

Piercing the Veil of Ignorance: Niqabi Women and the Adjudication of Sexual Assault

Natasha Bakht

In the twenty-first century, the western world is at an astonishing historical moment, when women's clothes are still the subject of legislation,¹ judicial consideration, and public approbation. A Muslim woman complainant from Toronto made a request to wear her niqab while giving testimony in a preliminary inquiry in which she alleged that two of her relatives sexually assaulted her over a period of several years.² The accuseds' lawyers objected to the complainant wearing her niqab arguing that it interfered with their clients' right to make full answer and defence³ including the right to disclosure upon a preliminary inquiry. Their argument was that in order to effectively cross-examine the complainant, they needed to be able to see her face in order to gauge her reactions to their questions. This article looks at the reliability of demeanour evidence as a tool for assessing credibility in the context of sexual assault, arguing that the prosecution and adjudication of the offence must be more inclusive of the needs of Muslim women who cover their faces. Though their numbers may be few, adequately responding to the plight of niqabi women in this context is both just and will serve to ameliorate the workings of the judicial system for all women.

Part I of this article addresses women's experience with the judicial system in the context of sexual assault. Just as other feminist reforms have demonstrated the importance of taking into account more than simply the accused's rights in a sexual assault trial, I will argue that a Muslim woman's equality rights and religious freedom are equally deserving of serious consideration in this context. Part II of the article closely examines the aforementioned Canadian case in which a niqabi 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* is analyzed and compared with a New Zealand case, *Police v Razamjoo*,⁴ 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.⁵ Yet, I argue that these decisions do not go far enough in protecting the rights of niqabi women.

Associate Professor, Faculty of Law, University of Ottawa, nbakht@uottawa.ca

¹ Lori G Beaman, "Overdressed and Underexposed or Underdressed and Overexposed?" (2013) 19:6 Soc Identities 723 at 725 [Beaman].

² *R v NS*, 2012 SCC 72, [2012] 3 SCR 726 [*R v NS*].

³ The accused has a traditional right to face his/her accuser though *R v Levogiannis* (1990), 1 OR (3d) 351, 2 CR (4th) 355 (ONCA) [*Levogiannis*] stands for the proposition that this is not a basic tenet of the legal system. While normally, the accused has the right to be in the sight of witnesses who testify against him, an order under s 486(2.1) of the *Criminal Code* permitting the 12 year old complainant to testify behind a screen such that he would not have to see the accused was held to be constitutional. *Levogiannis, ibid.*

⁴ *Police v Razamjoo*, [2005] NZDCR 408 [*Razamjoo*].

⁵ 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.

Part III 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)*,⁶ where the accused was a niqabi. These cases demonstrate the impossible situation facing niqab-wearing women. Indeed the decisions permit dubious protestations that certain requests for accommodation have gone too far. Finally, part IV of this article examines parallel attempts to exclude niqab-wearing women from public spaces in Canada, relying primarily on the 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. And 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.

Part I – Women’s Harrowing Experiences with the Judicial System in the Context of Sexual Assault

Sexual assault is an area of law that has been fraught with misogyny and racism. While efforts to reverse this trend have been enormous,⁷ real, practical, on the ground change has been slow. It has already been amply documented that the offence of sexual assault is most often perpetrated by men on women.⁸ Sexual assault for the most part goes unreported and the prosecution and conviction rates for sexual assault are among the lowest for all violent crimes. “There are a number of reasons why women may not report their victimization: fear of reprisal, fear of a continuation of their trauma at the hands of the police and the criminal justice system, fear of a perceived loss of status and a lack of desire to report due to the typical effects of sexual assault such as depression, self-blame or loss of self-esteem.”⁹

When women have reported their sexual assaults, the criminal law has forced them to fit rigid characterizations of the ideal rape victim. This ideal rape victim has been described not only as morally and sexually virtuous, read white, but also as cautious, unprovocative and consistent.¹⁰ Classist and sexist stereotypes pervade the law’s understanding of victims of sexual violence.¹¹ Aboriginal and racialized women fare particularly poorly in

⁶ *The Queen v D(R)* (16 September 2013), Crown Court at Blackfriars [*D(R)*].

⁷ Refer to success of Jane Doe conference and the number of participants who submitted abstracts, presented papers and attended the various sessions.

⁸ See for example *R v Seaboyer*, [1991] 2 SCR 577 at para 137, 4 OR (3d) 383, L’Heureux-Dubé J, dissenting in part [*Seaboyer*].

⁹ *Ibid* at para 139.

¹⁰ Wendy Larcombe, “The ‘Ideal’ Victim v Successful Rape Complainants: Not What You Might Expect” (2002) 10 Fem Leg Stud 131 at 131.

¹¹ Jane Doe, *The Story of Jane Doe: A Book About Rape* (Toronto: Vintage Canada, 2003) [Doe].

a system that erases colonial and racial aggression in its attempt to combat sexual violence.¹²

Courtrooms have not been safe spaces for women who have told their stories of sexual violence. Prior to 1981, Canadian women who were raped by their husbands had no legal recourse since marital rape was not an offence in the *Criminal Code*.¹³ The adversarial nature of western criminal justice systems has often made women complainants feel as though they were on trial for their non-criminal behaviour. Overtly sexist and racist remarks by police,¹⁴ judges,¹⁵ and over-zealous defence lawyers who use questionable tactics¹⁶ to embarrass, violate and denigrate the complainant's character, and the regular use of irrelevant information to prejudice the jury were, and many would argue still are, commonplace in our judicial system.¹⁷ Madam Justice L'Heureux-Dubé has referred to the biases at play when women are sexually assaulted as rape mythologies. In other words, a woman's description of her rape is measured against false typecasts of who she should be, who her attacker should be and how injured she must be in order for it to be believed that she was, in fact raped.¹⁸

Historically the legal system has not served sexual assault complainants well. However, feminist legal scholars and activists have insisted upon statutory and court-interpreted reforms to rules of evidence and procedures to accord with complainants' privacy and

¹² Sherene Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1999) at 62; Doe, *ibid*; Margo L Nightingale, "Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases" (1991) 23 Ottawa L Rev 71.

¹³ Section 278 of the *Criminal Code* now states that "A husband or wife may be charged with an offence under section 271, 272 or 273 [sexual assault, sexual assault with a weapon or aggravated sexual assault] in respect of his or her spouse, whether or not the spouses were living together at the time the activity that forms the subject-matter of the charge occurred." *Criminal Code*, RSC 1985, c C-46, s 278 [Code].

¹⁴ Jan Jordan, "Beyond Belief: Police, Rape and Women's Credibility" (2004) 44:1 Crim Just 29.

¹⁵ Elizabeth Sheehy, "Canadian Judges and the Law of Rape: Should the *Charter* Insulate Bias?" (1989) 21 Ottawa L Rev 741. The Canadian Judicial Council has begun an inquiry into the conduct of Justice Robin Camp for his reliance on stereotypical and biased thinking and the trivializing comments he made during a sexual assault trial. Canadian Judicial Council, "In the Matter of an Inquiry Pursuant to s 63(1) of the *Judges Act* Regarding the Honourable Justice Robin Camp" (2 May 2016), online: Canadian Judicial Council <https://www.cjc-ccm.gc.ca/cmslib/general/Camp_Docs/2016-05-02%20Notice%20Allegations.pdf>.

¹⁶ Certain defence lawyers have promoted the following tactic in defending those charged with sexual assault: "You have to go in there as defence counsel and whack the complainant hard at the preliminary. You have to do your research; do your preparation; put together your contradictions; get all the medical evidence; get the Children's Aid Society Records...and you've got to attack the complainant with all you've got so that he or she will say I'm not coming back in front of 12 good citizens to repeat this bullshit story that I've just told the judge." Cristin Schmitz, "'Whack' Sex Assault Complainant at Preliminary Inquiry", *The Lawyer's Weekly* (29 May 1988) 22. Elaine Craig has written about the ethical responsibilities of defence lawyers representing those accused of sexual assault, arguing that strategies that invoke social assumptions that have been legally rejected as baseless and irrelevant are contrary to counsel's duty. Elaine Craig, "The Ethical Obligations of Defence Counsel in Sexual Assault Cases" (2014) 51:2 Osgoode Hall LJ 427.

¹⁷ The judge in *R v Ghomeshi* relied upon the complainants' post-offence conduct, including continued interactions with the accused, in describing them as deceptive and unreliable. *R v Ghomeshi*, 2016 ONCJ 155 (CanLII) at para 136 [*Ghomeshi*].

¹⁸ *Seaboyer*, *supra* note 8 at para 140.

equality rights. This has included the abolition of the doctrine of recent complaint¹⁹ and the corroboration rules,²⁰ both of which perpetuated the traditional distrust of women's veracity in sexual assault cases. It has also meant limitations on questions about the complainants' prior sexual conduct²¹ and strict restrictions around access to complainants' therapeutic records.²² This fairer and more sensitive approach to the prosecution of sexual assault has also resulted in accommodations in the form of giving independent status to a complainant to apply for an order directing that her identity and any information which could disclose her identity not be published.²³ Moreover, closed circuit television testimony and testimonial screens for minor complainants²⁴ for whom testifying before the accused would be overly traumatic have been implemented.

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.²⁵ The increasing diversity of society means that such reforms must be catered to the specific needs, interests and characteristics of varying complainants. Religious women, for example, who are sometimes identified by outward symbols of their faith must also feel that the justice system is inclusive of their concerns. 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 demeanour evidence in courtrooms.

¹⁹ Section 275 of the *Criminal Code* abrogates the rules relating to evidence of recent complaint. *Code, supra* note 13, s 275.

²⁰ Section 274 of the *Criminal Code* states that in sexual assault offences "no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration." *Ibid*, s 274.

²¹ *Ibid*, ss 276(1), 276(2)(c). These sections were upheld by the Supreme Court of Canada in *R v Darrach*, 2000 SCC 46, [2000] 2 SCR 443.

²² *Code, supra* note 13, ss 278.1-278.91. These provisions were constitutionally upheld in *R v Mills*, [1999] 3 SCR 668, 180 DLR (4th) 1 [*Mills*]. Lise Gotell has argued that despite the *Code* reforms, women's access to privacy rights as it pertains to confidential records and "the systemic nature and complexities of sexual violence have been actively resisted in legal decision making." Lise Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the *Charter* for Sexual Assault Law" (2002) 49 Osgoode Hall LJ 251 at 295.

²³ *Code, supra* note 13, ss 486.4-486.5. See Jane Doe, "What's in a Name?: Who Benefits from the Publication Ban in Sexual Assault Trials?" in Ian R Kerr, Valerie M Steeves & Carole Lucock, eds, *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (Oxford: Oxford University Press, 2009) 265, which contemplates the use and consequences of publication bans in sexual assault cases.

²⁴ Section 715.1(1) of the *Criminal Code* permits a video recording of victims or witnesses under the age of eighteen at the time of the offence as admissible evidence if certain conditions are met. Section 486.2(1) permits a witness under eighteen or a witness who has a mental or physical disability to testify outside the court room or behind a screen or other device that would allow the witness not to see the accused. *Code, supra* note 13, ss 715.1(1), 486.2(1).

²⁵ In Canada, see *Seaboyer, supra* note 8; in the United States, see Jody Clay-Warner & Callie Harbin Burt, "Rape Reporting After Reforms: Have Times Really Changed?" (2005) 11:2 Violence Against Women 150; in the United Kingdom, see *R v A*, [2001] UKHL 25; in Australia, see New South Wales Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (Woolloomooloo, NSW: Department for Women, 1996).

Demeanour evidence when used to assess credibility may indicate truthfulness but it can also be misleading. Justice O'Halloran noted in the 1952 case of *Faryna v Chorny* that "[t]he law does not clothe the trial judge with a divine insight into the hearts and minds of witnesses."²⁶ There is a growing body of case law²⁷ and social science literature²⁸ that warns judges about the excessive use of demeanour evidence because of its inherent unreliability. Paul Ekman in his study of lying found that with rare exception, "no one can do better than chance at spotting liars simply by their demeanour."²⁹ Moreover, the quality of the witness' testimony would be hampered where she was prevented from wearing her usual clothing. Ensuring that someone is comfortable in the witness box enables the best evidence to be proffered. This is one of the rationales behind protections for child witnesses in sexual assault cases.³⁰

The concern with the over-confident use of demeanour evidence in the sexual assault context is that people will depend on "myths and stereotypes"³¹ about the appropriate way in which women ought to react to sexual assault, penalizing those who do not fit into such rigid characterizations. For example, women who appear nervous may create the impression of untruthfulness; if a woman fails to show emotion, this can indicate a lack of sincerity; if she is identified as a sex worker, one may see her as more sexually available. Reliance on demeanour evidence will disadvantage complainants whose attitude and disposition does not accord with fixed conceptions of the appropriate reactions to sexual violence. The use of demeanour evidence in sexual assault cases is essentially a license to use (sometimes unarticulated) racist and sexist notions about women as a way to defeat their narratives. The legitimate fear is that lawyers and judges may perpetuate the standard of the "ideal rape victim" that few victims of sexual assault will be able to achieve.

Although judges may not state the reasons for their belief of credibility based on demeanour, this simply makes their power less accountable and more dangerous. Just as women are likely to be disadvantaged by demeanour evidence, the quiet hegemony of white supremacy and patriarchy will protect some men's accounts such that their appearance, attitude and disposition work in their favour: "He doesn't look like a rapist;

²⁶ *Faryna v Chorny* (1951), [1952] 2 DLR 354 at 357 (BCCA) [*Faryna*].

²⁷ See for example *R v White*, 2011 SCC 13, [2011] 1 SCR 433 [*White*]. See also *Faryna, ibid*; *R v Levert* (2001), 159 CCC (3d) 71 at 81 (ONCA), 51 WCB (2d) 289 [*Levert*]; *R v Norman* (1993), 16 OR (3d) 295 at para 47 (ONCA), 26 CR (4th) 256 [*Norman*].

²⁸ See for example Gerald TG Seniuk, "Liars, Scoundrels, and the Search for Truth" (2000) 30 CR (5th) 244 at 249; Mark J Sandler, "Lessons for Trial Courts from the Morin Inquiry" (2005) at 38 [unpublished]; Gilles Renaud, "Credibility and Demeanour: An Examination based on the World of Literature" (2001) Ontario Court of Justice, online: <<http://www.trussel.com/maig/credibil.htm>>. The scholars whose work in this area is particularly well known include Paul Ekman, Bella M DePaulo, and Jonathan Freedman (whose affidavit testimony was rejected in the preliminary hearing of *R v NS*).

²⁹ Paul Ekman, *Telling Lies* (New York: WW Norton, 1992) [Ekman].

³⁰ David Griffiths, "'There's No Art to Find the Mind's Construction in the Face': Some Thoughts on the Burqa Case in New Zealand" (2005) 1 New Zealand Post Graduate Law E-Journal at 10 [Griffiths].

³¹ *Seaboyer, supra* note 8 at paras 125, 141, 157.

he's too well dressed, well mannered or intelligent.”³²

It is possible of course, that demeanour evidence can be used in favour of sexual assault complainants. Indeed several such instances can be pointed to in the case law.³³ The scope of this article does not allow a comprehensive analysis of whether demeanour evidence has been used favourably for complainants and if so, what the characteristics of these complainants are. However, a preliminary search of sexual assault cases in Ontario indicates that judges may use demeanour evidence favourably as it pertains to complainants.³⁴ I nonetheless remain unconvinced that such evidence is a reliable source of probative information. In particular, I worry that the most marginalized of women, those who experience intersecting inequalities by virtue of race, Aboriginality, physical and mental disability, age and socio-economic status, may not appear sufficiently credible.

The Impact of a Niqab Prohibition on Muslim Women

In 2006, another niqab-wearing Muslim woman found herself in court. Ginnah Muhammad brought suit in Michigan against Enterprise Rent-A-Car. She was seeking relief for \$2,750 in assessed damages to a rental car that she claimed was caused by thieves.³⁵ Rather than discussing her claim, Judge Paul Paruk gave her the stark choice of removing the niqab or having her case dismissed. Judge Paruk reasoned: “I can't see your face and I can't tell whether you're telling me the truth and I can't see certain things about your demeanor and temperament that I need to see in a court of law.”³⁶ Setting aside the problematic over-confidence that Judge Paruk displayed in his ability to “see

³² Amanda A Farahany, “Juror Bias in Sexual Assault Cases,” online: <justiceatwork.com/wp-content/media/jury_bias_after_sexual_assault.ppt>.

³³ See for example *R v AI*, [2003] OJ No 3347 (QL) at paras 44, 52, 124 ACWS (3d) 1085 (Ont Sup Ct J), where the judge stated “I was impressed with both Ms. K.D. and Ms. J.D. I find that they have tried to be truthful and fair in their testimony. Both appear to have been profoundly affected by adverse incidents of a sexual nature in their youth. They cried often in giving their testimony. They were each under obvious stress. They did not exaggerate in their claims and did their best to recollect as best they could. They are honest and credible witnesses who sincerely believe the allegations they make against Mr. A.I. They have no apparent motive to make false charges against Mr. A.I. They certainly believe in what they testified happened to them in their contact as young girls with Mr. A.I.... As I have said already, I find both complainants and Mrs. L.D. to be very straightforward and credible witnesses. The demeanour of each complainant was convincing. In my view, each did her best to answer questions truthfully and to relate events as best she could remember. I believe each is trying to be truthful and fair in respect of her allegations in her testimony against Mr. A.I. It is understandable that each complainant is emotional about the situation. The complainants cried often in the course of their testimony.” The accused in this case was nonetheless acquitted.

³⁴ In 2010, a preliminary search of the Quicklaw Criminal Law Case database with Ontario as the jurisdiction and using the search string “(“sexual assault” or rape) and ((complainant or victim) /s facial)” yielded 332 cases. Of these, there were 88 examples of the use of demeanour evidence. In 67 cases the judges’ assessment of demeanour was favourable to the complainant (even if a reasonable doubt was found and the accused was acquitted). In 16 cases, the judges’ assessment of demeanour was not favourable to the complainant. In the remainder of the cases, the use of demeanour evidence was unclear or equivocal.

³⁵ *Muhammad v Enterprise Rent-a-Car* (11 October 2006), No 06-41896-GC (Mich 31st Dist Ct) [Muhammad].

³⁶ *Ibid*, transcript at 4.

the truth,³⁷ of particular note is the striking language with which Ginnah Muhammad couched her refusal to remove the niqab.³⁸ She said: “I wish to respect my religion and so I will not take off my clothes.”³⁹

Most women would agree that one should not have to remove one’s clothing in order to testify in court. Claire McCusker has argued, “The dissonance was definitional: those who drafted the rules governing Paruk’s courtroom would never have thought to consider a face-covering ‘clothes’ in the same sense that a skirt and blouse are ‘clothes,’ while to Muhammad this was a natural use of the word and the concept.”⁴⁰ Ginnah Muhammad’s small claims dispute was eventually dismissed because she refused to remove her clothes. In a sexual assault trial, more than perhaps in any other courtroom situation, the effect of forcing a woman to remove her niqab will be to literally strip her publicly and in front of her alleged perpetrators. Courtrooms already reproduce and subject women to a reliving of their horrifying experiences of rape and sexual abuse. Having to confront this situation without one’s usual clothing is grossly insensitive.

Muhammad’s pronouncement, “I will not take off my clothes,” rings clearly and signals the severe consequences of courts not permitting victims of sexual assault to testify with a niqab. Niqab-wearing Muslim women, who already have limited visibility in courtrooms, will be unlikely to utilize the justice system when they have been sexually assaulted. They will feel marginalized and excluded from public institutions and they would be right to conclude that justice will not be done for them. The impact of being excluded from the justice system should not be underestimated. When asked how she felt after her case had been dismissed, Ginnah Muhammad said, “When I walked out, I just really felt empty, like the courts didn’t care about me.”⁴¹ It is not difficult to imagine that a woman would feel disillusioned if her sexual assault case were dismissed for lack of evidence because she refused to remove what she considers to be her everyday attire.

Many of the feminist reforms surrounding the prosecution of sexual assault have been for the purpose of increasing the reporting of such violent crimes. The impact of not reporting sexual assault is ongoing victimization. “Whether or not a particular woman has been sexually assaulted, the high rate of assault works to shape the daily life of all women. The fact is that many, if not most, women live in fear of victimization. The fear can become such a constant companion that its effect remains largely unnoticed and

³⁷ Clearly, Judge Paruk would have disagreed with Justice O’Halloran who noted in *Faryna v Chorny* that “[t]he law does not clothe the trial judge with a divine insight into the hearts and minds of witnesses.” *Faryna*, *supra* note 26.

³⁸ Claire McCusker, “When Church and State Collide: Averting Democratic Disaffection in a Post-*Smith* World” (2007) 25:2 Yale L & Pol’y Rev 391 at 391 [McCusker].

³⁹ *Muhammad*, *supra* note 35, transcript at 6.

⁴⁰ McCusker, *supra* note 38 at 396.

⁴¹ Paul Egan, “Muslim woman told to remove veil in court files lawsuit”, *The Detroit News* (28 March 2007), online: <<http://www.muslimnews.co.uk/news/news.php?article=12521>>. In a New Zealand case that considered whether two witnesses could give their testimony in a criminal trial while wearing the burqa, one witness said that she would rather kill herself than reveal her face while giving evidence. Rex J Ahdar, “Reflections on the Path of Religion-State Relations in New Zealand” (2006) 2006:3 BYUL Rev 619 at 654 [Ahdar]. Clearly, the removal of the niqab in courtrooms will have intensely disorienting effects that can lead to serious vulnerability.

sadly, unremarkable.”⁴² Some studies have demonstrated that women who have been sexually assaulted withdraw in some form from social life in order to prevent being further harmed. Even where such restrictions of her behaviour are moderate, it can negatively affect the individual’s sense of personal autonomy and diminish the quality of her life.⁴³

Muslim women who are asked to choose between being faithful to their religious beliefs or “opting out” of providing testimony in a sexual assault trial may well make the choice in favour of religion. The result of that supposed choice will be to severely and negatively damage her sense of self-worth and acceptance in Canadian society. Muslims are already a globally targeted community since the events of September 11, 2001.⁴⁴ In addition to the general concern that Muslims will avoid participation in democratic processes where they consistently feel marginalized by the state, the cultural insensitivity of not recognizing religious practices that offer comfort, security and stability to women will send the specific message that niqab-wearing women need not report their sexual assaults as justice will not be done for them.

Part II – Permitting Niqabs in Some Courtrooms

R v NS, released by Canada’s Supreme Court on December 20, 2012, examined whether a devout Muslim woman sexual assault complainant who covered her face publicly for over eight years could wear her niqab while testifying. NS alleged that two of her male relatives sexually assaulted her over several years. NS is a uniquely challenging case in that it concerns sexual assault, an offence which is underreported and has high attrition rates.⁴⁵ Some of the biases at play when women are sexually assaulted include that they 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 in certain specific ways post-offence such as making a complaint shortly after the event, cutting off all ties with the aggressor⁴⁶ or being visibly upset during testimony.⁴⁷ The implications of being prohibited from wearing a niqab while testifying as a sexual assault complainant will exacerbate the biases that women experience in this context. Indeed banning the niqab from courtrooms will have ramifications for Muslim women’s access to justice in many situations. In a 2005 New Zealand case, *Police v Razamjoo*, two Muslim women who wore burqas⁴⁸ were called as prosecution witnesses in a criminal insurance fraud case. These women were assisting the state in pursuing an alleged criminal. Defence counsel argued, as in *NS*, that the inability to observe the demeanour of the witnesses would impair the accused’s right to a fair trial. Judge Moore acknowledged that what was at

⁴² *Seaboyer*, *supra* note 8 at para 150.

⁴³ *Ibid* at paras 150-152.

⁴⁴ Sherene Razack, *Casting Out: The Eviction of Muslims from Western Law & Politics* (Toronto: University of Toronto Press, 2008) [Razack].

⁴⁵ *R v NS*, *supra* note 2 at para 37; Louise Ellison & Vanessa E Munro, “Reacting to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility” (2009) 49:2 *Brit J Crim* 202-219 Ellison & Munro, “Reacting to Rape”].

⁴⁶ *Ghomeshi*, *supra* note 17.

⁴⁷ *Doe*, *supra* note 11; Ellison & Munro, “Reacting to Rape”, *supra* note 45.

⁴⁸ A burqa is a garment worn by some Muslim women that covers the entire body and face.

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 fulsome 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.”⁴⁹ In keeping with Canada's policy of multiculturalism, that minority practices must be protected where they are compatible with fundamental values,⁵⁰ 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.⁵¹ However, the *NS* majority's analytical framework to determine if a woman can testify wearing her niqab skews the balance in favour 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*,⁵² which held that for a claim under section 2(a) of the *Canadian Charter of Rights and Freedoms*⁵³ 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.⁵⁴ 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

⁴⁹ *R v NS*, *supra* note 2 at para 56.

⁵⁰ *Bruker v Marcovitz*, 2007 SCC 54, [2007] 3 SCR 607 at paras 1-2.

⁵¹ Bill C-6, *An Act to amend the Canada Elections Act (visual identification of voters)*, 2nd Sess, 39th Parl, 2008 [*Visual Identification Act*]; Laura Payton, “Face veils banned for citizenship oaths”, *CBC News* (12 December 2011), online: <www.cbc.ca>; *R v NS*, *supra* note 2 [Payton]; Bill 60, *Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests*, 1st Sess, 40th Leg, Quebec, 2013 [Bill 60].

⁵² *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551 [*Amselem*].

⁵³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act (UK)*, 1982, c 11.

⁵⁴ 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.” Dalia Vitkauskaitė-Meurice, “The Scope and Limits of the Freedom of Religion in International Human Rights Law” (2011) 18:3 *Jurisprudence* 841 at 844; see also Carolyn Evans, *Freedom of Religion under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001) at 58-59.

appropriate.⁵⁵ 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.⁵⁶ 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 acknowledged 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*.⁵⁷ He accepted the witnesses' sincere beliefs, indicating that the state must not make pronouncements as to the correctness of any person's faith and found that not to allow them to wear a burqa while giving evidence was a *prima facie* breach of their religious freedom.⁵⁸ Judge Moore noted 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."⁵⁹ Indeed one of the witnesses said that she would rather kill herself than reveal her face while giving evidence.⁶⁰ Judge Moore's freedom of religion analysis demonstrates an understanding of the serious nature of religious practices for these devout witnesses.

Trial Fairness and Demeanour 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*' behaviour 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.⁶¹ Starting from the assumption that she must remove her niqab is subjective: there is no constitutional

⁵⁵ 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. *R v NS* (2009), 95 OR (3d) 735, [2009] OJ No 1766 [*R v 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 licence which included a photo of her face uncovered. *R v NS* (2009), *ibid*.

⁵⁶ *Amselem*, *supra* note 52 at para 52.

⁵⁷ *New Zealand Bill of Rights Act 1990* (NZ), 1990/109.

⁵⁸ *Razamjoo*, *supra* note 4 at para 66.

⁵⁹ *Ibid* at para 67.

⁶⁰ *Ahdar*, *supra* note 41 at 654.

⁶¹ Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton: Princeton University Press, 2006).

right to face one's accuser.⁶² 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 a pervasive feature of communal life.'"⁶³ 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?⁶⁴ 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. 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,⁶⁵ 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 much social science research strongly suggests this is not true,⁶⁶ most judges were unwilling to question the importance of facial expressions to credibility assessment.⁶⁷ The majority identified "a deeply rooted presumption in our criminal justice system"⁶⁸ that seeing a witness' face is important to a fair trial, enabling

⁶² *Levogiannis, supra* note 3 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 rather 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).

⁶³ Howard Kislowicz, Richard Haigh & Adrienne Ng, "Calculations of Conscience: The Costs and Benefits of Religious Freedom" (2011) 48:3 *Alta L Rev* 679 at 688; Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990) at 11 [Minow].

⁶⁴ Minow, *ibid.*

⁶⁵ Beverley Baines, "Banning Niqabs in the Canadian Courtroom: Different Standards for Judges", *Jurist* (24 January 2013), online: <www.jurist.org>.

⁶⁶ The scholars whose work in this area is particularly well known include Paul Ekman, Bella M DePaulo, and Jonathan Freedman (whose affidavit testimony was rejected in the preliminary hearing of NS). See also Paul Ekman, *Telling Lies: Clues to Deceit in the Marketplace, Politics, and Marriage* (New York: Norton, 1992); Natasha Bakht, "Objection, Your Honour! Accommodating niqab-wearing women in courtrooms" in Ralph D Grillo et al, eds, *Legal Practice and Cultural Diversity* (Surrey: Ashgate, 2009) [Bakht, "Objection, Your Honour!"]; Natasha Bakht, "What's in a Face? Demeanour Evidence in the Sexual Assault Context" in Elizabeth Sheehy, ed, *Sexual Assault Law, Practice and Activism in a post-Jane Doe Era* (Ottawa: University of Ottawa Press, 2012) [Bakht, "What's in a Face?"]; Amna M Qureshi, "Relying on Demeanour Evidence to Assess Credibility during Trial – A Critical Examination (2014) 61 CLQ 235 [Qureshi]; Charles F Bond & Bella M DePaulo, "Individual Differences in Judging Deception: Accuracy and Bias" (2008) 134:4 *Psychol Bull* 477.

⁶⁷ Abella J is an exception. She states about the need to see a face during testimony: "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." *R v NS, supra* note 2 at para 92.

⁶⁸ *Ibid* at para 27.

effective cross-examination and credibility assessment. The majority assumes the importance to trial fairness in seeing a face, although this has never been tested.⁶⁹ 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 demeanour evidence is surprising since in a case rendered one year before *NS*, the Court unanimously expressed reservations about demeanour.

In *R v White*,⁷⁰ 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."⁷¹ The majority held that inferring based on post-offence conduct was more objective than drawing inferences using demeanour evidence, which presented "hallmark flaws:"

[A] problem with [demeanour] 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.⁷²

Justice Binnie equated the two types of evidence: "the subjective interpretation placed by a witness on the post-offence demeanour 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."⁷³ The majority, concurrence and dissent agreed that demeanour evidence could be unreliable. Seven justices from *White* sat in *NS*, yet the Court provided no warnings about the unreliability of demeanour evidence.

The court's silence with respect to concerns regarding demeanour 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."⁷⁴ Interestingly, in support of its contention that "non-verbal communication" provides "valuable insights that may uncover... deception,"⁷⁵ 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

⁶⁹ 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*, 2009 SCC 37, [2009] 2 SCR 567, 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.

⁷⁰ *White*, *supra* note 27.

⁷¹ *Ibid* at para 134.

⁷² *Ibid* at para 76.

⁷³ *Ibid* at paras 141-142.

⁷⁴ *R v NS*, *supra* note 2 at para 27; see also *R v NS*, *supra* note 2 at paras 22, 24.

⁷⁵ *Ibid* at para 24.

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' demeanour could be useful in assessing credibility. Judge Moore's confidence in his ability to detect falsehoods through demeanour is not unusual. Indeed it is very common for people to believe they can detect a liar.⁷⁶ Disappointingly however, the *NS* majority misconstrued 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."⁷⁷ Judge Moore concluded "there could be a fair trial even if Mrs. Salim and other witnesses of like belief gave evidence wearing their burqas."⁷⁸ The *UK Equal Treatment Bench Book*, which provides guidance to judges, noted 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.⁷⁹ There are circumstances when judges hear evidence without being able to see demeanour, such as evidence taken telephonically, or where the judge is visually impaired, such as American Judge Conway Casey.⁸⁰

The identification of flaws in demeanour evidence discussed in *White* is consistent with an emerging trend in jurisprudence⁸¹ and judicial education⁸² 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 demeanour. This raises the question why the *NS* Court painted such an uncritical picture of demeanour, particularly in a case where full context was critical for reasoned analysis of the competing rights at issue.⁸³ Perhaps the majority was concerned that displacing

⁷⁶ Paul Ekman & Maureen O'Sullivan, "Who Can Catch a Liar? (1991) 46 Am J Psych 913 at 916-917.

⁷⁷ *Razamjoo*, *supra* note 4 at para 70.

⁷⁸ *Ibid* at para 106.

⁷⁹ Judicial Studies Board, *Equal Treatment Bench Book*, 2nd ed (London: Judicial Studies Board, 2005-2008). This bench book is no longer available on line. The chapter on religious dress dealing with the niqab was likely removed for seeming to encroach on a judge's jurisdiction to control her/his courtroom or because of live issues that might come before a court such as a witness or accused wearing the niqab during testimony.

⁸⁰ Adam Schwartzbaum, "The *Niqab* in the Courtroom: Protecting Free Exercise of Religion in a Post-*Smith* World" (2011) 159:5 U Pa L Rev 1533 at 1568 [Schwartzbaum]. In New Zealand, blind people have been able to serve on juries since 2000, suggesting an acknowledgement by Parliament that facial demeanour is not essential. Griffiths, *supra* note 30 at 10.

⁸¹ Qureshi, *supra* note 66; Bakht, "Objection, Your Honour!", *supra* note 66.

⁸² Gloria Epstein, "What Factors Affect the Credibility of a Witness?" (2002) 21 Adv Soc J 10; Canadian Judicial Council, "Model Jury Instructions in Criminal Matters, Instruction 4.11, Assessing Evidence" (2013), online: National Judicial Institute <http://www.cjc-ccm.gc.ca/english/lawyers_en.asp?selMenu=lawyers_NCJI-Jury-Instruction-Preliminary-2011-03_en.asp#_Toc287950397>; Lynn Smith, "The ring of truth, the clang of lies: Assessing credibility in the courtroom" (2012) 63 UNBLJ 10.

⁸³ Amna Qureshi has argued that if the majority had so desired, they could have noted that in *NS*' factum, there was an excerpt from an article in which the published and widely regarded findings of Dr. Paul Ekman on the unreliability of deception detection was cited. Qureshi, *supra* note 66. Notably, Justice

demeanour evidence would disrupt the way our legal system has functioned to date. I suggest that the upheaval of the judicial system was a non-issue. 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.”⁸⁴

The case’s sexual assault context deserved heightened sensitivity given the history of legal and procedural norms and rape mythologies that re-victimize complainants and reinforce their inequality. The fact that a complainant would be required to strip in order to seek justice is outrageous. 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. The Supreme Court ought to have at least included some cautions about the documented problems with demeanour evidence. Worryingly, *NS* may renew focus on demeanour as an indicator of credibility⁸⁵ 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. It is considered a basic legal tenet that judges and juries can assess credibility and evidence.⁸⁶ However, courts’ confidence in their ability to assess behaviour may also translate into judicial hesitation in appreciating social science research.⁸⁷ Cases have demonstrated a lack of knowledge about human nature. In *R v Lavallee*,⁸⁸ 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.⁸⁹ The Supreme Court recognized that laypeople do not have adequate knowledge, absent expert assistance, of why women do not simply leave violent relationships.⁹⁰ In this example of reform embracing social science findings, it took extensive lobbying, public pressure, many publications⁹¹ and parliamentary standing committees⁹² before the Court was able to come to its decision.⁹³

Abella in her dissent made reference to this author’s article in which Dr. Paul Ekman’s work was also discussed. *R v NS*, *supra* note 2.

⁸⁴ Qureshi, *supra* note 66 at 242. Body language, eye movements and vocal indicators such as hesitation and tone and the manner in which the witness testifies are unaffected by the wearing of the niqab.

⁸⁵ *Ibid* at 266.

⁸⁶ *R v Béland*, [1987] 2 SCR 398 at para 17, 43 DLR (4th) 641.

⁸⁷ Qureshi, *supra* note 66 at 247.

⁸⁸ *R v Lavallee*, [1990] 1 SCR 852, [1990] 4 WWR 1.

⁸⁹ *Ibid* at paras 31-34.

⁹⁰ For expert evidence to “educate” jurors on rape victims’ different reactions to rape, see Louise Ellison & Vanessa E Munro, “Turning Mirrors Into Windows?: Assessing the Impact of (Mock) Juror Education in Rape Trials” (2009) 49:3 *Brit J Crim* 363 [Ellison & Munro, “Turning Mirrors Into Windows?”].

⁹¹ See for example Lenore E Walker, *The Battered Woman Syndrome* (New York: Springer, 1984); Phyllis L Crocker, “The Meaning of Equality for Battered Women Who Kill Men in Self-Defense” (1985) 8 *Harv*

The reluctance of courts to admit shortcomings and to adapt to science is also evidenced in that it took nearly ten years for DNA evidence to be appreciated by the legal system.⁹⁴ The lesson that police informants and eyewitness identification in line-ups contribute to misidentification also took years and missteps to learn. Court processes must be subjected to continuous critical scrutiny to ensure that they evolve with advancing scientific knowledge and in the sexual assault context, with insight into the unique plight of complainants. 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.⁹⁵

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 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. Often, considered and thorough analysis of the issues may reveal no stark conflict.⁹⁶ In *Razamjoo*, Judge Moore was able to find a middle ground between the two alternatives of taking off the veil or not testifying based on the witness' belief.⁹⁷ The search for a way to accommodate competing rights should be paramount.

Women's LJ 121; Charles Patrick Ewing, *Battered Women Who Kill: Psychological Self-Defense as Legal Justification* (Lexington, Mass: Lexington Books, 1987).

⁹² For example House of Commons, Standing Committee on Health, Welfare and Social Affairs, 32nd Parl, 1st Sess, No 34 (1985) at 7; House of Commons, Standing Committee on Health, Welfare and Social Affairs, *Report on Violence in the Family: Wife Battering* (Ottawa: Queen's Printer, 1982); Ontario, Legislative Assembly, Standing Committee on Social Development, *Official Report of Debates (Hansard)*, (May-July 1982); Ontario, Legislative Assembly, Standing Committee on Social Development, *First Report on Family Violence: Wife Battering* (Toronto: Queen's Printer, 1982).

⁹³ Qureshi, *supra* note 66 at 248.

⁹⁴ Jennifer A Chandler, "Reading the Judicial Mind: Predicting the Courts' Reaction to the Use of Neuroscientific Evidence for Lie Detection" (2010) 33 Dal LJ 85 at 101.

⁹⁵ Elizabeth Nicholas, "France's Burqa Ban Gets New Scrutiny in European Court", *Huffington Post* (18 December 2013), online: <www.huffingtonpost.com> [Nicholas]; BBC News, "Belgian lawmakers pass burka ban", *BBC News* (30 April 2010), online: <www.news.bbc.co.uk> [BBC News]; Anna C Korteweg, "The 'Headrag Tax: Impossible Laws and their Symbolic and Material Consequences" (2013) 19:6 Soc Identities 759 [Korteweg]; *Visual Identification Act*, *supra* note 51; Payton, *supra* note 51.

⁹⁶ Agarwal and Di Carlo argue that the majority's approach in *NS* represents a shift in the case law from reconciling rights to balancing rights. They suggest, relying on Justice Iacobucci's articulation of the distinction that conflicting rights under the *Charter* ought to strive to "reconcile ostensibly conflicting rights by properly defining or circumscribing the scope of these rights according to context." Ranjan K Agarwal & Carlo Di Carlo, "The Re-emergence of a Clash of Rights: A Critical Analysis of the Supreme Court of Canada's Decision in *R. v. S. (N.)*" (2013) 63:2 SCLR 143 at 144.

⁹⁷ Similarly, in *SAS v France*, the niqabi applicant was willing to compromise by wearing only veils that were diaphanous or 'see through' in public spaces, thus ensuring that her facial features remained essentially visible. Eva Brems, "Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings" (2014) 22:2 JL & Pol'y at 526 [Brems]. Clearly, not all niqab-wearing individuals would agree to such concessions.

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 demeanour evidence, one could view the issue as forming no real conflict at all. Certainly Justice Abella's dissenting perspective was that even accepting that demeanour may be useful, seeing less of a witness' face does not sufficiently impair the ability to assess the credibility of a witness.⁹⁸ As she notes, abridgements of the "ideal demeanour package" often occur in practice due to medical impairments, use of interpreters, exceptions to hearsay evidence⁹⁹ or where the witness cannot testify at trial at all.¹³ Yet, these departures from the ideal do not disqualify evidence.¹⁰⁰

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 the complainant and the public who have a right to the proper administration of justice.¹⁰¹ Indeed, the Supreme Court has stated where competing *Charter* rights are engaged, no single principle is absolute and capable of trumping the others.¹⁰² In a case about defence 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."¹⁰³ 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*),¹⁰⁴ 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.¹⁰⁵ The majority omits entirely that NS is also entitled to a fair trial and fails to examine the multiple rights at stake for her.

⁹⁸ *R v NS*, *supra* note 2 at para 82.

⁹⁹ *R v Khan*, [1990] 2 SCR 531, [1990] 410 AC 353.

¹⁰⁰ *R v NS*, *supra* note 2 at paras 103-105.

¹⁰¹ Bakht, "What's in a Face?", *supra* note 66 at 606-607.

¹⁰² *Mills*, *supra* note 22 at para 61.

¹⁰³ *Ibid* at para 90.

¹⁰⁴ 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."

¹⁰⁵ *Cunningham v Canada*, [1993] 2 SCR 143, 20 CR (4th) 57.

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) 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.¹⁰⁶ Niqab-wearing women should not have to remove their clothing in court in order to perpetuate the misapprehension that this will further the fair trial rights of the accused.

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.¹⁰⁷ To understand the issue as merely one of religious freedom is to misinterpret what is at stake. The gendered aspect of this issue lies in the fact that this is a case of sexual assault allegedly committed by two men upon a woman. The context of this offence cannot be forgotten:

¹⁰⁶ *Mills*, *supra* note 22 at para 74.

¹⁰⁷ NS argued that she should be "entitled to wear her niqab out of respect for her Charter religious freedom and equality rights, respect for her dignity and vulnerable position as a sex assault complainant, and because the veil does not impair a full assessment of her credibility." *R v NS*, *supra* note 2 (Factum of the Appellant). 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. *R v NS*, *supra* note 2 (Factum of Intervener Women's Legal Education and Action Fund), online: < <http://www.leaf.ca/wp-content/uploads/2012/12/NS-SCC.pdf>>. The Ontario Human Rights Commission argued that "[t]he gender equality component of N.S.'s claim is twofold, and each aspect compounds the other." *R v NS*, *supra* note 2 (Factum of the Intervener Ontario Human Rights Commission), online: <<http://www.ohrc.on.ca/en/commission-intervenes-court-case-involving-muslim-womans-right-testify-wearing-her-niqab-face>>. Further they concluded "it is clear that it would be a significant and substantial interference with N.S.'s religious and gender rights to require her to testify without her niqab. In this context, requiring N.S. to remove it is likely to be traumatic and may re-victimize her." *R v NS*, *supra* note 2 (Factum of the Intervener Ontario Human Rights Commission). The Canadian Council on American-Islamic Relations drew on sections 27 and 28 of the *Charter* to link arguments in NS' favour to multicultural and gender equality rights. *R v NS*, *supra* note 2 (Factum of the Intervener Canadian Council on American-Islamic Relations), online: < <http://www.aspercentre.ca/Assets/Asper+Digital+Assets/David+Asper+Centre/Asper+Digital+Assets/Supreme+Court/R.+v.+N..S+Factum+Intervener+CAIR-CAN.pdf>>.

that a majority of sexual assaults are committed by men on women;¹⁰⁸ that testifying in a sexual assault trial is a stressful experience that provokes much anxiety for complainants; and that the public and adversarial process makes for an extremely difficult place to answer questions about sensitive and highly traumatic incidents. Moreover, the subjective religious requirement of wearing the niqab is a specific article of faith exclusive to women.¹⁰⁹ While the Islamic requirement of modesty is interpreted differently by Muslims globally, no interpretation requires men to cover their faces by wearing a niqab. 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 offences 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.¹¹⁰ 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.”¹¹¹ 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,¹¹² 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 demeanour has not happened, the reverse is not true.¹¹³ Guy Paul Morin was wrongfully convicted of rape and murder because the prosecution relied heavily on demeanour evidence, namely his reactions in the presence of investigators and witnesses.¹¹⁴ 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 demeanour evidence. They also implicitly question the necessity of demeanour with the implication that having the face

¹⁰⁸ *Ghomeshi*, *supra* note 17.

¹⁰⁹ Three religious accommodation cases to have reached the Supreme Court of Canada have all involved male applicants and religious practices that are uniformly shared by men and women of the particular faith. See *Amselem*, *supra* note 52 where Orthodox Jewish residents of a Montreal condominium sincerely believed in was necessary to build a succah or religious hut on their balconies during the festival of Succot. In *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256, a Sikh youth sincerely believed he was required by his faith to carry a kirpan or religious dagger at all times including to school. In *Hutterian Brethren of Wilson Colony v Alberta* (2007), 283 DLR (4th) 136, [2007] 9 WWR 459 (ABCA), members of a Christian religious group sincerely believed that voluntarily having their photograph taken for a driver's license violated the Bible's second commandment against idolatry.

¹¹⁰ *R v NS*, *supra* note 2 at para 37.

¹¹¹ *Ibid* at para 44.

¹¹² *Ibid* at para 96.

¹¹³ Qureshi, *supra* note 66 at 262-265.

¹¹⁴ Danny Ciraco, “Reverse Engineering” (2001) 11 Windsor Rev Legal Soc Issues 41.

removed from the credibility equation may increase trial fairness. 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. Indeed scholars have concluded that visual indicators may actually mislead judges and juries.¹¹⁵ Studies show that sexual assault complainants' credibility is strongly influenced by stereotypes regarding appropriate emotional expressions when testifying.¹¹⁶ Arguably, seeing the face would provide information that would "only serve to distort the truth-seeking purpose of a trial."¹¹⁷

In fact, new research from the University of Ontario Institute of Technology released after *NS* indicates that veiling does not hamper lie detection, but improves it. Observers were more accurate at detecting deception in witnesses who wore the niqab because they were more likely to base their decisions on verbal cues than nonverbal ones; the niqab minimized the amount of information available preventing them from basing their decisions on misleading facial cues.¹¹⁸

Ultimately, the *NS* majority avoids a clear rule on whether niqab-wearing women can testify in their usual clothes. 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 uncontested 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 favour of the woman removing her niqab.¹¹⁹ 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.¹²⁰

¹¹⁵ Schwartzbaum, *supra* note 80; Jeremy A Blumenthal, "A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility" (1993) 72:4 Neb L Rev 1157; Olin Guy Wellborn III, "Demeanor" (1991) 76:5 Cornell L Rev 1075.

¹¹⁶ Ellison & Munro, "Turning Mirrors Into Windows?", *supra* note 90.

¹¹⁷ *Mills*, *supra* note 22 at para 94.

¹¹⁸ Amy-May Leach et al, "Less is More? Detecting Lies in Veiled Witnesses" (2016) 40:4 Law and Human Behavior 401 at 408. "[B]anning the niqab because it interferes with one's ability to determine whether the speaker is lying or telling the truth is not supported by the scientific evidence." *Ibid*.

¹¹⁹ *R v NS*, *supra* note 2 at para 44.

¹²⁰ Canadian Press, "Woman's fight to testify in court wearing face-covering veil may be over", *National Post* (26 November 2013), online: <<http://news.nationalpost.com/2013/11/26/womans-fight-to-testify-in>

In *Razamjoo*, despite the finding that a witness wearing a burqa would not compromise a fair trial, Judge Moore had the witnesses testify from behind a screen such that their faces were visible to the male lawyers and judge as he 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.¹²¹ Unfortunately, Judge Moore's approach promotes the perspective that religious practices outside of mainstream conventions are to be discouraged. Legislators responded after the case 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."¹²²

Part III – Judicial Prohibitions of the Niqab in Courtrooms

The above reasons that try to include niqab-wearing women in some courtrooms are 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."¹²³ 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 LeBel J 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. Though there are several noted exceptions to the openness of the courts and to publicity at trials,¹²⁴ niqab-wearing women must be subject to the definitive rule that the niqab not be permitted in Canadian courtrooms. According to LeBel J, 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."¹²⁵ This simplistic interpretation of public access to courts has the perverse effect of closing Canadian courtrooms to all niqab-wearing women.

LeBel J cannot bring himself to look through the eyes of niqabi women. They are not of the view that the niqab indicates a withdrawal from society. If that were the case, why

court-wearing-face-covering-veil-may-be-over/>. Indeed the charges against the accused were eventually withdrawn entirely by the Crown. News Staff, "Sex assault charges withdrawn in landmark niqab case", *City News* (17 July 2014), online: <<http://www.citynews.ca/2014/07/17/sex-assault-charges-withdrawn-in-landmark-niqab-case/>>.

¹²¹ *Razamjoo*, *supra* note 4 at para 95.

¹²² *Evidence Act 2006* (NZ), 2006/69, s 103.

¹²³ *R v NS*, *supra* note 2 at para 77.

¹²⁴ *Ibid* at para 75.

¹²⁵ *Ibid* at para 76 [emphasis added].

would NS be actively engaging with the justice system? “Many of the [niqabi] women stated that, from their perspective, communication is perfectly possible, even if they recognize that the veil could be experienced as a communicative barrier by those they speak to.”¹²⁶ One niqab-wearing woman stated: “Me, I talk to everybody, everybody sees me laugh; they answer me in the same tone if they want to. When they don’t want to, that’s another matter.”¹²⁷

Inability to have facial contact does not prevent communication. 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 non-facial technology to communicate, women who wear the niqab must simply be accommodated and accepted as contributors to society. Instead, LeBel J reveals his exasperation. The belief that women lie about sexual assault is pervasive.¹²⁸ When LeBel J states that “the niqab shields the witness from interacting fully with the parties, their counsel, the judge and, where applicable, the jurors,”¹²⁹ he “not-so-subtly suggest[s]... that the niqab allows her to lie.”¹³⁰

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.’¹³¹

Ironically, despite the call for religious neutrality,¹³² 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.¹³³

That LeBel J views tensions illustrated in the appeal as caused by “the growing presence in Canada of new cultures, religions, tradition and social practices”¹³⁴ demonstrates the “in-group/out-group” relation of power where westerners act as gatekeepers. The

¹²⁶ Brems, *supra* note 97 at 539.

¹²⁷ *Ibid.*

¹²⁸ Doe, *supra* note 11.

¹²⁹ *R v NS*, *supra* note 2 at para 77.

¹³⁰ Lori Chambers & Jen Roth, “Prejudice Unveiled: The Niqab in Court” (2014) 29:3 CJLS 381 at 391.

¹³¹ Robert Leckey, “Face to Face” (2013) 19:6 Soc Identities 743 at 747 [Leckey].

¹³² *R v NS*, *supra* note 2 at para 60.

¹³³ Leckey, *supra* note 131 at 747; Pascale Fournier, “Headscarf and Burqa Controversies at the Crossroad of Politics, Society and Law” (2013) 19:6 Soc Identities 689 at 689 [Fournier].

¹³⁴ *R v NS*, *supra* note 2 at para 59.

problem of excessive religiosity is something outsiders bring to Canadian society.¹³⁵ 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.”¹³⁶ 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)*,¹³⁷ a woman was charged with one count of witness intimidation, alleged to have occurred while the defendant was covered by a niqab. In a pre-trial proceeding, Murphy J 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, Murphy J preferred LeBel J’s characterization that the niqab necessarily hinders the full openness and communication demanded by an adversarial trial process.¹³⁸ Amazingly, Murphy J described the impact on D(R) of having to remove the niqab as merely causing “some degree of discomfort.”¹³⁹ There was no discussion of the typically heralded rights of the accused to a fair trial, to make full answer and defence, 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 understood as obligatory.¹⁴⁰ Thus Murphy J’s pronouncement that D(R) is “free to make... the choice of how to dress for court”¹⁴¹ 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 defence. Incidentally, D(R) pleaded guilty to the offence and was sentenced to six months in prison.¹⁴² This decision forced D(R) to choose between wearing her niqab and participating in defence of her liberty. In effect, it was no meaningful choice at all.

¹³⁵ In the only study that examines the lived realities of niqab-wearing women in Canada, Lynda Clarke 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.” Lynda Clarke, “Women in niqab speak: A study of the niqab in Canada” (2013), online: Canadian Council of Muslim Women < <http://ccmw.com/women-in-niqab-speak-a-study-of-the-niqab-in-canada/>>.

¹³⁶ Beaman, *supra* note 1 at 729.

¹³⁷ *D(R)*, *supra* note 6.

¹³⁸ *Ibid* at para 58.

¹³⁹ *Ibid* at para 58.

¹⁴⁰ Martha C Nussbaum, *Liberty of Conscience: In Defense of America’s Tradition of Religious Equality* (New York: Basic Books, 2008) at 117, 167.

¹⁴¹ *D(R)*, *supra* note 6 at para 65.

¹⁴² Mary Dejevsky, “Beyond the veil: What happened after Rebekah Dawson refused to take her niqab off in court” *The Independent* (7 April 2014), online: <<http://www.independent.co.uk/news/uk/home-news/beyond-the-veil-what-happened-after-rebekah-dawson-refused-to-take-her-niqab-off-in-court-9244409.html>>.

By contrast, Murphy J 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.¹⁴³

The fact that Murphy J 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? It seems Murphy J was not concerned about the impact of removing the face veil on D(R), but rather the effect on people who are confronted with D(R)'s face veil. Murphy J'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.

Murphy J accepts the "cardinal importance"¹⁴⁴ of observing the witness' demeanour 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."¹⁴⁵ In making this statement, he ignores the multiple problems of demeanour evidence because courts have always relied on demeanour. Murphy J's analysis also seriously misapprehends how religious accommodation analysis functions. He states, "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."¹⁴⁶ 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."¹⁴⁷

When an individual from a religious community seeks inclusion in society through an

¹⁴³ *D(R)*, *supra* note 6 at para 59.

¹⁴⁴ *Ibid* at para 34.

¹⁴⁵ *Ibid* at para 31.

¹⁴⁶ *Ibid* at para 60.

¹⁴⁷ *Ibid* at para 63.

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.¹⁴⁸ 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. Murphy J’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.

Part IV – Legislative Prohibitions of the Niqab

Running parallel to judicial decisions prohibiting or severely limiting the niqab in courtrooms¹⁴⁹ 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.¹⁵⁰ A French member of the Conseil d’Etat stated that, “Islam frightens, and this law [banning the niqab] is an expression of that fright.”¹⁵¹ 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.¹⁵² Canada has not been far behind with several incidents of attempting to curb the attire of niqab-wearing women.¹⁵³ This article will examine one such incident.

In 2013, Quebec was embroiled in a debate where niqab-wearing women featured

¹⁴⁸ Formal equality is the notion of equality as sameness, that is, the assumption that equality is achieved if the law treats all persons alike. However, when individuals or groups are not identically situated in terms of their real circumstances, formal equality perpetuates discrimination and inequality. Substantive equality requires that the effects of laws, policies, and practices, be examined to determine whether they are discriminatory. See International Women’s Rights Action Watch Asia Pacific, “Convention on the Elimination of Discrimination Against all Women Knowledge Resource” (2013), online: <www.iwraw-ap.org>.

¹⁴⁹ For an American case that also prohibited a niqab-wearing woman from testifying in a small claims dispute see *Muhammad*, *supra* note 35. For a discussion of this case and others involving niqabi women in courtrooms, see chapter 3.

¹⁵⁰ Nicholas, *supra* note 95; BBC News, *supra* note 95.

¹⁵¹ Herman T Salton, “‘A Flag for All Republicans’: The Legislative History and Parliamentary Debates on the French Law of Religious Signs at School” (2013) 2:1 Can J Hum Rts 118 at 156.

¹⁵² Korteweg, *supra* note 95.

¹⁵³ See for example *Visual Identification Act*, *supra* note 51; Payton, *supra* note 51.

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,¹⁵⁴ making it mandatory to have one’s face uncovered when either providing or receiving a state service.¹⁵⁵ The bill died when the governing provincial party was defeated in an 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.¹⁵⁶ 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.¹⁵⁷

The likelihood of this bill withstanding constitutional scrutiny was minimal. The bill tried to re-introduce 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”¹⁵⁸ 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 childcare, 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. Firstly, 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.”¹⁵⁹ Judicial and governmental insistence on seeing one’s face is simply disingenuous when

¹⁵⁴ Bill 60 would also limit the wearing of conspicuous or ostentatious religious symbols if one is employed by the state. Bill 60, *supra* note 51, art 5. All federal political parties have roundly rejected this part of the bill. Interestingly, the bill’s predecessor (Bill 94, *An Act to establish guidelines governing accommodation requests within the Administration and certain institutions*, 1st Sess, 39th Leg, Quebec, 2010), which targeted only niqab-wearing women in its public ban of face-veils, did not garner similar denunciation from federal political parties.

¹⁵⁵ Bill 60, *supra* note 51.

¹⁵⁶ Michelle Gagnon, “The political steamroller that is Quebecs charter of values: As a classic divide-and-conquer strategy, it seems to be working for the PQ”, *CBC News* (22 January 2014), online: <www.cbc.ca>.

¹⁵⁷ Bill 60, *supra* note 51.

¹⁵⁸ *Ibid.*

¹⁵⁹ Leckey, *supra* note 131 at 748.

reasoning cannot support it and day-to-day practice suggests many exceptions.¹⁶⁰

Second, reactions to the niqab disclose a very particular and polarized construction of “us” as insiders and “them” as outsiders. In *NS*’s concurring opinion, niqab-wearing women are the source of tension, bringing their “new cultures, religions, traditions and social practices” from outside Canada. 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,”¹⁶¹ niqab-wearing women depict a very particular profile about us. *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,”¹⁶² 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.¹⁶³ Niqab-wearing women are a threatened group in need of rescuing from their male oppressors that force the niqab upon them. And 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. 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 policymakers 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 behaviour 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, follows suit.¹⁶⁴ Moreover, statutes aimed at a despised or feared minority prompt outcomes from harassment to violence that go beyond the

¹⁶⁰ Qureshi, *supra* note 66 at 254-255.

¹⁶¹ Leckey, *supra* note 131 at 743.

¹⁶² *Amselem*, *supra* note 52 at para 87.

¹⁶³ Leckey, *supra* note 131 at 751.

¹⁶⁴ Marianne Githens, *Contested Voices: Women Immigrants in Today’s World* (New York: Palgrave Macmillan, 2013) at 151-152; Adelaide Mena, “Canadian charter sparks fears over religious freedom threats”, *Catholic News Agency* (15 September 2013), online: <<http://www.catholicnewsagency.com/news/canadian-charter-sparks-fears-over-religious-freedom-threats/>>.

legislated text.¹⁶⁵ Though Bill 60 has not become law, the Quebec government's backing of these discriminatory ideas has emboldened public views of this nature.¹⁶⁶ In Sherbrooke, Quebec, 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."¹⁶⁷ 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."¹⁶⁸

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

The accommodation of women who cover their faces is particularly crucial in the context of a sexual assault trial because the experience of testifying in court about such sensitive and distressing matters puts women in highly vulnerable situations. Over the years, court processes and rules of evidence in criminal law have changed to recognize the traditional disservice the law has done to women complainants of sexual assault. Knowing that court processes are receptive to all women's circumstances will encourage more women,

¹⁶⁵ Leckey, *supra* note 131 at 748.

¹⁶⁶ 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, *supra* note 123. However, this extra-judicial regulation will not, at least for now, have the law's backing. See also Razack, *supra* note 39. Sadly, Bill 62, which discriminates against niqabi women by preventing them from working in government and accessing government services is still on the table in Quebec. Bill 62, *An Act to foster adherence to State religious neutrality and, in particular, to provide a framework for religious accommodation requests in certain bodies*, 1st Sess, 41st Leg, Quebec, 2015. See also "No niqabs on public buses? Confusion reigns after surprise amendments to Quebec bill" *CBC News* (16 August, 2017), online: <<http://www.cbc.ca/news/canada/montreal/bill-62-identity-politics-muslim-burqa-1.4250417>>.

¹⁶⁷ Ingrid Peritz, "Anti-Islam vandalism stokes concerns", *The Globe and Mail* (22 February 2014) A6.

¹⁶⁸ Ingrid Peritz, "Quebec Muslims facing more abuse since charter proposal, women's groups say", *The Globe and Mail* (2 October 2013), online: <<http://www.theglobeandmail.com/news/national/quebec-muslims-facing-more-abuse-since-charter-proposal-womens-groups-say/article14672348/>>. In *SAS v France*, the niqabi applicant said the following about France's ban of niqabs in public spaces: "[A]s a result of the implementation of Loi no. 2010-1192 I now live under the threat of both state prosecution and public persecution...I am now villified and attacked on the streets of the Republic I live..." Brems, *supra* note 97 at 524.

including niqab-wearing women, to report their incidents of sexual violence. The accommodation of religious women in such a context is necessary because it is just and not because lawmakers are doing a favour to certain Muslim women. Indeed the majority of evidence indicates that relying on demeanour evidence such as the expression on a witness' face to evaluate credibility is dangerous and undependable.

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 into courtrooms to niqabi and hijabi women in two US cases and one Australian case¹⁶⁹ discloses that the problem of disciplining dress and prohibiting certain religious expression is widespread, even rampant.

This chapter 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 and intersecting 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 demeanour 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.

¹⁶⁹ *Muhammad*, *supra* note 35; Daniel Nasaw, "Georgia judge jails Muslim woman for wearing headscarf to court", *The Guardian* (17 December 2008), online: <<http://www.theguardian.com/world/2008/dec/17/georgia-headscarf-courtroom-rollins>>; *R v Sayed*, (19 August 2010), Perth 164/2010 (WADC).