nt L.C. Groen en B.P. Vermeulen (betrokkene/ de Stichting voor Openbaar Voortgezet Onderwijs Utrecht) ¶ 7.8 (Neth.).

36. Hof ’s-Gravenhage 10 april 2012, LJN 2012, BW1270 m.nt (appellant/ de rechtspersoon naar publiek recht Gemeente Rotterdam, Dienst Sociale zaken en Werkgelegenheid, gevestigd te Rotterdam) ¶¶ 3, 15 (Neth.).

37. See, e.g., COMMISSIE GELIJKE BEHANDELING, OORDEELNUMMER 2006-51 [Dutch Equal Treatment Commission, Decision No. 2006-51] ¶ 4.16 (Mar. 27, 2006); see also COMMISSIE GELIJKE BEHANDELING, OORDEELNUMMER 2006-220 [Dutch Equal Treatment Commission, Decision No. 2006-220] (Nov. 7, 2006).

38. COLLEGE VOOR DE RECHTEN VAN DE MENS, OORDEELNUMMER 2016-142 [Netherlands Institute for Human Rights, Decision No. 2016-142] ¶¶ 4.8, 4.10 (Dec. 22, 2016); see also John Maes, *Ontsteltenis over handenuweigeraar*, DE TELEGRAAF (Jan. 10, 2017), (response of members of Council of Utrecht to the decision); *Geen handen schudden, hoe zit dat?*, COLLEGE VOOR DE RECHTEN VAN DE MENS (Jan. 18, 2017) (reply to the council members of the Netherlands Institute for Human Rights).

such as elbow bumping, head nodding, and air kissing.³⁹ Viewed through the lens of the Covid-19 crisis, avoiding handshakes is a civic duty essential to protect members of society; it is part of social responsibility.⁴⁰ Nevertheless, at the early stage of the pandemic, in February 2020, Denmark denied citizenship to a male applicant, originally from Pakistan, because of his refusal to shake hands on religious grounds during a citizenship ceremony at Copenhagen City Hall. According to the decision, if the applicant is unable to shake hands with Danish officials in another citizenship ceremony in the next two years, he will have to apply for citizenship from scratch.⁴¹ The legal ground for the decision is a Danish law, passed in 2018, which has made handshaking with the mayor or other officials mandatory in all naturalization ceremonies.⁴² Inger Støjberg, the former Minister for Immigration, Integration and Housing, said, “[i]f you don’t shake hands, you don’t understand what it means to be Danish,”⁴³ and added, “[i]t’s in exactly that moment [of the handshake] that you become citizens.”⁴⁴ Denmark even canceled the citizenship ceremony in March 2020 “as a handshake with the local mayor or official is a mandatory part of the ceremony (without gloves),”⁴⁵ and temporarily suspended the mandatory requirement of handshaking only in April 2020.⁴⁶

39. Caroline Davies, *Elbow-Bumps and Footshakes: The New Coronavirus Etiquette*, THE GUARDIAN (Mar. 3, 2020), <https://www.theguardian.com/world/2020/mar/03/elbow-bumps-and-footshakes-the-new-coronavirus-etiquette>.

40. Ashley Mantha-Hollands & Liav Orgad, *The Future of Handshaking: How Coronavirus Can Transform ‘Living Together’ in Europe*, VERFASSUNGSBLOG (Apr. 27, 2020), <https://verfassungsblog.de/the-future-of-handshaking/>.

41. David Rue Honoré, *Mand nægtede at give hånd på Københavns Rådhus og blev ikke dansk statsborger* [Man refused to shake hands at Copenhagen City Hall and did not become a Danish citizen], BERLINGSKE (Feb. 26, 2020), <https://www.berlingske.dk/samfund/mand-naegtete-at-give-haand-paa-koebenhavns-raadhus-og-blev-ikke-dansk>; Steen A. Jørgensen, *En mand nægtede at give hånd på Københavns Rådhus - så han blev ikke dansk statsborger* [One man refused to shake hands at Copenhagen City Hall—so he did not become a Danish citizen], JYLLANDS-POSTEN (Feb. 26, 2020), <https://jyllands-posten.dk/politik/ECE11967947/en-mand-naegtete-at-give-haand-paa-koebenhavns-raadhus-saa-han-blev-ikke-dansk-statsborger/>.

42. Martin Selsoe Sorensen, *Denmark, With an Eye on Muslims, Requires New Citizens to Shake Hands*, N.Y. TIMES, Dec. 20, 2018, at A8.; Lov om ændring af lov om dansk indfødsret og lov om danskuddannelse til voksne udlændinge m.fl. [Act amending the Act on Danish citizenship and the Act on Danish education for adult foreigners and others] 2018.

43. *Want to be Danish? You’d Better Shake Hands*, REUTERS (Jan. 17, 2019), <https://www.reuters.com/article/us-denmark-immigration-idUSKCN1PB29Q>.

44. *Handshakes High on the Agenda as Denmark’s Immigration Minister Awards Nine Citizenships*, THE LOCAL (Jan. 18, 2019), <https://www.thelocal.dk/20190118/handshakes-high-on-the-agenda-as-denmarks-immigration-minister-awards-nine-citizenships/>.

45. European Commission Press Release, Danish Refugee Council, Denmark: New Hotline in 25 Languages About Coronavirus (Apr. 6, 2020); see also Elian Peltier, *No Handshakes, No New Citizens: Coronavirus Halts Danish Naturalizations*, N.Y. TIMES, Mar. 7, 2020, at A11.

46. Press Release, COVID-19: Regeringen vil midlertidigt suspendere håndtryk til grundlovsceremonier [COVID-19: The government will temporarily suspend handshakes for constitutional ceremonies], GOVERNMENT OF DENMARK (Apr. 16, 2020), <https://uim.dk/nyheder/2020/2020-04/covid-19-regeringen-vil-suspendere-handtryk-til-grundlovsceremonier>.

In March 2020, at the peak of the Covid-19 crisis, when Chancellor Merkel demanded “no more handshakes”⁴⁷ and social-distance rules were strictly applied throughout Germany, the Administrative Court of Baden-Württemberg rejected a citizenship application of a male applicant because of his refusal to shake hands with a female immigration official. The applicant moved to Germany from Lebanon in 2002 and graduated in Human Medicine from a German university; he was married to a German-born citizen, passed a citizenship test with the highest grade, expressed loyalty to the German Constitution, and signed a declaration denouncing extremism.⁴⁸ However, in a citizenship ceremony in 2015, he refused to shake hands with a female official for religious reasons and, consequently, his application was rejected.⁴⁹ The court held that refusing to shake hands with women does not satisfy the legal requirement that a person shows sufficient integration into “German living conditions.” It admitted that this term is undefined, but added that, at minimum, it requires acceptance of “elementary principles of social and cultural community life, which are regarded as indispensable extra-legal prerequisites for a prosperous coexistence.”⁵⁰ The court found that “due to its social and legal significance, handshaking is part of the German living conditions” and is a “common non-verbal ritual of greeting, regardless of one’s social status, gender, or other characteristics . . . the result of centuries of practice.”⁵¹ When a man “refuses to shake hands with a woman,” it “represents a degradation of the woman as a person because . . . she is reduced solely to her sexuality.”⁵² In an interesting statement, the court noted that:

The history of the handshake goes back thousands of years . . .
Due to the long historical tradition of the handshake, the Senate
considers it impossible that the current corona pandemic, which
is associated with the avoidance of the handshake, will lead to an

47. Press Release, Chancellor Angela Merkel, An Address to the Nation by Federal Chancellor Merkel (Mar. 18, 2020), <https://www.bundesregierung.de/breg-de/themen/coronavirus/statement-chancellor-1732296>.

48. Verwaltungsgerichtshof [VGH] Baden-Württemberg [Administrative Court of Baden-Württemberg] Aug. 20, 2020, 12 S 629/19, <http://www.landesrecht-bw.de/jportal/?quelle=jlink&docid=MWRE200003933&psml=bsbawueprod.psml&max=true> (Ger.), at ¶¶ 2–4.

49. The applicant was not himself against handshakes, but rather his wife was. The court found that “he refused to do so on the grounds that he had promised his wife not to shake hands with any other woman . . . due to [his wife’s] strong jealousy, [the applicant] promised her not to touch any foreign women. . . . [The wife] was a very jealous woman, and she did not like it when her husband touched other women. . . . He was not enthusiastic about it, but wanted to keep to his promise since, to lead a harmonious marriage, one sometimes had to make compromises.” *Id.* at ¶¶ 8–9, 61–63, 74–76. Still, the court was willing to assume that the applicant’s refusal to shake hands was based on religious grounds. *Id.* at ¶ 12.

50. *Id.* at ¶¶ 41, 44–45, 49.

51. *Id.* at ¶ 53, 56; *see also id.* at ¶¶ 12, 30.

52. *Id.* at ¶ 78.

end to the handshake in the long run. Even in the past, the handshake outlasted the times marked by global pandemics.⁵³

This statement shows that the court did not find the handshakes to be a fashionable trend that is open to social and cultural change. Reading the decision, one gets the impression that it is not the act of refusing to shake hands that bothered the court, but the *motivation*. The court found that there are circumstances in which not shaking hands can be legally permitted, such as at the hospital, but these actions are based on “hygienic conditions,”⁵⁴ unlike the present case in which a refusal to shake hands “can be understood as a building block in the general tactics of some political fundamentalists to make Islamist ideas . . . culturally and socially acceptable in Germany.”⁵⁵

The case of handshaking reveals how shaky European tolerance has become. Religious tolerance should require religious believers to tolerate non-religious manners, but, at the same time, it should require non-religious people to tolerate religious manners, as long as these manners are not unlawful or fundamentally harmful. That a refusal to shake hands is perceived as fundamentally harmful to gender equality and social manners is odd, both because of the changing perception of what is considered harmful and because of the role of handshakes in contemporary European identity.

B. *Swimming*

Aziz Osmanoglu moved from Turkey to Switzerland at the age of ten. In the penultimate year of his studies, he decided to study Islamic precepts in Turkey, where he met his future wife, Sehabat Kocabaş. The couple moved to Switzerland in 1999 and they were both naturalized in 2003. In 2008, they refused to allow their daughters, who were born in Switzerland and were seven and nine years old, to take part in mixed swimming classes in school. The school authorities did not excuse them from swimming lessons, as exemptions, according to the guidelines issued by the Canton of Basel, could be granted only to students at the age of puberty (usually, the age of twelve). Moreover, in 2010, the Cantonal Department of Education imposed a CHF 1,400 fine on the parents for violating their parental duties. The decision was challenged in the Cantonal Court of Appeals, but the court rejected the appeal in 2011⁵⁶ and the Swiss Federal Supreme Court upheld the decision in 2012.⁵⁷ The Federal Court ruled that compulsory mixed swimming lessons in schools were crucial to ensure integration. It found irrelevant the claim that the girls knew how to swim—based on

53. *Id.* at ¶ 53.

54. *Id.* at ¶ 81.

55. *Id.* at ¶ 83.

56. Appellationsgericht Basel-Stadt [Court of Appeal of the Canton Basel-Stadt] May 30, 2011, 255 BASLER JURISTISCHE MITTEILUNGEN [BJM] (Switz.).

57. Bundesgericht [BGer] [Federal Supreme Court] Mar. 7, 2012, 2C_666/2011 (Switz.).

private lessons organized for the Muslim community—holding that the value of school swimming lessons was not only in learning how to swim but also in submitting to external teaching conditions.⁵⁸ This is interesting because the Swiss school system is not unified, but varies among cantons. Swimming is not mandatory in all cantons and compulsory sports often include skiing, gymnastics, and ice-skating (the type of activities depends on the school).

In 2017, the European Court of Human Rights (ECtHR) sustained the Swiss decision.⁵⁹ The ECtHR found that compulsory mixed swimming lessons interfered with the right to freedom of religion of the parents, protected by Article 9 of the European Convention of Human Rights, but that it was justified.⁶⁰ Mixed swimming lessons have a legitimate aim (“the integration of foreign children from different cultures and religions . . . [and] the protection of public order”).⁶¹ The ECtHR concluded that “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.”⁶² Moreover, “a child’s interest in attending those lessons lies not merely in learning to swim and taking physical exercise, but above all in participating in that activity with all the other pupils”—that is, the idea of “learning together.”⁶³ Compulsory mixed swimming lessons, *à la* ECtHR, were thus justifiable in a democratic society, or at least in Swiss society.

The ruling of the Federal Supreme Court of Switzerland, backed up by the ECtHR, presents a U-turn from a previous decision rendered in 1993. Back then, the Federal Supreme Court exempted female Muslim students from mixed swimming lessons. It held that “people from other countries and cultures residing in Switzerland . . . [have] no legal obligation to adapt their customs and ways of life” beyond complying with the legal system.⁶⁴ Fifteen years later, in 2008, the court overruled its decision. In justifying this reversal, the court explained that in 1990 there were 152,200 Muslims

58. *Id.* For a similar case, see Bundesgericht [BGer] [Federal Supreme Court] Apr. 11, 2013, 2C_1079/2012 (Switz.).

59. *Osmanoğlu and Kocabaş v. Switzerland*, App. No. 29086/12, Eur. Ct. H.R. (Jan. 10, 2017), <http://hudoc.echr.coe.int/eng?i=001-170346>.

60. European Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, 213 U.N.T.S. 221. Article 9 protects the right to freedom of religion, which includes a right to manifest a religion or belief. It can be limited only by law and for legitimate aims necessary in a democratic society, such as “the protection of public order . . . or for the protection of the rights and freedoms of others,” two aims that the court found to be associated with mixed swimming lessons; see *Osmanoğlu* at ¶ 64.

61. *Id.* at ¶ 64.

62. *Id.* at ¶ 97.

63. *Id.* at ¶¶ 98, 100.

64. Bundesgericht [BGer] [Federal Supreme Court] June 18, 1993, 119 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] Ia 178, ¶ 8d (Switz.).

in Switzerland, whereas in 2008 the number had reached 400,000.⁶⁵ Given the new demographic composition, the court held that compulsory swimming classes were essential to guaranteeing equal opportunities and gender equality in Swiss society. The school could not fulfill “all personal wishes,” and immigrants “must regularly accept certain limitations and adaptations to their ways of life.”⁶⁶ In Switzerland, people often saw girls wearing short skirts in public, and immigrants “should learn to deal with it.”⁶⁷

Swimming lessons have become a litmus test for social integration, not only in Switzerland, but also in other European countries. Take Germany. In 2016, the German Constitutional Court ruled that swimming classes are a mandatory part of the curriculum.⁶⁸ The case concerned Asma, a Muslim girl who was born in Germany in 2000. Asma received good grades and attended a gymnasium in Frankfurt. In the fifth grade the school required participation in swimming lessons taught in mixed-sex classes, even if it meant wearing a full-body bathing suit—the so-called “burkini.” Asma refused to participate in class because, she asserted, a burkini would not cover her full body and, furthermore, her religion did not allow her to see male classmates wearing bathing suits. Therefore, she requested an exemption based on religious beliefs, but the school authorities denied her request.⁶⁹ Asma appealed the school’s decision through four judicial instances, up to the German Federal Constitutional Court, but lost.⁷⁰

The German Federal Administrative Court linked swimming classes to social integration. The court held that integration “requires that minorities do not distance themselves, and *a priori* close themselves off from learning content against which they have religious, ideological, or cultural reservations”; only mandatory participation “can have the community-building effect.”⁷¹ Exemptions from swimming classes could be justified only if the restriction on religious freedom was of a “particularly severe intensity”—that is, when a certain rule was a religious imperative—yet this was not the case when Asma could have limited the restriction on her religious beliefs

65. Bundesgericht [BGer] [Federal Supreme Court] Oct. 24, 2008, 135 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] I 79, ¶¶ 7.1–7.2 (Switz.).

66. *Id.*

67. *Id.*

68. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 3237/13, Nov. 8, 2016, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/11/rk20161108_1bvr323713.html (Ger.).

69. *Id.* at ¶¶ 1–4.

70. Verwaltungsgericht Frankfurt am Main [VG Frankfurt/Main] [Administrative Trial Court of Frankfurt am Main], Apr. 26, 2012, Az. 5 K 3954/11.F (Ger.); Verwaltungsgerichtshof Hessischer [VGH Hessischer] [Higher Administrative Court of Hessischer], Sept. 28, 2012, Az. 7 A 1590/12 (Ger.); Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], Sept. 11, 2013, 6 C 25.12 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Nov. 8, 2016, 1 BvR 3237/13 (Ger.).

71. Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], Sept. 11, 2013, 6 C 25.12, ¶¶ 16–17, 20 (Ger.).

to an “acceptable level.”⁷² Integration, the court noted, required the encouragement of children to experience and accept social mores and the cultural norms of others.⁷³ In 2016, the German Federal Constitutional Court upheld the lower court’s decision, holding that Asma should participate in mixed swimming lessons by wearing a burkini. An exception could not be granted as she had not demonstrated why a burkini could “not be sufficient to ensure respect for Islamic dress regulations.”⁷⁴

In Germany, too, things were different just twenty years ago. In 1993, the German Federal Administrative Court reviewed a request for exemption from physical education classes, including swimming lessons, by a twelve-year-old Muslim girl.⁷⁵ It found that the school had to offer physical education classes separated by gender and, if this was not possible due to organizational reasons, the student could be exempted. The court added that the school had not sufficiently respected the girl’s religious freedom by allowing her to participate in swimming classes wearing loose clothes and a headscarf, as this would not prevent her conflict of conscience (unlike the 2013 decision, in which the court found that the burkini amounted to sufficient accommodation in mixed swimming lessons). The court further held that although the girl might see lightly-dressed boys outside of physical education classes, this was not a sufficient reason for imposing mixed swimming lessons because she could avoid such situations in her private life (unlike the 2013 decision, in which the court found mixed swimming classes to be part of an unavoidable reality outside the school).⁷⁶ It concluded that “the integration of students is not endangered by an exemption from mixed-sex physical education classes”⁷⁷ (unlike the 2013 decision, in which the court found gender-mixed swimming lessons to be essential for integration). Comparing the two cases brings two views of liberal tolerance: One requires the minority to tolerate the prevailing ways of doing things of the majority (the 2013 decision) and the other requires the majority to tolerate the religious beliefs of the minority (the 1993 decision).

The increasing number of devout Muslims in Europe has transformed swimming lessons into an essential social topic—they have become a test for social integration—that has led the German and the Swiss courts to reexamine the rule that applies to taking part in mixed swimming lessons.

72. *Id.* at ¶¶ 21, 24.

73. *Id.* at ¶¶ 25, 30.

74. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Nov. 8, 2016, 1 BvR 3237/13, ¶ 30 (Ger.).

75. Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], Aug. 25, 1993, 6 C 8.91 (Ger.); *see also* Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], Aug. 25, 1993, 6 C 30.92 (Ger.).

76. Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], Sept. 11, 2013, 6 C 25.12, ¶ 30 (Ger.).

77. Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], Aug. 25, 1993, 6 C 8.91 (Ger.).

C. *Burkini*

At the end of July 2016, the mayor of the French city of Cannes, David Lisnard, issued a decree temporarily prohibiting access to public beaches to people wearing “beachwear that ostentatiously displays religious affiliation” or “clothing that disrespects good morals (*bonnes mœurs*), secularism (*laïcité*), the rules of hygiene, and swimming safety.”⁷⁸ The decree was signed a few days after the 2016 Nice truck attack in the French Riviera, in which eighty-six people were killed. The prohibition was perceived as a measure to protect public safety during a state of emergency.⁷⁹ According to the city of Cannes, the ban did not target the burkini, but because it only applied to ostentatious religious clothing “that refers to allegiance with terrorist movements fighting a war against us,” it became, *de facto*, a ban on burkinis.⁸⁰ Soon afterward, more than fifteen towns followed suit and adopted similar decrees. At first, the validity of the decrees was challenged in court without success. Referring to the decree of the city of Villeneuve-Loubet, the Administrative Tribunal of Nice linked the burkini to “Islamist religious fundamentalism that advocates a radical practice of religion, incompatible with the essential values of the French community.”⁸¹ The Tribunal ruled that beaches were not “an adequate place to express religious beliefs in an ostentatious manner.”⁸² It considered the burkini to be an act of “provocation” which, in the context of the recent terrorist attacks, created a threat to public order.⁸³ The decree of the city of Villeneuve-Loubet was found “necessary, appropriate, and proportionate” to ensure public order.⁸⁴

In August 2016, the burkini ban made international news after the publication of photographs of armed police officers surrounding a woman resting on the beach in Nice and forcing her to remove some of her clothes. The woman was not even wearing a burkini, but leggings and a long-sleeved shirt; her head was covered with a scarf. Still, she was fined for wearing swimwear that disrespected the principles of “good morals and secular-

78. Arrêté municipal 16/2754 du 28 juillet 2016 portant interdiction d'accès aux plages et de baignade à toute personne n'ayant pas une tenue correcte [Municipal decree 16/2754 of July 28, 2016 prohibiting access to beaches and swimming for persons not wearing proper attire] (Fr.).

79. *Le maire de Cannes interdit le port du burkini sur les plages* [The mayor of Cannes bans the wearing of the burkini on the beaches], NICE MATIN (Aug. 11, 2016), <https://www.nicematin.com/faits-de-societe/le-maire-de-cannes-interdit-le-port-du-burkini-sur-les-plages-70612>.

80. *Burkini: le maire de Cannes interdit les vêtements religieux à la plage* [Burkini: the mayor of Cannes bans religious clothing at the beach], LE MONDE (Aug. 11, 2016), https://www.lemonde.fr/societe/article/2016/08/11/le-maire-de-cannes-interdit-les-vetements-religieux-a-la-plage_4981587_3224.html.

81. Tribunal Administratif [TA] [Administrative Court of First Instance] Nice, Aug. 22, 2016, 1603508 and 1603523, ¶ 15–16 (Fr.).

82. *Id.*

83. *Id.* at ¶ 16.

84. *Id.*

ism.”⁸⁵ Shortly afterward, similar images became prolific, showing women being fined or asked to leave the beach,⁸⁶ some of them for wearing quite regular clothes and a headscarf. These cases indicated that the authorities wanted to prohibit not only the burkini, but any visible sign of Islam on public beaches.

At the peak of the burkini controversy, the *Conseil d'État* put an end to the discussion. It annulled the decision of the Nice Administrative Court and suspended the execution of the decree. It held that the mayor's authority was limited to measures that were necessary and proportionate for the protection of public order at the beaches, such as swimming safety; the fears of terrorist attacks resulting from wearing a burkini were not sufficiently well-grounded to justify the prohibition. The *Conseil d'État* found no risk to public order by wearing a burkini and held that the decree “violates fundamental liberties.”⁸⁷ The ruling became a focus of fierce political debate. France's Prime Minister Manuel Valls declared that “the burkini is not a harmless bathing suit . . . [but a symbol of] a radical Islamism that appears and wants to impose itself in the public space.”⁸⁸ Prime Minister Valls defended the municipal decree, stating that it was not a restriction of freedom but precisely the opposite.⁸⁹ According to Valls, France was fighting for the freedom “of women who should not have to live under the yoke of a chauvinist order,” and “for the freedom of the majority of Muslims who do not identify with this proselyte minority who manipulate their religion.”⁹⁰ The burkini ban, it seemed, became an expression of freedom. Valls went further to explain his concept of freedom: “The conviction on which the French nation is based is that to have free and equal citizens, religion must fall under the private sphere.”⁹¹

The French policy⁹² was widely criticized by the international media. “How is it possible that in a ‘modern’ world, tanning naked is accepted but keeping your clothes on at the beach is not?” asked a 23-year-old student in

85. See, e.g., Ben Quinn, *French Police Make Woman Remove Clothing on Nice Beach Following Burkini Ban*, THE GUARDIAN (Aug. 24, 2016), <https://www.theguardian.com/world/2016/aug/24/french-police-make-woman-remove-burkini-on-nice-beach>.

86. See, e.g., *id.*; *France Burkini Ban: Australian Woman Forced off Riviera Beach*, BBC (Sept. 19, 2016), <https://www.bbc.com/news/world-australia-37382318>; Laura Thouny, *Siam, verbalisée sur une plage de Cannes pour port d'un simple voile [Siam, fined on a beach in Cannes for wearing a simple veil]*, L'OBS (Aug. 23, 2016), <https://www.nouvelobs.com/societe/20160822.OBS6680/siam-verbalisee-sur-une-plage-de-cannes-pour-port-d-un-simple-voile.html>.

87. Conseil d'État [CE] [Council of State], Aug. 26, 2016, 402742, ¶ 6 (Fr.).

88. Manuel Valls, *En France, les femmes sont libres [In France, women are free]*, HUFFINGTON POST (Sept. 5, 2016), https://www.huffingtonpost.fr/manuel-valls/manuel-valls-interdiction-burkini-islam-laicite_b_11865808.html.

89. *Id.*

90. *Id.*

91. *Id.*

92. For similar policies on swimming pools in Belgium, see Eva Brems, Saïla Ouald Chaïb & Katrijn Vanhees, “*Burkini*” *Bans in Belgian Municipal Swimming Pools: Banning as a Default Option*, 36 NETHERLANDS QUARTERLY OF HUMAN RIGHTS 270 (2018).

the *New York Times*.⁹³ But for Prime Minister Valls, nudity is French, while the burkini is not. Referring to the bare breasts of Marianne, a national symbol of the French Republic, he declared: “Marianne has a naked breast because she is feeding the people! She is not veiled, because she is free! That is the republic!”⁹⁴ It is not clear why a naked breast is French, while a burkini is not. It is probably based on the assumption that nudity and bikinis are a symbol of freedom and liberation, while a burkini is a symbol of submission and oppression. Whatever one thinks of this assumption, this was not always the case. In the 1950s, the itchy-bitsy bikini was censured by the Catholic Church and unwelcome in European societies—in Italy, Portugal, Spain, and the French Atlantic coastline.⁹⁵ It was not seen as a symbol of freedom, but a “seed of corruption” (for Christian churches) and “male chauvinist piggery” (for feminist groups).⁹⁶ Police officers issued tickets for wearing a bikini,⁹⁷ and women were sentenced for public indecency for wearing a monokini.⁹⁸

The burkini has become a cause of battle over freedom. When Marks and Spencer announced that it was selling burkinis, the French Minister for Families, Children, and Women’s Rights, Laurence Rossignol, strongly objected to it, comparing women who supported burkinis to “negroes who were in favor of slavery.”⁹⁹ But the battle over freedom was peculiar. According to Manuel Valls, France is committed to freedom: “We protect our Muslim citizens against those who want to make scapegoats of them . . . [We want] to make it resoundingly clear that Islam is totally compatible with democracy, secularism, and the equality of men and women.”¹⁰⁰ Yet the idea that Islam should be “fully compatible” with principles of “secularism” is paradoxical.

The burkini debate cannot be isolated from Europe’s burqa controversy. The public discussion over the burqa, a full-face veil, became heated in France in 2009, when former President Nicolas Sarkozy stated that the

93. Lillie Dremeaux, *The Way People Look at Us Has Changed: Muslim Women on Life in Europe*, N.Y. TIMES (Sept. 2, 2016), <https://www.nytimes.com/2016/09/03/world/europe/burkini-ban-muslim-women.html>.

94. Angélique Chrisafis, *French PM Suggests Naked Breasts Represent France Better than a Headscarf*, THE GUARDIAN (Aug. 30, 2016), <https://www.theguardian.com/world/2016/aug/30/france-manuel-valls-breasts-headscarf-burkini-ban-row>.

95. PATRIK ALAC, BIKINI STORY 52 (2012).

96. *Id.* at 52–53.

97. 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>.

98. MARCELA IACUB, PAR LE TROU DE LA SERRURE: UNE HISTOIRE DE LA PUDEUR PUBLIQUE, XIX^e-XXI^e SIÈCLE 171 (2008).

99. Niraj Chokshi, *Muslims in veils are like ‘American negroes’ who supported slavery, French minister says*, WASHINGTON POST (Mar. 31, 2016), <https://www.washingtonpost.com/news/worldviews/wp/2016/03/31/muslim-women-in-veils-are-like-american-negroes-who-supported-slavery-french-minister-says/>.

100. Valls, *supra* note 88.

burqa was “not welcome” in France.¹⁰¹ Soon after, a parliamentary commission was established to investigate the practice of wearing the burqa on French territory. The commission proposed different measures to counter the practice of wearing a burqa, one of which was a burqa ban.¹⁰² In 2010, the French Parliament adopted a law prohibiting people from “wear[ing] clothing designed to conceal the face in any public space”—defined broadly to include hospitals, public transportation, shopping centers, and cinemas—subject to a few exceptions, such as health, sport practices, and artistic manifestations.¹⁰³ Five justifications were provided for the ban. The burqa was found to endanger individual liberty, human dignity, gender equality, public order, and the French social life—the concept of “living together.”¹⁰⁴

After the French Constitutional Council (the *Conseil Constitutionnel*) approved the law,¹⁰⁵ the case was brought to the ECtHR, which upheld the ban. Although acknowledging that the ban interfered with the right to religious freedom, the ECtHR noted that such limitation was necessary and proportionate for safeguarding respect for the principle of “living together”—which required minimum social interaction and community life.¹⁰⁶ In spite of the allegedly neutral language of living together, the court did not protect a European mode of life—it actually concluded that the French position was a minority in Europe—but rather the values of the *majority* in France.¹⁰⁷ It held that the question of whether a woman “should be permitted to wear the full-face veil in public places constitutes a choice

101. Sarkozy: <<La burqa n'est pas la bienvenue sur le territoire de la République>> [“The burqa is not welcome on the territory of the Republic”], LIBÉRATION (June 22, 2009), https://www.liberation.fr/france/2009/06/22/sarkozy-la-burqa-n-est-pas-la-bienvenue-sur-le-territoire-de-la-republique_566253/.

102. ASSEMBLÉE NATIONALE [FRENCH NATIONAL ASSEMBLY], RAPPORT D'INFORMATION FAIT EN APPLICATION DE L'ARTICLE 145 DU RÈGLEMENT AU NOM DE LA MISSION D'INFORMATION SUR LA PRATIQUE DU PORT DU VOILE INTÉGRAL SUR LE TERRITOIRE NATIONAL 166–86 (2010). This measure was seen at that time legally questionable. See CONSEIL D'ÉTAT, STUDY OF POSSIBLE LEGAL GROUNDS FOR BANNING THE FULL VEIL 19–36 (2010).

103. 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 concealment of the face in public spaces], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344 (Fr.), Arts. 1, 2(1), 2(2).

104. ASSEMBLÉE NATIONALE [FRENCH NATIONAL ASSEMBLY], PROJET DE LOI INTERDISANT LA DISSIMULATION DU VISAGE DANS L'ESPACE PUBLIC: ETUDE D'IMPACT 5–7 (2010); see also François Fillon [French Prime Minister], Circulaire relative à la mise en oeuvre de la loi n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public, J.O., Mar. 2, 2011, p. 4128.

105. Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2010-613DC, Oct. 7, 2010, J.O. 18345 (Fr.); see also Patrick Weil, *La loi sur la burqa risque l'invalidation par l'Europe*, LE MONDE (Nov. 23, 2010), https://www.lemonde.fr/idees/article/2010/11/23/la-loi-sur-la-burqa-risque-l-invalidation-par-l-europe_1443886_3232.html.

106. *S.A.S. v. France* [GC], 2014-III Eur. Ct. H.R. 341, ¶¶ 121–122, 142, 153. The ruling of the ECtHR was condemned by the U.N. Human Rights Committee. See *UN Human Rights Committee Condemns “Burqa Ban,” Countering European Court*, INTERNATIONAL JUSTICE RESOURCE CENTER (Nov. 14, 2018), <https://ijrcenter.org/2018/11/14/un-human-rights-committee-condemns-burqa-ban-countering-european-court/>.

107. *S.A.S.*, 2014-III Eur. Ct. H.R. at ¶ 156.

of society,” and not an individual choice.¹⁰⁸ Consequently, French courts have rejected complaints of Muslim women who were fined or obliged to take a citizenship course.¹⁰⁹

The examples of handshaking, swimming, and burkini wearing are symptoms—marginal and limited in scope and application, yet not insignificant—of a moral panic in Europe. Other examples include the Swiss ban on minarets and issues related to halal food, space for prayer, and school trips. These cases raise a wide range of normative issues, some of which will be discussed next.

II. WESTERN HYPOCRISY

This Part discusses normative implications of recent policies in Europe. First, it shows how the legal and political discourse often uses a cover story to hide its actual reasons. Second, it presents the abuse of the concept of freedom to force people to be free. Third, it demonstrates how the legal discourse has veiled itself with a universal language to protect a national way of life. Fourth, it underscores two trends: culturalization of religion and universalization of culture regarding the majority, and religionization of culture (and its politicization) regarding the minority. European courts, so it seems, apply double standards in evaluating cultural and religious symbols and modes of life. On the whole, this Part reveals Western hypocrisy—applying different moral standards to majority and minority groups.

A. *Legal White Lies*

There can be different justifications for the European policies on handshaking, swimming, and burkini wearing. Take, for example, the burkini ban. Official justifications for the ban focus on three interests: national security, public health, and individual liberty. These justifications, however, are not compelling. To begin with, although the Administrative Tribunal of Nice associated the burkini with radical “Islamist religious fundamentalism” and with a threat to public order after the 2016 Nice truck attack,¹¹⁰ there is a remote connection between the burkini and terror or a threat to national security. It is quite ironic that the target of anti-terrorist measures were women, rather than men, who were involved in the attack in Nice. Following the public debate, one gets the impression that the burkini was a victim of public anger and the government’s wish to be seen as doing *some-*

108. *Id.* at ¶ 153.

109. *See, e.g.*, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Versailles, Jan. 8, 2014, No. 13219000185; Cour d’appel [CA] [regional court of appeal] Versailles, Oct. 22, 2014, No. 13219000185; Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-613DC, Oct. 7, 2010, J.O. 18345 (Fr.); Cour de cassation [Cass.] [Supreme Court for Judicial Matters] crim., Mar. 5, 2013, Bull. crim., No. 54. For further details, see ANNA C. KORTEWEG & GÖKÇE YURDAKUL, *THE HEADSCARF DEBATES: CONFLICTS OF NATIONAL BELONGING* 54 (2014).

110. Nice Administrative Court of First Instance, *supra* note 81, ¶¶ 15–16 (Fr.).

thing after the attack in Nice. Similarly, the claim that swimming with a burkini is unhygienic and presents a risk to public health, as claimed by the deputy mayor of Villeneuve-Loubet,¹¹¹ is peculiar. At best, this argument may apply to a swimming pool,¹¹² but not to the Mediterranean Sea in the French Riviera.

A third case against the burkini relates to freedom—it is perceived as a symbol of oppression. The French Minister Laurence Rossignol explicitly made this point by comparing women who support wearing a burkini to “negroes who were in favor of slavery.”¹¹³ Yet what exactly is undermining freedom? Is it the action of wearing the burkini or the religious motivation for it? If it is the burkini itself, one could expect a similar ban on wearing a long maxi or kimono dress on the beach. If it is the religious motivation for wearing the burkini, it would be reasonable to accept a similar objection to a Catholic nun’s habit or an ultra-orthodox Jew’s clothing. We should not forget that the definition of an “ostentatious” religious symbol is decided by the majority, for whom a Muslim dress may be more ostentatious than a Christian or a Jewish dress. In today’s France, “a nun in traditional dress is simply going about her day, whereas a woman going for a walk in a headscarf is conspicuously colonizing public space in the name of Islam.”¹¹⁴ In addition, it is hard to see how banning the burkini serves individual freedom as affected Muslim women, who are unlikely to wear bikinis, may just avoid going to the beach and, thus, their freedom may be restricted.

It is telling that the birth of the burkini was connected to freedom. Aheda Zanetti, the Australian fashion designer who invented it, pointed out that she intended to “give women freedom, not to take it away”—the freedom to swim freely out of the staring eyes of curious men.¹¹⁵ Zanetti told her personal story about the first time she swam in public with a burkini: “I felt freedom,” she testified, “[d]iving into water is one of the best feelings in the world. And you know what? I wear a bikini under my burkini. I’ve got the best of both worlds.”¹¹⁶ Freedom is an elusive concept. What Zanetti saw as freedom the French Minister Laurence Rossignol con-

111. The mayor of Villeneuve-Loubet justified the burkini ban on sanitary grounds: “These garments . . . pose a real hygiene problem.” *Interdiction du burkini: Lionnel Luca voulait <<stopper tout prosélytisme>>* [Burkini ban: Lionnel Luca wanted to “stop all proselytism”], LE PARISIEN (Aug. 16, 2016), <https://www.leparisien.fr/politique/j-ai-voulu-stopper-tout-proselytisme-16-08-2016-6043893.php>. This relates to the claim that swimming with a burkini increases the number of bacteria in the water. *Id.*

112. See generally Brems, Chaib & Vanhees, *supra* note 92.

113. Chokshi, *supra* note 99.

114. Yascha Mounk, *The West Can Have Burkinis or Democracy, but Not Both*, FOREIGN POLICY (Aug. 27, 2016), <https://foreignpolicy.com/2016/08/27/the-west-can-have-burkinis-or-democracy-but-not-both/>.

115. Aheda Zanetti, *I Created the Burkini to Give Women Freedom, Not to Take it Away*, THE GUARDIAN (Aug. 24, 2016), <https://www.theguardian.com/commentisfree/2016/aug/24/i-created-the-burkini-to-give-women-freedom-not-to-take-it-away>. (“The burkini does not symbolise Islam, it symbolises leisure and happiness and fitness and health . . . It’s just a garment to suit a modest person, or someone who has skin cancer, or a new mother who doesn’t want to wear a bikini.”)

116. *Id.*

sidered slavery. The association of the burkini with slavery lies in the assumption that women are not freely wearing it.¹¹⁷ And even when they wear the burkini based on what they see as free choice, it is influenced by the cultural and religious context in which Muslim women live that precludes a free choice,¹¹⁸ because freedom depends on options from which one can freely choose.¹¹⁹ Such empirical claims have little evidence.¹²⁰ And it is exactly at this point that French policymakers confuse the concept of freedom with the idea of fashion. Thus, for example, the assumption that a woman wearing a *bikini* does so because she is free is, at best, an illusion; it is also influenced by cultural contexts, (Western) fashion trends, and social expectations—all are affected by marketing strategies and mass media.¹²¹ Individual preferences (e.g., what to wear) and perceptions (e.g., what is freedom) are always affected by external forces.

The handshaking, swimming, and burkini cases show how cultural and religious concerns are frequently accompanied by exaggerated facts, false conclusions, and public hysteria. While European States complain about the failure of multiculturalism, it seems that the option of a multicultural way of life is not genuinely viable for immigrant and minority communities. One way to understand these policies is to think of them as “legal white lies,” cases in which the law does not tell the truth because it may be seen as legally impermissible or politically incorrect and, instead, offers a differ-

117. The former French Prime Minister Manuel Valls called the burkini the “enslavement of women.” See Alissa J. Rubin, *Fighting For the ‘Soul of France,’ More Towns Ban a Bathing Suit: The Burkini*, N.Y. TIMES (Aug. 17, 2016), <https://www.nytimes.com/2016/08/18/world/europe/fighting-for-the-soul-of-france-more-towns-ban-a-bathing-suit-the-burkini.html>. The French Minister Laurence Rossi-gno declared that the burkini is “the beach version of the burqa . . . it has the same logic: Hide women’s bodies in order to better control them.” See Editorial, *France’s Burkini Bigotry*, N.Y. TIMES (Aug. 18, 2016), <https://www.nytimes.com/2016/08/19/opinion/frances-burkini-bigotry.html?searchResultPosition=1>. Concerning the burqa, the French National Assembly found it to “clearly negate the freedom of choice of women.” ASSEMBLÉE NATIONALE, RAPPORT D’INFORMATION (SUR LA PRATIQUE DU PORT DU VOILE INTÉGRAL SUR LE TERRITOIRE NATIONAL), No. 2262, at 95 (2010).

118. Such claims are often heard in public debates. For a review, see Giulia Evolvi, *The Veil and its Materiality: Muslim Women’s Digital Narratives about the Burkini Ban*, 34 J. CONTEMP. RELIGION 469 (2019). Other claims associate the burkini with a choice to express a radical ideology. See, e.g., Hala Arafa, *The Burkini is a Toxic Ideology, not a Dress Choice*, THE HILL (Aug. 23, 2016), <https://thehill.com/blogs/pundits-blog/civil-rights/292335-burkini-toxic-ideology-not-a-dress-choice> (“To say the burkini ban stifles cultural diversity is to focus on the superficial garment, not the rape ideology it promotes . . . This isn’t a choice of dress. This is a choice of a very specific ideology that has proven harmful to society.”).

119. Joseph Raz, *Multiculturalism: A Liberal Perspective*, in ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 170, 176 (1996).

120. See, e.g., Shadi Hamid, *The Dilemma of the Burqini*, THE ATLANTIC (July 20, 2017), <https://www.theatlantic.com/international/archive/2017/07/burqini-reactions/533715/>; Shadi Hamid, *The Burqini Debate’s Irresolvable Tension*, THE ATLANTIC (July 25, 2017), <https://www.theatlantic.com/international/archive/2017/07/burqini-debate-irresolvable-tension/534828/>; Carmen Fishwick, *Why We Wear the Burkini: Five Women on Dressing Modestly at the Beach*, THE GUARDIAN (Aug. 31, 2016), <https://www.theguardian.com/world/2016/aug/31/why-we-wear-the-burkini-five-women-on-dressing-modestly-at-the-beach>.

121. The bikini received world attention following the film *MANINA, THE GIRL IN THE BIKINI* (Sport-Films 1952), which showed Brigitte Bardot wearing a bikini—back then, immodest clothing.

ent story, most often by invoking “universal” justifications such as national security, public health, and individual liberty. This is an indirect (and widely unspoken) way that the majority promotes its cultural and political interests.¹²² The burkini debate may seem peripheral, but it is a good example of the ongoing attempt to enlighten (or Westernize) immigrants, particularly of Muslim faith, making them “Muslim lite,” invisible in the public space.¹²³

B. *The Illusion of Freedom*

There may be another, more fundamental explanation to the policies in Europe, according to which some ways of life of immigrant and minority communities are seen as a threat to freedom and, as a result, community members should be forced to be free—for their own sake or for the common good. This Section explains the philosophical background to such ways of thinking, as embodied in the writing of Jean-Jacques Rousseau, John Stuart Mill, and Immanuel Kant.

Jean-Jacques Rousseau, a political philosopher of the eighteenth century, was probably the first to coin the phrase “forced to be free” (even though the sentiment it captures derives from earlier thinkers). The origin of it is rooted in his *magnum opus*, *The Social Contract*.¹²⁴ In a nutshell, people have more freedom when they limit their freedom and move from a state of nature to a civil state. Coming together, as a collective, they achieve more than each individual alone. This is why people are willing to limit their freedom and become members of a sovereign.¹²⁵ *The Social Contract* is grounded in the condition of equality between members. Each individual has both a “private will” (a set of private interests) and a “general will” (a common interest, the welfare of the community).¹²⁶ In public policy decisions, citizens should act on the basis of the general will, and since it is a rational method, the outcome is likely to be similar.¹²⁷ Fellow citizens count on one another—that each will act on behalf of the general will.¹²⁸ According to Rousseau, in one of his most enigmatic quotes, “whoever ref-

122. ORGAD, *supra* note 3, at 8–9, 149, 233.

123. *Id.* at 67–78.

124. ROUSSEAU, *supra* note 1, at 172–175.

125. *Id.*

126. *Id.* at 243–47; see also Arthur I. Appelbaum, *Forcing a People to Be Free*, 35 PHIL. & PUB. AFF. 359 (2007) (discussing “What is it to be a *people*? What is it for a people to be *forced*? And what is it for a people to be *free*?”), Steven G. Affeldt, *The Force of Freedom: Rousseau on Forcing to Be Free*, 27 POL. THEORY 299 (1999); Frederick Neuhouser, *Freedom, Dependence, and the General Will*, 102 PHILOS. REV. 363 (1993); George Kateb, *Aspects of Rousseau’s Political Thought*, 76 POLITICAL SCI. Q. 519 (1961).

127. Rousseau excludes the notion of groups. He feared that “men will come to think of themselves as merchants and farmers, Catholics and Protestants, rather than citizens,” and vote according to their group will, rather than the general will. See Richard Dagger, *Understanding the General Will*, 34 W. POL. Q. 359, 362 (1981).

128. *Id.* at 365–66; Arthur Ripstein, *Universal and General Wills: Hegel and Rousseau*, 22 POL. THEORY 444, 449 (1994).

uses to obey the general will [shall] be constrained to do so by the whole body [politic], which means nothing else but that he will be forced to be free.”¹²⁹ The justification for this is found in the common interest of the body politic. Only by universal compliance with the general will can every member be sure not to be personally dependent on others; the individual’s interest will also be theirs, and the law will reflect their shared interest.¹³⁰ Hence, the general will must be considered every citizen’s deepest and truest will, even when they do not consciously recognize it, and even if it appears to contradict an individual’s private will.¹³¹

While Rousseau can hardly be classified as “liberal,” his thesis reveals the risk of using the concept of freedom whenever one’s action is perceived as the enemy of freedom.¹³² On the one hand, no society is entirely free and almost every law restricts, to some extent, freedom. People are forced to be free whenever they are sent to public schools or asked to wear motorcycle helmets. These paternalistic policies are normal and even essential to maintain a society; they are not illiberal per se. On the other hand, there is a constant risk to providing freedom with the meaning given only by one group (usually, a majority) or a number of groups in society, thereby disenfranchising others (usually, minority groups). Such a risk is related to what Columbia Law Professor Philip Hamburger calls “liberal theology.”¹³³ Hamburger explains that, “when pursued by a powerful majority,” liberalism can “become a threat to freedom” and, ironically, may become theologically intolerant.¹³⁴

The philosophy of forcing people to be free is shared by other political theorists, although its legitimate *goals* and *means* vary among scholars. John Stuart Mill, an English political philosopher of the nineteenth century, is known for supporting the principle of non-interference with individual liberties unless there is harm to others.¹³⁵ For Mill, a person’s “own good, either physical or moral, is not a sufficient warrant” and, as a result, “[h]e cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.”¹³⁶ The only reason to restrict

129. ROUSSEAU, *supra* note 1, at 175 (emphasis added).

130. *Id.* at 243–47.

131. *Id.* at 246 (“When a law is proposed in the assembly of the people, what they are being asked is not precisely whether they approve the proposal or whether they reject it, but whether or not it is conformable to the general will that is theirs.”).

132. For criticism of Rousseau’s “forced-to-be-free” thesis, see JACOB L. TALMON, *THE RISE OF TOTALITARIAN DEMOCRACY* 38–49 (1952). Criticizing Rousseau, Talmon warned against intolerant laws that are implanted in the name of democracy and reason. *Id.*

133. Hamburger, *supra* note 4, at 694.

134. *Id.*

135. MILL, *supra* note 2, at 13 (“The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”).

136. *Id.*

freedom is to prevent harm to others.¹³⁷ At first, Mill seemed to object to the notion of forcing people to be free. A society that forces people to conform to certain customs and traditions, usually the ones of the majority population, undermines freedom and social progress.¹³⁸ It would amount to “the tyranny of the prevailing opinion and feeling.”¹³⁹ An individual forced to conform “might be guided in some good path, and kept out of harm’s way,” but “what will be his comparative worth as a human being?”¹⁴⁰ Mill warned against “the magical influence of custom,” which is a false “universal illusion.”¹⁴¹

Mill, however, made an exception to the principle of non-interference with freedom, even where there is no harm to others: “*The principle of freedom cannot require that he should be free not to be free. It is not freedom, to be allowed to alienate his freedom.*”¹⁴² Mill’s case is narrower than that of Rousseau—it does not apply whenever a person’s private will does not conform to the general will, which, almost by definition, is the will of the majority. In such cases, unless there is harm to others, people should be free to pursue the life they wish, even in self-harm cases. Mill’s exception is rather concerned with a particular situation when people choose not to be free, as in the case of people who are willing to sell themselves as slaves.¹⁴³ In these cases, people cannot be free to be unfree, and it is legitimate to prevent them from enslaving themselves (“by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act . . . He is no longer free. . .”).¹⁴⁴ Still, the difference between self-harm and a voluntary choice not to be free is not clear-cut. Thus, for example, Mill was willing to tolerate polygamy, which he considered “a direct infraction” of liberty because it was largely voluntary on the part of women.¹⁴⁵ Nonetheless, the dividing line between voluntary slavery and voluntary polygamy,

137. *Id.* (“The only part of the conduct of any one, for which he is amenable to society, is that which concerns others.”).

138. *Id.* at 56 (“While mankind are imperfect there should be different opinions . . . different experiments of living . . . varieties of character . . . different modes of life . . . It is desirable, in short, that in things which do not primarily concern others, individuality should assert itself. Where, not the person’s own character, but the traditions or customs of other people are the rule of conduct, there is wanting one of the principal ingredients of human happiness”).

139. *Id.* at 8.

140. *Id.* at 58.

141. *Id.* at 9 (“People are accustomed to believe . . . that their feelings . . . are better than reasons, and render reasons unnecessary. The practical principle which guides them to their opinions on the regulation of human conduct, is the feeling in each person’s mind that everybody should be required to act as he . . . would like them to act. No one, indeed, acknowledges to himself that his standard of judgment is his own liking . . . and if the reasons, when given, are a mere appeal to a similar preference felt by other people, it is still only many people’s liking instead of one.”).

142. *Id.*, at 99–100 (emphasis added).

143. *Id.* at 99.

144. *Id.*

145. *Id.*, at 89–90 (“It must be remembered that this relation is as much voluntary on the part of the women concerned in it, and who may be deemed the sufferers by it, as is the case with any other form of the marriage institution.”).

similar to Mill's comment on forcing people to be free, has remained a conundrum.¹⁴⁶

The difference between Rousseau and Mill touches upon the divide between negative and positive liberty, as British twentieth-century philosopher Isaiah Berlin coined it.¹⁴⁷ Mill seems to favor a negative conception of liberty in terms of the ability of individuals to do what they please without the interference of others, and particularly without the interference of the state, unless their liberty harms others; yet, individuals cannot entirely renounce their liberty, such as in the case of selling themselves as slaves. Such choices “would be null and void; neither enforced by law nor by opinion.”¹⁴⁸ Rousseau, however, seems to favor a positive conception of liberty, which does not associate freedom with non-interference, but with doing the *rational* thing, which, in most cases, prioritizes the dominant view on which norms are considered rational, because they largely depend on the socio-cultural context in which individuals live. Here lies a constant threat to liberty. An effective exercise of liberty depends on the political power of the state, whose aim is to guarantee liberty, yet “liberty” is defined by the majority. Berlin considered Rousseau's thesis to be the enemy of freedom:

To force a man to be free is to force him to behave in a rational manner. A man is free who gets what he wants; what he wants is a rational end. If he does not want a rational end, he does not truly want; if he does not want a rational end, what he wants is not true freedom, but false freedom. I force him to do certain things which will make him happy . . . [T]hat is the heart of this famous doctrine, and there is not a dictator in the West who in the years after Rousseau did not use this monstrous paradox in order to justify his behaviour.¹⁴⁹

While Rousseau sought to free individuals for their *own* sakes, a rather paternalistic ground, Immanuel Kant, one of the central Enlightenment philosophers, proposed a non-paternalistic ground—individuals may be forced to be free for *our* sakes. For Kant, leaving the state of nature and entering a civil condition was not just a rational thing to do, but also an obligation (“each may impel the other by force to leave this state [of nature] and enter into a rightful [civil] condition”);¹⁵⁰ free persons are a necessary condition to our freedom. Referring to Kant, Harvard political theorist Ar-

146. Henry David Rempel, *On Forcing People to be Free*, 87 *ETHICS* 18, 25 (1976); David Archard, *Freedom Not to be Free: The Case of the Slavery Contract in J. S. Mill's on Liberty*, 40 *PHILOS. Q.* 453 (1990).

147. Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969).

148. MILL, *supra* note 2, at 99.

149. ISALAH BERLIN, *FREEDOM AND ITS BETRAYAL: SIX ENEMIES OF HUMAN LIBERTY* 47 (Henry Hardy ed., 2002). Berlin concluded that Rousseau was “one of the most sinister and most formidable enemies of liberty in the whole history of modern thought.” *Id.* at 49.

150. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 90, §44 6:312 (Mary Gregor ed./trans., 1996). The “other” seems to apply to the national level (i.e., individuals) rather than the international level (i.e., other states), though this question remains disputed.

thur Applbaum noted that “individuals may sometimes be forced to do their duty, and when that is so, they are not forced for their own sake, but for the sake of those to whom the duty is owed.”¹⁵¹ Applbaum seems to support Kant’s proposition: “[m]y own view is that there is a non-paternalistic reason to force individuals who live side by side to become a free people;” at the end, he adds, “[a]ll foundings are forced. If we, collectively, are free, it is because we too have been forced to be free.”¹⁵²

Rousseau, Kant, and, to a lesser extent, Mill developed their arguments in an era of transition from religious order—when independent thinking was not the prevailing norm and individuals acted according to religious orders dictated by God—to a society based on *reason*, encouraging individuals to think independently. They celebrated the idea of liberty as non-conformity to the prevailing norms; this was one of the most significant achievements of the Age of Enlightenment. In his book, *On Liberty*, Mill acknowledged the principles of individual judgment, moral choice, and non-conformity:

The human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference, are exercised only in making a choice. He who does anything because it is the custom, makes no choice . . . The mental and moral, like the muscular powers, are improved only by being used. The faculties are called into no exercise by doing a thing merely because others do it, no more than by believing a thing only because others believe it . . . He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation.¹⁵³

To a large extent, the ideas of individual judgment, moral choice, and non-conformity are what dominant majorities in Europe expect of migrant and minority communities—to reason and think for themselves. But there are three problems with this expectation. First, it is not always true that certain modes of life—say, a refusal to shake hands—are not based on independent thinking. People can follow religious and cultural traditions based on their free will and out of a free choice. Second, there is an irony in a reality in which, on the one hand, the majority finds members of the minority group to be irrational creators who simply follow prevailing norms of their group without a second-order reflection, and, on the other hand, the majority seems to follow the very same pattern toward its prevailing norms.¹⁵⁴ Thinking independently, as German philosopher Theodor

151. Applbaum, *supra* note 126, at 393.

152. *Id.* at 395, 400.

153. MILL, *supra* note 2, at 57–58.

154. Rogers Brubaker, *Between Nationalism and Civilizationism: The European Populist Moment in Comparative Perspective*, 40 *ETHNIC & RACIAL STUD.* 1191, 1203 (2017) (referring to European policies,

Adorno claimed, means not blindly following mainstream conventions that are taken for granted in society, but reflecting on mainstream conventions from other perspectives.¹⁵⁵ Members of the majority group seem to conform to their own mores. And third, the expectation that people will free themselves of religious and cultural traditions is not an open invitation for non-conformity, but a very specific invitation to conform to the majority group's traditions and customs.

As demonstrated in Part I, *supra*, Europeans often perceive Muslim women as people who have become used to their oppressed reality, accustomed to their life mode, like slaves or prisoners who refuse to walk out of the prison gates. The analogy to slaves—used by the former French Minister Laurence Rossignol and Prime Minister Manuel Valls¹⁵⁶—illustrates this approach. It considers Muslims as people who have become so habituated to their way of life that they do not recognize their vulnerability. Forcing women to be free, in this view, will probably lead them to witness revelation and endorse their freedom. But what the majority group is really asking of members of the minority is to “free” themselves from their cultural background by replacing it with another—seemingly universal, yet culturally-specific—political order. Freedom does not require handshaking or gender-mixed swimming lessons; in fact, in many liberal societies, such legal requirements do not exist. Forcing individuals to adopt local ways of doing things—what to wear on the beach or how to greet other people—reflects the way that a Western majority sees the concept of freedom. Take handshaking: Would a person who refuses to shake hands on the ground of hygiene and risk for transmitting diseases,¹⁵⁷ or for other non-religious reasons, be fired, rejected from a job, or denied a wedding ceremony? No doubt, a refusal to shake hands can be seen as impolite, especially if the reason for the refusal is grounded on a belief that shaking hands with women is impure. In addition, there can be jobs that are almost impossible to perform if one refuses to touch another human being. But on the whole, a handshake is just a form of greeting—similar to other respectful forms such as smiling, bowing, or waving, all of which can be seen as particular prac-

Brubaker mentions the “ironies of an intolerant, illiberal, and exclusionary celebration of one’s own tolerance, liberalism, and inclusiveness”).

155. THEODOR ADORNO, *MINIMA MORALIA: REFLECTIONS ON A DAMAGED LIFE* 36–37 (trans., E.F.N. Jephcott, 2005) (making this claim in the context of a discussion of tact).

156. Chokshi, *supra* note 99; Rubin, *supra* note 117. This sentiment is shared by non-European officials as well. See, e.g., Martin Patriquin & Charlie Gillis, *About Face*, *Maclean’s* (Apr. 7, 2010) (quoting Canadian politician Louise Beaudoin: “They [Muslim women] say it’s their choice but I don’t believe it. You know, at the time of slavery there were slaves who didn’t want to be freed, who praised their chains, but that’s not a reason to not abolish slavery.”).

157. Anna Gorman, *Handshake-Free Zone: Stopping the Spread of Germs in the Hospital*, *MEDSCAPE* (May 30, 2017), https://www.medscape.com/viewarticle/880856_print; Idan Frumin et al., *A Social Chemosignaling Function for Human Handshaking*, 4 *eLIFE* (2015), <https://doi.org/10.7554/eLife.05154.001>.

tices used to express public courtesy¹⁵⁸—and a way of communication that varies across cultures and periods. For some people, a handshake may express the universal idea of paying respect to others, but it is not the only possible form to show respect or greet people. Policymakers should be more tolerant of different modes of life, even when they are perceived as “wrong” by the majority and incompatible with its perception of freedom.

It is certainly true that newcomers change the general will, because the perception of what ought to be considered the common good changes. However, what can be observed in Europe is *not* a refusal on the part of the migrants to participate in forming the general will, but rather a refusal of the majority to allow the minority to reshape the general will continuously. This undermines equal citizenship participation. Admitting new citizens should mean that they should not only be citizens on paper, but also become equal members in political decision-making who can (re)shape the general will.

C. *Veiled Universalism*

The European policies on handshaking, swimming, and burkinis have been mostly justified on the basis of “universal values,” primarily freedom and equality, and public interests, such as the child’s best interest and social integration.¹⁵⁹ Although the targets of these policies in the political discourse are mainly Muslims, either migrants or citizens, the law rarely invokes such language explicitly. Reading statutes and cases (see Part I, *supra*), there is an impression that the matter is fundamental, rather than sectorial. The appeal to universal values is a safe legal path since, if universal values are being challenged, the law usually protects these values against those who challenge them. If these individuals happen to be predominantly Muslims, this can be seen merely as a by-product of a general policy, almost an incidental impact. The appeal to universal values disguises not only its (often) sectorial target but also the fact that the law seeks to defend a particular national culture. Universal language seems to be more justified, at least to a (liberal) majority, than an argument based upon particular national interests (although liberal states often also invoke national interests to protect a particular way of life). This technique, which can be termed as the “*universalization of culture*,” is another indirect way that majorities protect their cultures (in addition to the above-mentioned “legal white lies” and alongside the “culturalization of the majority religion” and the “religionization of the minority culture,” below).

158. *The End of the Handshake: Saying Hello During the Coronavirus Outbreak*, THE GUARDIAN (Mar. 3, 2020), <https://www.theguardian.com/world/2020/mar/03/the-end-of-the-handshake-saying-hello-during-the-coronavirus-outbreak>; Ali Martin, *England to Swap Handshakes for Fist Bumps During Sri Lanka Tour*, THE GUARDIAN (Mar. 2, 2020), <https://www.theguardian.com/sport/2020/mar/02/joe-root-heads-to-sri-lanka-ready-to-celebrate-with-fist-bumps>.

159. See *supra* Sections I.B, II.A.

The universalization of culture occurs when the law uses universal language to promote a culturally-specific policy goal, or to limit a more culturally-specific way of life. For example, the law can justify gender-mixed swimming lessons by invoking the principle of “learning together,”¹⁶⁰ although, below the surface, the issue is (lack of) Muslim integration. The law does not tell the entire truth because that truth is legally impermissible or politically incorrect, and therefore the law offers a different (cover) story. Another example is the burkini ban, which has been partly justified as a counter-terrorism measure.¹⁶¹ A third example is handshaking, which, based on gender equality considerations, has become a “job requirement” for a bus driver.¹⁶² Majority populations in Europe, it seems, have also *veiled themselves* using the veil of universalism—they target one mode of behavior as a proxy for dissatisfaction with another mode of behavior.

The universalization of culture can also be found in the ECtHR. For example, in the *Lautsi* case, the Italian government defended the display of the crucifix by claiming, among other things, that the crucifix is a “symbol of the principles and values which formed the basis of democracy and western civilization;” the crucifix is not just a Catholic or national symbol, but a universal moral principle—an expression of tolerance, equality, and liberty.¹⁶³ Similarly, in the ECtHR case on the 2010 French law banning the burqa in public spaces, France defended its particular version of secularism, *laïcité*, by invoking public safety and the universal values of gender equality, human dignity, and living together. The ECtHR held that the only legitimate aim for an absolute ban on a full-face veil was to guarantee the minimum requirements of “living together” in society.¹⁶⁴ But despite the universal language, the ECtHR protected a specific *French* cultural mode of life.¹⁶⁵ Likewise, in the Swiss case of compulsory swimming lessons, the ECtHR framed the justification for these lessons through a universal language—the idea of “learning together,” which is essential in a democratic society.¹⁶⁶ The ECtHR has thereby universalized a cultural way of life be-

160. *Osmanoğlu*, *supra* note 59, at ¶¶ 98, 100.

161. *Le maire de Cannes interdit le port du burkini sur les plages*, *supra* note 79; *Burkini: le maire de Cannes interdit les vêtements religieux à la plage*, *supra* note 80.

162. See Dutch Equal Treatment Commission, *supra* note 37. This is not to say that the universal justifications are a lie; they may be true and may be justified as well. The lie is rather presenting them as the *main* justification for a policy.

163. *Lautsi v. Italy* [GC], 2011-III Eur. Ct. H.R. 61, ¶ 36. The *Lautsi* case is further discussed in Section II.D, *infra*.

164. *S.A.S.*, 2014-III Eur. Ct. H.R. at ¶¶ 121–122, 142, 157 (upholding the French government claim in ¶ 82 that “[t]he effect of concealing one’s face in public places is to break social ties and to manifest a refusal of the principle of ‘living together’ (*le ‘vivre ensemble’*).”).

165. *Id.* at ¶¶ 6, 9 (Judges Nussberger and Jäderblom, dissenting) (“The very general concept of ‘living together’ does not fall directly under any of the rights and freedoms guaranteed within the Convention . . . [T]he concept seems far-fetched and vague . . . It is true that ‘living together’ requires the possibility of interpersonal exchange. It is also true that the face plays an important role in human interaction. But this idea cannot be turned around, to lead to the conclusion that human interaction is impossible if the full face is not shown.”).

166. *Osmanoğlu*, *supra* note 59, at ¶ 100.

cause it seems easier to justify, in its view, a universal norm than the majority mode of life.

The universalization of culture has five reasons, and, to a certain extent, it is an inevitable result of their aggregate effect. The first reason relates to *liberalism*. In the past few decades, liberal ideology has ruled the West. Liberalism has formed itself on individual autonomy and freely-consented-to, human-made laws and has broken out from old traditions based on the supremacy of God and religious orders. The Enlightenment, however, did not entirely break away from the old world order and continued to protect the human interest in following religious observances; it found its expression in freedom of religion, which allowed people to practice their religions without state interference. The right to freedom of religion has enabled human behavior to be guided by individual religious understandings in liberal societies—in Rome, London, and Berlin—as *part of* liberalism and *under* its protection. The liberal assumption has been that whenever there is a conflict between the rule of law and the rule of God, there will be a way to solve it peacefully; in case of unreconciled conflict, the rule of law will prevail. But liberalism has not justified it on the basis of a particular way of life, but rather on a universal truth. Thus, in a conflict between a religious and a liberal way of life, liberalism—which claims to be universal—always prevails. This is likely why liberal countries try to universalize their local ways of life, as this provides them with justification for restricting the human right to freedom of religion. The “universal” story has stronger legitimacy.

The second reason concerns *human rights*. Post-WWII human rights law outlawed discrimination based on race, ethnicity, religion, and national origin.¹⁶⁷ It is unlawful to promote policies that prioritize or restrict groups based on ethnoreligious criteria (the use of culture, however, is not clear-cut¹⁶⁸). Human rights law, however, has not entirely eliminated practices of ethnic and religious discrimination, but channeled it into different routes. Prioritization and restriction of ethnoreligious ways of life are often based on other criteria as a pretext, such as universal morality and public interests. States have not entirely stopped adopting policies that intend to cause, or result in, ethnoreligious discrimination, but have stopped publicly saying so by appealing to universal values instead.¹⁶⁹

The third reason for universalizing culture is *political correctness*, which has developed in the past few decades. Political correctness means that, even if lawful, there is language that should be avoided if it offends members of a

167. The clearest prohibition on racial discrimination in international law appears in the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

168. ORGAD, *supra* note 3, at 163–166; Orgad, *supra* note 4, at 89–92.

169. See, e.g., CHRISTIAN JOPPKE, *SELECTING BY ORIGIN: ETHNIC MIGRATION IN THE LIBERAL STATE* (2005); Liav Orgad & Theodore Ruthizer, *Race, Religion and Nationality in Immigration Selection: 120 Years After the Chinese Exclusion Case*, 26 CONST. COMMENT. 101 (2010).

minority group or can be seen as insulting, marginalizing, or excluding people considered disadvantaged.¹⁷⁰ A euphemistic language is indeed more inclusive and less offensive, yet it is also more imagined and less of an authentic reflection of societal reality. In this context, majority populations are resorting to a “universal” language, rather than a cultural terminology that may be seen as politically incorrect.

The fourth reason is related to *nationalism*. The bloody World Wars in the 20th century demonstrated the dangers of nationalism, which, together with radical fascism, led to one of the worst tragedies in human history. Other reasons, among them colonialism, contributed to fears of nationalism in the post-WWII international system. With the rise of globalization in the 1990s and the creation of the European Union, nationalism has become old fashioned. Against this background, justifying policies on the basis of universal values is seen as more just than justifications based on nationalism and majoritarian-based identities, ways of life, and modes of doing things.

The fifth reason for the universalization of the legal discourse derives from the rise of *multiculturalism*. One of the assumptions of multiculturalism is that cultures are equal (it builds on WWII’s lessons that all individuals, regardless of their race, are equal) and, consequently, it rejects the idea that there are “right” or “wrong” cultures. Prioritizing one culture is seen, in a post-WWII legal order, as not politically correct at best, and unlawful or immoral at worst. This notion has led to the universalization of cultures; in order to promote one culture, universal rather than culture-specific justifications seem essential.

These five reasons explain the use of indirect techniques by majority populations in Europe to protect their particular cultures. Yet, regardless of the reasons, the veil of universalism is an insulting technique. The underlying message is that the culture of the minority is a deviation from universal moral standards, rather than from the national mainstream, while the majority culture is an expression of universal morality and inalienable values. Historian Alex Yakobson noted in this context that “[p]articularism clothed in universalist rhetoric” is more offensive than “particularism that frankly acknowledges itself as such—provided, of course, that this particularism functions within a strong liberal framework.”¹⁷¹ It presents the “other” as a risk to universal values and institutions rather than a challenge to the majority culture. The universal façade allows the creation of a social and legal reality in which the minority deviates not from the majority’s mode of life, but from universal morality.¹⁷² Attempts to universalize culturally-specific mores of majority populations, such as handshaking with

170. See generally, GEOFFREY HUGHES, *POLITICAL CORRECTNESS: A HISTORY OF SEMANTICS AND CULTURE* (2009); JORDAN PETERSON ET AL., *POLITICAL CORRECTNESS GONE MAD?* (2018).

171. Alexander Yakobson, *Muslims in Europe: Dilemmas of Secularism, Christian Heritage, ‘Neutrality’ and Religious Freedom* (Mar. 2015) (unpublished essay) [on file].

172. Brubaker, *supra* note 154, at 1194, 2013 (finding, similarly, that “Christianity is embraced not as a religion but as a civilizational identity understood in antithetical opposition to Islam. . . . [The]

women and a dress code in the French Riviera, are misguided and offensive. They focus on “universal” issues to fight a more particular and sectorial battle.

D. *Double Standard*

The dishonest legal discourse is wider than universalizing the majority culture; reviewing statutes and cases, as discussed in Part I, *supra*, it is possible to identify two opposite trends. On the one hand, concerning the majority, the tendency is not only the universalization of culture (as discussed in Section II.C, *supra*) but also the culturalization of the Christian religion (as discussed *infra*). On the other hand, when it comes to the minority, the tendency is the opposite—either a religionization of Islamic culture, mainly in states that adhere to religious neutrality, or a downgrading of the religious significance of a way of life, which, from some Muslims’ perspectives, is a religious imperative. Islamic culture is then politicized to make it part of a radical and fundamentalist ideology.¹⁷³ The legal frame is necessary because one way to articulate power is to frame the legal discourse favoring the political interests of the majority. This reinforces the sense of Western hypocrisy.¹⁷⁴

The ECtHR’s *Lautsi* case best demonstrates the first trend. The question in that case was whether the display of the crucifix on the walls of public classrooms in Italy violates the right to freedom of religion. Italy argued that the crucifix is not necessarily a Christian symbol, but “a historical and cultural symbol” and part of Italy’s “national particularity”; thus, keeping it hanging on the walls in schools is a “matter of preserving a centuries-old tradition.”¹⁷⁵ While the Grand Chamber of the ECtHR did not directly rule on this matter, it held that, whatever other meanings the crucifix may have, it is “above all a religious symbol.”¹⁷⁶ The court found, however, that as long as there is no indoctrination, states enjoy a wide margin of appreciation in setting their curriculum.¹⁷⁷ In a concurring opinion, Judge Bonello de-religionized the crucifix, finding it a symbol of “cultural continuum of a

embrace of Jews, women, and homosexuals . . . [is] a discursive strategy, a way of claiming a liberal and progressive warrant for an anti-Islamic stance.”)

173. Tribunal Administratif de Nice, *supra* note 81; Valls, *supra* note 88; *Interdiction du burkini : Lionel Luca voulait <<stopper tout prosélytisme>>*, *supra* note 111.

174. The term “Western hypocrisy” builds on the writing of Jon Elster on the “civilizing force of hypocrisy” showing how claims motivated by self-interest are framed by concerns for the common good. Jon Elster, *Deliberation and Constitution Making*, in *DELIBERATIVE DEMOCRACY* 97, 111 (Jon Elster ed., 1998) (“Generally speaking, the effect of an audience is to replace the language of interest by the language of reason and to replace impartial motives by passionate ones . . . [T]his *civilizing force of hypocrisy* is a desirable effect of publicity . . . Publicity does not eliminate base motives, but forces or induces speakers to hide them.”).

175. *Lautsi*, 2011-III Eur. Ct. H.R. at ¶ 15 at 5, ¶ 36 at 16-17.

176. *Id.* at ¶ 66 at 27.

177. *Id.* at ¶¶ 68-76 at 28-31.

nation's flow through time.”¹⁷⁸ Another example of the culturalization of religion is the French case on Nativity scenes. In 2016, the *Conseil d'Etat* ruled that, although the 1905 statute on the separation of church and state forbade the display of religious symbols by public authorities, Nativity scenes have “a variety of meanings,” ranking from “a religious meaning” to a “decorative element during the New Year holidays without a particular religious significance.”¹⁷⁹ Given the temporary display of Nativity scenes in public spaces, the court upheld their constitutionality when they have “a cultural, artistic or festive purpose.”¹⁸⁰ A third example comes from Germany. When some *Länder* banned the wearing of the Islamic headscarf by public school teachers, they exempted “veiled Catholic nun teachers, on the contorted argument that the nun's garb was merely a performance of ‘tradition’ or of the ‘Christian-Occidental’ culture.”¹⁸¹ Culturalization of religion is a means by which the majority protects religious symbols and modes of life by labeling them “culture.”¹⁸² Political sociologist Christian Joppke observed that the “main strategy for the state to square the circle of principled neutrality . . . [is] to declare religion ‘culture’”;¹⁸³ in the liberal state, “if the state wants to associate itself with religion, it can do so only by transforming religion into culture.”¹⁸⁴

An opposite trend is found when Muslim modes of life are concerned. Although refusing to shake hands with the opposite gender, participate in gender-mixed swimming lessons, or wear a revealing swimsuit can be based on religious grounds—some followers of Islam see these actions as religious imperatives—it can *also* have a cultural justification.¹⁸⁵ Muslim men may justify a refusal to shake hands with women on the ground of a cultural way of life. In spite of this possibility, in countries where religious neutrality and separation of church and state exist—such as Belgium, France, and the Netherlands—national courts have linked these actions to religion rather than culture. Judicial decisions are based on the premise that there is no place for religion in the public sphere, such as a public school in the Netherlands.¹⁸⁶ Although wearing the burkini can be perceived as a cul-

178. *Id.* at ¶¶ 1.1 at 38, 1.4 at 48 (Bonello, J., concurring).

179. Conseil d'État [CE] [Council of State], Nov. 9, 2016, 395223, ¶ 4 (Fr.).

180. *Id.* at ¶ 5.

181. Christian Joppke, *Culturalizing religion in Western Europe: Patterns and puzzles*, 65 SOC. COMPASS 234, 238 (2018).

182. I leave out the complex question: *To what extent is religion part of culture (and vice versa)?*

183. Joppke, *supra* note 181, at 238.

184. Joppke, *supra* note 181, at 236.

185. See, e.g., Hanna Yusuf et al., *My Hijab Has Nothing to Do With Oppression. It's a Feminist Statement: Video*, THE GUARDIAN (June 24, 2015), <https://www.theguardian.com/commentisfree/video/2015/jun/24/hijab-not-oppression-feminist-statement-video>; Sonia Sikka, *Pluralism About What? Religion as Belief and Identity*, in RE-THINKING RELIGIOUS PLURALISM 3, 7 (Bindu Puri & Abhishek Kumar eds., 2020); Adrien Katherine Wing & Monica Nigh Smith, *Critical race feminism lifts the veil?: Muslim women, France, and the headscarf ban*, 39 U.C. DAVIS L. REV. 743, 761–767 (2006).

186. CRvB 7 mei 2009, LJN 2009, BI2440 m.nt L.C. Groen en B.P. Vermeulen (betrokkene/de stichting) ¶ 7.8 (Neth.).

tural mode of life, in France, the Administrative Tribunal of Nice has connected it to “Islamist religious fundamentalism that advocates a radical practice of religion” and ruled that beaches are not “an adequate place” to express religious beliefs.¹⁸⁷ The technique of *religionization of culture* enables courts to place a mode of behavior, which is not merely religious, under the category of “religion,” thereby finding it not religiously neutral and ruling that it should stay in the private sphere. The religionization of culture, thus, allows courts to focus *only* on the religious aspect of the mode of life. In addition, in countries where the separation of church and state is less strict, such as Germany and Switzerland, the technique is quite different, finding a mode of behavior as not religiously strong enough. In the German case of swimming lessons, the court did not find it to be a severe violation of freedom of religion to force Muslim women to take part in mixed swimming lessons while wearing a burkini.¹⁸⁸ Such cases are not seeking to religionize culture but to *downgrade the religious significance* of a way of life, which may be a religious imperative from a particular Muslim’s perspective. At the same time, regardless of the technique used, there seems to be a *politicization* of Islamic cultural and religious symbols of ways of life, turning them into symbols of political actions. Thus, for example, the burkini has been associated with terrorism and radical groups in France and is seen as a political “provocation,”¹⁸⁹ while the refusal to shake hands in the Netherlands has been considered as a clear manifestation of disrespect.¹⁹⁰

It is at this point that, paradoxically, the interests of radical liberalism merge with the interests of religious fundamentalism—both insist on the religious aspect of a mode of life that can also be seen as, and may even be, cultural. Thus, for example, several Muslim leaders insist on defending their mode of life on religious, as opposed to cultural, grounds.¹⁹¹ The same applies to devout Christians. Interestingly, Christian Joppke mentions that when the German *Länder* exempted veiled Catholic nuns from the headscarf ban on teachers based on cultural rather than religious grounds, the favored nuns “disagree[d] with calling their dress an expression of ‘culture’ rather than ‘belief.’”¹⁹² This behavior of religious believers somehow overlaps with the interest of radical liberals, who wish to focus merely on the religious aspect of a certain mode of life to exclude it from being part of the public sphere. For various reasons, radical liberals and religious fundamentalists

187. Nice Administrative Court of First Instance, *supra* note 81, ¶ 15.

188. Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], Sept. 11, 2013, 6 C 25.12, ¶¶ 16–17, 21–24 (Ger.), <https://www.bverwg.de/en/110913U6C25.12.0>.

189. Nice Administrative Court of First Instance, *supra* note 81, ¶¶ 15–16 (Fr.).

190. See *supra* Section I.A. I thank Christian Joppke for pointing out the tendency to politicize religious claims.

191. See, e.g., Tariq Modood, MULTICULTURALISM, MUSLIMS AND CITIZENSHIP: A EUROPEAN APPROACH (2006); Tariq Modood, *Moderate Secularism, Religion as Identity and Respect for Religion*, 81 Political Q. 4 (2010).

192. Joppke, *supra* note 181, at 238.

seem to share a common interest—to frame the case as religious in character.

The two opposing trends may not necessarily occur intentionally—I do not claim, nor have evidence to claim, that there is a conspiracy to religionize the minority culture and universalize the majority religion. It is more likely that these trends occur unintentionally. While Islamic symbols, such as the burkini, are new in modern European public life, Christian symbols are already there; they have been part of Europe’s landscape for centuries. “Parisians may not notice a cross or a church,” John Bowen notes, but “they certainly notice a headscarf or a minaret.”¹⁹³ For majority groups in Europe, church bells or a school trip to a cathedral may just be associated with culture and history, and not with religion.¹⁹⁴ But whether intentional or unintentional, there is a double standard in the legal and political discourse. And the combination of the two trends together is more problematic because it means that the tension is not viewed as being between two particular cultural ways of life, but instead between a universal way of life (the majority) and a religious way of life (the minority). In this context, universal rhetoric will always prevail.

CONCLUSION

Global migration yields integration challenges of historical significance, rapidly changing the fabric of Western societies.¹⁹⁵ Migrants bring with them different values, modes of life, and ways of doing things. Numbers count, especially in a democracy, and so do the normative gaps between the local community and migrant and minority groups; to maintain a free society, there must be a sufficient number of people who are free enough and believe in freedom beyond a certain threshold. The first reaction, and perhaps the easiest one, is to require migrants to conform to “our” values and the way “we” interpret these values—for their own sake or for the ‘common good.’ This reaction, which often ends up forcing people to be free, is not illiberal per se; after all, almost every use of coercion restricts freedom. Yet, a liberal society must be careful not to force its members to adopt conceptions of freedom as perceived by the majority.

The question under which circumstances it is permissible to coerce people to be free is a highly complex topic in legal theory. Instead of presenting a definitive answer, the Article identifies a double standard in Europe

193. JOHN R. BOWEN, CAN ISLAM BE FRENCH?: PLURALISM AND PRAGMATISM IN A SECULARIST STATE 3 (2009). This is perhaps the reason why the crucifix was described as an “essentially passive symbol” by the ECtHR, while the headscarf was characterized as a “powerful external symbol.” *Compare Lautsi*, 2011-III Eur. Ct. H.R. at ¶ 72, with *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. 447, ¶ 1.

194. See, e.g., OLIVIER ROY, HOLY IGNORANCE: WHEN RELIGION AND CULTURE PART WAYS (2014) (claiming that the lack of cultural embeddedness of contemporary religiosity makes it more prone to radicality).

195. Amnon Rubinstein & Liav Orgad, *Global Migration Crisis*, 62 JUSTICE 38 (2018–19).

in evaluating cultural and religious modes of life. It further reveals different techniques of majority populations to prioritize their cultural and religious modes of life: (1) legal white lies (Section II.A), (2) universalization of the majority culture (Section II.B), (3) culturalization of the majority religion (Section II.C), (4) religionization of the minority culture (Section II.D), and (5) politicization of the minority cultural and religious modes of life (Section II.D). These techniques shed new light on the notion of forcing people to be free, as they show not only the almost theological sanctification of reason as the main, or even the only, ground for public life, but also the extent to which the principle of freedom is oriented toward the majority's understanding of it and the little tolerance that is often shown in Europe toward the minority's perception of being free.

