

In Your Face: Piercing the Veil of Ignorance About Niqab-Wearing Women

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Abstract

This article examines three judicial decisions in three different jurisdictions involving niqab-wearing women in courtrooms. Particular emphasis is paid to the Canadian Supreme Court case of *R v. NS* in which a sexual assault complainant wanted to wear her niqab while testifying. The uniquely challenging context of sexual assault, which has garnered much feminist attention and reform internationally, is considered. It is argued that serious consideration must be given to the multiple rights of Muslim women by reassessing the traditional use of demeanor evidence. Some judges in these cases attempt to be inclusive of niqab-wearing women in accordance with policies of multiculturalism, yet they do not go far enough in protecting Muslim women's rights. Other judges refuse to accommodate the niqab entirely. This troubling analysis parallels attempts made to exclude niqab-wearing women from public spaces in Canada and permits dubious objections that certain requests for accommodation have gone too far.

Keywords

Burqa, Canada, Charter of Quebec Values, demeanor, multiculturalism, niqab, religion, secularism, sexual assault, veil

Introduction

In the 21st century, the Western world is at an astonishing historical moment, when women's clothes are still the subject of legislation (Beaman, 2013: 725), judicial

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consideration, and public approbation. Women who wear the niqab or the full-face veil have borne the brunt of oppressive government tactics internationally to limit their choice of clothing. These tactics to ban certain public displays of religiosity are 'justified' by numerous explanations that reveal more about niqab objectors' illogical, bias-laden, and viscerally negative reactions than any legitimate concerns that the niqab may actually raise (Bakht, 2012b).

This article begins with a Canadian case in which a niqab-wearing sexual assault complainant wished to testify in court with her usual clothing. The majority decision by the Supreme Court of Canada in *R v. NS* (*NS*, 2012) is closely examined and compared with a New Zealand case, *Police v. Razamjoo* (*Razamjoo*, 2005), in which the issue of niqab-wearing women in courtrooms was also raised. The judges in these cases attempt to accommodate the niqab to some extent in keeping with each nation's policy of normative multiculturalism.¹ Yet I argue that these decisions do not go far enough in protecting the rights of niqab-wearing women. The second part of the article analyzes problematic judicial interpretations that refuse to accommodate the niqab in courtrooms. The concurrence in *NS* is contrasted with an English case, *The Queen v. D(R)* (*D(R)*, 2013) where the accused was a niqabi. These cases demonstrate the impossible situation facing niqab-wearing women. They also permit dubious protestations that certain accommodation requests have gone too far.

Finally, this article examines parallel attempts to exclude niqab-wearing women from public spaces in Canada, relying primarily on the recent Bill 60 controversy in Quebec. Three themes recur in the aforementioned cases and this legislative controversy featuring niqab-wearing women. First, there is an unqualified privileging of face-to-face encounters. Second, one sees a clear and polarized construction of majority–minority relations, an 'us versus them'. Finally, prevalent throughout the judicial and legislative discourse are competing and contradictory notions about the niqab-wearing woman. She is threatened. She is a threat. The article ends with a call to remember that these debates have consequences for the lived realities of Muslims, particularly Muslim women.

Permitting Niqabs in Some Courtrooms

R v. NS was decided by Canada's Supreme Court on December 20, 2012. *NS* examines whether a devout Muslim woman sexual assault complainant, who has covered her face publicly for over 8 years, could wear her niqab while testifying. *NS* alleged that two of her male relatives sexually assaulted her over several years. Lawyers for the accused objected to *NS* remaining veiled, claiming that it interfered with their clients' right to a fair trial, including the right to full answer and defense and the right to full disclosure. They argued that in order to effectively cross-examine the complainant, they needed to see her face to gauge her reactions to cross-examination. They also argued that the trier of fact would have difficulties assessing credibility if not able to see the complainant's face.

As I have argued elsewhere, this case is essentially about the prosecution and adjudication of sexual assault, which is historically and contemporaneously fraught with racism and misogyny (Bakht, 2012a: 592). The criminal law has long forced women to fit rigid characterizations of the 'ideal' rape victim. Aboriginal and racialized women fare particularly poorly in a system that erases colonial and racial aggression in its

attempt to combat sexual violence (Doe, 2004; Razack, 1999). Some of the biases at play when women are sexually assaulted include that they often lie about their rapes, that they deserve it because of their dress or any prior sexual conduct they may have engaged in, and that they react to rape in certain specific ways such as making a complaint shortly after the event or being visibly upset during testimony (Doe, 2004; Ellison and Munro, 2009b). These rape myths have resulted in a number of ongoing reforms to national criminal justice systems in order to make the harrowing experience of reporting sexual assault and testifying in court more equitable and tolerable for women (in Canada, see *R v. Seaboyer*, 1991; in the United States see Clay-Warner and Burt, 2005).

Just as these other feminist reforms have demonstrated the importance of taking into account more than simply the accused's rights in a sexual assault trial, *NS* highlights the need to give serious consideration to a Muslim woman's rights to equality, security of the person, and religious freedom by reassessing the traditional use of demeanor evidence in courtrooms. Demeanor refers to a person's attitude, appearance, or disposition. Demeanor evidence of a witness is not simply 'what is said' but 'how it is said' (*NS*, 2012: paras 25–26). It can comprise of nonverbal behaviors including audible cues such as speech hesitations and pitch as well as visual cues such as blinking, smiling, scowling, crying, blushing, scratching, swallowing prior to responding, nervous twitches, and leg and foot movements. 'Demeanour cues can be anything which the observer deems as potentially indicative of a witness's state of mind – voluntary or involuntary, simple or complex' (Qureshi, 2014: 10).

Although *NS* is a uniquely challenging case in that it concerns sexual assault, an offense that is underreported and has high attrition rates (Ellison and Munro, 2009b; *NS*, 2012: para 37), the implications of being prohibited from wearing a niqab in a courtroom have ramifications for Muslim women's access to justice in many situations. For example, in a 2005 New Zealand case, *Police v Razamjoo* (2005), two Muslim women who wore burqas were called as prosecution witnesses in a criminal insurance fraud case. These women were not in court of their own choosing. They were assisting the state in pursuing an alleged criminal. Defense counsel argued, as in *NS*, that the inability to observe the demeanor of the witnesses would impair the accused's right to a fair trial. Judge Moore acknowledged that what was at the stake in the case included the rights of the witnesses to manifest their religious beliefs, the accused's right to a fair trial, and the public's right to an open and public criminal justice system. Each of these issues will be examined in turn with a view to the niqab-wearing woman's religious freedom, the appropriate analysis of a fair trial, any accommodation that might be possible, and a full-some proportionality inquiry.

Protecting Religious Freedom

The majority opinion in *NS* tries to find a 'just and proportionate balance' between two positions that appear at odds. Respectfully, it does not find the right balance. As the Chief Justice notes, Canada does not uncritically remove religion from the courtroom. Relying on human rights doctrine, entrenched jurisprudence, and courtroom practice, the Chief Justice elucidates the concept of accommodation in arguing that totally banning face coverings is a denial of religious freedom for 'no good reason' (*NS*, 2012: para.

56). In keeping with Canada's policy of multiculturalism, that minority practices must be protected where they are compatible with fundamental values (*Bruker v. Marcovitz*, 2007: paras 1–2), the majority rightly tries to include niqab-wearing women in public institutions. This is particularly critical in light of four blatant government-sanctioned attempts to discriminate against Muslim women who wear face veils in Canada (Bill 60; Quebec National Assembly, 2013; Payton, 2011; NS, 2012; Bill C-6: An act to amend the Canada Elections Act (Visual Identification of Voters), 2008). However, the NS majority's analytical framework to determine if a woman can testify wearing her niqab skews the balance in favor of banning the niqab.

The majority's analytical framework begins by asking whether requiring the witness to remove the niqab while testifying interferes with religious freedom. This portion of the NS framework draws on the religious freedom analysis found in *Syndicat Northcrest v. Amselem* (*Amselem*, 2004), which held that for a claim under section 2(a) of the *Canadian Charter of Rights and Freedoms* to be successful, a claimant must only show that her practice is based on sincere religious belief. The practice need not be proven through scripture or dictated by religious leaders nor even practiced by any others. The Canadian test of sincerity of belief is in keeping with international covenants that protect religious freedom.² Given this approach, the Chief Justice's critique of the preliminary inquiry judge who first questioned NS (and concluded her belief was not 'strong' enough) is appropriate.³ The section 2(a) inquiry adjudicates sincere belief, not truth. The majority also addressed the issue of inconsistent adherence to religious practice and found that this does not necessarily suggest a lack of sincerity. Rather, the claimant's belief may change over time, may permit situational exceptions, or the claimant may not always live up to an ideal. The direction in NS to view a claimant's present and past religious practice contextually is consistent with *Amselem's* holding that analysis into sincerity should not be overly probing but only enough to ensure good faith (*Amselem*, 2004: para 52). Religious freedom claimants may have to make concessions to participate in some facets of society. This should not be held against them.

In *Police v. Razamjoo*, Judge Moore also acknowledges the right to freedom of religion of the burqa-clad witnesses guaranteed by sections 13, 14, 15, 19, and 20 of the *New Zealand Bill of Rights Act* 1990. He accepts the witnesses' sincere beliefs, indicating that the state must not make pronouncements as to the correctness of any person's faith and finds that not to allow them to wear a burqa while giving evidence is a prima facie breach of their religious freedom (*Razamjoo*, 2005: para 66). Judge Moore notes that exposing one's self to an entire courtroom of people would be upsetting to these women:

to require her to remove her burqa in public (dire emergencies or other very compelling reasons excepted) would be to shame and disgrace her both in her own eyes and in those of the community of like believers whose customs and beliefs she is proud to uphold. (*Razamjoo*, 2005: para 67)

Indeed one of the witnesses said that she would rather kill herself than reveal her face while giving evidence (Ahdar, 2006: 654). Judge Moore's freedom of religion analysis demonstrates an understanding of the serious nature of religious practices for these devout witnesses.

Trial Fairness and Demeanor Evidence

Next, the majority in *NS* asks, 'Would permitting the witness to wear the niqab while testifying create a serious risk to trial fairness?' The concern with this question and the response that it evokes is its focus on *NS*' behavior or appearance. The dominant community's assumptions remain unquestioned. The majority decision is premised on *NS*' difference, assuming the court must 'permit her' to wear the niqab (Berger, 2008; Brown, 2006). Starting from the assumption that she must remove her niqab is subjective; there is no constitutional right to face one's accuser.⁴ This starting point reveals an intractable issue with multiculturalism and the legal treatment of minority populations that differences are often ascribed to the minority community. The majority is seen as 'normal', while the minority is burdened with 'difference'. Martha Minow provides the basis for the argument 'that all difference is relative; you are only as different from me as I am from you . . . difference is actually best understood as [sic] "as a pervasive feature of communal life"' (Kislowicz et al., 2011: 688; Minow, 1990: 11). Had this view been adopted, the majority's questions would take a very different shape. They might have asked how might we structure legal institutions so as to equally distribute burdens attached to difference (Minow, 1990); or how can we consider this minority, whose needs were not built into the structure of mainstream institutions?

Another concern with the majority's formulation of the risk to a fair trial is that it subverts the typical approach to *Charter* justification under section 1. Once an infringement of a right is found, the government would have to justify the violation. In this case, the accused, backed by the state, is essentially seeking a ban of the niqab in the courtroom (Baines, 2013) and by framing the question as 'a serious risk to trial fairness' the majority forces *NS* to justify the niqab. Had the majority asked 'whether a ban on the niqab would create a risk to trial fairness', it would have permitted questioning of dominant practices. *NS* challenged a foundational premise of Western legal systems that those who see the witness are at the greatest advantage. Although there is much social science research that strongly suggests this is not true (Bakht, 2009b, 2012a; Ekman, 1992; Qureshi, 2014), most judges were unwilling to question the importance of facial expressions to credibility assessment.⁵ The majority identified 'a deeply rooted presumption in our criminal justice system' (*NS*, 2012: para. 27) that seeing a witness' face is important to a fair trial, enabling effective cross-examination and credibility assessment. The majority assumes the importance to trial fairness in seeing a face, although this has never been tested.⁶ The only reason given is that seeing the face is historic practice; in other words, this is how we have always done it. The court's confidence in demeanor evidence is surprising since in a case rendered one year before *NS*, the court unanimously expressed reservations about demeanor.

In *R v. White* (*White*, 2011: para. 134), the accused appealed a murder conviction claiming that the jury drew an impermissible inference when the Crown characterized his flight from the scene of a homicide as suspicious because there was 'no hesitation here, no shock, no uncertainty'. The majority held that inferring based on postoffense conduct was more objective than drawing inferences using demeanor evidence, which presented 'hallmark flaws':

[A] problem with [demeanor] evidence is that the inferential link between the witness's perception of the accused's behaviour and the accused's mental state can be tenuous. . . . The witness's assessment depends on a subjective impression and interpretation of the accused's behaviour. . . . Moreover, it appears to involve an element of mind reading. (*White*, 2011: para. 76)

Justice Binnie equated the two types of evidence: 'the subjective interpretation placed by a witness on the post-offence demeanor evinced by an accused is fraught with danger' and involves a series of 'speculative inferences from a failure to perform as the onlooker thinks "normal" to a conclusion of guilt of a particular offence' (*White*, 2011: paras 141–142). The majority, concurrence and dissent, agreed that demeanor evidence could be unreliable. Seven justices from *White* sat at *NS*, yet the Court provided no warnings about the unreliability of demeanor evidence.

The court's silence with respect to concerns regarding demeanor evidence, including its own analysis in *White*, is contrasted with *NS*' insistence that seeing the face is 'too deeply rooted in our criminal justice system to be set aside absent compelling evidence' (*NS*, 2012: para. 27; see also paras 22, 24). Interestingly, in support of its contention that 'non-verbal communication' provides 'valuable insights that may uncover. . . deception' (*NS*, 2012: para. 24), the majority only cites jurisprudence, without any social science evidence. The accused should have to demonstrate that removal of the complainant's niqab is necessary to prevent a real and substantial risk to his rights. Yet the majority accepts the mere assertion, absent proof, that seeing the face is critical to a fair trial.

The *NS* majority then references *Police v. Razamjoo* and quotes Judge Moore's comment that a witness' demeanor could be useful in assessing credibility. Judge Moore's confidence in his ability to detect falsehoods through demeanor is not unusual. Indeed, it is very common for people to believe they can detect a liar (Bakht, 2012a: 597; Ekman and O'Sullivan, 1991: 916–917). Disappointingly however, the *NS* majority misconstrues Judge Moore's findings and did not quote from later in *Razamjoo*, 'A sense of the witness's character emerged, though much more slowly than is usual. . . . Courts (and people) adjust over time to the new or strange' (*Razamjoo*, 2005: para. 70). Judge Moore concluded 'there could be a fair trial even if Mrs. Salim and other witnesses of like belief gave evidence wearing their burqas' (*Razamjoo*, 2005: para. 106). The UK Equal Treatment Bench Book, which provides guidance to judges, notes that while it may sometimes be difficult to assess the evidence of a niqabi, judicial experiences have shown that it is often possible to do so (Judiciary of England and Wales, 2008). There are circumstances when judges hear evidence without being able to see demeanor, such as evidence taken telephonically, or where the judge is visually impaired, such as American Judge Conway Casey (Schwartzbaum, 2011: 1568).

The identification of flaws in demeanor evidence discussed in *White* is consistent with an emerging trend in jurisprudence (Bakht, 2009a; Qureshi, 2014) and judicial education (Canadian Judicial Council, 2013; Epstein, 2002; Smith, 2012) that critiques evaluating a person's trustworthiness on their appearance, attitude, or disposition. Since society continually struggles with systemic racism, sexism, and other oppressions, that certain people appear untrustworthy should caution against reliance on demeanor (Bakht, 2012a: 600). This raises the question why the *NS* Court painted such an uncritical picture

of demeanor, particularly in a case where full context was critical for reasoned analysis of the competing rights at issue. Perhaps the majority was concerned that displacing demeanor evidence would disrupt the way our legal system has functioned to date. I suggest that the upheaval of the judicial system was a nonissue. Judges and juries would continue to assess credibility but would seek support for their findings from the entire trial record and an examination of all of the elements of the case, 'the presence of independent evidence confirming or contradicting the witness, inconsistent and consistent statements, interest in the outcome and motives to lie as well as expert evidence on human behaviour and memory' (Qureshi, 2014: 11).

The case's sexual assault context also deserved heightened sensitivity, given the history of legal and procedural norms and rape mythologies that revictimize complainants and reinforce their inequality (Bakht, 2012a: 596). The fact that a complainant would be required to strip in order to seek justice is perverse. What women say about their sexual assaults ought to outweigh what they wear on the stand. NS' niqab does not prevent an intensive and thorough cross-examination. What remained unstated was that the person most likely to be detrimentally affected by the niqab was NS herself. In a social context where niqab-wearing women are either viewed as fanatics who refuse to integrate or infantilized as victims unable to see their own oppression, fact finders are less likely to trust their testimony. The Supreme Court ought to have at least included some cautions about the documented problems with demeanor evidence. Worryingly, NS may renew focus on demeanor as an indicator of credibility (Qureshi, 2014: 40) and reverse efforts to make the law of sexual assault more responsive to all women's needs.

Perhaps the majority's insistence that seeing a witness' face is important to trial fairness can be attributed in part to reluctance to adapt to scientific changes (Qureshi, 2014). It is considered a basic legal tenet that judges and juries can assess credibility and evidence (*Beland*, 1987: para. 17). However, courts' confidence in their ability to assess behavior may also translate into judicial hesitation in appreciating social science research (Qureshi, 2014: 17). Cases have demonstrated a lack of knowledge about human nature. In *R v. Lavallee* (1990), the Supreme Court of Canada required expert evidence as necessary to explain the psychological impact of female battering in a case where a battered woman killed her partner. As Justice Wilson explained, while the average person may think they are experts on human nature, popular mythology embedded in our society may lead them to erroneous conclusions (*Lavallee*, 1990: paras 31–34). The Supreme Court recognized that laypeople do not have adequate knowledge, absent expert assistance, of why women do not simply leave violent relationships. In this example of reform embracing social science findings, it took extensive lobbying, public pressure, many publications,⁷ and parliamentary standing committees⁸ before the Court was able to come to its decision (Qureshi, 2014: 18).

The reluctance of courts to admit shortcomings and to adapt to science is evidenced by the fact that it took nearly 10 years for DNA evidence to be appreciated by the legal system (Chandler, 2010: 16). The lesson that police informants and eyewitness identification in lineups contribute to misidentification also took years and missteps to learn. Perhaps it is simply a matter of time and a concerted campaign to demonstrate that little is lost in evaluating veiled testimony. However, an organized effort is improbable, given the many global campaigns trying to contain the niqab (BBC, 2010; Korteweg, 2013;

Nichols, 2013; Payton, 2011; Bill C-6: An act to amend the Canada Elections Act (Visual Identification of Voters), 2008 *SAS v. France*, 2014).

Accommodation: Legal Compromise

When competing rights are engaged, the *NS* majority's third question asks, 'Is there a way to accommodate both rights and avoid the conflict between them?' This legitimate question asks the judge to think creatively. There are often resolutions to seeming conflicts, and appropriate questions reveal compromises that address both parties' interests. A normative project of multiculturalism where people with diverse and deep commitments live peacefully together always entails negotiation (Bakht, 2012b: 71). A legal analysis that promotes compromise by encouraging consideration of the multiple issues at stake for all parties is surely better than proclaiming one side a winner. However, this requires that we leave open the possibility that our political and social certainties might be transformed in learning of the other (Tully, 2006: 23).

As societies become increasingly diverse, seeking a settlement of differences by mutual agreement and a potential modification of reciprocal demands must be valued. Often, considered and thorough analysis of the issues may reveal no stark conflict. The law's strength is typically not in finding such concessions for all parties, but it can certainly be encouraged. In *Razamjoo*, Judge Moore created a compromise between two stark alternatives of taking off the veil or not testifying. He had the women testify behind a screen with their faces uncovered so that only the judge, counsel, and female court staff could see their faces. This compromise was arrived at based on Judge Moore's questioning of the witness' beliefs including exceptions to veiling. Mrs. Salim testified regarding some relaxation in relation to being unveiled in the presence of relatively aged male authority figures, such as the judge and lawyers in *Razamjoo*.

The search for a way to accommodate competing rights should be paramount. But not all situations will reveal a middle ground. Depending on how the situation is framed, it may not be possible to avoid conflict. *NS*' sincere religious belief did not divulge exceptions to face covering that might have led to a compromise. However, had the majority accepted the inherent flaws in demeanor evidence, one could view the issue as forming no real conflict. Certainly Justice Abella's dissenting perspective was that while demeanor may be useful, seeing less of a witness' face does not sufficiently impair the ability to assess the credibility of a witness (*NS*, 2012: para. 82). As she notes, abridgements of the 'ideal demeanor package' often occur in practice due to medical impairments, use of interpreters, exceptions to hearsay evidence (*R v. Khan*, 1990), or where the witness cannot testify at trial at all.⁹ Yet these departures from the ideal do not disqualify evidence (*NS*, 2012: paras 103–105).

Framing Proportionality

Where no accommodation is possible, the *NS* majority's final question asks, 'Do the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so?' The majority characterizes this question as a proportionality analysis where one is to consider the effect of the niqab on trial fairness versus the effect on freedom of

religion. According to the majority, the salutary effects of requiring the witness to remove the niqab are in preventing harm to the fair trial interest of the accused and safeguarding the repute of the administration of justice. This analysis sets up a false dichotomy that does not fully recognize the multiple rights at stake. A fair trial, protected under Canada's *Charter*, is a right enjoyed not only by the accused but also by the complainant and the public who have a right to the proper administration of justice (Bakht, 2012a: 606–607). Indeed, the Supreme Court has stated where competing *Charter* rights are engaged, no single principle is absolute and capable of trumping the others (*R v. Mills*, 1999: para. 61). In a case about defense access to information contained in the private records of sexual assault complainants, the court also emphasized that equality concerns must inform the contextual circumstances of a fair trial. 'An appreciation of myths and stereotypes in the context of sexual violence is essential to delineate properly the boundaries of full answer and defence' (*R v. Mills*, 1999: para. 90). Thus the proper administration of justice requires consideration of not only the accused's fair trial rights (guaranteed by section 11(d) of Canada's *Charter*)¹⁰ but also the intersecting constitutional rights of the complainant and the public's interest in the prosecution of criminal charges through processes that are sensitive to the needs of victims and witnesses (*Cunningham v. Canada*, 1990). The majority omits entirely that NS is also entitled to a fair trial and fails to examine the multiple rights at stake for her.

This omission by the majority skews the proportionality inquiry. A fair trial is defined as primarily within the purview of the accused, that is, the individual cost on one who could lose his liberty and the concomitant loss of public confidence from an unfair trial. These should naturally be critical considerations. However, in a sexual assault case, equally relevant are the complainant's section 7 (security of the person) and section 15 (equality) *Charter* rights and the public's confidence in a trial that is free from discrimination. Acknowledging the relationship between sexual violence and the victimization of women requires understanding the gender equality dimensions of the treatment of sexual assault complainants. This analysis is in line with the direction in *Mills* that a defendant is entitled to a fair trial, not a perfect one that entitles him to irrelevant information or data that would distort the truth (*R v. Mills*, 1999: para. 74). Although argued by the appellant and the interveners, the Women's Legal Education and Action Fund, the Canadian Human Rights Commission, and the Canadian Council on American-Islamic Relations, the majority never addresses the intersecting claims of the complainant, doing a grave injustice to the multiple issues in the case.¹¹ By rooting NS' rights only in religious freedom, the majority fundamentally misconstrues and weakens the fair trial analysis made on NS' and the public's behalf.

In considering the deleterious effects of requiring the complainant to remove her niqab, the *NS* majority rightly notes the broader societal harm of niqab-wearing women becoming reluctant to report criminal offenses or otherwise participate in the legal system. The majority states that this consideration is especially weighty in the sexual assault context since this is a crime that has historically been underreported (Bakht, 2012a: 596; *NS*, 2012: para. 37). Unfortunately, the majority finds that 'where the liberty of the accused is at stake, the witness's evidence is central to the case and her credibility vital, the possibility of a wrongful conviction must weigh heavily in the balance, favouring removal of the niqab' (*NS*, 2012: para. 44). Despite the lip service paid to countering

broader harms, this statement ensures that niqab-wearing women will be required to remove their veils in sexual assault trials since their evidence will necessarily be contested (*NS*, 2012: para. 96), undermining concerns about underreporting.

The repeated discussion by the *NS* majority of possible wrongful convictions if a woman wears her niqab must be unpacked. Although a wrongful conviction associated with *not* relying on demeanor has not happened, the reverse is not true (Qureshi, 2014: 35–38). Guy Paul Morin was wrongfully convicted of rape and murder because the prosecution relied heavily on demeanor evidence, namely his reactions in the presence of investigators and witnesses (Ciraco, 2001). Similarly, in *R v. Nelles*, the prosecution inferred guilt from a doctor's observation that Nelles, a nurse exculpated of child murder 'had a very strange expression on her face' and showed 'no sign at all of grief' when a baby died. These cases offer concrete examples of the dangers of demeanor evidence. They also implicitly question the necessity of demeanor with the implication that having the face removed from the credibility equation may increase trial fairness. Indeed, scholars have concluded that visual indicators may actually mislead judges and juries (Blumenthal, 1993; Schwartzbaum, 2011; Wellborn, 1991). Studies show that sexual assault complainants' credibility is strongly influenced by stereotypes regarding appropriate emotional expressions when testifying (Ellison and Munro, 2009a). Arguably, seeing the face would provide information that would 'only serve to distort the truth-seeking purpose of a trial' (*R v. Mills*, 1999: para. 94). That there may be salutary effects to a fair trial, should a witness wear the niqab was not considered in the majority's proportionality inquiry.

Ultimately, the *NS* majority avoids a clear rule on whether niqab-wearing women can testify. Trial judges continue to have discretion to require a niqabi to unveil, even in a sexual assault trial. The majority's test also leaves the possibility that niqab-wearing women can testify while wearing clothing they sincerely believe is a tenet of their faith. This position is an important counterstatement that defies explicit discrimination. It may assist niqab-wearing women testifying in the civil context or those who provide uncontested¹² evidence in criminal trials. The majority rightly states that Canada's traditions do not involve leaving one's religious convictions at the courtroom door. However, the majority's approach does not go far enough. Its analytical framework makes it impossible for a niqab-wearing woman to predict in advance whether the decision to seek justice will require her to remove a garment with both religious and psychological significance, thus limiting her access to justice. While this might still be an acceptable burden in a system that prefers individualistic, case-by-case analysis of accommodation, it is highly problematic when the test itself is not balanced. The majority's analytical framework effectively creates a test that will more often than not require niqab-wearing women to remove their veils. Notably, the majority finds that where a niqab-wearing witness' testimony is contested, which it naturally would be in a sexual assault trial, the balance weighs heavily in favor of the woman removing her niqab (*NS*, 2012: para. 44). Indeed, the result for *NS*, when the case returned to the preliminary inquiry stage and the judge considered the Supreme Court's four-part framework, was that she was ordered to remove her niqab in order to testify (Canadian Press, 2013). Equally disappointing was the Crown prosecutor's recent withdrawal of charges against the two accused, citing 'no reasonable prospect of conviction' with 'the receipt of additional material' (Hasham, 2014).

In *Razamjoo*, despite the finding that a witness wearing a burqa would not compromise a fair trial, Judge Moore was concerned that adopting procedures so out of keeping with the expectations of the community would call into question the public's confidence in the justice system (*Razamjoo*, 2005: para. 95). He thus required the witnesses to testify from behind a screen such that their faces were visible to the male lawyers and judge. In my view, this was not a convincing reason to take the approach he did as it encourages the belief that religious practices that are outside of mainstream conventions have no place in public life. Interestingly, however, after *Razamjoo*, legislators responded to the 'basic values of New Zealand society' (*Razamjoo*, 2005: para. 103) by enacting a statutory means of accommodation that permits a witness to give evidence in an alternate way on the grounds of 'the linguistic or cultural background or religious beliefs of the witness' (*Evidence Act (NZ)*, 2006).

Judicial Prohibitions of the Niqab in Courtrooms

The aforementioned cases that try to include niqab-wearing women in courtrooms is contrasted with the alarming concurrence in *NS* which removes niqabi women from all Canadian courtrooms and the English case *D(R)* that also prohibits the niqab for troubling reasons. It is imperative to reject the position that niqab-wearing women should never be 'permitted' to wear veils in courtrooms.

The concurring opinion in *NS* by Justice LeBel illustrates his utter disapproval of the niqab:

[the niqab] removes the witness from the scope of certain elements of [communication] . . . on the basis of the assertion of a religious belief in circumstances in which the sincerity and strength of the belief are difficult to assess or even question. (*NS*, 2012: para. 77)

The only reason to probe beyond sincerity would be to attack the religious practice of wearing the niqab, which is obviously irrelevant to the legal issues. While Justice LeBel grudgingly acknowledges that religious freedom is at stake for *NS*, he prefers to frame the issue as the niqab's incompatibility with the nature of a public adversarial trial. This 'clash' as he prefers to call it engages the constitutional values of openness and religious neutrality in contemporary democratic Canada. Although there are several noted exceptions to the openness of the courts and to publicity at trials (*NS*, 2012: para. 75), niqab-wearing women must be subject to the definitive rule that the niqab not be permitted in Canadian courtrooms. According to Justice LeBel, because a trial is 'an act of communication with the public at large', the 'public must be able to *see* how the justice system works' (*NS*, 2012: para. 76, emphasis added). This simplistic interpretation of public access to courts has the perverse effect of closing Canadian courtrooms to all niqab-wearing women.

Inability to have facial contact does not prevent communication (Bakht, 2012b, 90–92). It is the social construction of what the niqab represents that prevents some from 'seeing' this for the access to justice issue that it is. Just as visually impaired lawyers litigate and, in the same way, that we regularly use nonfacial technology to communicate, women who wear the niqab must simply be accommodated and accepted as

contributors to society. Instead, Justice LeBel reveals his exasperation. The belief that women lie about sexual assault is pervasive (Doe, 2004). When Justice LeBel states that ‘the niqab shields the witness from interacting fully with the parties, their counsel, the judge and, where applicable, the jurors’ (*NS*, 2012: para. 77), he ‘not-so-subtly suggest[s] . . . that the niqab allows her to lie’ (Chambers and Roth, 2014: 10).

Justice LeBel and the majority in *NS* privilege face-to-face communication. The unwillingness to even question their standpoint reveals how culturally embedded the practice is. It is simply seen as natural. One explanation for the emphasis on being face to face derives from Christianity:

The famous hymn to Christian charity in the First Letter to the Corinthians includes one of the New Testament’s best-known lines: ‘For now we see through a glass, darkly, but then face to face: now I know in part; but then shall I know even as also I am known’ (1 Corinthians 13:12 [KJV]) . . . What is crucial is the verse’s epistemological resonance that ‘[f]ace-to-face understanding outshines any other way of seeking to know’ . . . providing ‘complete mutuality of knowledge’. (Leckey, 2013: 747)

Ironically, despite the call for religious neutrality (*NS*, 2012: para. 60), the Pauline epistles permeate the judicial consciousness to posit face-to-face interaction as a universal indicium of civilization, stigmatizing those departing from these cultural constructs (Fournier, 2013: 689; Leckey, 2013: 747).

That Justice LeBel views tensions illustrated in the appeal as caused by ‘the growing presence in Canada of new cultures, religions, tradition and social practices’ (*NS*, 2012: para 59), he demonstrates the us versus them relation of power where Westerners act as gatekeepers. The problem of excessive religiosity is perceived as something outsiders bring to Canadian society. However, in the only study that examines the lived realities of niqab-wearing women in Canada, Clarke (2013, iv) found that:

the typical profile of a woman in niqab is that of a married foreign-born citizen in her twenties to early thirties who adopted the practice after arriving in Canada. Most of the women possessed a high level of education, having attended university, graduate school, community college, or some form of vocational education.

Increased migration of the other heightens the need to protect fundamental Canadian values such as an open and independent court system. ‘That We don’t do “that” here and that It is not part of Our values is a useful fiction that works to keep narratives of patriarchy and oppression associated with Them and not with Us’ (Beaman, 2013: 729). That a Canadian who prizes the ideals of religious neutrality and an open and independent court system might also wear the niqab is inconceivable.

In an English criminal law case, Judge Murphy relied primarily on the concurrence in *NS* to forbid the accused from wearing a niqab while testifying. In *The Queen v. D(R)* (*D(R)*, 2013), a woman was charged with one count of witness intimidation, alleged to have occurred while the defendant was covered by a niqab. In a pretrial proceeding, Judge Murphy solicited submissions on the proper treatment of *D(R)*’s refusal to remove her niqab in the presence of any man. He certainly attempted to write his judgment from

a perspective free of inherent bias against niqab-wearing women. He accepted the assertion that D(R)'s religious belief was sincere. However, Judge Murphy preferred Justice LeBel's characterization that the niqab necessarily hinders the full openness and communication demanded by an adversarial trial process (*D(R)*, 2013: para. 58). Amazingly, Judge Murphy described the impact on D(R) of having to remove the niqab as merely causing 'some degree of discomfort' (*D(R)*, 2013: para. 58). There was no discussion of the typically heralded rights of the accused to a fair trial, to make full answer and defense, nor was much emphasis put on the fact that a criminal defendant is brought before the court under compulsion and not by 'choice'. For the devout, religious requirements are experienced as obligatory (Nussbaum, 2008: 117,167). Thus Judge Murphy's pronouncement that D(R) is 'free to make . . . the choice of how to dress for court' (*D(R)*, 2013: para. 65) is not correct. Indeed, for D(R), this meant being unable to give evidence in her own trial, which undoubtedly compromised her ability to provide a fulsome defense. This decision forced D(R) to choose between wearing her niqab and participating in defense of her liberty. In effect, it was no meaningful choice at all.

By contrast, Judge Murphy discusses at length:

the question of the comfort – and beyond comfort, the rights and freedoms – of others whose participation in a trial is essential. In my view, it is unfair to ask a witness to give evidence against a defendant whom he cannot see. It is unfair to ask a juror to pass judgment on a person whom she cannot see. It is unfair to expect that juror to try to evaluate the evidence given by a person whom she cannot see, deprived of an essential tool for doing so: namely being able to observe the demeanour of the witness; her reaction to being questioned; her reaction to other evidence given . . . I would add that, although of lesser significance in the case of a judge, it is also unfair to require a judge to sentence a person he cannot see. (*D(R)*, 2013: para. 59, emphasis added).

The fact that Judge Murphy points to the rights and freedoms of the other participants in a trial without making reference to D(R)'s right to a fair trial under Article 6 of the *European Convention on Human Rights* is highly problematic. D(R) obviously has religious freedom at stake but as an accused person, her fair trial rights are of critical importance. While consideration of the victim's rights are increasingly relevant, and particularly so in the sexual assault context as I have argued, why would the rights and freedoms of a witness, jury, and judge garner so much concern? Judge Murphy's phrasing that 'it is unfair' to ask others to accept or merely tolerate the niqab is interesting. It suggests that the request for accommodation is unreasonable. D(R) is called on to undress because she is seen as interfering with the rights of others. But in fact, there is no deliberation on how a trial is unfair to others if a defendant's face is unseen.

Judge Murphy accepts the 'cardinal importance' (*D(R)*, 2013: para. 34) of observing the witness' demeanor as a critical component of a trial 'because it comports with the long experience of judges and counsel in adversarial proceedings in England and Wales' (*D(R)*, 2013: para. 31). In making this statement, he ignores the multiple problems of demeanor evidence because courts have always relied on demeanor. Judge Murphy's analysis also seriously misapprehends how religious accommodation analysis functions, 'If D is entitled to keep her face covered, it becomes impossible for the Court to refuse

the same privilege to others, whether or not they hold the same or another religious belief, or none at all' (*D(R)*, 2013: para. 60). Later he finds:

A defendant cannot, by claiming to adopt a particular religious practice, oblige the court to set aside its established procedure to accommodate that practice. That would be to privilege religious practice in a discriminatory way, and would adversely affect the administration of justice. (*D(R)*, 2013: para. 63)

When an individual from a religious community seeks inclusion in society through an exemption from a rule of general application, this appeal to recognize how 'neutral' laws disproportionately burden certain minorities cannot be assumed to be discriminatory. To provide a relief of accommodation is to recognize that treating everyone similarly does not always result in equality. Thus, after careful and balanced analysis of any competing positions, accommodation is an individualized assessment that attempts to relieve this burden and allow the minority to participate in society. The precedential effect of such a ruling is limited to other cases with similar facts. Thus another woman entering a courtroom who sincerely believed that wearing a niqab was religiously necessary might benefit, but it would not permit a person who preferred wearing a balaclava to court to do so. Judge Murphy's beleaguered accommodation analysis is troubling and, sadly, identical to popular beliefs that equate accommodation with an inability to set any limits. It permits declarations of the kind that accommodation requests, multiculturalism, and indeed equality measures have gone too far. Niqab-wearing women appear to be in the paradoxical situation where being a niqabi complainant too greatly impacts the fair trial rights of the accused, yet being a niqab-wearing accused too greatly impacts the rights of others, for them to ever be permitted to testify wearing the niqab. There is no principled distinction between *NS* and *D(R)*. The only point of distinction is that a woman wearing a niqab is featured.

Legislative Prohibitions of the Niqab

Running parallel to judicial decisions prohibiting or severely limiting the niqab in courtrooms¹³ are legislative attempts to enact regulations that prohibit or sanction women from wearing the niqab in public. France and Belgium have passed laws that prohibit face veiling in all public spaces (BBC, 2010; Nichols, 2013). A French member of the Conseil d'Etat stated that 'Islam frightens, and this law [banning the niqab] is an expression of that fright' (Salton, 2013: 156). The Grand Chamber of the European Court of Human Rights recently upheld the French criminal ban of the niqab (*SAS v. France*, 2014). The Netherlands came close to adopting a ban with Dutch politician Geert Wilders proposing a 'headrag tax' on women wearing headscarves, a levy for their pollution of public space (Korteweg, 2013).

Canada has not been far behind. The federal government attempted to force niqab-wearing women to remove their face veils while voting in an election claiming the need to identify the woman in order to prevent fraud. But unveiled Canadians at polling stations need not facially prove their identity (Parliament of Canada, 2008). They need only show two pieces of non-photo identification in order to vote. The irrational insistence on seeing one's face defies logic. Similarly, in a unilateral move by the Immigration

Minister, face veils have been banned during Canadian citizenship ceremonies (Payton, 2011). Thus, women who have overcome all hurdles to Canadian citizenship are denied this coveted privilege because of asinine complaints that ‘it’s hard to tell whether people with their faces covered are actually reciting the oath of citizenship, which . . . is a requirement to become Canadian’ (Payton, 2011). Minister Kenney reiterated several themes typically proffered by niqab objectors in his explanation for the new regulation, namely the niqabi’s veil during citizenship ceremonies ‘is counter to Canada’s commitment to openness, equality, and social cohesion’ (Payton, 2011).

Recently, Quebec was embroiled in a debate where niqab-wearing women featured prominently. Bill 60, also known as the Charter of Quebec Values, proposed to amend the *Quebec Charter of Human Rights and Freedoms* by, among other things,¹⁴ making it mandatory to have one’s face uncovered when either providing or receiving a state service (Quebec National Assembly, 2013). The bill died when the governing provincial party was defeated in a recent election, although likely on grounds other than Bill 60. In fact, Bill 60 had the support of the majority of Quebecers for most of its life with 60% of Quebecers (and 69% of Francophone Quebecers) supporting it (Gagnon, 2014). Article 7 of the Bill stated:

Persons must ordinarily have their face uncovered when receiving services from personnel members of public bodies . . . When an accommodation is requested, the public body must refuse to grant it if, in the context, the refusal is warranted for security or identification reasons or because of the level of communication required. (Quebec National Assembly, 2013)

The likelihood of this bill withstanding constitutional scrutiny was minimal. The bill tried to reintroduce formal equality in law and public discourse by suggesting that all would be best served by eliminating difference. Essentially, niqab-wearing women (and all who wear ‘conspicuous religious symbols’ (Quebec National Assembly, 2013) could never have worked in government. Workers already employed by government could lose their jobs simply because of their religious beliefs. Niqab-wearing women would also have been prevented from accessing such government-run services as child care, health care, and education despite the contention that Bill 60 was in part about the equality of men and women. How does preventing a woman from working or accessing basic government services promote equality?

Despite its failure, Bill 60 and the judicial opinions in *NS* profoundly shape public debates in Canada. It is noteworthy to trace certain themes. First, both Bill 60 and *NS* exalt face-to-face interaction. In the context of court proceedings, the common law presumption of seeing the face being a necessary part of trial fairness runs afoul of scientific literature that informs us that reading faces is not as easy as it seems and that we are easily deceived. In the context of interactions between public servants and citizens the ‘romantic focus on face-to-face interaction . . . squares poorly with the experience of many people – veiled or unveiled – trawling through endless government Web pages or navigating labyrinthine-automated systems *via* their touchtone phone’ (Leckey, 2013: 748). Judicial and governmental insistence on seeing one’s face is simply disingenuous when reasoning cannot support it and day-to-day practice suggests many exceptions (Qureshi, 2014: 8–9).

Second, reactions to the niqab disclose a very particular and polarized construction of ‘us’ as insiders and ‘them’ as outsiders. In *NS*’ concurring opinion, niqab-wearing women are the source of tension, bringing their ‘new cultures, religions, traditions, and social practices’ from outside Canada. Minister Kenney’s remarks regarding the oath of citizenship reveal a similar perspective. Their practices clash with Canadian ‘constitutional values’. The niqabi cannot communicate and affects the rights of others in the process. For Quebec politicians, niqab-wearing women’s signification is primarily reducible to women’s oppression, an idea that is incompatible with ‘nos valeurs’. But niqab-wearing women also belie neutrality. Simply being identified as religious casts doubt on her ability to perform her job in a fair and impartial manner. If ‘interventions to address the conduct of a religious minority may be analyzed as occasions on which the minority and so-called majority reciprocally redefine and reconstitute themselves’ (Leckey, 2013: 743), niqab-wearing women depict a very particular profile about us. Although we describe them as foreigners, immigrants, outsiders, guests in ‘our’ country, in fact we need niqab-wearing women in order to create a self-portrait that is favorable – one that is virtuous while she is deviant, innocent in contrast to her guilt, and powerful as she is weak (Bakht, 2012b: 98–99). The niqab wearing-woman’s proximity sets the limit of the nation. *NS* and Bill 60 reinforce a conception of us, and the nation as secular, equal in its relations between men and women and religiously neutral; whereas, ‘they’ are wholly religious, unequal, repressed, and incapable of neutrality. The nation can be inclusive of some and indeed it ‘advertises its modern record of respecting cultural diversity and human rights’ (*Amselem*, 2004: para. 87), but niqabi women take things too far and cannot be incorporated into our identity. She must remain other.

Third, the fact that messages deployed about Muslim women are entirely contradictory seems to heighten the veracity of such claims. The veiled woman is both threat and threatened (Bakht, 2008; Leckey, 2013: 751). Niqab-wearing women are a threatened group in need of rescuing from their male oppressors that force the niqab upon them. They are threatening in the attire that they wear publicly to hide their identity, engage in electoral fraud, avoid security measures, and prevent open communication (Bakht, 2012b: 76). In a courtroom, a niqab-wearing sexual assault complainant threatens the fair trial rights of the accused and the value of open communication in courts, but when she is the accused she threatens the rights of others with little concern for the threat of a wrongful conviction.

These mixed messages from judges and policy makers transmit and reinforce xenophobic and racist ideas about niqab-wearing women. They shape the way the public views niqab-wearing women and legitimize attitudes and behavior about Muslims and those perceived as Muslims in ways that have a significant impact on everyday lives. These ideas seep into mainstream consciousness such that the private sector, which need not abide by such prohibitions, follow suit (Githens, 2013: 151–152; Mena, 2013). Moreover, statues aimed at a despised or feared minority prompt outcomes from harassment to violence that go beyond the legislated text (Leckey, 2013: 748). Though Bill 60 has not become law, the Quebec government’s backing of these discriminatory ideas has emboldened public views of this nature. In Sherbrooke, Quebec, recent acts of vandalism against a halal butcher and a mosque ‘underscore a growing sense of vulnerability since the start of the debate on the Quebec charter of secular values’ (Peritz, 2014). Reports of

harassment and insults against Muslims have multiplied in recent months since the Bill 60 controversy began. Muslim women who wear the hijab or niqab have faced an increase in disturbing acts of anti-Muslim intolerance, from spitting to racist insults. Valérie Létourneau, spokeswoman for the *Regroupement des centres de femmes du Québec*, has stated, 'It's obvious. Since the debate over . . . [Bill 60], the increase in intolerance is palpable . . . It's contributing to a climate of fear. Veiled women are finding it harder to leave their homes. It . . . [has] taken serious proportions' (Peritz, 2013). The failure of Bill 60 does not mean that Muslim women are 'free' to wear the niqab. Women who wear the niqab or hijab have always faced discrimination privately whether in the areas of landlord-tenant, hiring or other neighbor relations (Fournier, 2013). For now, this extrajudicial regulation will not have formal legislative backing.

However, views such as the concurrence in *NS* and the text of Bill 60 increase suspicion and marginalization of Muslims and other minority religious communities. Judicial and legislative ideas that exclude niqab-wearing women lower the bar in terms of what can appropriately and publicly be said about Muslims, and indeed what can be done to them. They influence Muslim women's everyday experiences of belonging. Certainly, these exclusionary discourses coexist with more inclusionary assertions of acceptance by the judiciary and the state, by strong alliances of civil support, and powerful resistance from women themselves. But these historical moments change us, and the implications for Muslim women are very real.

Conclusion

This article has used several examples of the difficulties that niqab-wearing women face internationally in order to simply go about their daily lives. The issue of niqabs in courtrooms has already been addressed in New Zealand, Canada, and the United Kingdom. The fact that *D(R)* cites *NS* and *NS* cites *Razamjoo* reveals the interconnectedness of Western jurisprudence and that these decisions literally impact how law treats Muslim women across Western jurisdictions. The denial of entry in courtrooms to niqabi and hijabi women in two US cases (*Muhammad*, 2006; Nasaw, 2008) discloses that the problem of disciplining dress and prohibiting certain religious expression is widespread, even rampant.

This article gives *R v. NS* particular attention because it is a decision of the highest appellate court in Canada, with the uniquely challenging conditions of a sexual assault case including a determination of what constitutes a fair trial when multiple rights are at stake for the complainant. It is also significant for access to justice in a range of jurisdictions where this issue is likely to arise or has already arisen and influenced cases such as *D(R)* in England. Though the majority in *NS* attempts to be progressive and not systematically exclude niqab-wearing women in keeping with an inclusive policy of multiculturalism, its analytical framework will frequently lead to a decision forcing the niqab's removal. The decision sends the message that the Supreme Court cares about some women, as previous important reforms in the area of sexual assault suggest, but not Muslim women. The decision further marginalizes an already stigmatized group and renews emphasis on demeanor as a viable indicator of credibility, undermining feminist efforts to reform the inequality faced by sexual assault complainants. Finally,

the decision, the concurrence, in particular, legitimizes the pervasive belief that wearing the niqab is a practice that provokes the rest of society, emboldening radical attempts at prohibiting the niqab more generally.

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Notes

1. By normative multiculturalism, I refer to laws or policies, such as human rights statutes, where diversity in the national population is considered a positive development and the official response is to be inclusive of minority communities and individuals such that they are able to fully participate in public life.
2. For example, Article 18 of the *International Covenant on Civil and Political Rights* guarantees ‘all possible attitudes of the individual toward the world [and] toward society’ (see also Evans, 2001: 58–59; Vitkauskaitė-Meurice, 2011: 844).
3. At the first preliminary inquiry there were several procedural errors recounted by the Superior Court review judge that disadvantaged NS. She was initially not given access to her own counsel despite the prosecutor’s insistence that she needed a lawyer and was then asked by the judge to sit in the witness box and answer questions from the bench about her religious beliefs, though not under oath (NS, 2009). Finally, NS was not given an opportunity to explain new evidence that the accused persons put before the judge, namely that she had a driver’s license which included a photo of her face uncovered (NS, 2009).
4. *R v. Levogiannis* (1993) held that while normally an accused has the right to be in the sight of the witnesses who testify against him, it is not an absolute right but one which is subject to qualification in the interests of justice. There was no violation of sections 7 or 11(d) of the *Canadian Charter* in allowing for witnesses in certain circumstances to testify outside of court, behind a screen or through another device such as closed-circuit television, but still visible to the accused per section 486 (2.1) of the *Criminal Code* (now section 486.2).
5. Justice Abella was the exception, ‘a general expectation is not the same as a general rule, and there is no need to enshrine a historic practice into a “common law” requirement’ (NS, 2012: para. 92). However, Justice Abella was equally uncritical in her acceptance that the assessment of a witness’ demeanor is easier when one sees the face (NS, 2012: para. 91).
6. The majority’s acceptance of the assertion by the accused that seeing the face is critical to a fair trial, absent proof, is in line with much criticism that the Supreme Court of Canada has lowered the bar with respect to the sufficiency of proof required regarding limitations on *Charter* rights. See, for example, *Alberta v. Hutterian Brethren of Wilson Colony* (Hutterian Brethren, 2009), where the Court required little evidence from the government of the necessity for a universal photo requirement for an effective driver’s license scheme that minimizes fraud.
7. See for example, (Walker, 1984); (Crocker 1985); and (Ewing, 1987).
8. For example, see Canadian House of Commons Standing Committee on Health, Welfare and Social Affairs, (1982, 1985) and Standing Committee on Social Development, 1982a, 1982b).
9. The reading in of transcripts from testimony at preliminary inquiries is another example where the court loses the physical presence of the witnesses along with any demeanor cues. Admission

- of hearsay and the reading in of transcripts permits more of a risk to trial fairness than the limiting of demeanor cues with a niqab since contemporaneous cross-examination is entirely absent in the former situations (Qureshi, 2014).
10. Section 11(d) of Canada's *Charter* states that 'any person charged with an offence has the right . . . to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal'.
 11. The Women's Legal Education and Action Fund (LEAF) made the most fulsome arguments about NS' rights beyond freedom of religion. LEAF argued that the section 7 rights of NS included the right to be free from state induced psychological harm; the right to personal dignity, autonomy, and integrity; the right to physical security of the person; the right to make fundamental personal choices; and the right to liberty. Forcing niqab-wearing women to choose between accessing the justice system and their faith and personal integrity (physical, psychological, and emotional) contravenes section 7 in a manner inconsistent with the principles of fundamental justice. The equality impact of the case is unavoidably gendered. Only Muslim women wear the niqab, and it is in the context of a sexual assault proceeding that NS is being asked to remove an intimate article of clothing (Women's Legal Education and Action Fund, 2012). See also Canadian Council on American-Islamic Relations (2012).
 12. In *R v. Kachkar*, an unreported 2013 jury trial in the Ontario Superior Court of Justice, where the accused was charged with first-degree murder in the death of a Toronto police officer, a witness for the defense was allowed to testify with a burqa, which covered her face. The Crown in this case raised no objection to the woman's 'right to wear' the veil (Palmer, 2013). Apparently, niqab-wearing women have testified in India wearing their face veils. There are no reported judgments citing this because the fact that a significant demographic would testify in their usual clothing is not considered controversial or worthy of mention (Bakht, 2013).
 13. For an American case that also prohibited a niqab-wearing woman from testifying in a small claims dispute, see *Muhammad v. Enterprise Rent-A-Car* (2006).
 14. Bill 60 would also limit the wearing of conspicuous or ostentatious religious symbols if one is employed by the state (Article 5). All federal political parties roundly rejected this part of the bill. Interestingly, the bill's predecessor (Bill 94, 2010), which targeted only niqab-wearing women in its public ban of face veils did not garner similar denunciation from federal political parties.

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