Prejudice Unveiled: The Niqab in Court[¯]

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Abstract

The public use of the niqab and other religious face coverings is a source of considerable debate in Western nations. The veiled Muslim woman is often constructed as "other," reviled as backward, represented as in need of rescue, or associated with Islamic extremism. Despite widespread racist attitudes, officially, Canadians purport to support multiculturalism and the equality of all people under the law as guaranteed under section 15 of the *Charter*. In a recent Supreme Court of Canada decision, *R v NS*, the Court had to consider the right of a Muslim woman to wear her niqab while testifying in a sexual assault trial. In "balancing" the conflict between the religious rights of *NS* and the section 7 rights of the accused to a full and fair defense, the Court ignored the security of the person and equality rights of *NS*. The Court instead legitimated anti-Muslim stereotypes and reiterated rape myths that had ostensibly been overturned.

Keywords: niqab, sexual assault, multiculturalism, equality, demeanor evidence

Résumé

Le port du niqab et d'autres habits religieux couvrant le visage a soulevé des débats intenses dans les pays occidentaux. La femme musulmane voilée est souvent représentée comme « autre », vilipendée comme rétrograde, représentée comme une personne à secourir ou associée à l'extrémisme islamique. En dépit d'attitudes racistes répandues, les Canadiens et Canadiennes prétendent soutenir

¯ The authors wish to acknowledge the financial support of the Social Sciences and Humanities Research Council of Canada.

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Canadian Journal of Law and Society / Revue Canadienne Droit et Société, 2014,
Volume 29, no. 3, pp. 381–395. doi:10.1017/cls.2013.62

https://doi.org/10.1017/cls.2013.62 Published online by Cambridge University Press

le multiculturalisme et l'égalité de tous garantis par la loi en vertu de l'article 15 de la *Charte*. Dans une décision récente de la Cour suprême du Canada, *R c NS*, la Cour a dû examiner le droit d'une femme musulmane de porter le niqab lors de son témoignage dans un procès pour agression sexuelle. En assurant l'équilibre entre les droits religieux de *NS* et le droit, en vertu de l'article 7, de l'accusé à une défense pleine et entière, la Cour a ignoré la sécurité de la personne et les droits à l'égalité de *NS*. En revanche, la Cour a légitimé les stéréotypes islamophobes et réitéré les mythes du viol qui avaient manifestement été renversés.

Mots clés : niqab, agression sexuelle, multiculturalisme, égalité, preuve fondée sur le comportement

The public use of the niqab and other religious face coverings is a source of considerable debate in Western nations.[1] The veiled Muslim woman is often constructed as "other," reviled as backward, represented as in need of rescue, or associated with Islamic extremism.[2] Despite widespread Islamophobic attitudes, officially, Canadians purport to support multiculturalism and the equality of all people under the law as guaranteed under section 15 of the *Charter*.[3] In a recent Supreme Court of Canada decision, *R v NS*, the Court had to consider the right of a Muslim woman to wear her niqab while testifying as a victim in a sexual assault trial, a trial in which the defendants, her relatives, were also Muslim. The Court determined that the case involved a conflict between the religious rights of *NS*, protected under section 2 of the *Charter*,[4] and the section 7 rights[5] of the accused to a full and fair defense. While all three decisions of the Court employed a balancing approach, only Abella J., in dissent, considered the structural discrimination faced by *NS* as a Muslim woman. In Part I of this article we examine *R v NS* at all levels of court. In Part II we explore stereotypes about veiled women and illustrate that the balancing approach, in a context of structural prejudice and colonialism, obscures these prejudices in processes of review. In Part III we explore the ways in which stereotypes about veiled women indirectly reinforced the common perception that women are likely to lie about rape. In our conclusion, we echo Abella J., who warned

1 Pascale Fournier and Erica See, "The 'Naked Face' of Secular Exclusion: Bill 94 and the Privatization of Belief," *Windsor Journal of Access to Justice* 30 (2012): 63; Rachel Rebouché, "The Substance of Substantive Equality: Gender Equality and Turkey's Headscarf Debate," *American University International Law Review* 24 (2009): 711; Anastasia Vakulenko, "Islamic Headscarves and the European Convention on Human Rights: An Intersectional Perspective," *Social and Legal Issues* 16, no. 2 (2007): 183.

2 Lila Abu-Lughod, "Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others," *American Anthropologist* 104, no. 3 (2002): 783–90.

3 Under section 15 of the *Charter*, equality is guaranteed. Section 28 also specifically protects the equality of women: *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, online at http://laws-lois.justice.ga.ca/eng/const/page-15.html.

4 Under section 2, all Canadians are guaranteed "freedom of conscience and religion" and "freedom of thought, belief, opinion and expression": *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, online at http://laws-lois.justice.ga.ca/eng/const/page-15.html.

5 *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, online at http://laws-lois.justice.ga.ca/eng/const/page-15.html.

https://doi.org/10.1017/cls.2013.62 Published online by Cambridge University Press

in dissent that denying religious freedom in this case "is like hanging a sign over the courtroom door saying 'Religious minorities not welcome.'"[6] Abella J.'s critique, however, obscured the fact that the accused were also of a religious minority, but that their rights were upheld.[7] It is more accurate, we would argue, to assert that the decision is akin to the Court hanging a sign reading, "Niqab-wearing women can be raped with impunity in Canada because no court will hear their complaints."

Part I: *R v NS*

In 2007, *NS* accused two men, her uncle and cousin, of sexually assaulting her. She alleged that "she was sexually abused from the age of six."[8] In 1992, she reported the assaults to a teacher, but her father intervened.[9] Years later, *NS* sought justice. Charges were laid and she was called as a witness in the preliminary inquiry and wished to testify wearing her niqab. *NS* described the niqab as "a part of me"; she asserted that it was essential to her "modesty" and "honour."[10] The accused sought an order that she remove it. The preliminary inquiry judge, Weisman J., held a *voir dire* and concluded that since *NS* had allowed her picture to be taken for a driver's license and had shown her face in the context of borders and travel, her religious belief was "not that strong."[11] He ordered her to remove her niqab. The preliminary inquiry was adjourned due to *NS*'s objections.

NS then applied to the Superior Court of Justice for an order to permit her to wear the niqab and was partially successful. Marrocco J. held that *NS* should be allowed to wear the niqab if she had a sincere religious belief, but that the preliminary inquiry judge would have the right to exclude her evidence if the wearing of the niqab interfered with the right of the accused to a full and fair defense.[12] *NS* appealed, and one of the accused cross-appealed. The Court of Appeal held that if court procedures could not be accommodated to balance the interests of the parties, then "the accused's fair trial interest may require that the witness be ordered to remove her niqab."[13] The case was returned to the preliminary inquiry judge, but *NS* appealed to the Supreme Court of Canada. Her appeal was denied. The failure of the majority to consider these extra-legal, contextual issues is disturbing given the briefs provided by interveners, in particular the Legal Education and Action Fund (LEAF), the Barbara Schlifer Clinic, the Canadian Council on American-Islamic Relations, and the Canadian Civil Liberties

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6 *R v NS*, [2012] SCJ No 72 at para 94.

7 Intersectional analysis places the gendered body within a broad cultural context to consider how race, class, ability, age, sexuality, racialization, etc. work to destabilize static ideas about gender experience: Vanaja Dhruvarajan, "The Multiple Oppression of Women of Colour," in *Racism in Canada*, ed. Ormond McKague (Saskatoon: Fifth House Publishers, 1991), 101–4; Rosemary Brown, "Overcoming Racism and Sexism—How?," in *Racism in Canada*, ed. Ormond McKague (Saskatoon: Fifth House Publishers, 1991), 163–77.

8 *R v NS* (2009) OJ No 1766 at para 80.

9 Ibid. at para 80.

10 Ibid. at para 29.

11 *R v NS*, [2012] at para 4.

12 *R v NS* (2009), 95 OR (3d) 735.

13 *R v NS* (2010) ONCA 670, 102 OR (3d) 161.

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Association.[14] For example, the brief from the Barbara Schlifer Clinic argued that the Court should have considered the balancing of the rights of the accused and the complainant in the context of "(i) the effect of the removal order on the under-reporting of sexual violence, and (ii) the potential discriminatory exclusion of a class of women from access to the justice system."[15]

Speaking for the majority (which included Deschamps, Fish, and Cromwell J.J.), McLachlin C.J. rejected both the assertion that "the courtroom is a neutral space where religion has no place" and the counter-argument that the justice system "should respect the witness's freedom of religion and always permit her to testify with the niqab on."[16] She asserted that a woman could be ordered to remove her niqab if "permitting the witness to wear the niqab while testifying create[s] a serious risk to trial fairness" and no accommodation could be found. Fundamentally, she argued that, in this case at least, the interests of the accused to a fair trial outweighed the religiously based concerns of the complainant.[17]

The judge in the preliminary inquiry had asserted that *NS*'s religious belief was not strong. McLachlin C.J., however, held that the judge's inquiry in this regard had been insufficient and that "a witness should not be denied the right to raise section 2(a) merely because she has made what seemed to be a compromise in the past in order to participate in some facet of society."[18] She ordered that the preliminary inquiry must reconsider this issue. She then assessed the argument by the defendant that "allowing *NS* to testify with her face covered by a niqab denies his fair trial rights."[19] McLachlin C.J. admitted that the issue of "effective cross-examination and accurate assessment of a witness's credibility" was hotly disputed. She asserted that "provisions of the *Criminal Code*, RSC 1985, c C-46, and judicial pronouncements" presume that the "ability to see a witness's face is an important feature of a fair trial" and that "this common law assumption cannot be disregarded lightly."[20] The majority minimized the obligation of the Court to consider fair trial rights in sexual assault cases from the perspective not only of the accused, but also of the complainant, and did not give adequate weight to the prejudice that exists against veiled women in the larger society. McLachlin C.J. did note that "if . . . women are required to remove the niqab while testifying against their sincere religious belief they will be reluctant to report offences and pursue their prosecution."[21] However,

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14 LEAF is a national organization promoting women's legal rights. The Barbara Schlifer Clinic provides support to victims of violence. The Canadian Council on American-Islamic Relations promotes understanding and goodwill between Muslim and non-Muslim Canadians. And the Canadian Civil Liberties Association intervenes in the courts in cases involving violations of civil freedoms. The Ontario Human Rights Commission, the Criminal Lawyers' Association (Ontario), the Muslim Canadian Congress, the South Asian Legal Clinic, and the Barreau du Québec also intervened, but their briefs are less relevant to the current argument. The Criminal Lawyers' Association and the Muslim Canadian Congress argued in favor of the accused and insisted on the importance of demeanor evidence in a full and fair trial: http://aspercentre.ca and http://www.cbc.ca/news/politics/story/2012/12/20.

15 Brief of the Barbara Schlifer Clinic at para 28: http://schliferclinic.com/advocacy-and-social-change/legal/facial-coverings.html.

16 *R v NS*, [2012] at para 1.

17 Ibid. at para 9.

18 Ibid. at para 13.

19 Ibid. at para 16.

20 Ibid. at para 21.

21 Ibid. at para 37.

https://doi.org/10.1017/cls.2013.62 Published online by Cambridge University Press

she asserted that the interests of the accused and "safeguarding the repute of the administration of justice" were more compelling in this case since "no less is at stake than an individual's liberty."[22] She concluded that trial judges would have to weigh the interests of all parties in future cases, and that the niqab could be ordered removed when the Court determined that it would interfere in a fair trial.

Concurring in the disposition, LeBel J. and Rothstein J. (with reasons delivered by LeBel J.) asked whether wearing the niqab in any trial was compatible "with the constitutional values of openness and religious neutrality in contemporary democratic, but diverse, Canada."[23] While LeBel J. prefaced his decision with the comment that he does "not cast doubt on the sincerity of the appellant's religious beliefs,"[24] he considered such beliefs far less important than the rights of the accused. In particular, he asserted that "cross-examination is a necessary tool for the exercise of the right to make full answer and defense . . . and the balancing process works in his favour."[25] This finding ignored the vulnerability of the victim-witness in sexual assault cases and the long history of credibility evidence being used in rape trials to discredit the victim.[26] LeBel J. also found that the "trial is itself a dynamic chain of events" and that allowing discretion with regard to when women can and cannot wear the niqab would lead to complications, confusion and mistrials: "[G]iven the nature of the trial process itself, the niqab should be allowed either in all cases or not at all . . . Because of its impact on the rights of the defense, in the context of the underlying values of the Canadian justice system, the wearing of a niqab should not be allowed."[27]

Abella J. dissented. In balancing the interests of the victim and the defendant, she considered the context of sexual assault and asserted that "the harm to a complainant of requiring her to remove her niqab while testifying will generally outweigh any harm to trial fairness."[28] She asserted that visual evidence is unnecessary, as "the court system has many examples of accepting evidence from witnesses who are unable to testify under ideal circumstances because of visual, oral, or aural impediments. I am unable to see why witnesses who wear niqabs should be treated any differently."[29] The niqab also does not, she argued, prevent the assessment of the complainant's demeanor, as "a witness wearing a niqab may still express herself through her eyes, body language, and gestures . . . the tone and inflection of her voice, the cadence of her speech, or, most significantly, the substance of the answers she gives,"[30] and a woman wearing a niqab may still be vigorously cross-examined. Unlike the majority, Abella J. explicitly noted that "a judicial environment where

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22 Ibid. at para 38.
23 Ibid. at para 60.
24 Ibid. at para 66.
25 Ibid. at para 68.
26 *R v Ewanchuk* [1999] 1 SCR; Constance Backhouse, *Carnal Crimes: Sexual Assault Law in Canada 1900–1975* (Toronto: Irwin Law and the Osgoode Society for Legal History, 2008); Melanie Randall, "Sexual Assault Law and 'Ideal Victims': Credibility, Resistance and Victim Blaming," *Canadian Journal of Women and the Law* 23, no. 2 (2010); and Elizabeth Sheehy, "Evidence Law and the 'Credibility Testing' of Women: A Comment on the E Case," *Queensland University of Technology Law and Justice Journal* 2 (2010): 157.
27 *R v NS*, [2012] at para 69.
28 Ibid. at para 86.
29 Ibid. at para 82.
30 Ibid. at para 106.

https://doi.org/10.1017/cls.2013.62 Published online by Cambridge University Press

victims are further inhibited by being asked to choose between their religious rights and their right to seek justice undermines the public perception of fairness not only of the trial, but of the justice system itself."[31] Abella J. would have sent the case back to trial with *NS*'s right to wear her niqab vindicated.

While the Supreme Court of Canada has spoken, for *NS*, this ordeal is far from over. On April 24, 2013, Weisman J., the same judge who initially determined that *NS*'s religious belief was "not that strong,"[32] ruled that *NS* must remove her niqab to testify in her sexual assault trial. Her lawyer has announced his intention to appeal.[33]

Part II: Veiled Women, Prejudice, and Section 15

In the West, particularly since the attacks of September 11, Muslim women often face hostility and suspicion.[34] As the Canadian Council on American-Islamic Relations asserted in their brief to the Court, "in popular discourse they (niqab-wearing women) are either vilified as fanatics who refuse to integrate, or infantilized as victims who are prevented from seeing their own oppression."[35] The history of Western discourse is rife with "representations constructing women from the East and other parts of the world as exotic Others who needed to be unveiled so that their hidden natures could be consumed by the colonizers."[36] The constructed opposition between "West versus East; modernity versus primitive tribalism; freedom versus oppression; democracy versus totalitarianism; Christianity versus Islam"[37] underlies the interpretation of veiling as hiding[38] and constructs niqab-wearing women as mysterious, untrustworthy and inscrutable.[39]

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31 Ibid. at para 95.

32 Ibid. at para 4.

33 http://www.cbc.ca/.../toronto-court-rules-woman-must-remove-niqab-to-testify. Weisman J. is 75 and faces mandatory retirement, and this may well be his final judgment.

34 Sherene Razack has argued, "Muslims are stigmatized, put under surveillance and denied full citizenship rights": Sherene Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008), 173; Sedef Arat-Koc, "The Disciplinary Boundaries of Canadian Identity after September 11: Civilizational Identity, Multiculturalism, and the Challenge of Anti-Imperialist Feminism," *Social Justice* 32, no. 4 (2005): 32–49; Eve Haque, "Homegrown, Muslim and Other: Tolerance, Secularism, and the Limits of Multiculturalism," *Social Identities* 16, no. 1 (2010): 79–101.

35 Brief of the Canadian Council on American-Islamic Relations, para 1: http://caircan.ca/downloads/CAIRCAN_Factum_33989.

36 Yasmin Jiwani, *Discourses of Denial: Mediations on Race, Gender and Violence* (Vancouver: University of British Columbia Press, 2006), 34–35. See also Jennifer Simpson, Carl James and Johnny Mack, "Multiculturalism, Colonialism, and Racialization: Conceptual Starting Points," *Review of Education, Pedagogy, and Cultural Studies* 33 (2011): 285–305.

37 Ibid. 178. See also Homi Bhabha, *The Location of Culture* (New York: Routledge, 1994).

38 Sheila McDonough, "Perceptions of the Hijab in Canada," *The Muslim Veil in North America: Issues and Debates* (2003), 126–30.

39 Homa Hoodfar,"The Veil in Their Minds and On Our Heads: The Persistence of Colonial Images of Muslim Women," *Resources for Feminist Research/Documents pour recherches féministes* 22, no. 3/4 (1993): 2–18; John Esposito, *The Islamic Threat: Myth or Reality?* (New York: Oxford University Press, 1995); Fred Halliday, *Islam and the Myth of Confrontation: Religion and Politics in the Middle East* (London: I. B. Taurus, 1999); Homa Hoodfar et al., introduction to *The Muslim Veil in North America: Issues and Debates*, eds. Sajida Sultana, Homa Hoodfar, and Sheila McDonough (Toronto: Women's Press, 2003), xi–xvii; Samuel Huntington, "The Clash of Civilizations?" *Foreign Affairs* 72, no. 3 (1993): 22–49; Reem Meshal, "Banners of Faith and Identities in Construct: The *Hijāb* in Canada," in *The Muslim Veil in North America: Issues and Debates*, 72–104; and Zuhair Kashmerier, *The Gulf Within: Canadian Arabs, Racism and the Gulf War* (Toronto: J. Lorimer, 1991).

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Critiques of these stereotypes of Muslim women abound. Jen'nan Ghazal Read finds that Muslim women in the West often veil "*against* the wishes of their father and husbands . . . to deal with the marginality they experience as outsiders in western society," or to allow them more freedom of movement outside their homes.[40] Homa Hoodfar notes similar findings among Canadian teenagers.[41] Marie Lavigne argues that veiling—wearing the *hijāb*—is complex: "As a religious symbol, it raises the question of freedom of religion . . . As a cultural symbol it forces the . . . majority to consider their own capacity to assimilate people who are different. As a political symbol, it is associated in many minds with Islamic fundamentalism, and with opposition to democratic values."[42] Similarly, Sharon Todd's analysis finds that veiling "is no innocent 'signifier' . . . It has come to symbolize everything from Islamic fundamentalism . . . [to] women's subordination."[43]

As initially conceived, the veil was a symbol of respectability; it was not until the time of the Ottoman Empire that veiling became associated with religious practice as opposed to public decency and social status.[44] Now, the two are often conflated; the majority of young participants in a study cited the "freeing" aspects of the veil within Muslim communities in Canada—when they veiled, or when they socialized with girls who did, they showed their communities that they were "good" Muslim women who did not need to be strictly surveilled.[45] As scholar Reem Meshal points out, "Like their counterparts the world over, Muslim women are well aware of the significance of dress as a vehicle of gender expression."[46] Hoodfar notes of veiling that "what we wear . . . has significant social and political functions, serving as a non-verbal medium of ideological communication."[47] In practice, women veil for many reasons; however, courts have an obligation to recognize the myths that affect veiled Muslim women in Western, majority-Christian societies. Instead, the *NS* court, with the exception of Abella J., wrote judgments that, while ostensibly focused on upholding common law precedents regarding the rights of the accused to a fair trial, in effect reinforced stereotypes of veiled Muslim women as unworthy and untrustworthy.

The concern with courtroom openness indicates not the necessity to see the witness's face—all of the decisions acknowledge exceptions—but the discursive constructions of Canada, Canadian identity, and "regular" Canadians within the context of multiculturalism. Yasmin Jiwani argues that the current political discourse

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[40] Jen'nan Ghazal Read, "The Politics of Veiling in Comparative Perspective," in "Muslim Integration in the United States and France," special issue, *Sociology of Religion* 68, no. 3 (2007): 232; Jen'Nan Ghazal Read and John P. Bartkowski, "To Veil or Not to Veil? A Case Study of Identity Negotiation among Muslim Women in Austin, Texas," *Gender and Society* 14, no. 3 (2000): 395–417.

[41] Homa Hoodfar, "More Than Clothing: Veiling as an Adaptive Strategy," in *The Muslim Veil in North America: Issues and Debates*, 3–40.

[42] Marie Lavigne summarized in Sheila McDonough, 125.

[43] Sharon Todd, "Veiling the 'Other,' Unveiling Our 'Selves': Reading Media Images of the Hijab," *Canadian Journal of Education* 23, no. 4 (1998): 441–42.Todd also points out the positive signifiers of *hijāb*. However, with historical Eurocentric constructions of the covered face as suspect, it is not likely that positive readings of niqab would be at the forefront of adjudicators' minds.

[44] Hoodfar, "More Than Clothing: Veiling as an Adaptive Strategy," 5–7.

[45] Hoodfar, "The Veil in Their Minds and On Our Heads," 3.

[46] Meshal, "Banners of Faith and Identities in Construct: The *Hijāb* in Canada," 72.

[47] Hoodfar, "The Veil in Their Minds and On Our Heads," 3.

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of multiculturalism creates a false us-them binary in which those who are "multicultural" stand opposed to "regular" Canadians, and to Eurocentric constructions of "freedom, liberation, and democracy."[48] Similarly, Carl James and others demonstrate "that Canada's multicultural policy, and by extension multicultural education, sustain a discourse of diversity in which "other" Canadians (commonly read as "foreigners") and their differences are merely "patronized" and tolerated, but not *accepted*."[49] LeBel J. invoked the vague but ideologically powerful narrative of "common," culturally authentic "roots,"[50] moving a troubling construction of multiculturalism to the heart of this decision. He argued that the "appeal . . . illustrates the tension and changes caused by the rapid evolution of contemporary Canadian society and by the growing presence in Canada of new cultures, religions, traditions and social practices"[51] and asked whether wearing the niqab is "compatible . . . with the constitutional values of openness and religious neutrality in contemporary democratic . . . Canada."[52] When LeBel J. defined multiculturalism as a "space where all will be welcome . . . but where some common values" control interactions, he moved from multiculturalism to assimilation.

In general, Canadian Muslim women who veil "are deemed to be strange and strangers,"[53] despite their status as Westerners. Arguing that Canada has an "independent and open justice system in which the interests and the dignity of all are taken into consideration" and that "open and independent courts" are "a core component of a democratic state, ruled by law" instead of, presumably, religious fundamentalism, LeBel J. situated veiling firmly outside independence, openness, justice and even the rule of law.[54] The existing social construction of veiled women as "other" allowed the LeBel J. majority to render *NS* an outsider who has come up against "common values [which] . . . allowed Canada to develop and live as a diverse society." It should be noted that the "hard line" position taken by LeBel J. and Rothstein J. was not supported by most other judges. McLachlin C.J., notably, concluded that in cases where the presiding judge finds that a woman's right to wear the niqab does not impede a free and fair trial, the right to wear the niqab should be honoured. Nevertheless, we argue that in a society where "common values of Canadian society" [55] support Islamophobia and Eurocentrism, it is likely that most niqab-wearing women will be found to be impeding a free and fair trial, at least if counsel for the accused raises the issue.

Definitions of multiculturalism such as that implicitly argued by LeBel J. have come under attack by anti-racist activists and scholars alike because they deny

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[48] Jiwani, *Discourses of Denial,* 189.

[49] Carl James, "Perspectives on Multiculturalism in Canada," in *Possibilities & Limitations: Multicultural Policies and Programs in Canada*, ed. Carl James (Winnipeg: Fernwood Publishing, 2005), 19–20; Himani Bannerji, *The Dark Side of the Nation: Essays on Multiculturalism, Nationalism, and Gender* (Toronto: Canadian Scholars' Press Inc., 2000).

[50] *R v NS*, [2012] at para 72.

[51] *R v NS*, [2012] at para 59.

[52] Ibid. at para 60.

[53] Rita Dhamoon, *Identity/Difference Politics: How Difference is Produced, and Why it Matters* (Vancouver: UBC Press, 2009), 134.

[54] Ibid. at para 73–74.

[55] Ibid. at para 70.

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experiences of structural racism by racialized people.[56] Jiwani argues that eradicating the common-sense racism that affects veiled women in the West is difficult because "dominant discourses of denial . . . trivialize and dismiss the subtle and overt expressions of racism or simply refuse to name them as such."[57] In foregrounding the hardships suffered by the accused when balancing religious rights with the right to a fair trial, LeBel J. ignored the double-bind that women of colour face when systems of patriarchy collude against them. Jiwani argues that the "colonial representation of women of colour as secretive, deceptive, and as appearing to be meek and submissive while plotting against their benevolent colonizers—or, for that matter, against their own men" positions racialized women as potentially dangerous, not only to the patriarchy of settler-colonizers, but also to the patriarchal privilege within their own group.[58]

Afsaneh Najmabadi argues that the veil is "an overdetermined sign . . . already disqualifying the woman as a liberal autonomous subject, a sign of extranational belonging that constitutes a civilizational threat, a sign of religious challenge to the secularism of modern states, and finally a sign of women's oppression."[59] The veil is seen

> as some kind of mask, hiding the woman. With the help of this opaque veil, the Oriental woman is considered as not yielding herself to the Western gaze, and therefore imagined as hiding something . . . Such a discursive construction incites the presumption that the real nature of these women is concealed, their truth is disguised and they appear in a false deceptive manner.[60]

The presumption "that the real nature of these women is concealed, their truth is disguised and they appear in a false deceptive manner"[61] has particularly damaging consequences in the context of a sexual assault trial and both relies on and reifies the myth that women lie about rape.

Part III: Sexual Assault and Section 7

Sherene Razack argues that "Aboriginal women and women of colour are considered inherently less innocent and less worthy than white [Christian] women and the

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56 Sarita Srivastava, "Troubles with 'Anti-Racist Multiculturalism': The Challenges of Anti-Racist and Feminist Activism," in *Race & Racism in 21st-Century Canada: Continuity, Complexity, and Change*, eds. Sean Hier and B. Singh Bolari (Peterborough, Ontario: Broadview Press, 2007), 291–311; Augie Fleras, "Racialising Culture/Culturalising Race: Multicultural Racism in a Multicultural Canada," in *Racism, Eh?: A Critical Inter-Disciplinary Anthology of Race and Racism in Canada*, eds. Camille Nelson and Charmaine Nelson (Concord, Ontario: Captus Press, 2004), 429–43; Augie Fleras and Jean Leonard Elliott, *Unequal Relations: An Introduction to Race, Ethnic, and Aboriginal Dynamics in Canada*, 5th ed. (Toronto: Pearson, 2007), especially 4–26; and May Chazan, Lisa Helps, Anna Stanley, & Sonali Thakkar, eds., *Home and Native Land: Unsettling Multiculturalism in Canada* (Toronto: Between the Lines, 2011).

57 Jiwani, *Discourses of Denial*, 136.

58 Ibid., 187.

59 Afsaneh Najmabadi, "Gender and Securalism of Modernity: How Can a Muslim Woman Be French?," *Feminist Studies* 32, no. 2 (2006): 242.

60 Meyda Yeğenoğlu, *Colonial Fantasies: Towards a Feminist Reading of Orientalism* (Cambridge: Cambridge University Press, 1998), 44.

61 Ibid.

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classic rape in legal discourse is the rape of a white woman."[62] These underpinnings of racialization lead the Supreme and lower courts to assert that in order for *NS* to be trustworthy—to give "open" evidence—she must remove a visible marker of her racialized identity. This is despite the fact that Canadian courts, particularly the Supreme Court, have previously recognized that rape is endemic in Canadian society and that women face considerable obstacles in prosecuting perpetrators of rape. As Moldaver J. argued in *Jane Doe*, "[M]ost women fear sexual assault and in many ways govern their conduct because of this fear. In this way male violence operates as a method of social control."[63] As l'Heureux-Dube J. asserted in *R v Ewanchuk* (1999), "[V]iolence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights," and the Court has an obligation to protect women from harassment, intimidation and demeaning and prejudicial stereotypes in the course of determining a sexual assault complaint.[64] The Court has also recognized the long history of the prejudicial nature of demeanor evidence in the specific context of sexual assault trials.[65] Demeanor evidence has been used by defense counsel to humiliate, harass, intimidate, and discredit victim-witnesses.

It need not be shown here that myths with regard to rape have repeatedly been used in cross-examination and in the attempt to define the demeanor of the victim as untrustworthy, since this is well established in legal and social science literature. Rape remains the most under-reported serious crime in North America, and false reports of rape are no more common than are false accusations in other types of crime,[66] yet the myth that women lie about sexual assault remains pervasive.[67] This myth is particularly powerful with regard to suspect groups, such as minority women. LeBel J. asserted that "the niqab shields the witness from interacting fully with the parties, their counsel, the judge and, where applicable, the jurors,"[68] not-so-subtly suggesting that the niqab allows her to lie.

Legislation and court decisions have sought to protect women from the use and abuse of such stereotypes in the context of cross-examination.[69] However, as Elizabeth Sheehy has illustrated, "[E]very law reform in evidence law that has been generated to overcome sex discrimination in the adjudication of rape has been met

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62 Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998), 68.

63 *Jane Doe v Board of Commissioners of Police for the Municipality of Metropolitan Toronto*, [1990] OJ No 1584, 4.

64 *R v Ewanchuk*, [1999] 1 SCR at para 69.

65 Backhouse, *Carnal Crimes*; John McInnes and Christine Boyle, "Judging Sexual Assault Law Against a Standard of Equality," *University of British Columbia Law Journal* 29 (1995), 34; Randall, "Sexual Assault Law and 'Ideal Victims,'"; and Sheehy, "Evidence Law and the 'Credibility Testing' of Women," 157.

66 http://www.ca/mythbusting/rape-myths/

67 Elizabeth Sheehy, "Let Me Tell You a Story: English-Canadian Newspapers and Sexual Assault Myths," *Canadian Journal of Women and the Law* 22, no. 2 (2010): 301–28.

68 *R v NS*, [2012] at para 77.

69 Lise Gotell, "Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records," *Alberta Law Review* 43 (2006): 743; Sheilah Martin, "Some Constitutional Considerations on Sexual Violence Against Women," *Alberta Law Review* 32 (1994): 535; McInnes and Boyle, "Judging Sexual Assault Law Against a Standard of Equality," 341; and Lucinda Vandervort, "Honest Beliefs, Credible Lies and Culpable Awareness: Rhetoric, Inequality and Mens Rea in Sexual Assault," *Osgoode Hall Law Journal* 42 (2004): 625.

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with counter-moves by the defense bar."[70] Attitudes about the niqab in this case provide a new example of a counter-move by the defense.[71] In 1999, the Supreme Court of Canada asserted unequivocally that, in the context of sexual assault, "an assessment of the fairness of the trial process must be made 'from the point of view of fairness in the eyes of the community and the complainant' and not just the accused."[72] McLachlin J. (as she was then) made this same argument in *R v O'Connor*, in the decision that a complainant's sexual assault counseling records were prejudicial and would not be made available to defense counsel: "[W]hat constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants."[73] She asserted that a perfect trial is not possible, and that while "perfect justice in the eyes of the accused might suggest that an accused person should be shown every scintilla of information which might possibly be useful to his defense," privacy interests require a "more realistic standard of disclosure."[74]

This same standard could, and should, have been applied in the context of *NS*'s right to religious freedom. As LEAF argued in their brief, "[T]he 'undressing of sexual assault complainants through cross-examination on their sexual history, medical records and other areas has repeatedly been analogized to the assault itself."[75] Instead of limiting the right of the defense to harass, intimidate and discredit *NS*, "the metaphorical re-enactment of the assault through cross-examination becomes literal when the niqab is ordered removed."[76] LeBel J. dismissed such concerns and accepted that "this model of justice imposes a significant personal burden on witnesses and parties."[77] Such assertions consider witness discomfort to be an unavoidable individual burden, when in fact the humiliation and denigration of sexual assault victim-witnesses constitutes a violation of their section 7 rights to a fair trial.

Demeanor evidence was the foundation of the accused's argument for a full defense in this case, but the negative implications of traditional ways of evaluating and weighing demeanor evidence in a sexual assault trial, which are well-documented in social science literature, in jurisprudence, and in some previous decisions of the Supreme Court of Canada, were ignored. The defense argued, as summarized by McLachin C.J., that "credibility assessment is equally dependent not only on what a witness says, but on how she says it. Effective cross-examination and accurate credibility assessment are central to a fair trial."[78] While McLachlin C.J. noted that "being able to see the face of a witness is not the only—or indeed perhaps the most

70 Sheehy, "Evidence Law and the 'Credibility Testing' of Women," 157 at 173.

71 It is not surprising that the Criminal Lawyers' Association (Ontario) intervened on behalf of the accused, asserting the "importance of demeanor" in the conduct of a fair trial: http://aspercentre.ca.

72 *R v Mills*, [1999] 3 SCR 668.

73 *R v O'Connor*, [1995] SCJ No 98 at para 193.

74 Ibid. at para 194.

75 "Factum of the Intervener, Women's Legal Education and Action Fund," at 18.

76 Ibid.

77 *R v NS*, [2012] at para 67.

78 *R v NS*, [2012] at para 18.

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important—factor in cross-examination or accurate credibility assessment," she asserted that it is nonetheless "deeply rooted in our criminal justice system."[79]

Both decisions of the majority minimize the importance of a significant body of law that carves out exceptions with regard to the observation of the demeanor of a witness. Abella J., however, provided a compelling list of exceptions in her dissent. In cases involving a translator, the demeanor of the witness is mediated through translation, but this does not disqualify his or her evidence. As the Alberta Court of Appeal determined in *R v Davis*, "[T]he interpreter is usually calm and professional and so the English interpretation heard by the judge is done in a calm, non-contentious manner," precluding full and direct observation of the witness.[80] As Abella J. also noted, physical or medical limitations may prevent full assessment of a witness's demeanor: "[A] stroke may interfere with facial expressions; an illness may affect body movements; and a speech impairment may affect the manner of speaking," yet such impairments do not disqualify individuals from providing evidence.[81] Further, evidence will be accepted by the Court from "a witness who is unable to attend the trial because of a disability, even when the accused's counsel is not present for the taking of the evidence"; this precludes any kind of assessment of the demeanor of the witness, but the testimony is still considered probative.[82] Neither McLachlin C.J. nor LeBel J. explained how or why the limitations on the assessment of demeanor created by the niqab differ from these types of situations.

Moreover, the probative value of demeanor evidence has been questioned. Large-scale sociological studies have found that experts cannot determine who is, and who is not, telling the truth purely from outward demeanor.[83] Concerns with regard to the prejudicial potential of demeanor evidence are so widely shared that the Canadian Judicial Council manual *Model Jury Instruction in Criminal Matters* advises jurors not to "jump to conclusions based entirely on how a witness testifies."[84] Courts echo such exhortations. As early as 1952, for example, the British Columbia Court of Appeal held that judging witnesses based on an "appearance of sincerity [would lead to] a purely arbitrary finding and justice would then depend upon the best actors in the witness box."[85] This concern was reiterated very clearly in a 1995 case before the Alberta Court of Appeal: "I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanor, or the tone of his voice, whether he is telling the truth."[86] In 2010, the Ontario Court of Appeal held that "demeanor alone is a notoriously unreliable predictor of the accuracy of evidence

79 Ibid. at para 27.
80 *R v Davis,* (1995), 165 AR 243.
81 *R v NS*, [2012] at para 103.
82 Ibid. at para 104. See: *Criminal Code*, RSC 1985, c C–46, s 714.3, ss 709 and 713; *R v Chapdelaine*, 2004 ABQB 39 (CanLII); *R v Butt* (2008), 280 Nfld & PEIR 129.
83 Paul Ekman, *Telling Lies* (New York: W. W. Norton, 1992); Barry R. Morrison, Laura L. Porter, and Ian H. Fraser, "The Role of Demeanour in Assessing the Credibility of Witnesses," *Advocates Quarterly* 33 (2007): 170.
84 Canadian Judicial Council, *Model Jury Instruction in Criminal Matters*, instruction 4.11, "Assessing Evidence," at 45–46, para 10: www.courts.ns.ca/General/resource_docs/jury_instr_model_April04.pdf.
85 *Faryna v Chorny*, [1952] 2 DLR 354 at 356.
86 *R v Pelletier* (1995) 165 AR 138.

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given by a witness,"[87] and that social science evidence clearly illustrates that there are "no specific physical signs of lying."[88] Although the majority asserted that the presumption that demeanor evidence was useful could not be overturned based on the evidence provided by the complainant's counsel, it is nonetheless disturbing that the exceptions already granted were not analogized with regard to the niqab. Moreover, even if demeanor evidence had reliable probative value, that value would ultimately be destroyed in forcing a religious witness to remove her niqab.

Although the veil is worn for many reasons and holds religious, political, and embodied meanings,[89] when it is worn for modesty or respectability, as *NS* declared her niqab to be,[90] asking a woman to unveil in a public courtroom serves to further humiliate and debase her in a sexual assault case. There is no doubt that undressing *NS* would change her demeanor and thereby render demeanor evidence irrelevant due to her distress. As LEAF's factum to the Court of Appeal noted, "[E]ven the most experienced witness would behave differently if asked to testify without, for example, his or her shirt on."[91] In other words, her right to a fair trial was sacrificed to that of the defendant, despite the fact that the trial process is already known to be difficult for, and prejudiced against, the victim in sexual assault cases.

Conclusion

Disturbingly, the result in this case is perhaps not surprising. Despite supposed guarantees of equality before the law in Western countries, prejudice against Muslim women is often expressed through hostility to the niqab. During the period when this case was under consideration, the right to wear the niqab was threatened, or denied, in multiple jurisdictions in the West. In July 2010, the French National Assembly passed a bill making it illegal to wear a full-face veil in public areas in France, with the bill receiving almost unanimous approval in the French Senate.[92] Belgium also recently moved to prohibit the niqab.[93] In Canada,

87 *Law Society of Upper Canada v Neinstein* [2010] 99 OR (3d) 1 (Ont Ct A), at para 66.

88 Marcus Stone, "Instant Lie Detection?: Demeanor and Credibility in Criminal Trials," *Criminal Law Review* (1991): 821 at 829; see also, Jeremy Blumenthal, "A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility," *Nebraska Law Review* 72 (1993): 1157–1205.

89 Sultana, Hoodfar, and McDonough, *The Muslim Veil in North America: Issues and Debates*.

90 *R v NS* (2009) at para 29.

91 "Factum of the Intervener, Women's Legal Education and Action Fund," at 15.

92 Edward Cody, "France Moves to Fine Muslim Women With Full-Face Islamic Veils," *Washington Post*, May 20, 2010, http://www.washington-post.com/w-p-d-y-n/content/story/2010/05/19/ST201006212.html?519.

93 Amnesty International, "Belgium Votes to Ban Full-Face Veils," Amnesty International, April 30, 2010, http://www.amnesty.org/en/news-and-updates/belgium-votes-ban-full-face-veils-2010-04-3; Howard Adelman, "Contrasting Commissions on Interculturalism: The Hijab and the Workings of Interculturalism in Québec and France," *Journal of Intercultural Studies* 32, no. 3 (2011): 245; Mayanthi L Fernando, "Reconfiguring Freedom: Muslim Piety and the Limits of Secular Law and Public Discourse in France," *American Ethnologist* 37, no. 1 (2010): 19; and Gulce Tarhan, "Roots of the Headscarf Debate: Laicism and Secularism in France and Turkey," *Journal of Political Inquiry* 4 (2011).

https://doi.org/10.1017/cls.2013.62 Published online by Cambridge University Press

the province of Quebec's Bill 94 proposed to ban the use of religious face coverings in public settings.[94] As Pascale Fournier and Erica See argued, "[T]he proposed legislation . . . [would have had] the effect of preventing [niqab-wearing women from completing] even the most banal activities such as going to the local office of the electric company to enquire about charges or picking up a child from a government-funded daycare."[95] The Liberal Party failed to pass the legislation before their defeat in 2012,[96] but the Parti québéqois government recently introduced the *Charter of Quebec Values*, which would achieve the same result.[97] Clearly, such legislation would represent a profound interference with niqab-wearing women's religious rights and civil freedoms; already, women in Canada are required to remove the niqab for the oath of citizenship.[98] In December 2011, just days after the Supreme Court of Canada heard oral evidence in *R v NS*, "Jason Kenney, the Minister of Citizenship, Immigration, and Multiculturalism . . . stated that 'the citizenship oath is a quintessentially public act. It is a public declaration that you are joining the Canadian family and it must be taken freely and openly.'"[99] Such statements implicitly assert that veiled women are neither free nor open/honest.

The Supreme Court had a unique opportunity in *R v NS* to challenge the stereotypes faced by Muslim women in contemporary Canadian society. Instead, in balancing the religious rights of *NS* with the right to a full defense of the accused, the majority replicated patterns of discrimination and exclusion. The decision further demonstrated that the balancing method of analysis, undertaken in a context that assumes the equality of the victim and assailant, serves to obscure, not to rectify, the injustices that the victim faces. The Supreme Court of Canada also had an opportunity to confront the perpetuation of rape myths and the privileging of the rights of the accused in sexual assault trials. *NS* faced intersecting oppressions as a Muslim and as a woman, conditions that were not considered by the majority. As the Canadian Council on American-Islamic Relations asserted in their brief, "[T]he choice the appellant faces is between walking away from her religious convictions as a person of faith, and walking away from the pursuit of justice as a victim of an alleged sexual assault. Her status as a woman is what connects this

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94 Bill 94, *An Act to establish guidelines governing accommodation requests within the Administration and certain institutions,* 1st Sess, 39th Leg, Quebec, 2010 ("Bill 94, 2010").

95 Fournier and See, "The 'Naked Face' of Secular Exclusion," 63.

96 See: http://www.cbc.ca/news/canada/story/2012/12/19/f-niqab-list.html.

97 The proposed *Charter of Quebec Values* would prohibit the wearing of any religious symbols, including yarmulkas, kippas, turbans, burkas, hijabs, niqabs, and large crosses, in the giving or receiving of any civil service. Employees who refuse to conform would be fired. While some employers might be given the option to opt out of the regime for the first five years, daycare workers and elementary school teachers, primarily women, would be denied this opt-out, presumably on the assumption that wearing such symbols corrupts children: http://www.montrealgazette.com/life/Attacks+against+Muslim+women+increasing/8990742/story.html.

98 Kim Mackrael and Les Perreaux, "Muslim Women Must Show Faces When Taking Citizenship Oath," *Globe and Mail*, December 12, 2011, http://www.theglobeandmail.com/news/politics/muslim-women-must- show-faces- when-taking-citizenship-oath/article2267972.

99 Fournier and See, "The 'Naked Face' of Secular Exclusion," 63.

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impossible choice."[100] The result of the case will be a "chilling . . . further marginalization of this population of women."[101] If veiled Muslim women are hesitant to report sexual assault because they fear that they will have to remove the niqab in court, their right to live free of violence is undermined. This is a scenario that all women should find intolerable, whatever their religious beliefs and habits of dress.

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[100] Brief of the Canadian Council on American-Islamic Relations, at para 10: http://caircan.ca/downloads/CAIRCAN_Factum_33989. Martha Nussbaum has asserted that laws "often put religious minorities in something like Antigone's dilemma: either they have to violate a sacred requirement or they have to break the law and/or forfeit some state-granted privilege": Martha Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008), at 167.In the case of the niqab, however, only women face such choices. See also, Natasha Bakht, "Objection, Your Honour! Accommodating *Niqab*-Wearing Women in Courtrooms," in *Legal Practice and Cultural Diversity*, eds. Ralph Grillo et al. (London: Ashgate Publishing, 2009), 115.

[101] Fournier and See, "The 'Naked Face' of Secular Exclusion," 63.

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