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The German “*Burqa*” Ban Debate: Conceal and Reveal Strategies

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Abstract

While no national and general “*burqa*” ban exists in Germany, eight out of sixteen states have a penal provision in place. The author does not provide a detailed legal analysis of any given ban. Instead, he incorporates information that is relevant for one overarching objective: to explore the current political context influencing the “*burqa*” ban debate and dispute. The most publicized part of this is between the German Chancellor (Angela Merkel) from the center-right Christian Democratic Union (CDU) and the far-right Alternative for Deutschland (AfD). The agenda of each political party promotes conflicting and competing models to balance state obligations and individual rights. In the case of the AfD, they have been accused and criticized for having Nazi-like ideas – with the implications (in post-World War II Germany) that their subsequent legislation is necessarily tainted. Belief in such a coupling strikes at the heart of people’s trust in political structures and processes. Therefore, to try to determine the truth or falsity of the widely held assumption (that a penal “*burqa*” provision is evidence of a certain legacy), the author undertakes a three-pronged inquiry. One path, comparing their public attitudes of Muslims with Nazism as a political ideology, tests the veracity of ad hominem allegations. By analyzing the German legislative and judicial review processes respectively,

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the second and third paths test the validity of the implications of the same key assumption. Finally, to clarify evidence-based and ethical issues raised by the debate and dispute, the author proposes an amended Parliamentary Code of Conduct.

Keywords:

“*burqa*” ban; judicial review, legislative motives, proportionality

I. Introduction: Prelude to a “*burqa*” Ban

Although various viewpoints have informed the national debate about a general “*burqa*” ban, in German politics by analogy to its American counterpart, the mass media tend to center on celebrity figures. Accordingly, they report the controversial standpoints of Angela Merkel, the German Chancellor from the center-right Christian Democratic Union (CDU) and the Alternative for Deutschland (AfD), the leading far-right party. Since the CDU and the AfD belong among the most politically powerful legislative voices,² it is essential to be familiar with their agendas. The antagonistic stakeholders invoke conflicting and competing models that attempt to balance state obligations and individual rights. Their dispute concerns the extent to which Muslim veils may cover the face and, furthermore, the scope of the legal norms, how much ostensibly justifiable and reasonable laws should restrict protected individual rights.

Strategically, the AfD identifies threats against *German* society and individual freedoms and, as a response to these, the party demands *immediate* solutions. In particular, the AfD perfunctorily blames immigrants for lowering the standards of living and for threatening German traditional cultural values. High profile representatives of AfD’s neo-conservatism include Alexander Gauland, Christian Lüth, Frauke Petry, and Alice Weidel. As if ignoring their

concerns, the Chancellor told the German Parliament, the *Bundestag*: “The AfD is a challenge for all of us in this house.”³ Rather than rebut their contentions, she discredited the AfD and warned that, “[w]hen we join in with this behavior where facts are ignored or brushed aside, then a responsible and constructive debate is no longer possible.”⁴ Strategically, the effectiveness of a reference to their denial coincides with a willingness to be reasonable. Revealing her priority, she insisted that due to Germany’s economic strength, it would continue to “take care of the weakest in our country.”⁵ This representative interchange contrasts the motives driving the different agendas, just as it shows that all sides of the partisan divide are guilty of launching attacks that serve to subtract from the political credibility of their opponents.

Apparently not convinced by the public statements of the celebrity politicians, observers and commentators allege “Nazi-like”⁶ attitudes equally often against them.⁷ Typically, such *ad hominem* “arguments” serve to impugn their good faith and accomplish three interconnected outcomes: to touch off doubts in the constituency, to tarnish the reputation of individual politicians, and to taint any merit of the resulting laws.

Accusers, who publicize their suspicions of politicians’ motivations, echo Mahatma Gandhi’s insight that “[t]he moment there is suspicion about a person’s motives, everything he does becomes tainted.”⁸ Even earlier, Baron de Montesquieu warned that, “the people upon seeing it [the legislature] once corrupted would no longer expect any good from its laws.”⁹ Acceptance of this assumption leads to four consequences. First, stakeholders, who assume that illicit legislative motives¹⁰ necessarily vitiate enacted laws, impugn the validity of the legislative products formulated by suspect politicians. The widely held assumption that bad motivations propel illegitimate legislation probably encourages them to publicize their suspicions. Such a coupling may strike at the heart of any constituency’s trust in public processes and policies, and may cause them not to participate fully. Setting aside the democratic deficit that

results from the last-mentioned, the strategy introduces mentalism as a challenge. Methodologically, no strict and legal criterion will be applied to examine *their* personal motives. The Federal Constitutional Court (*Bundesverfassungsgericht*) reviews the purpose of the legislation. Personal motives can only be inferred from *their* public statements. This makes a form of empirical adjudication possible. The veracity of the Nazi-like claims will be investigated in Section A.

A second concern raised by the assumption is that of tarnishing unfairly the reputation of politicians. To falsify unfair claims, an investigator would need to substitute other underlying reasons for a politician's endorsement of any "burqa" ban policy.

A third outcome of the assumption holds that, especially in post-World War II Germany, since attitudes and motivations¹¹ are closely intertwined, politicians who enact laws based on Nazi-like (illicit) motivations are legislating in bad faith and as a result, their subsequent legislation must be unjust and consequently illegitimate. However, even if the evidence demonstrated that either Chancellor Merkel or the AfD held Nazi-like attitudes, does it follow 1) that their attitudes taint their positions concerning bans and 2) that their positions could not be "outvoted" by other lawmakers and thereby prevent tainted laws? In other words, can the usual mechanics of policy formulation guard against the insidiousness of ulterior motives of a minority? These questions will be addressed in Section B.

Section C is dedicated to a fourth question: "Is there a fail-safe mechanism in place to guard against the effects of the passage of a law dominated by ulterior *cum* constitutionally impermissible motivations?" It matters whether such an illicit group exists for at least two reasons. They would block or hinder good legislative attempts from others and could become a legislative majority. Since the Federal Constitutional Court's judicial review does not encompass the motives of legislators,¹² what happens when legislation appears to be

compromised? Could a majority or even a unanimous and illegitimate legislative intent bind Germany's courts *a priori*?

This inquiry attempts to demonstrate that the public debate¹³ between the Chancellor and the AfD conceals their similarities on issues of religious practices and garment-wearing. Both want to balance public safety and individual rights for native-born and foreign-born constituents. However, an analysis of their remarks reveals their deeper differences on those of Islam, peoplehood, and gender.

A. The AfD, Chancellor Merkel, and Nazi-Like Views

This section focuses on the first of a three-pronged investigation concerning the question of whether comparisons with Nazism as a political ideology can be substantiated. It is based on a concept of concentric circles,¹⁴ which analyzes the politicians' evaluative statements¹⁵ about four of the most relevant and interrelated memberships held by Muslim female "*burqa*"-wearers,¹⁶ namely religion, peoplehood, gender, and outer appearance.

The AfD is charged with mistreatment of the Muslim community and denial of Muslim dignity, allegedly caused by Nazi-like attitudes. The Chairman of Germany's Central Council of Muslims, Aiman Mazyek,¹⁷ likened the AfD's attitude toward his community to that of the Nazis toward the Jews.¹⁸ Other critics indicate that, in general, "the AfD creates space for racism and anti-Semitism in the public debate... It denies people their dignity for a variety of reasons: skin color, religion, sexual orientation... Choosing the AfD means choosing Nazis as well."¹⁹ The party leaders deny that its members are Islamophobic, xenophobic or racist; asserting instead that they are engaged in a rational discourse of critiquing religion. Even in the *Bundestag*, after a Social Democratic politician accused an AfD legislator of being a "right-wing radical" and using "tactics of fascism," the ninety-four AfD members of parliament

walked out, saying that comparisons to the Nazis and other insults were “unacceptable.”²⁰

Similarly, the Chancellor is charged with a denial of Muslims’ right to assemble for political rallies. Reacting to Merkel’s refusal to approve rallies,²¹ several Turkish newspapers published illustrations of Merkel with a mustache, in a Nazi uniform next to a *swastika* and accused her of having a “Nazi mentality.”²² After she cancelled referendum rallies supporting Turkish President Erdogan, he said that Germany was not “even close to a democracy,” and claimed that the country’s practices “are not different from the Nazi practices of the past.”²³

The accusations are politically relevant because the AfD and the Chancellor control a significant number of parliamentary votes, which, if cast, could be utilized to pass national laws. The accusations link ulterior motives of the politicians to their legal debate, and ultimately to subsequent legislation. To analyze each of the linkages, public statements made by the AfD and Chancellor Merkel about the four mentioned key aspects of “*burqa*”-wearers (cf. religion,²⁴ peoplehood,²⁵ gender, and outer appearance).

Beginning with religion, it is important to first separate attitudes toward religious ideology from those toward its believers to not misinterpret any criticism of the doctrine as prejudice against the affected stakeholders. Because interpretations of Islam guide the practices of its followers, which in turn, can support or conflict with German national laws, it is equally important to compare the AfD’s and the Chancellor’s public statements on Islam and its perceived incompatibility with German values.

The AfD has indicated that Islam is not a part of Germany. “An Islam which neither respects nor refrains from conflicting with our legal systems, or even lays claim to power as the only true religion, is incompatible with our legal system and our culture.”²⁶ The AfD has declared that the preference of “*burqa*”-wearing is not an Islamic practice that is mandated, and that Islam is not even a religion. Instead, Islam is a way to undermine (Western) democracy

with gender inequality, extremism, intolerance, and violence (terrorism). And yet, although the differences among Christian subgroups vary widely, the AfD does not require uniformity or unanimity *for them* to be recognized as part of the Christian religion.

While the AfD disparages Islam, the Chancellor contradicts the AfD, “There is no question that our country is historically Christian and Jewish... It is also true that Islam has in the meanwhile become part of Germany. ... some Germans find that hard to accept.”²⁷

Relativizing the desirability of Judaism, Christianity, and Islam, on many occasions, she has said that freedom of religion for all is guaranteed by Germany’s constitution and that Islam belongs to Germany.²⁸ According to one of her statements, “We don’t have too much Islam; we have too little Christianity... We have too few discussions about the Christian view of mankind.” In her opinion, Germany needs more public discussion “about the values that guide us (and) about our Judeo-Christian tradition.” The Chancellor concluded, “We have to stress this again with confidence, then we will also be able to bring about cohesion in our society.”²⁹

Interestingly enough, statements that entail “Nazi-like” accusations from Muslim stakeholders misfire in historical cases and indeed paradigms for Nazism as a political ideology. Unlike the AfD, the Nazis favored the militant and other aspects of Islam;³⁰ to them it was:

- A religion of the community, not a religion of the individual. It is thus a religion of the common welfare and not of self-interest. This is the most important goal that Islam follows. It is at the basis of its prayers and commandments.³¹
- A practical and sympathetic religion for soldiers.³²
- Used to justify war against Jews. Here citing Matthias Küntzel, “According to the Moslem religion... Your sole hope of salvation lies in annihilating the Jews before they annihilate you.”³³

- Acceptable to Hitler who decided that Muslims could become members of the Nazi Party and that Germans who are believers in Islam can remain members of NSDAP. Citing Martin Bormann, “Belief is a personal matter of conscience. Muslims can be members of the NSDAP just as can members of the Christian confessions.”³⁴

To summarize, the perspective of the Nazis favoring the militant and other aspects of Islam opposed the viewpoints of both the AfD and the Chancellor, but for different reasons. The Nazis did not view Islam as incompatible to German culture, as does the AfD. The Nazis did not view Islam as compatible with Judaism or Christianity, as does the Chancellor.

Regarding the separation of attitudes toward religious ideology as opposed to its believers, in fact, some stakeholders cannot distinguish. To illustrate, Melanie Amann, reporter for the news magazine *Der Spiegel*, points to parallels between the anti-Judaism of the Nazi era and the AfD's anti-Islam sentiment in an interview with Steve Inskeep:

From a lot of AfD leaders, you hear derogatory, aggressive general accusations towards the Muslims that can be comparable to the way the Nazis treated the Jews – for example, see them as enemies of the German people. They also use language comparing Muslims to animals like, for example, bacteria.³⁵

Amann's statements are confirmed by the AfD's 2016 *Manifesto for Germany*:

Islam does not belong to Germany. Its expansion and ever-increasing number of Muslims in the country are viewed by the AfD as a danger to our state, our society, and our values... The AfD wishes to curb a trend towards religious radicalization amongst Muslims, and these turning into violent Salafists or terrorists.³⁶

Parsing her words, Chancellor Merkel responded cautiously, too cautiously according to some, to concerns about terrorism:

International terror chooses the locations of its attacks differently. But its goal is always the same: It is our free life in free societies. The terrorists are enemies of all free people, indeed they are enemies of all humanity, whether in Syria or Turkey, in France or Germany.³⁷ ...Turkish and Italian immigrants had played a vital role in the rebuilding of post-war Germany and their families were part of mainstream life.³⁸

For the Nazis, the real enemies were Jews:

“The Jew” was everywhere, responsible for everything Hitler detested and feared: modernism in art and music; pornography and prostitution; the organization of the white slave trade (much featured in anti-Semitic literature); ... used by Jewish leaders of the Social Democratic party to ensnare the masses and turn them against the state, the German nation, and the Aryan master race.³⁹

Currently, some observers have expressed that the failure of denazification in post-World War II Germany fuels today’s Holocaust-denying, anti-immigration AfD. To explain, Esther Bejarano, one of the last survivors of the Women's Orchestra of Auschwitz, indicated that right after 1945, there was no education about the holocaust.⁴⁰ The people who were most involved (in the barbarity) returned to their old employment posts and remained silent. For those reasons, according to Bejarano, anti-Semitism was never effectively reduced.⁴¹

Be that as it may, the phenomenon of neo-Nazism differs from the traditional paradigm, as previously pointed out. Making the transition to considerations about peoplehood, the differences continue. Compared to the neo-Nazis, Nazis like Heinrich Himmler believed,⁴² that Muslims were:

- Recruited to fight for Germany.⁴³

- Labelled officially as a “kindred” people;⁴⁴ as Aryans!⁴⁵
- Seldom victims of Hitler because they were Turks, but in harm’s way only if mistaken for Turkish Jews. Typically, screened Turkish Muslims were exempt from Nazis’ atrocities⁴⁶ and received the same treatment as the members of other European states.⁴⁷
- Treated the same as other non-Jewish foreign nationals, if they were Iranian or Egyptian Muslims citizens.⁴⁸
- Not forbidden to marry German men or women, as Egyptian Muslims. Marriage laws were regulated by the same laws that would apply to a marriage to someone “from any other European state.”⁴⁹
- Were exempt, in general, from the racial laws. In Berlin on July 1, 1936, it was reaffirmed that the Nuremberg race laws applied only to relations between Germans and Jews.⁵⁰

The intended strategy of the High Command was to persuade the Muslims to join *them* in the fight against the Allies. However, a North African Muslim, working for the Germans, claimed to the contrary, that the Nazi guards disparaged the Muslim people:

Everywhere we are termed colored or even black; almost every German soldier gives us clearly to understand that he counts us to be one of the most despised races of the world. Even expressions like ‘Jew,’ ‘Nigger,’ ‘black scoundrels’ etc. are not uncommon.⁵¹

Most studies of the Holocaust do not mention Turkish victims who practiced Judaism,⁵² yet. In a chart entitled “Account of the Inmates of the Islamic Faith,” the male and female Muslim prisoners from fourteen camps were listed:

Altogether, 1,130 Muslim men and nineteen Muslim women were recorded. Most of them were from eastern and southeastern Europe and had presumably been interned as

political prisoners. Still, the list was incomplete, as some groups, most notably Muslim prisoners from Arab countries, were not included.⁵³

If these reported figures are nearly accurate, it suggests that *few* Muslim women ended up in concentration camps compared to hundreds of thousands of the so-called “inferior races,” a finding which supports the intent to exempt Muslims from the racial laws. However, if a Muslim were to be identified as a Jew to the Nazis, even by mistake, that person suffered horrific consequences. Therefore, one tentative conclusion is a finding that underscores differences. Unlike the Nazis, the perceived enemies for the AfD are the Muslims; for Merkel, the enemies are the terrorists, who in many cases, happen to be Muslims.

An accommodation of intersectionality also implies consideration of gender as a key aspect of “*burqa*”-wearers. Any alleged discrimination against Muslim women must address this. In the context of an analysis of Nazi ideology, the applications opens up for a way of rebutting the *ad hominem* strategy. The Nazis not only stressed national governmental power over individual freedoms, but in comparison to men, had stricter sanctions and restrictions against women.⁵⁴ In addition, depending on how they were classified by the government of Nazi Germany, women were treated differently within their own group. For example, if classified as:

- Bona fide Germans, they were treated as “superior” Aryans, encouraged to be a wife and mother (as the German woman’s highest essence and purpose of life);⁵⁵ encouraged and/or forced to have children (e.g. through prevention of abortion) and made physically fit;⁵⁶ and in the home, their activities were restricted to “Kinder,” “Küche,” and “Kirche” (children, kitchen, and church);⁵⁷ if unmarried to be impregnated by “racially valuable” German men in “breeding camps;”⁵⁸ removed from political and economic life from 1933 to 1936;⁵⁹ discriminated against under the

“principle of sacrifice;”⁶⁰ in the *Ostraum*, lured to become teachers, nurses or secretaries, but made “accessories to genocide;”⁶¹

- Non-Aryan mothers, in general, were treated as “inferior” and discouraged and/or prevented from having children even to the point of sterilizations;⁶²
- Jews and other targeted groups,⁶³ were treated as “inferior” and were to be debased, deported, detained or decimated;
- Exempted foreign nationals, such as Turkish, Iranian, Egyptian, and Iraqi Muslims, they were excluded officially from the Nuremberg racial laws and other laws forbidding mixed marriages to German men or women;⁶⁴ but they were subjected to administrative errors.

Although no comprehensive and conclusive literature concerning Nazi treatment of Muslim women is available,⁶⁵ it is an ideological-derivative fact that the Nazis recognized Muslim women as a separate category. They were not German, and so they did not merit the accompanying respect; but neither were they the lowest, and therefore, they did not receive continuous contempt. Comparatively, they were treated better than the so-called “inferior races,” but worse than the German Aryan women, who even though they were promoted as “superior,” were, in fact, highly regulated and restricted by the *Reich*. Within this social arena, it is also likely that the Nazis honored the traditional treatment of Muslim females and therefore, treated them no better than the Muslim men did.

Like the Nazis, according to a former member of the AfD, “(t)here is a belief that women should stick to children, kitchen and church.” The AfD’s Bavarian leader and congressman Petr Bystron reportedly believes that women should dance on a pole instead of getting into politics.⁶⁶

Unlike the Nazis and the AfD, according to Merkel, “Women enrich life, not only private life but also political life. You don’t know what you’re missing.”⁶⁷ As Germany marked the 100th anniversary of women’s suffrage, Merkel said in a speech in Berlin that there was a lot still to do to achieve

gender equality, notably in the worlds of politics, business, science, and culture. She ended her speech with the statement, “The goal needs to be equality, equality everywhere.”⁶⁸

This shows, of course, that the current state of affairs in Germany as regards gender equality is a work in progress, and sometimes leaving observers with the impression that the expectations and indeed perceptions about women’s contributions differ.

Making the transition to the last and fourth membership held by Muslim female “*burqa*”-wearers, namely outer appearance, the various categories used in the analysis (religion, peoplehood, and gender) come to further enhance the interrelatedness, especially in the area of politics and economics.

The political pressure exerted on Muslim women today to conform and/or to obey may be like that exerted on women, even German women during the Nazi era. Clothing is and has been utilized to suppress individuality and to help achieve the political goals of those in charge. A comprehensive study reports the limitations Muslim women face in their daily lives when they chose to practice their religion by wearing religious dress:⁶⁹

Discrimination against Muslim women must be understood from an intersectional perspective. In addition to being women and religious minorities in Europe, Muslim women who wear religious dress are highly visible and easily identifiable as Muslim, making them even more vulnerable. The intersectionality of discrimination against Muslim women who wear face veils or headscarves in the EU is emphasized by this report.⁷⁰

Irene Guenther wrote about the Nazis’ public restrictions on German female dress.⁷¹ The Nazis claimed that the fashion industry, dominated by a “crushing Jewish presence,” ruined Aryan middle class and destroyed feminine dignity. As their solution:

An Aryanization organization named the *Arbeitsgemeinschaft deutsch-arischer Fabrikanten der Bekleidungsindustrie* (or Adefa), was established in May 1933 by several longtime German clothing manufacturers and producers. The group's aim was to systemically purge the Jews from all areas of the fashion industry. Through a combination of massive pressure, boycotts, economic sanctions, illegal buy-outs, forced liquidations, and the systematic exclusion and persecution of countless Jews, Adefa succeeded by January 1939 in ousting all Jews from the fashion world.⁷²

Praising Guenther's account of how the fashion industry took up the task of creating images of German women to support the Nazi ideology and propaganda purposes, Lois Parkinson Zamora points to the broader (than totalitarian) applications of dress codes:

We may say, of course, that conformity is the sine qua non of all dictatorships, but we might also think that such conformity deals primarily with political and intellectual activities rather than physical appearance. *Nazi Chic?* makes us realize that in many cultures (and not just dictatorships) dress codes are used to construct usable identities for women, with or without the conscious consent of the women in question.⁷³

Since "Islamic garments can be religious, political, or personal signifiers," "*burqa*"-wearers can be motivated to wear them for a variety of reasons."⁷⁴ In 2011, Amnesty International submitted a statement to the 55th Session of the United Nations Commission on the Status of Women:

Under international human rights law everyone has the rights to freedom of expression... The way people dress can be

an important expression of their... personal identity or beliefs. Governments have an obligation to respect, protect and ensure every individual's right to express their beliefs or personal convictions or identity. They must create an environment in which every person can make that choice free of coercion.⁷⁵

Expressing a generalized Western perspective about female clothing, the following viewpoints focus on the political aspects of religious suppression and discrimination *through* outer appearance:

We long fought over how much skin it was acceptable to show, but today the debate is over the amount of veiling we are willing to accept. In Europe, veiling has become symbolic of Islam's suppression of women - a point of view shared by some, but not all, Muslim women. But for us Westerners, veiling also represents foreignness and undesirability. Nothing symbolizes the ominous and opaque side of Islam better than a scarf that obscures a person's identity. Whether we tolerate the "*burqa*" or not is a question that serves to highlight our tolerance.⁷⁶

Concerning the AfD's attitude toward women's appearance, they used political ads in the 2017 federal elections that showed two women, photographed from behind and dressed in skimpy two-piece bathing suits that barely covered their gender-specific characteristics.⁷⁷ The tagline read: "Burkas? We prefer bikinis." Campaigning on anti-immigrant sentiments, the AfD ran political pictorials with strong signals about peoplehood: "'Neue Deutsche?' Machen wir selber."⁷⁸ Admittedly, these images of preferred motherhood are consistent with those presented by the Nazis.⁷⁹

Concerning the "*burqa*", Chancellor Merkel indicated that with interpersonal communication, "we show our face." For that reason, "a full veil is inappropriate and should be banned... It does not belong in our country."⁸⁰

Although praised as a German value, tolerance does not extend to all alien customs.

In addition, she recognized how misguided attention on fashion is often substituted for substantive political discussions, thereby invoking the central distinction between rational debate and *ad hominem* arguments; she recognized that even she was a target of misplaced attention.

Much has been made about the Chancellor's dress style, her visits to Saudi Arabia without wearing a scarf, and her attitude about women's clothing... When she visited Saudi Arabia to hold wide-ranging talks with the kingdom's leaders, rather than center on substantive issues, most of the media coverage centered on the fact that she did not wear a headscarf.⁸¹

The Chancellor lamented that her wardrobe choices prompt "letter-writing," but male politicians do *not* face the same reaction. "It's no problem at all for a man to wear a dark blue suit for a hundred days in a row, but if I wear the same blazer four times in two weeks, that leads to letter-writing from citizens."⁸² Her comments reflect the double standards for men and women, together with the relationship between outward appearance and the projection of authority to the public.

Like the Nazis in recognizing the importance of the economics of fashion, the Chancellor requested to be apprised of the funding needed to support critical development programs for Germany's fashion scene.⁸³ She also requested a comparative list of "how much which country spends in their fashion industry." In a similar vein, in a Global Islamic Economy report, Muslim consumer spending on apparel topped \$243 billion in 2015, with an expected increase to over \$368 billion by 2021. As a result, some fashion brands are increasingly recognizing the scale of opportunity that could stem from better connecting with Muslim women.⁸⁴

Apparently, these Muslims believe that their faith does not have to be compromised when it comes to fashion and beauty.

For a long time, Muslims felt disregarded by the fashion industry. That is, until many Muslim designers and fashion bloggers, who love fashion but want to honour their spiritual practices, started to speak up...Women, in particular, aren't afraid to express their desire for modesty while recognising their admiration for beauty.”⁸⁵

In other words, they point to a paradox in the sense that the German economy is going to miss out – if the “*burqa*” is banned. There is money to be made from Muslim modesty.

B. The Essence of the Interpretative Signposts

The previous section showed the competing perspectives on the four categories used in the analysis. For the purpose of clarity, the main points made so far in the debate and dispute together with a brief response to these are outlined below. In this way, the contrasts between the interpretative signposts will be presented in succinct manner. Going forward, the information will also guide the next stage/s of the investigation.

To recap the four memberships of “*burqa*”-wearers, concerning critiques of *religion*, the Nazis rebuked Christianity, but praised Islam; on the contrary, the AfD rebuked Islam. Unlike either of them, Chancellor Merkel balances the desirability of Islam with Judaism and Christianity. Regarding *peoplehood*, the Nazis enticed Muslims to serve *their* purpose of defeating the Allies; whereas, by conflating law-breaking Muslims with law-abiding ones, the AfD overgeneralized the sources of the problems. By focusing on the poor and not disaggregating the violent agents, the German Chancellor assigned too much potency to employment as a suitable solution to crime reduction.

Concerning *gender*, the Nazis restricted women's activities to the private sphere (to serve as wives and mothers). Likewise, the AfD also prefers them to remain in the private sphere. In contrast to both, Chancellor Merkel wants women to take advantage of both the private and public spheres. Regarding *outer appearance*, the Nazis (claimed that they) restricted German female fashion to defend against foreign influence, specifically on the grounds of its potential harm to women's dignity. In contemporary Germany, the AfD wants to restrict Muslim female dress to defend against Muslim and internal religious suppression and/or political symbolism. The German Chancellor recognizes that misguided attention on fashion is often substituted for involving women in substantive political discussions and in leadership roles. She also recognizes the economic importance of fashion to a nation. In short, she recognizes the interconnections of outer appearance, fashion, and personal identity. However, she wants to defend against its obstruction to authentic communication.

The AfD is often guilty of making “cap and close” and other statements that arouse indignation in Muslims and of stirring prejudices and unrest. But Nazism is that and much more. Nazism was premeditatively applied for decades and caused atrocities and serious human rights violations. The Chancellor may have refused permission for events which frustrated Muslims and others. However, Nazism is consistent with respect for Muslims, as shown in the analysis. In fact, politicians may share attitudes like the ones held by the Nazis in varying degrees. That granted, the overuse of analogies (cf. Nazi-like statements) can render them meaningless and, in the process, demean the victims who suffered. Outside of Germany, the non-trivial effects – reaching violence – can be seen at the highest political level, e.g. the U.S Congress. In 2019, *Politico* reported that “Bizarre fight breaks out in House over whether socialists are Nazis.”⁸⁶

II. Other Rationales for Endorsement

The different rationales of the AfD and the Chancellor for a “*burqa*” ban

will be further explored in this section. The second prong of the investigation addresses the assumption that legislation proposed by politicians holding bad motives must result in bad law. After inspection of the German legislative process, to the contrary, it is observed that laws are dependent on many variables, any one of which could counteract any influence of so-called bad motives of a minority (of policymakers). As an alternative to the supposedly necessary and sufficient postulation, among other factors,⁸⁷ personal characteristics (in addition to attitudes) and evidence utilization by other lawmakers could lead to the final passage of legislation, however unpredictable in and of itself.

Setting aside Nazi-like motives, there may be other reasons why politicians endorse a “burqa” ban. Thought experiments can clarify this. Due to a representative sample of underlying attitudes, hypothetical politicians (referred to as *Politicians L*, etc.) may endorse only one of the following three mutually exclusive laws: 1) “no “burqa” ban;” 2) “partial “burqa” ban;” or 3) a “blanket (or “general”) “burqa” ban:”

1. Politicians endorse a “no “burqa” ban” policy because they:
 - View a “burqa” as a signal to express anti-Islamic sentiments. For example, they want Muslims to be easily targeted for harm either by themselves or by others (*Politicians V*);
 - Form no opinion one way or the other;
 - See a “burqa” as a cloth symbolizing individual liberty (*Politicians L*).
2. Endorse a “partial “burqa” ban” policy because they:
 - Trust the collective power of the state against claims of certain individuals;
 - See a “burqa” as a potential hazard: safety, health, order, morals in selected circumstances;

- Favor a “*burqa*” as a cloth representing religious expression, but will yield to the “needs” of government (*Politicians R*);
 - Favor a “*burqa*” as a cloth of individual liberty, but will yield to the “needs” of government.
3. Endorse a “blanket “*burqa*” ban” policy because they:
- See a “*burqa*” as a potential hazard: safety, health, order, morals in most or all circumstances;
 - See a “*burqa*” as connected to domestic crime or international terrorism;
 - Are against individual liberty (*Politicians Z*) or freedom of religion (*Politicians N*);
 - View a “*burqa*” as preventing social cohesiveness (including authentic communication);
 - See the “*burqa*” as a symbol of impending annihilation, an imminent threat emanating from *sharia* law or *jihad*;
 - Are against the “*burqa*” as a means of gender-based discrimination perpetrated either by males or females.

The thought experiments demonstrate that without a complete knowledge of politicians’ attitudes, one can only predict haphazardly their preferred type of “*burqa*” ban policy. Utilizing the attitudes from the hypothetical politicians, the scenarios below illustrate at least three sets of paradoxes:

Scenario One shows that it is possible for two politicians to agree that the “*burqa*” is a symbol of *liberty*. However, unbeknownst to any observer, Politicians L *favor* individual liberty, while Politicians Z *oppose* it. Openly, Politicians L endorse a “no “*burqa*” ban” policy, while in opposition, Politicians Z favor only a “blanket “*burqa*” ban” policy.

In Scenario Two, Politicians R and N agree that the “*burqa*” is a symbol of religious expression. However, unbeknownst to any observer, Politicians R *favor* religious expression, but Politicians N *oppose* it. Openly, Politicians R

endorse a “partial “*burqa*” ban” policy, while in opposition, Politicians N endorse only a “blanket “*burqa*” ban” policy.

In Scenario Three, Politicians V express their support for Muslim females to wear a “*burqa*”. However, unbeknownst to any observer, Politicians V *favor dispensing* harm to targeted Muslim females. Openly, Politicians V endorse a “no “*burqa*” ban” policy.

In the three scenarios, any observer, having inaccurate information cannot explain the apparent paradoxes. Applying analyses of the hypothetical politicians and situations to that of the AfD and Chancellor Merkel, the author of this article contends that unless the accusers know *all* the underlying attitudes of either the AfD or Chancellor Merkel, they cannot assign motives to politicians with certainty for any endorsement of a “*burqa*” ban policy.

The AfD and Chancellor Merkel express opposite views about the compatibility of Islam with Germany but agree to endorse a “*burqa*” ban. Apparently, for the AfD, the rapid inundation of immigrants and their association with violent attacks led to the AfD’s fears for the German people’s safety and survival, which in turn, led to their demands for a *blanket “burqa”* ban. Presumably, for the Chancellor, the safety of immigrants against violence and starvation led to her goals for social integration, which in turn, led to her demands for a *partial “burqa”* ban.⁸⁸

Instead of utilizing credible evidence, the AfD seems to subscribe to the logical fallacy *ad populum*, which holds that “If many believe it, it is so.” The implication is that neo-conservatism errs by utilizing only populism as credible evidence. Since other European governments have banned or placed restrictions on wearing the “*burqa*” in public spaces,⁸⁹ the AfD claims that Germany has a similar right to demand removal of “*burqa*”s too. However, it ignores evidence associated with the French “*burqa*” ban, which supports an unintended consequence – its increased utilization as a tool for terrorist recruitment.⁹⁰ This evidence runs counter to the goals stated by the AfD.

Unfortunately, this is common as research findings support the conclusion that politicians tend to reject evidence that contradicts their prior attitudes.⁹¹

Failing to mention her supporting evidence, Chancellor Merkel asserted a regularity of German culture. She said, “the full facial veil is inappropriate and should be banned wherever it is legally possible.”⁹² She explained, “Our law takes precedence over codes of honour, tribal or family rules, and over sharia law – that has to be spelled out clearly... This also means that it is important to show faces when people communicate.”⁹³ Unlike the AfD that blames the newcomers, Chancellor Merkel’s position (on a *partial* “*burqa*” ban) accommodated other stakeholders by adding that not just migrants had to work towards integration: “Sometimes one gets the impression that some of those who have always lived in Germany are also in urgent need of an integration course.”⁹⁴

Concerning the number of total female veil-wearers involved in a crime, the German Interior Ministry has not reported the statistics. However, as if the available evidence flagged “*burqa*”-wearers as criminals and terrorists for the AfD or as obstructionists to social cohesion for Chancellor Merkel, they both supported “*burqa*” bans. Instead of focusing on true threats, the proposed ban aims indiscriminately⁹⁵ at female family members of six different groups of immigrants or migrants:

1. Invited guest workers seeking economic improvement;
2. Uninvited entrants from other nations within the European Union seeking economic improvement;
3. Uninvited entrants from outside of the European Union seeking economic improvement;
4. Uninvited entrants from outside of the European Union seeking safety through asylum;
5. Uninvited entrants from outside of the European Union seeking to commit criminal or terrorist activities; and
6. Temporary visitors who have no long-term plans.

Germany invited the first group: guest workers seeking economic improvement to fulfill a labor shortage in Germany. To offset shortages of workers, Germany made several agreements with other nations to recruit and temporarily employ foreign labor.⁹⁶ Political leaders assumed that the “guest workers” would not stay long. For example, Chancellor Merkel offered her perception of immigration:

In the early 1960s, we brought the guest workers to Germany. Now they are living with us. We lied to ourselves for a while. We said they won't stay long; one day they will be gone. But this is not the case. Of course, the multicultural approach, living side by side and being happy with each other. This approach has failed, utterly. That is why integration is so important. Those who want to participate in our society must not only comply with the law and follow the Constitution, but, above all, must learn our language. They must know German. It must be given absolute value. This means that the demand for integration is one of our main tasks for the near future.⁹⁷

Concerning the *fourth* group (uninvited entrants from outside of the European Union seeking the safety of asylum), the Chancellor indicated:

Those fleeing from war and persecution will find protection with us. Those who found refuge and protection with us must obey our laws, values, and traditions. And in order to understand us, they must learn the German language. All this... is integration. All this is the exact opposition of multiculturalism. It remains true that multiculturalism leads to parallel societies and multiculturalism therefore remains a lie.⁹⁸

Unfortunately, Germany also attracts the *fifth* group (uninvited entrants from outside of the European Union who seek to commit criminal or terrorist

activities). Chancellor Merkel's solution of employment is, perhaps, better suited for the first three migrant groups mentioned above than for the fifth group *determined* to commit violent offenses. Unlike Chancellor Merkel, the AfD fails to distinguish accurately the lawless acts committed by the newly arrived members of the fifth group from those committed by any of the other categories of immigrants.

In addition, the AfD exaggerates the criminality of the new arrivals. For example, the deputy leader of the AfD said there had been "447 killings and murders" by illegal migrants in Germany in 2017. Disputing this claim, the German Interior Ministry says that, in fact, in 2017, twenty-seven illegal migrants either committed or attempted to commit murder or manslaughter. The "447" figure refers to killings or attempted killings by all asylum seekers and refugees, most of whom are in Germany legally. Overall, crime in Germany has fallen to the lowest level since 1992, but there has been an increase in migrant crime.⁹⁹

Consistent with the statistics provided by the German Interior Ministry, Chancellor Merkel said, "The phenomenon of Islamist terrorism by IS is not something that came to us with the refugees – it was already there."¹⁰⁰ The AfD has attempted to link the record influx of migrants and refugees in 2016 to an increased threat of attacks – an argument Merkel sharply rejected while on the campaign trail in her home district.

As a nationalist party, the AfD wants a cap on all immigration unless deportations of rejected asylum-seekers result in a net immigration of zero or lower.¹⁰¹ They also want to close the German border to stop what they view as "unregulated mass migration." The party is against all types of family reunification, regardless of protection status.¹⁰² Many AfD members view migrants from Middle East countries and Africa as a potential threat to the security or stability of Germany.

For the AfD, Adolf Hitler may have served as an unintended exemplar for any feared and camouflaged peril. He exclaimed:

We become Reichstag deputies in order to paralyze the Weimar democracy with its own assistance. If democracy is stupid enough to give us free travel privileges and per diem allowances for this service, that is its affair... *We come as enemies!* Like the wolf tearing into the flock of sheep, that is how we come. Now you are no longer among yourselves!¹⁰³

The AfD may fear that the Muslims want to enter Germany disguised as defenseless refugees to wreak havoc like Hitler did to the Weimar Republic or even long before him, the Greeks to the Trojans who used their giant horse as a subterfuge. Although the German parliament may not be ready to completely cap immigration or ban the “*burqa*”,¹⁰⁴ the AfD is ready. During presentations to the German parliament, members of the relevant nationalist party offered their reasons for a total “*burqa*” ban.¹⁰⁵ Their statements signaled concern for sovereignty and individual freedoms (for the German people):

Perceived threats against the German culture/society:

- Islam is not a religion but a political force;
- Fear-free places are scarce;
- Failed immigration policy admits (sexually) uninhibited young men;
- Multiculturalism is not desirable;
- The “*burqa*” is a “flag” (symbol) of *sharia* law.

Perceived threats against individual freedoms:

- The “*burqa*” is sexist, that is, oppressive;
- The “*burqa*” promotes gender discrimination;
- The “*burqa*” encourages misogyny;
- The “*burqa*” symbolizes a violation of human dignity;
- Muslim women should not be allowed to self-ghettoize.

Acknowledging the importance of the German constituency in a closing statement in the *Bundestag*, one AfD member said, “Ladies and gentlemen, according to Forsa,¹⁰⁶ 60 percent of respondents are in favour of a ban on full

concealment. Honourable Members of the future GroKo (Grand Coalition): Show us that you do not want to govern against the declared will of 60 percent of the population.”¹⁰⁷

Contrary to the opinions of the AfD and exacerbating their fears, originally, the Chancellor opposed an upper limit for how many refugees can enter Germany each year. People who have been granted refugee status can currently apply for close family members to join them in Germany. This applies to their spouses, their children, as well as their parents.¹⁰⁸ She admitted that in retrospect, her initial hope that the chaos of the war in Syria would not harm Germany was naïve. It soon became clear that the country was not prepared for an influx of displaced people, she said, describing the taking in of more than a million refugees as a “necessary humanitarian exception.”¹⁰⁹

As the Chancellor’s solution, integration is contrary to the opinions of many Muslims and faces challenges because they are not likely to abandon their religious practices, ethics, or garb to please Germans. Demonstrating a profound difference of priorities, Chairman Mazyek of the Central Council of Muslims in Germany described the “*burqa*” in the media as “our least problem” and as a “marginal issue.” Integration issues should be addressed in the right order, he added. It is primarily about the elimination of discrimination.¹¹⁰

If the “*burqa*” were a danger¹¹¹ or true threat¹¹² against security and German culture and/or individual freedoms as claimed by the nationalist party, then the government should defend against it and ban its wearing. Even if some Germans have the opinion that the “*burqa*” is a threat to individual freedoms, public spaces, cultural annihilation, it may or may not, in fact, constitute a “true threat,” which should be prohibited. Consistent with the US Supreme Court, unless the wearer *intends* to harm an individual or group or to terrorize them, the mere wearing of a veil should not be in violation of German law.

Due to the *ad hominem* accusations, the politicians’ legislative motives have been brought into question. Were they convinced that the “*burqa*” ban was the

best solution to a perceived social problem? Or instead, were they driven by ulterior motives? In vying for dominance during the law formulation process, personal attitudes, expertise, and evidence utilization challenge Nazi-like as well as non-Nazi-like initiatives. As part of the modern German legislative array of checks and balances, individual and group motivations are always in play and they act as counterexamples to the critics' assumption. This is because any number of legislative votes cast that is less than a majority does not have the legal authority to represent officially *all* of its members. Even if the number of legislative votes reached a majority and they enacted a statute, it still must endure a further elaborate judicial review. In other words, the German complex legislative process challenges the simplistic assumption that the motivations of any minority politicians can override the will of the majority or necessarily taint enacted statutes.

III. What is the Role of the Federal Constitutional Court?

Whether Nazi-like or not, what would happen if a majority having undisclosed ulterior motives pass a "*burqa*" ban? Given the historical experiences of the segregated American South and Nazi Germany, it is a non-trivial matter to ask, "When the community's interest appears to be compromised, may the Court inquire into the motives of the legislature?"

What limits the Federal Constitutional Court review? Legal scholars have for decades debated the merits of an independent judiciary reviewing legislative motives.¹¹³ The Court's "first-order" judicial review does not encompass the motives of individual legislators; it is limited instead to examining the purpose of the legislation. The alternative, "second-order" review does not focus on the purpose of the legislation, but instead on the legislative procedure itself. It scrutinizes the motives of the legislature and the legislative fact-finding procedure.

In opposition to second-order review, the US Supreme Court indicated:

[...] this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated: "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." ... Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature.¹¹⁴

In the American South, which served as a model to the Third Reich,¹¹⁵ the courts did not inquire into the motives¹¹⁶ of any Jim Crow legislature. To clarify definitions, one legislator might vote to segregate the schools because he wishes to keep the races apart (his *purpose*) and thereby to discourage miscegenetic marriages (his *motive*). Another so votes in order to make "Negroes" feel inferior (also a *purpose*) and thereby to keep them from competing for white men's jobs (a *motive*).¹¹⁷ In effect, the unreviewable laws of the segregated South made Jim Crow effective.

Shifting to the practices of Nazi Germany, "Even prior to the 1933 election of Adolf Hitler as Chancellor... concerted efforts had already been initiated to delegitimize the very existence of the Jewish people in Germany and eventually throughout Europe."¹¹⁸ Governmental sanctions that would effectively serve as the first anti-Semitic decrees came to be known as the Nuremberg Race Laws.¹¹⁹ The laws subjected the Jewish people to social, economic, and political isolation. They engaged in mass extermination and genocide of an entire people and other minorities. In effect, the statutes of the Nazi government made the Holocaust possible. Some of the enabling statutes included the outlawing of rival political parties, pledging loyalty to Hitler

rather than to the Constitution, and the adoption of numerous restrictive decrees against Jews. The missing link, one may say, is that the interpretations and jurisprudence of the German courts failed to challenge the oppressive acts of the regime.

One learning lesson from the past consists in providing a legal context for a possible “*burqa*” ban. It details statutes, court cases, and conditions surrounding Muslim women in Germany. Beginning in 2003, the Federal Constitutional Court decided in favor of a Muslim woman who had been refused a teaching position because she wore a headscarf.

In response to that Court decision, eight out of sixteen states in Germany (Baden-Württemberg, Bavaria, Berlin, Bremen, Hesse, Lower Saxony, North Rhine-Westphalia, and Saarland) passed “neutrality laws” which in practice discriminated against veiled Muslim women teaching in public schools. The common aim of the restrictions imposed by the eight states was to prohibit the wearing of visible items of religious clothing and symbols. None of the legislations explicitly banned Islamic headscarves or face veils. Despite sharing common features, the extent to which the ban is applied varies among the states.

As if in further counteraction, the Federal Constitutional Court ruled in 2015 on the constitutionality of a state law prohibiting public school teachers from wearing any religious clothing or symbol while teaching.¹²⁰ Since the new ruling limits the lawmakers’ discretion in balancing religious freedom and state neutrality more narrowly than before, the 2015 decision differs from the 2003 judgment on a comparable legal matter. This time, the Court held that the teachers’ behavior must constitute a sufficiently specific danger of impairing the peace at school. Following its tradition, the Court balanced the teachers’ freedom of faith with conflicting legal interests of the state. It considered these related legal concepts¹²¹ in the following specified paragraphs:

- Balancing the weight of interference vs. weight of reason to justify interference – para. 102, para. 182
- Disproportionality – para. 80, para. 82, para. 97, para. 100, para. 101
- Equal treatment – para. 137, para. 159
- Legislative aim – para. 9
- Legislative intent – para. 99, para. 132, para. 135, para. 142
- Religious scarf defined – para. 93
- Respect for legislature – para. 132
- State’s neutrality mentioned fifty times – e.g., paras. 2-6.

The Federal Constitutional Court held that the state’s restriction was disproportionate. Therefore, by a majority of six votes to two, the Court decided in favor of the complainants. It recognized legislative aims:

In prohibiting religious expression through outer appearance or conduct by introducing § 57 sec. 4 sentence..., the legislature that enacted the North Rhine-Westphalian Education Act was pursuing legitimate aims. This also applies to the legislature’s intention to include clothing that has religious connotations, and particularly the Islamic headscarf if worn in the typical manner. Its aims were to preserve the peace at school and the neutrality of the state, and thus to safeguard the educational mandate of the state, to protect conflicting fundamental rights of pupils and parents, and thereby to prevent conflicts from the outset in the sphere of the state schools under the legislature’s responsibility... These *aims* are clearly not objectionable under constitutional law. They can easily be related to the educational mandate of the state, the principle of neutrality, the pupils’ negative freedom of faith, and parents’ rights to the upbringing of their children, and thus to restrictions on educational staff’s freedom of faith

and freedom to profess a belief that are inherent in the Constitution.¹²²

In reviewing the legislative drafting stage, the Court explained the relationship between pre-vote discussions and legislative intent:

Nevertheless, just as in the drafting of the Act, the intention not to pass a law that would, for example, prohibit teachers from teaching in the habit of a religious order, or from wearing a Jewish kippah, was maintained in the further course of the legislative process... This *intention* was not changed by the discussion of a possible different interpretation before the conclusion of the legislative process; that discussion merely shows that the *Landtag* was aware of the risk of the Act's incompatibility with constitutional law.¹²³

The Court reviewed the principle of equal treatment:

Under the requisite restrictive interpretation, § 57 sec. 4 sentence 1... does not violate the principle of equal treatment on grounds of gender. However, under the challenged interpretation of the Federal Labour Court, the provision would not have been compatible with the equal treatment requirement insofar as it would have affected the expression of religious beliefs by outer appearance or conduct as was the *intention* that determined the legislature's choice.¹²⁴

At present in Germany, there are no bans of full-face garbs at the national level.

For all the key terms contrasting "motives," "purposes," and "aims" and despite the odious experiences of the American South and Nazi Germany, the Federal Constitutional Court, like the US Supreme Court, does not review legislative motives, but legislative intent. The actual method used by the German Court to review a state statute banning religious clothing was demonstrated.

In defense against laws passed to intentionally disfavor a certain group or that were motivated by the politicians' aversions, current German parliamentary and judiciary safeguards include:

- A process of law formulation, in which personal attitudes, expertise, and evidence utilization challenge all initiatives;
- Legal authority that is only represented by a majority of its members (unlike the Nazi regime);
- Legislative intent, even if knowable, is not binding on independent German courts *a priori*.

Since neither legislative motives nor intent have a binding force on the courts, they cannot control

their final judicial interpretation in advance. Despite any assumed legislative motives or intents, they become peripheral under the current rules of court interpretation, which limits the interpreter to the text of the statute. Because the Federal Constitutional Court's judicial review¹²⁵ does not encompass the motives of legislators, it is limited instead to examining legislative history and content (*inter alia*, means-end fit and proportionality). In Germany, its role is to enforce constitutional standards.¹²⁶

IV. Suggestion for a Future Synergy and Code: Evidence and Ethics

In addition to any role played by the Federal Constitutional Court externally, the existing Code of Conduct for Members of the German Bundestag could be amended *internally* so as to improve the guidance tools for politicians.¹²⁷ A "burqa" ban policy designed to deal with threats and/or obstructions to social integration arguably should consider not only evidence but also ethical principles, such as avoidance of harm.¹²⁸ The amended Code would bridge legislative motives and a proposed "burqa" ban. Taken from several sources,¹²⁹ the author suggests a two-part Code: evidence and ethics. The evidence-based part addresses policy characteristics, whereas the ethics

concern key personal aspects. It would serve public officials who formulate public policies, first and foremost by raising the bar for integrity.

Rationally, politicians propose new policies to ameliorate something that is already working or to correct a deficit. A needs assessment asks the question: what are the security and safety problems? In this circumstance, one answer returned may be that due to a failed immigration policy, young men are attacking females. After careful reflection, however, it is not clear how the removal of veils from women would address that problem. Yet, the removal of veils may address other public safety issues.¹³⁰

The recommended multivariate approach, that includes evidence-based policymaking, has two goals: *to use what is already known* from program evaluation to make policy decisions and *to build more knowledge* to better inform future decisions. This approach prioritizes rigorous research findings, data, analytics, and evaluation of new innovations above anecdotes, ideology, marketing, and inertia around the status quo.¹³¹

The evidence-based principles of the Code of Conduct would:

- Contribute to the pragmatic component of policy-making, including costs and benefits;
- Monitor program delivery and use impact evaluation to measure program effectiveness;
- Use compiled evidence to improve program, and redirect funds away from inconsistent programs;
- Encourage innovation and test new approaches.

Evidence-based policymaking can take many forms: using research findings to inform new policies or improve effectiveness of existing programs, supporting data collection and analysis for research and management, developing policies that incentivize the use of evidence, and so on. It has most frequently been applied to social and human services programs, but a wide variety of government programs could benefit from building and using evidence.¹³²

Such a Code (which is likely to be met with resistance) could be used as a further check and balance against undisclosed counterproductive motives. It is meant to prevent specific types of conduct and behavior, such as conflict of interest, dishonesty, lack of consideration, marginalization of people, and unnecessary harm.

The content of the ethics and policy approach would be reviewed by the political parties¹³³ In order to implement it, members of the *Bundestag* will be expected to receive training and communications that relate to the principles of the Code. Regular assessment of the Code itself would be scheduled, and every effort would be made to ensure that the public sees evidence that each member is committed to high standards.

Legislative motivations may be driven by key personal aspects, for example, health, financial, bias, etc. To combat accusations of Nazi-like attitudes and the like, the ethics part of the Code¹³⁴ targets such potential factors:

The first is the Principle of Consideration.¹³⁵ Consideration of vulnerable people would be a starting point for the amended Code, to be written: “Members of the German political parties will endeavor to consider all of the relevant Stakeholders: their motivations, needs, and reactions to this policy.”

The second is the Principle of Recognition of Value. The security of natives and of nonnatives of a country matters. Therefore, as a starting point for the amended Code, the following pronouncement should be contained therein: “Members of the German political parties will endeavor to protect all of the relevant Stakeholders: men and women from all forms of violence and harassment in public spaces, including verbal, physical, sexual, or psychological.”

The third is the Principle of Decent Treatment. An appropriate starting point for the writers of an amended Code would be the following statement: “Members of the German political parties will endeavor to treat all of the relevant Stakeholders with fairness.”

The fourth is the Principle of Respect and Dignity. Politicians should treat each person, regardless of citizenship, in a caring and respectful way in words and in action. The Code should minimally establish: “Members of the German political parties will endeavor to respect the human value, dignity, and uniqueness of all of the relevant Stakeholders.”

The fifth is the Principle of Avoidance of Harm, which suggests: “Members of the German political parties will endeavor to refrain from using words or deeds that tend to abuse, misuse or harm any of the relevant Stakeholders.”

As an internal check on potential ulterior motives, these nine principles taken together could be utilized to improve the effects of a “*burqa*” ban.¹³⁶

V. Summary and Concluding Remarks

The political debate between the AfD and Chancellor Merkel conceals the importance of Westphalian-based borders in determining the safety and security of immigrants, the paltry use of evidence to support their public statements, and the lack of references to ethical standards and values that support the human dignity of Muslim females as stakeholders.

At the same time, the examination of Nazi-like attitudes reveals other aspects:

- Their public statements about Muslims’ religion, peoplehood, gender, and outer appearance range from having a little to a lot in common with the Nazis. Chancellor Merkel appears to have little in common with Nazism, which caused intense physical and mental suffering, fear, and anguish in its victims. The rhetoric of the AfD suggests that it has a lot more in common with original Nazism. In addition, as an attempt to tarnish the reputation of politicians, any reckless *cum* unsubstantiated charge is unfair. As pointed out, the overuse of analogies (cf. Nazi-like statements) can render them meaningless and, in the process, demean the

victims who suffered (cf. B. The Essence of the Interpretative Signposts).

- The German legislative process resembles the free marketplace of ideas and, as such, its frenetic dynamics of checks and balances are always in play, thereby generating counterexamples to the critics' assumptions (cf. II. Other Rationales for Endorsement). Several non-Nazi-like variables (e.g. attitudes and evidence utilization), any one of which could outweigh the influence of any so-called bad motives, influence the formulation of laws. The German legislative process, consisting of debates and refutations of opposing viewpoints, challenges mere name-calling and other issue-avoiding techniques. It discourages apathy, indolence, and hastily enacted statutes. In the opinion of this author, democracy-enhancements obviously follow from the fact that it is not the minority that dictates to the majority (cf. Nazi regime). However, there is no "fail-safe."
- The irony is that while prominent thinkers like Baron de Montesquieu have pointed to the separation of powers (cf. legislative and judicial branches) as the solution to the kind of problem addressed in this article, it is that same measure that prevents it from happening in practice. Despite any assumed legislative motives or intents, these become peripheral under the current rules, which limits the Federal Constitutional Court's interpretation to the text of the statute. The Court is limited to examining legislative history and content (*inter alia*, means-end fit and proportionality). The tool of proportionality of the suspect law operates under the legal principle that the government must choose only such means that are least harmful to individual rights. Even if a legislative majority passed a law motivated by constitutionally impermissible motivations, there is a judicial mechanism in place to guard against its effects. This is still only an approximation (for corruption may still pollute the jurisprudence). Since neither legislative

motives nor intent have a binding force on the courts, they cannot control their final judicial interpretation in advance. This fact answers the question: “What relief measures are available to the public?”

- To improve the process of formulating a “*burqa*” ban, the two-part (ethics and evidence) legislative amended Code that this author proposed, serves to remedy the inadequacies in the existing Code of Conduct. Comparatively speaking, considerations having to do with economic benefits and income – which are the primary focus of the Code of Conduct – are arguably missing the point when it comes to issues like the “*burqa*” ban debate and dispute. The accent and, more to the point, the lines of reasoning should be aligned with the stakeholder constituency that politicians are legislating for.

VI. Epilogue

In Germany, the debate and dispute is about a possible “*burqa*” ban. In France, however, a ban has existed since 2010. In the case of France, the link between the “*burqa*” ban and terrorism recruitment has been noted. There are admittedly a number of learning lessons from France, which Germany may and may not pay attention to. It makes sense to look at European neighbors, especially the historical trailblazer (France). This authors wishes to draw attention to the two cases of France and Germany for particular reasons having to do with the separation of powers and public reactions. More precisely, the different lines of reasonings can be condensed and contrasted with the use of two tables; an exercise that could also be helpful for German policymakers and legislators.

Table 1 begins with the deduction that hidden personal motives are unknowable to the public. It is based on several thought experiments previously recited, which demonstrate that without a complete knowledge of politicians’ attitudes, no member of the public can identify with certainty the motives of politicians for the endorsement of any law, including a “*burqa*” ban.

However, due to *ad hominem* accusations, the motives of leading German politicians have been brought into question, that is, were the politicians convinced that a “*burqa*” ban was the best solution to a perceived social problem? Or instead, were they driven by malevolent motives? These accusations reinforced suspicions that if politicians’ motivations were malevolent, then their enacted laws had to be tainted. If true, this coupling could be expected to harm democratic processes.

Assuming that evaluative statements (favorable or unfavorable), as made by politicians, about four key memberships of female Muslim “*burqa*”-wearers would reflect or suggest their underlying motives for a “*burqa*” ban, an investigation was conducted.

Personal Motives of Lawmakers	Legislative Aim/Purpose Relation to Constitution	Relationship Between Legislative Means and Aim (Fit)	Federal Constitutional Court Ruling	Public Acceptance of Enacted Law
Hidden				Unknowable
Inferred motives from public statements – Malevolent				Non-acceptance
Inferred motives from public statements– Benevolent				Acceptance
	Objectionable to the Constitution	N/A	Disapproval of legislation	
	Not objectionable to the Constitution	Wide	Dependent on wide margin of appreciation	
	Not objectionable to the Constitution	Close	Approval of legislation	

Table 1: *The Interrelationship Among Personal Motives, Legislative Aims, Judicial Review, and Public Acceptance*

Because France viewed uncovered faces as a necessary condition for “living together,” it banned the “*burqa*”. Hence, it fulfilled its obligation to *protect* a necessary condition for “living together” (an aim not objectionable to its constitution). Admittedly, although a blanket “*burqa*” ban may breach the religious rights of minority populations, the breach may be outweighed by the need to protect the rights of the majority. As applied to the German debate and dispute, an uncovered face may serve as a necessary condition to “authentic communication” for Chancellor Merkel as well as the “reduction of violence/terrorism” (public safety) for the AfD party. Both legislative aims would probably be found to be “not objectionable to the Constitution” by the Federal Constitutional Court.

Distinct from the issue of the constitutionality of legislative aims are the multiplex conditions of judicial reviews of the courts which can, in effect, approve or nullify legislative actions.¹³⁷ One such condition is that of proportionality, which originated in German law:

The proportionality [analysis] requires weighing the legal right that serves as the legitimate aim against the restriction of the affected right... [T]he restriction must be the least disturbing tool for the achievement of the desired outcome and must be proportionate in relation to the [legitimate] interest it tries to protect.¹³⁸

Proportionality requires that there be a reasonable relationship between an objective to be achieved and the means used to achieve that objective.¹³⁹ For example, in *S.A.S v. France*,¹⁴⁰ the European Court of Human Rights (ECtHR) did not find a violation of human rights, which for the purposes of Table 1 is equivalent to an “approval.” Hearing analogous cases, contrarily, the United Nations Human Rights Committee (UNHRC)¹⁴¹ found that restrictions on religious clothing violated Articles 18 and 26 of the International Covenant on Civil and Political Rights (ICCPR). A wide margin of appreciation was allowed to France by the ECtHR but denied by the UNHRC. As applied to the AfD

proposal, the Federal Constitutional Court would test the reasonableness of balancing a blanket face uncovering (means) with a reduction of violent attacks (aim). Contrasting the proposal offered by the German Chancellor and considering any potential claimed right of the “outsider” to be left alone, the Federal Constitutional Court would balance a blanket face uncovering (means) with a removal of physical barriers to full public communication (aim).

Cases	Federal Constitutional Court Ruling	Public Reaction of Enacted Law
Case No. 1	Approval of legislation	Acceptance
Case No. 2	Approval of legislation	Non-acceptance
Case No. 3	Disapproval of legislation	Acceptance
Case No. 4	Disapproval of legislation	Non-acceptance

Table 2: The Interrelationship Between Judicial Review and Public Acceptance

To conclude the implications of the relationship between the political context, legislative actions, and judicial review, Table 2 illustrates four theoretical relations between judicial review of a nation’s highest court and public reaction to its judicial review.¹⁴²

The name calling method (cf. “Nazi”) surmises that bad motives necessarily lead to bad statutes. Alternatively, this author holds that unknowable motives, separation of powers, and public reactions debunk the first method.

Appendix A:

Suggested Evidence- and Ethics-Based Amendment to the Code for the German Parliament

Evidence-Based Principles of the Code:

Members of the German political parties will endeavor:

- To build and compile rigorous evidence about what works, including costs and benefits.
- To monitor program delivery and use impact evaluation to measure program effectiveness.
- To use rigorous evidence to improve program, and redirect funds away from inconsistent programs.

- To encourage innovation and test new approaches.

Ethics-Based Principles of the Code:

Members of the German political parties will endeavor:

- To consider all the relevant Stakeholders: their motivations, needs, and reactions to this policy.
- To protect all of the relevant Stakeholders: men and women from all forms of violence and harassment in public spaces, including verbal, physical, sexual, or psychological.”
- To treat all of the relevant Stakeholders with dignity and respect.”
- To respect the human value, dignity, and uniqueness of all the relevant Stakeholders.
- To refrain from using words or deeds that tend to abuse, misuse, or harm any relevant Stakeholder.

¹ Willie Mack (Ph.D., CDAF, AAMS) is currently serving as Interim Superintendent of the Veterans Assistance Commission of Cook County and as a Consultant on ethics, financial and public policy issues. Dr. Mack is a former Visiting Assistant Professor, College of Education, University of Illinois at Chicago, USA. In the past, Dr. Mack has also held the position as the Director of Ethics and Fiscal Compliance, Suburban Cook County Regional Office of Education. In addition, he is a former Superintendent of three school districts in Cook County, Illinois.

² The AfD holds 11.3% of the seats in the 19th *Deutscher Bundestag* (German Parliament) and the Chancellor's party (CDU) 34.8%. Under the leadership of the Chancellor, the Federal Government (*Bundesrat*) submits 66 $\frac{2}{3}$ % of all German proposals for laws. See *Bundestag*, <https://www.bundestag.de/en/parliament/function/legislation/02initleg-245852>.

³ Kate Connolly, *Angela Merkel defends immigration policy after election blow*, THE GUARDIAN, (Sep 7, 2016), <https://www.theguardian.com/world/2016/sep/07/angela-merkel-defends-german-immigration-policy-elections-afd>.

⁴ Krishnadev Calamur, *Germany Will Remain Germany*', THE ATLANTIC, (Sep 7, 2016), <https://www.theatlantic.com/news/archive/2016/09/german-merkel-migrants/498929/>.

⁵ *Supra* note 2.

⁶ The comparison to Nazis may be used to avoid serious discussion of the *burqa* ban proposal. If the debate and dispute is diverted to an attack on the character or motive of the politician taking a particular position (cf. *ad hominem*), there is no rational and objective room left in which to consider the soundness and credibility of the position itself. For an account of the influence of the Nazi ideology, see Kai Ambos, *Nazi Criminology: Continuity and Radicalization*,

⁷ Note that the importance of discussing historical Nazi connections is supported by a parallel argument that links National Socialism and Islam. A connection between National Socialist racial ideology and contemporary anti-Semitism in the Middle East persisted into the post-war period and crucially shaped Middle Eastern politics and policies. It suggests that there is a direct line of continuity between National Socialism, the Muslim Brotherhood, and the rise of *al-Qaeda*. See Mia Lee, *Nazis in the Middle East: Assessing Links Between Nazism and Islam*, 27(1) CONTEMPORARY EUROPEAN HISTORY 125 (2018). DOI: 10.1017/S0960777316000333.

⁸ Internet Archive, WIT & WISDOM OF MAHATMA GANDHI 190 (N.B. Sen ed., 1995), <https://archive.org/details/in.ernet.dli.2015.202725/page/n1>. In this instance, “tainted” laws refer to laws passed that intentionally disfavored a certain group and were motivated by the politicians’ aversions to that group’s religion, skin color, sexual orientation, etc.

⁹ BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 59 (Thomas Nugent trans., Hafner Publishing Company, 1949 (1748)), <https://www.bard.edu/library/arendt/pdfs/Montesquieu-Spirit.pdf>.

¹⁰ Herein the terms “legislative intent”, “legislative intentions”, “legislative purposes” refer to the aims of the (entire) legislature after discussions and/or debates have concluded, and a vote has been taken. The terms “motive” and “motivations” refer to the attitudes or values (expressed and/or unexpressed) that induce politicians or small groups to adopt specific aims. Accordingly, forbidden *cum* unconstitutional motivations matter only as evidence of or due to their connection with forbidden intentions of the body as a whole (cf. legislature).

¹¹ The possibility of personal attitudes resulting in tainted legislation requires the ameliorative actions of the legislative and judicial processes.

¹² Only the Federal Constitutional Court (*Bundesverfassungsgericht*) can declare an Act of Parliament invalid. This court, established by

the constitution or Basic Law (*Grundgesetz*) of Germany, “ascertains whether a statute passed by the legislature... is consonant with the Constitution, under German law.” See Hans G. Rupp, *Judicial Review in the Federal Republic of Germany*, 9(1) THE AMERICAN JOURNAL OF COMPARATIVE LAW 29 (1960). DOI: <https://doi-org.eres.qnl.qa/10.2307/837853>.

¹³ The fact that 13 out of 28 European member countries have passed national laws mandating either a partial or total ban is a strong indicator of the importance of the debate. See Open Society Justice Initiative, *Restrictions on Muslim Women’s dress in the 28 EU Member States: Current law, recent legal developments, and the state of play* (Briefing Paper of July 2018), <https://www.justiceinitiative.org/uploads/dffdb416-5d63-4001-911b-d3f46e159acc/restrictions-on-muslim-womens-dress-in-28-eu-member-states-20180709.pdf> [hereinafter Open Society Justice Initiative].

¹⁴ Applying a circle-concentric concept, *burqa*-wearers demonstrate a belongingness to and various degrees of closeness to Islam, Muslims, women, and religious clothing, which in turn, guide their rights and obligations. The main idea is that the further away from the first circle a person is, the less is owed to her or him. Thus, closeness regulates the definition of the first-circle stakeholder, second-circle stakeholders, etc. See HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 134-139, (2d. ed. 1996); Anja Matwijkiw & Willie Mack, *Making Sense of the Right to Truth in Educational Ethics: Toward a Theory and Practice that Protect the Fundamental Interests of Adolescent Students*, 2 INTERCULTURAL HUMAN RIGHTS LAW REVIEW 329 (2007) [hereinafter *Making Sense of the Right to Truth in Educational Ethics*].

¹⁵ Statements, favorable or unfavorable, that are assumed to reflect underlying attitudes.

¹⁶ *Supra* note 13.

¹⁷ Attempting to expose their motivations, the Muslim Chairman has advocated having a “substantive debate” with the AfD in the *Bundestag*. “Only if the democratic parties seek this, it will succeed to unmask the inhumane and racist world view behind the AfD... Then it will become clear that their politics have nothing to do with our common German values.” See Von Jens Dieroff, *Aiman Mazyek: AfD im Bundestag entlarven*, STIMME.DE, (Sep 27, 2017), <https://www.stimme.de/deutschland-welt/politik/dw/Aiman-Mazyek-AfD-im-Bundestag-entlarven;art295,3918484>.

¹⁸ Tina Bellon, *Anti-immigrant AfD says Muslims not welcome in Germany*, REUTERS, (May 1, 2016), <https://www.reuters.com/article/us-germany-afd-islam-idUSKCN0XS16P>.

¹⁹ Valerie Höhne, *Alternative für Deutschland Wer sie wählt, wählt Nazis*, SPIEGEL, (Sep 2, 2018), <http://www.spiegel.de/politik/deutschland/afd-wer-sie-waehlt-waehlt-nazis-a-1226160.html>.

²⁰ Simon Schütz, *Germany's Far-Right AfD Party Now Polls Second*, NPR, (Sep 30, 2018), <https://www.npr.org/2018/09/30/652284976/germanys-far-right-afd-party-now-polls-second>.

²¹ The proposed rally would be unrelated to any *burqa* ban, but in support of an election of the Turkish president.

²² *Turkey Daily Portrays Merkel as Hitler Decries 'Nazi Mentality,'* NEWS 18, (March 26, 2018), <https://www.news18.com/news/world/turkey-daily-portrays-merkel-as-hitler-decries-nazi-mentality-1700499.html>.

²³ *Merkel calls for calm over 'Nazi' accusations amid strained German-Turkish relations*, DW.COM (Mar 6, 2017), <https://www.dw.com/en/merkel-calls-for-calm-over-nazi-accusations-amid-strained-german-turkish-relations/a-37819933>.

²⁴ Note that critics sometimes tend to overgeneralize by selectively focusing on religious leaders who have chosen to use their religious interpretations as an excuse to subjugate women and to justify beatings, rapes, and other crimes.

One example, among many, is that of Malala Yousafzai, the 2015 Nobel Peace Prize laureate, who was victimized by brutal and disfiguring attack.

²⁵ The concept of peoplehood refers to a common language, sacred history, religion, and land that influence behavior. See T. Holm et al, *Peoplehood: A Model for American Indian Sovereignty in Education*, 18(1) WICAZO SA REVIEW 7 (2003), DOI: 10.135/wic.2003.0004.

²⁶ MANIFESTO FOR GERMANY: THE POLITICAL PROGRAMME OF THE ALTERNATIVE FOR GERMANY, at #7.6.1, approved at the Federal Party Congress held in Stuttgart, 30th April to 1st May, 2016, https://www.afd.de/wp-content/uploads/sites/111/2017/04/2017-04-12_afd-grundsatzprogramm-englisch_web.pdf [hereinafter MANIFESTO FOR GERMANY]; Bellon, *supra* note 17.

²⁷ Jill Petzinger, *Merkel insists Islam is part of Germany in the first speech of her new term*, QUARTZ, (March 21, 2018), <https://qz.com/1234662/angela-merkel-says-islam-is-part-of-germany-in-her-first-major-speech-of-her-new-term/>.

²⁸ Bellon, *supra* note 17.

²⁹ Tom Heneghan, *Merkel: Germany doesn't have "too much Islam" but "too little Christianity*, REUTERS, (Nov 15, 2010) <http://blogs.reuters.com/faithworld/2010/11/15/merkel-germany-doesnt-have-too-much-islam-but-too-little-christianity/>.

³⁰ This view was also held by Heinrich Himmler who was, among other things, a leading member of the Nazi party that came into power in 1933, *Nationalsozialistische Deutsche Arbeiterpartei* (NSDAP).

³¹ For information about Nazi Germany and the Muslim world, there are a number of German resources that deserve mentioning, including Bundesarchiv Berlin, [Lichterfelde] (BAB) R901 Auswärtiges Amt, R73039 Rundfunkabteilung, Ref. VIII Arabische und Iranische Sendungen, vorl. 39, Dez. 1940-Jan. 1941, Kult.R, Ref. VIII (Orient), Mu/Scha "Religiöser

Wochentalk vom 12. Dez.1940 (arabisch) Die Friegebigkeit,” broadcast on December 12, 1940, pp. 14-16.

³² David Motadel (im Gespräch mit Andreas Main), *Islam im Nationalsozialismus: Führer und Prophet*, DEUTSCHLANDFUNK, (Feb 20, 2018), https://www.deutschlandfunk.de/islam-im-nationalsozialismus-fuehrer-und-prophet.886.de.html?dram:article_id=410286.

³³ Matthias Küntzel, *Nazi-Germany and the Antisemitism in the Muslim World*, The Global Forum For Combating Antisemitism at the Ministry of Foreign Affairs (Feb. 24, 2008 (presentation)), <http://www.matthiaskuentzel.de/contents/nazi-germany-and-the-antisemitism-in-the-muslim-world>.

³⁴ Martin Bormann, Rundschreiben Nr. 124/43, Führerhauptquartier (Sept. 2, 1943), Bundesarchiv Berlin (BAB) NS6/342, note 37.

³⁵ Steve Inskeep, *Germany's Right-Wing AfD Is Accused Of Exploiting Jewish Members*, NPR, (Oct 5, 2018), <https://www.npr.org/2018/10/05/654670139/germany-s-right-wing-afd-party-is-accused-of-exploiting-jewish-members>.

³⁶ MANIFESTO FOR GERMANY, *supra* note 25, at 7.6.1.

³⁷ Merkel: “Terroristen sind Feinde der Freiheit und Menschlichkeit,” EURONEWS (DEC 01, 2016), <https://de.euronews.com/2016/01/12/merkel-terroristen-sind-feinde-der-freiheit-und-menschlichkeit>.

³⁸ Petzinger, *supra* note 26.

³⁹ ALLEN BULLOCK, *HITLER AND STALIN: PARALLEL LIVES* 23 (1992).

⁴⁰ The orchestra was tasked with playing for the daily march of the work or death gangs by the camp gate. Esther Bejarano emigrated to Israel, returned later to Germany to fight for peace and against anti-Semitism, racism and fascism. See *Anne Will: Holocaust-Gedenken. Wie antisemitisch ist Deutschland heute?* (Jan 28, 2018), https://www.youtube.com/watch?v=fahbU_DD4ug.

⁴¹ *Id.*

⁴² *Supra* note 29.

⁴³ Motadel, *supra* note 31.

⁴⁴ DAVID MOTADEL, ISLAM AND NAZI GERMANY'S WAR 57 (2014); see also Marc David Baer, *Mistaken for Jews: Turkish PhD students in Nazi Germany*, The London School of Economics and Political Science, (2017), at 2, http://eprints.lse.ac.uk/67653/1/Baer_mistaken-for-jews.pdf.

⁴⁵ STEFAN IHRIG, ATATÜRK IN THE NAZI IMAGINATION 128 (2014).

⁴⁶ Baer, *supra* note 43, at 3.”

⁴⁷ Walter Gross, *An das Auswärtiges Amt...Leg.-Rat Hinrichs*, (Feb 4, 1936), PAdAA, "Zugehörigkeit der Ägypter, Iraker, Iraner, Perser und Türken zur arischen Rasse, Bd. 1, 1935-1936," Politisches Archive des Auswärtiges Amt (Berlin) R99173.

⁴⁸ David Motadel, *The Swastika and the Crescent*, THE WILSON QUARTERLY (Winter 2015), <https://wilsonquarterly.com/quarterly/fall-2014-the-great-wars/the-swastika-and-the-crescent/>.

⁴⁹ Bülow-Schwante to Ägyptische Gesandtschaft (June 13, 1936), PAdAA, "Zugehörigkeit der Ägypter, Iraker, Iraner, Perser und Türken zur arischen Rasse, Bd. 1, 1935-1936," Politisches Archive des Auswärtiges Amt (Berlin) R99173.

⁵⁰ See Jeffrey Herf, *Nazi Germany and the Arab and Muslim World: Old and New Scholarship*, draft paper of 2008, <https://www.bu.edu/historic/conference08/Herf.pdf>.

⁵¹ MOTADEL, ISLAM AND NAZI GERMANY'S WAR, *supra* note 43, at 130; Mehnaz M. Afridi, *The Enemies of our Enemies: Islam in Nazi Germany*, MARGINALIA: LOS ANGELES REVIEW OF BOOKS (Dec 29, 2015), <https://marginalia.lareviewofbooks.org/the-enemies-of-our-enemies-islam-in-nazi-germany-by-mehnaz-m-afridi/>.

⁵² Baer, *supra* note 43, at 2.

⁵³ Afridi, *supra* note 50.

⁵⁴ RICHARD J. EVANS, *THE THIRD REICH IN POWER* (2006); JILL STEPHENSON, *WOMEN IN NAZI GERMANY* (2001).

⁵⁵ IRENE GUENTHER, *NAZI CHIC? FASHIONING WOMEN IN THE THIRD REICH* 93 (2004).

⁵⁶ Charu Gupta, *Politics of Gender: Women in Nazi Germany*, 26(17) *ECONOMICS & POLITICAL WEEKLY* 40 (1991), <https://www.epw.in/journal/1991/17/review-womens-studies-review-issues-specials/politics-gender-women-nazi-germany.html>.

⁵⁷ GUENTHER, *NAZI CHIC? FASHIONING WOMEN IN THE THIRD REICH*, *supra* note 54, at 95.

⁵⁸ These camps were places for SS men and their growing families to be taken care of. They also provided a place to stay for single women who were carrying the children of German soldiers. Himmler and Hitler shared a desire to increase the population, *inter alia*, by ordering the fathering of children and “called on women to set aside their moral standards and have children out of wedlock for the good of the country.” See Karin Lynn Brashler, *Mothers for Germany: A Look at the Ideal Woman in Nazi Propaganda*, master’s thesis, at 19 (Iowa State University 2015), <https://lib.dr.iastate.edu/cgi/viewcontent.cgi?article=5361&context=etd> [hereinafter *Mothers for Germany*].

⁵⁹ GUENTHER, *NAZI CHIC? FASHIONING WOMEN IN THE THIRD REICH*, *supra* note 54, at 97.

Note that, in a post-election speech in Munich, Joseph Goebbels, Hitler’s head of a new Ministry for Public Enlightenment and Propaganda (RMVP) described women “as having a different mission, a different value, than that of the man.” See Joseph Goebbels, *German Women*, Calvin University’s German Propaganda Archive (speech, March of 1933), <https://research.calvin.edu/german-propaganda-archive/goebmain.htm>.

⁶⁰ GUENTHER, NAZI CHIC? FASHIONING WOMEN IN THE THIRD REICH, *supra* note 54, at 97.

⁶¹ Wendy Lower, *Hitler's Furies: German Women in the Nazi Killing Fields*, THE GUARDIAN, (Oct 5, 2013), <https://www.theguardian.com/books/2013/oct/05/hitlers-furies-wendy-lower-review>.

⁶² Gupta, *Politics of Gender: Women in Nazi Germany*, *supra* note 55, at 40. [For an account of pre-NSDAP American eugenics](#) as a pseudoscience and ideological policy program designed to exterminate humans deemed unfit and preserve those who conformed to a Nordic racial stereotype, [see Edwin Black, The Horrifying American Roots of Nazi Eugenics](#), (Sep 2003), <https://historynewsnetwork.org/article/1796>.

⁶³ Included were Polish, Roma (Gypsies), African descendants, Slavic people, Jehovah Witnesses, selected Roman Catholics, homosexuals, disabled (mental and physical), communists, trade unionists, anarchists, Freemasons, resistance fighters and spies.

⁶⁴ MOTADEL, ISLAM AND NAZI GERMANY'S WAR, *supra* note 43, at 130.

⁶⁵ Baer, *Mistaken for Jews: Turkish PhD students in Nazi Germany*, *supra* note 43, at 2.

⁶⁶ [Thomas Klikauer](#), *Inside Germany's New Crypto-Nazi Party – an AfD Dissident's Report*, TIKKUN, (September 28, 2018), <https://www.tikkun.org/inside-germanys-new-crypto-nazi-party-an-afd-dissidents-report>.

⁶⁷ Emily Schultheis, *In German Politics, Women Still Have a Long Way to Go*, DW, (Nov. 12, 2018), <https://www.dw.com/en/in-german-politics-women-still-have-a-long-way-to-go/a-46226146>. For a fact-check of the status of women in contemporary German politics, the following should be noted. In the Bundestag, after the 2017 federal elections: 218 of the 709 elected parliamentarians, or 31 percent, are women. This puts [Germany in 46th place](#) in

the world ranking of female representation (out of 193 countries), trailing 11 other European Union Member States, according to statistics from the Inter-Parliamentary Union. See *id.*

⁶⁸ *Politics and science need more women, says Angela Merkel*, THE GUARDIAN, (Nov 12, 2018), <https://www.theguardian.com/world/2018/nov/12/politics-and-science-need-more-women-says-angela-merkel>.

⁶⁹ Open Society Justice Initiative, *supra* note 12, at 80 n3.

⁷⁰ *Id.*

⁷¹ In addition, the Nazis restricted “de-generate” cosmetics and clothing, which they described as “jewified,” “masculinized,” “French-dominated,” and “poisonous.” They forbade short hair, shorter hemlines, pants, and visible makeup—all of these were purportedly causing the moral degradation of German women. See Irene Guenther, *Fascist and Nazi Dress*, in THE BERG COMPANION TO FASHION 272-276 (Valerie Steel ed., 2010).

⁷² *Id.*

⁷³ Lois Parkinson Zamora, *Nazi Chic’ by Irene Guenther*, CHRON, (Jun 20, 2004), <https://www.chron.com/life/article/Nazi-Chic-by-Irene-Guenther-1493622>.

⁷⁴ Willie Mack, *The Islamic Veils: American Perspectives Preliminary Remarks*, section in Erik Baldwin et al, “*The Burqa Ban*”: *Legal Precursors for Denmark, American Experiences and Experiments, and Philosophical and Critical Examinations*, 15(1) INTERNATIONAL STUDIES JOURNAL 157, 163 (Summer 2018), https://www.academia.edu/38323579/The_Burqa_Ban_Legal_Precursors_for_Denmark_American_Experiences_and_Experiments_and_Philosophical_and_Critical_Examinations.

⁷⁵ Amnesty International, *Women’s right to choose their dress, free of coercion* (November 2010),

https://www.amnesty.nl/content/uploads/2017/02/womens_right_to_dress_boer_kaverbod_3.pdf?x17739.

⁷⁶ Christiane Hoffmann, *Fear Unveiled: Why Banning the Burqa Makes No Sense*, SPIEGEL, (Aug 22, 2016), https://www.google.co.uk/search?ei=aKyTXJXILcfKsQXF2q1Y&q=christine+hoffman+why+banning+the+burqa+makes+no+sense&oeq=Christine+Hoffman+why+banning+the+burqa+makes+no+&gs_l=psy-ab.1.0.33i299i2.9799.38245..42666...4.0..0.120.4756.29j20.....0....1..gws-wiz.....0i71j0i131j0j0i67j0i10j0i22i30j0i22i10i30j33i160j33i22i29i30.q5jrkQGi_g4.

⁷⁷ Sarah Wildman, *The German far right is running Islamophobic ads starring women in bikinis*, VOX, (Aug 31, 2017), <https://www.vox.com/world/2017/8/31/16234008/germany-afd-ad-campaign-far-right>.

⁷⁸ Other taglines of posters read “*New Germans? We’ll make them ourselves.*” Furthermore, an image showed a prostrate (white) woman, her swollen belly ripe with a (presumably) German child, eyes and face mostly cut from the photo. See *id.*

⁷⁹ Brashler, Mothers for Germany, *supra* note 57.

⁸⁰ Angela Merkel, *Burqa has no place in Germany*, THE GUARDIAN, (December 6, 2016), www.the-guardian.com/world/video/2016/dec/06/angela-merkel-burqa-has-no-place-in-germany-video.

⁸¹ Siobhan Downes, *Why It Doesn't Matter That Angela Merkel Didn't Wear A Headscarf*, SAUDI ARABIA EMIRATES WOMAN, (May 4, 2017), <http://emirateswoman.com/why-it-doesnt-matter-that-angela-merkel-didnt-wear-a-headscarf-in-saudi-arabia/>.

⁸² Judith Mischke, *Merkel: Clothing criticism reveals double standards*, POLITICO, (Jan 23, 2019), <https://www.politico.eu/article/german-chancellor-angela-merkel-clothing-criticism-reveals-double-standards/>.

⁸³ Melissa Drier, *German Chancellor Angela Merkel Meets the Fashion Council Germany*, WWD, (July 8, 2018), <https://wwd.com/fashion-news/fashion-scoops/german-chancellor-angela-merkel-meets-fashion-council-germany-1202751164/>.

⁸⁴ Nathaniel S. Palmer, *Op-Ed | The Muslim Fashion Market Is Not a Monolith*, BOF, (Feb 3, 2018), <https://www.businessoffashion.com/articles/opinion/op-ed-the-muslim-fashion-market-is-not-a-monolith>.

⁸⁵ *Id.*

⁸⁶ John Bresnahan & Kyle Cheney, *Bizarre fight breaks out in House over whether socialists are Nazis*, POLITICO (Mar 26, 2019), <https://www.politico.com/story/2019/03/26/congress-socialist-nazi-debate-1237472>.

⁸⁷ For example, the AfD's self-proclaimed expertise in affairs of the military, the media, and German culture. Critiquing the Islamic culture for not conforming to principles of equality, Chancellor Merkel herself serves as an example of (female) expertise. Her personal characteristics include earning a doctorate in quantum chemistry, a clam and steady disposition, and thirteen years as a successful Chancellor of Germany, credited with a growing economy and low unemployment (cf. evidence). See Saskia Miller, *The Secret to Germany's COVID-19 Success: Angela Merkel is a Scientist*, THE ATLANTIC, (April 20, 2020), <https://www.theatlantic.com/international/archive/2020/04/angela-merkel-germany-coronavirus-pandemic/610225/>.

⁸⁸ *Angela Merkel endorses burka ban 'wherever legally possible,'* BBC NEWS, (December 6, 2016), <https://www.bbc.com/news/world-europe-38226081>.

⁸⁹ Michael Shields, *Swiss government's rejection of burqa ban prompts binding referendum*, THE CHRISTIAN SCIENCE MONITOR,

<https://www.csmonitor.com/World/Europe/2018/0627/Swiss-government-s-rejection-of-burqa-ban-prompts-binding-referendum>.

⁹⁰ Sanna Veikkola, *Whose interests does the burqa ban serve? An analysis of the effects of the ban on full-face veils on radicalisation and terrorism in France*, UNIVERSITY OF TAMPERE, (Master's Thesis, Nov. 2017), <https://trepo.tuni.fi/bitstream/handle/10024/102602/1513773671.pdf>.

⁹¹ [Martin Baekgaard](#) et al, *The Role of Evidence in Politics: Motivated Reasoning and Persuasion among Politicians*, 49(3) BRITISH JOURNAL OF POLITICAL SCIENCE 1117 (2019). DOI:10.1017/S0007123417000084.

⁹² Philip Oltermann, *Angela Merkel endorses party's call for partial ban on burqa and niqab*, THE GUARDIAN, (Dec. 6, 2016), <https://www.theguardian.com/world/2016/dec/06/angela-merkel-cdu-partial-ban-burqa-niqab-german>.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ The ban does not target only the females potentially involved in criminal or terrorist acts, but all six identified immigrant groups, which includes non-criminals and non-terrorists.

⁹⁶ Examples of nations are Italy (1955), Greece and Spain (1960), Turkey (1961), Morocco (1963), Portugal (1964), Tunisia (1965), and Yugoslavia (1968). See *Essay: Migration History in Germany, Documentation Centre and Museum of Migration in Germany*, DOMID, <https://www.domid.org/en/migration-history-germany>.

⁹⁷ Angela Merkel, *Multiculturalism utterly failed in Germany* (remarks delivered to a national meeting of the youth wing of the Christian Democratic Union (CDU) party), (October 17, 2010), https://www.youtube.com/watch?v=UKG76HF24_k.

⁹⁸ Angela Merkel, *Multiculturalism is a Sham* (video), THE WASHINGTON POST, (December 14, 2015),

https://www.washingtonpost.com/news/worldviews/wp/2015/12/14/angela-merkel-multiculturalism-is-a-sham/?noredirect=on&utm_term=.ea7ed7ba0e9f.

⁹⁹ Reality Check Team, *Reality Check: Are migrants driving crime in Germany?* BBC NEWS (September 13, 2018),

<https://www.bbc.com/news/world-europe-45419466>.

¹⁰⁰ *German Minister Proposes Partial Burqa Ban*, ALJAZEERA, (19 Aug 2016), <https://www.aljazeera.com/news/2016/08/german-minister-proposes-partial-burqa-ban-160819130010768.html>.

¹⁰¹ Mara Bierbach, *AfD, CDU, SPD: Where do German parties stand on refugees, asylum and immigration?* (September 24, 2017),

<https://www.dw.com/en/afd-cdu-spd-where-do-german-parties-stand-on-refugees-asylum-and-immigration/a-40610988>.

¹⁰² *Id.*

¹⁰³ KARL D. BRACHER, *THE GERMAN DICTATORSHIP* (*London: 1971), 141-142 footnote 8, *quoted in* ALLEN BULLOCK, *HITLER AND STALIN: PARALLEL LIVES*, 353 (1992).

¹⁰⁴ Note that “Sixty-five percent of Americans say they would oppose a burqa ban.” Public opinion polls also show that more than 80 percent of French citizens support the ban. That sentiment is echoed in other European countries, as well. A survey by the Washington-based Pew Research Center's Global Attitudes Project released in June found that in addition to 82 percent in France who would like to see bans on veils that cover the whole face, 71 percent of Germans support a prohibition, 62 percent of Britons and 59 percent of Spaniards. See Pew Research Center's Global Attitudes Project, *Widespread Support for Banning Full Islamic Veil in Western Europe: Most American Disapprove*, (July 8, 2010), <http://www.pewglobal.org/2010/07/08/widespread-support-for-banning-full-islamic-veil-in-western-europe/>; *The War on Burqas: French Ban only the Latest in European Debate*, (July 14, 2010),

<http://www.spiegel.de/international/europe/the-war-on-burqas-french-ban-only-latest-in-european-debate-a-706446.html>.

¹⁰⁵ Translation by Willie Mack from *Deutscher Bundestag, Plenarprotokoll 19/14, Stenografischer Bericht, 14. Sitzung, Berlin, Donnerstag, den 22. februar 2018*, 1111-1112 (Feb., 22, 2018),

<https://dserver.bundestag.de/btp/19/19014.pdf>.

¹⁰⁶ Forsa Institute uses modern research technologies., The institute was one of the first in Germany to introduce and further develop computer-assisted telephone interviewing (CATI).

¹⁰⁷ *Supra* note 104.

¹⁰⁸ Mara Bierbach, *AfD, CDU, SPD: Where do German parties stand on refugees, asylum and immigration?* (Sept. 24, 2017), <https://www.dw.com/en/afd-cdu-spd-where-do-german-parties-stand-on-refugees-asylum-and-immigration/a-40610988>.

¹⁰⁹ [Jill Petzinger, *Merkel insist \[sic\] Islam is part of Germany in first speech of her new term*, QUARTZ MEDIA, INC.](https://www.qz.com/1234662/angela-merkel-says-islam-is-part-of-germany-in-her-first-major-speech-of-her-new-term/) (March 21, 2018),

<https://qz.com/1234662/angela-merkel-says-islam-is-part-of-germany-in-her-first-major-speech-of-her-new-term/>.

¹¹⁰ Staff Writer, *Politik und Kirchen lehnen Burka-Verbot ab*, TAGESSPIEGEL (Feb., 12, 2014), <https://www.tagesspiegel.de/politik/islam-politik-und-kirchen-lehnen-burka-verbot-ab/11064916.html>.

¹¹¹ *Bundesverfassungsgericht* (BVerfG), Order of the First Senate of 27 January 2015 - 1 BvR 471/10 -, paras. 1-31, http://www.bverfg.de/e/rs20150127_1bvr047110en.html [hereinafter 1 BvR 471/10].

¹¹² In *Virginia v. Black*, 538 U.S. 343 (2003), the American Supreme Court distinguished between “threats” and “true threats.” According to this ruling, unless the wearer *intends* to harm an individual or group or to terrorize them, the mere wearing of a veil will not run afoul of the First Amendment. Even if

some Americans see the *burqa* as a threat, it may or may not constitute a “true threat,” which should be prohibited. For the constitutional debate, see generally Willie Mack, *Inter-American Perspectives on the Burqa (Ban)*, in *LAW, CULTURAL STUDIES AND THE “BURQA BAN” TREND: AN INTERDISCIPLINARY HANDBOOK* 301-328 (Anja Matwijkiw & Anna Oriolo eds., Intersentia 2021).

¹¹³ Niels Petersen, *The German Constitutional Court and Legislative Capture*, 12 INT’L J CONST. L. 650–669, (July 2014), <https://doi.org/10.1093/icon/mou040>.

¹¹⁴ United States v. O’Brien, 391 U.S. 367 (1968), at 383, <https://supreme.justia.com/cases/federal/us/391/367/>.

¹¹⁵ American racism inspired the Nazis and the Nuremberg Laws of September 1935. The Prussian Memorandum specifically invoked Jim Crow as a model for the new Nazi program, which was of tremendous interest to radical Nazis who wanted the same thing for Germany. See Bill Moyers (in conversation with James Q. Whitman), How the Nazis Used Jim Crow Laws as the Model for their Race Laws, (Oct. 13, 2017), <https://billmoyers.com/story/hitler-america-nazi-race-law/>.

¹¹⁶ Motive may be defined as “that within the individual, rather than without, which incites him to action; any idea, need, emotion, or organic state that prompts an action.” See John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law* 79(7) THE YALE LAW JOURNAL 1207, 1217 (1970).

¹¹⁷ *Id.*, at 1219.

¹¹⁸ Richard D. Heideman, *Legalizing Hate: The Significance of the Nuremberg Laws and The Post-War Nuremberg Trials*, 39 LOY. L.A. INT’L & COMP. L. REV. 5 (2017) 5, <http://digitalcommons.lmu.edu/ilr/vol39/iss1/>.

¹¹⁹ *Supra* note 114.

¹²⁰ 1 BvR 471/10, *supra* note 110.

¹²¹ *Id.*

¹²² *Id.*, at para. 99.

¹²³ *Id.*, at para. 135.

¹²⁴ *Id.*, at para. 142.

¹²⁵ *Supra* note 11.

¹²⁶ For a comparative analysis of American jurisprudence, see JEFFREY M.

SHAMAN, *CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY* (2001).

¹²⁷ German Parliament (*Bundestag*), Code of Conduct for Members of the German Bundestag (as amended 2011), <https://www.bundestag.de/resource/blob/195006/a1232d4a394f7cdee1b9bcc2f374880/codeofconduct-data.pdf>. Note that a precedent has been set in the judicial area by the European Court of Human Rights (ECtHR). See ECtHR, Resolution on Judicial Ethics (as adopted by the Plenary Court on 23 June 2008),

https://www.echr.coe.int/Documents/Resolution_Judicial_Ethics_ENG.pdf.

¹²⁸ Harm avoidance is not mentioned in the ECtHR tool, which enters into force on 1 September 2021. See *id.*

¹²⁹ Evidence-based Policy-Making Collaborative, *Principles of Evidence-Based Policymaking*, September 2016,

https://www.urban.org/sites/default/files/publication/99739/principles_of_evidence-based_policymaking.pdf.

¹³⁰ Examples could include facial recognition techniques need at airports or for traffic violations.

¹³¹ *Supra* note 128.

¹³² *Id.*

¹³³ Germany's most popular political parties include Alternative for Germany (AfD), Christian-Social Union of Bavaria (CSU), German Christian Democratic Party (CDU), The Green Party coalition (cf. Bündnis 90/Die

Grünen), Social Democratic Party of Germany (SPD), the Left, and the Free Democratic Party (FPD).

¹³⁴ For an analysis of ethics codes and codes of behavior, how they are (and can be) used in international development and how to evaluate a code's effectiveness, see Stuart C. Gilman, *Ethics Codes and Codes of Conduct as Tools for Promoting an Ethical and Professional Public Service: Comparative Successes and Lessons*, prepared for the PREM, the WORLD BANK, (Winter 2005), www.oecd.org/mena/governance/35521418.pdf.

¹³⁵ Matwijkiw & Mack, *Making Sense of the Right to Truth in Educational Ethics*, *supra* note 13.

¹³⁶ See Appendix A.

¹³⁷ Participants in political debates (already) orient themselves on future and likely forthcoming decisions of the Federal Constitutional Court. MPs mostly engage lawyers to interpret the relevant decisions right down to the details. See Jutta Limbach, *The Role of the Federal Constitutional Court*, 53(2) SMU L. REV. 429 (2000), <https://scholar.smu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1774&context=smulr>.

¹³⁸ Katitza Rodriguez, Valentian Hernández, J. Carlos Lara, *The Inter-American Legal Analysis, the 13 Principles and the Inter-American System for the Protection of Human Rights*, (August 2016), <https://necessaryandproportionate.org/americas-legal-analysis/>.

¹³⁹ RICHARD CLAYTON & HUGH TOMLINSON, *THE LAW OF HUMAN RIGHTS*, 278 (2000).

¹⁴⁰ ECtHR, *S.A.S. v. France*, Application No. 43835/11, Grand Chamber, Judgment (July 1, 2014).

¹⁴¹ UNHRC, *Hebbadj v. France*, Communication No. 2807/2016, CCPR/C/123/D, View (July 17, 2018); UNHRC, *Yaker v. France*, Communication No. 2747/2016, CCPR/C/123/D, View (July 17, 2018).

¹⁴² The author assumes that German justices like American “justices are indeed sensitive to the dynamics of public opinion on important issues in society.” See John Wihbey, *The Supreme Court, public opinion and decision making: Research Roundup*, *The Journalist’s Resource*, (June 28, 2013), <https://journalistsresource.org/politics-and-government/research-roundup-supreme-court-public-opinion/>.