Veiled Muslim Women: Challenging Patriarchy in the Legal System

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FOREWORD

Hijab: My Manifesto
Zainab Ramahi

The point is that I choose. I choose to whom I reveal my hair, my body. I do not exist to please others, so it follows that I do not craft my outward appearance for the pleasure of others. You might still leer at me. Undress me with your eyes. Fixate on the thought of what is underneath. But the agency remains with me since you will never know. My body is not for public display.

I will not be constrained, oppressed, or limited by what the society I live in has dictated should be a woman's appearance or personality. I will not show "just the right amount" of skin to strike a balance between being taken seriously at work or school and still being "just the right amount" of sexy. My sexy surprises include that I am far more interested in working and learning and yes, I speak fluent English!

DOI: https://doi.org/10.15779/Z38PK07231
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I will not participate in slut-shaming when other women express their confidence of, control over, or insecurity about their own bodies by wearing as much or as little as they choose. Rape happens regardless of whether a woman is wearing a burqa or a bikini, and I will never find the victim to be at fault for the crime. In the hope of maintaining control over my own body and soul, I will fight for the rights of others to do so.

I will cover what I choose when I choose and I will explain my choices to no one. I will contradict myself until I am comfortable, trying hard to ignore loud whispers and concerned stares. I will seek meaning from what I do and when justifying my actions to myself and my creator. I will appeal to the heart and the mind—never anonymous misogynist orders, subtle suggestions or helpful hints from the fantastical Guidebook to Being Good.

I will wear hijab and I will take my body back, swimming against the overwhelming tide of established patriarchy. Stop telling me what and who I need to look like, be like. I will not let my thoughts be limited to my limited role as a limited woman in Western society or Eastern society. Neither will I be reduced to a hyper-sexualized Orientalized version of who you think I am. I will not be your harem woman; this material veil does not exist only for you to remove. My hijab will serve as a reminder to you, but primarily to me, of what I can achieve.

With my hijab, I am easily identifiable as a Muslim woman whether I like it or not. And sometimes, I wonder if that's dangerous. With my hijab, I am easily identifiable as a Muslim woman, whether you like it or not. Sometimes, do you think I am dangerous?

My hijab is not a plea. It is not a cry for help or a symbol of a sheltered, simplified life. My hijab does not oppress me, but I have been oppressed. My hijab does not confine me, but I have been confined. My hijab does not dictate for me what I can and cannot do, but others have tried. My hijab does not limit my potential to contribute to society, but your persistent ignorance makes it more difficult and I become exhausted, frustrated, and a little sad. My hijab does not restrict me to closed spaces. The closed spaces in your head breed distrust and misunderstanding and you should probably stop because I am not alone in feeling like I'm always fighting.

My hijab is not a piece of cloth on my head.

My hijab is my manifesto.

I. OBJECTIVITY AND THE LAW: CHALLENGING AN IDEAL OR REJECTING IT ALTOGETHER?

For decades, feminists have challenged the operation of patriarchy in the social sciences and the legal system, often through the guise of "objectivity."[1] Objectivity is not a single idea; it is a "sprawling collection of assumptions,

1. Katherine T. Bartlett, "Feminist Legal Methods," 103 *Harvard Law Review* 829 (1990), https://perma.cc/TT9V-TPHJ; Kathryn Abrams & Hila Keren, "Who's Afraid of Law and the Emotions?," 94 *Minnesota Law Review* 1997 (2010), https://perma.cc/99KZ-WBAE.

attitudes, aspirations, and antipathies,"[2] and a significant body of research critiques notions of objectivity in the social sciences as doing little more than reifying a white, male, wealthy, heteronormative lens as the sole legitimate means through which to understand the world. The prejudices embedded in notions of objectivity are cast into relief when the incapacity for objective thought is variously and simultaneously asserted against marginalized people, including women, people of color, colonized peoples, and economically exploited people. Members of these groups, and by association their ways of knowing, are accused of being more emotional, less impartial, and therefore less capable of objective judgments, even (and most problematically) with regard to their own lived experiences.[3] The law also operates under an assumption that those who utilize the law to seek truth and justice more often than not find what they seek, facilitated by objective facts and observations somehow arrived at independent of individual subjectivities and interpretation, by rigorous analysis of court precedent and statutory interpretation, and by the mores of an adversarial courtroom.

Many people have challenged the idea that the legal systems of Canada and the United States effectuate even-handed justice, particularly for and against people from historically marginalized communities. This Article will argue that the assumptions upon which the legal system has been constructed will necessarily fail to achieve the ideal of uniform administration of justice because the system was created by European men who breathed their European patriarchal vision and experience of the world into a common law system, where principles established in previous legal cases shape the resolution of subsequent cases with similar facts. While I will focus this analysis on two cases from Canada, much of what I discuss is relevant to and reflective of the context of the courts in the United States as well.

In this Article, I will demonstrate how an investigation of the Canadian legal system from the positions of two Muslim women who choose to wear a face veil in public unsettles assumptions about the way in which the legal system operates. Feminist scholars have argued that as insiders, women are the best informants about their own lives, and in the social sciences, Black and feminist intellectuals have led efforts to resist the politicized hierarchy of knowledge. They have further argued that grounding an analysis of social forces in the lives of subjugated people improves our understanding of how these social forces perpetuate inequities and the privileges of dominant groups.[4] Those who hold marginalized identities are capable of challenging the so-called objective (in reality colonial, white, male) "truth" more generally because there is an intricate relationship between knowledge and power that they do not benefit from and thus are not motivated to

2. Peter Novick, *That Noble Dream: The "Objectivity Question" and the American Historical Profession*, 1 (Cambridge University Press, 1988).
3. Sandra Harding, "Strong Objectivity: A Response to the New Objectivity Question," 104 (3) *Synthese* 331, 332 (1995).
4. Sandra Acker, "In/Out/Side: Positioning the Researcher in Feminist Qualitative Research," 28 *Resources for Feminist Research* 153 (2001); Valerie Smith, "Black Feminist Theory and the Representation of the 'Other;'" in *Feminisms: An Anthology of Literary Theory and Criticism*, 512 (eds. Robyn R. Warhol et al., New Brunswick: Rutgers University Press, 2nd ed., 1997).

uphold.[5] Their perspectives offer the least distorted view of the world.[6] In addition to being neither white nor male, the visible Muslim identity of the women implicated in the legal cases discussed here positions them at the crosshairs of Islamophobic, racist debates increasingly prevalent in their communities.

In the process of exposing the operation of patriarchy in the Canadian legal system through analyzing the cases of niqab-wearing women who asserted their rights from the margins, I recognize that the perspectives and motivations of veiled Muslim women are endlessly diverse. A comprehensive analysis must carefully consider the diversity of particular women's subjectivities and feminist standpoints, in practice and in theory, to avoid the homogenizing and essentialist tendencies of unilateral approaches. This essay will attempt to apply an intersectional feminist critique to the law to reassess and dismantle male-biased approaches and analyses in the law masquerading as objective, even-handed justice.

An intersectional approach to the issue of women in niqab interacting with the courts is particularly important because of the mobilization of women as symbols in the coopting of feminist language and rhetorical measures restricting the right to wear Muslim female clothing. Susanna Mancini argues that this phenomenon is a "part of a strategy of cultural homogenization which aims at anchoring European identity in secularized Christianity," while simultaneously "reinforcing the systemic nature of gender oppression."[7] The mobilization of women as symbols in the demonization of Islam has a long history and is rooted in what Edward Said conceptualized as "Orientalism:" the representation of what is depicted as part of the "orient" as standing cohesively and diametrically opposed to that of the Occident.[8] Modern populist-feminist discourse and anti-veil arguments reinforce the perception of Islam as backward and barbaric and thus widen the gap between the "self" and "Other," heralding Samuel Huntington's foretold "clash of civilizations," in which he posits that people's cultural and religious identities are the primary source of conflict in the post-Cold War world.[9] Mancini further suggests that the appropriation of feminist language in campaigns against the Muslim veil can be interpreted according to the pattern of false projection, the phenomenon which enables majority cultures to project on minorities some features of their own which they seek to hide from themselves.[10]

5. "Strong Objectivity," in *The Blackwell Encyclopedia of Sociology* (ed. George Ritzer, Blackwell Publishing, 2007).
6. Id.
7. Susanna Mancini, "Patriarchy as the Exclusive Domain of the Other: The Veil Controversy, False Projection and Cultural Racism," 10 (2) *International Journal of Constitutional Law* 411, 411 (2012), https://perma.cc/U2W2-UYWS.
8. Edward W. Said, *Orientalism*, 2 (Vintage, 1st ed., 1978).
9. Mancini, see note 7, at 414; see Edward Said, *The Clash of Ignorance*, The Nation (22 Oct. 2001), https://perma.cc/WNZ5-ECU4. For a critique of Samuel Huntington, see Edward Said, *From Oslo to Iraq and the Road Map*, 293 (Pantheon, 2004) (arguing that the clash of civilizations thesis is an example of "the purest invidious racism, a sort of parody of Hitlerian science directed today against Arabs and Muslims").
10. Mancini, see note 7, at 413; see generally Theodor W. Adorno & Max Horkheimer, *Dialectic*

Muslim women are thus envisioned to embody the projected visions of Islam as "the" patriarchal Other, which, as Mancini notes, "is a particularly useful device for the purpose of hiding an unresolved conflict within Western civilization."[11]

This Article will be an attempt to abandon the white male gaze of the Canadian legal system and investigate what legal projections of veiled Muslim women might reveal about the operation of patriarchy in the western legal system. I will begin by exploring what it might mean for a Muslim woman to don the veil in North America, paying attention to the current popular anti-Muslim animus and the portrayal of Muslim women. Each woman's experience is unique.[12] Strategic agents in national conversations about niqab reduce veiled Muslim women to symbols. This Article will attempt to restore agency to these women by placing their advocacy at the center of an analysis of patriarchy as it operates in the legal system. Specifically, I will focus on the case of Zunera Ishaq as she fought for the right to wear her niqab at her Oath of Citizenship ceremony and that of N.S. as she fought for the right to wear her niqab while testifying against two family members accused of having sexually assaulted her as a child. I will provide legal analysis of the cases, discuss the social and political context within which the cases took place, and examine the consequences that derive from the legal system's failure to accommodate Muslim women. What does the public at large stand to learn by looking at the legal system through the eyes of these two women instead of through the European male gaze of the court?

II. *ISHAQ V. CITIZENSHIP AND IMMIGRATION CANADA*: NATIONAL IDENTITY AND THE REPRESENTATION OF WOMEN

Issues of national identity in relation to religious difference are often described through language of struggle and conflict. Zunera Ishaq's fight to be allowed to wear her niqab at her Canadian citizenship ceremony is one illustration of this conflict, which frequently implicates Muslims and animates increasingly popular anti-Muslim sentiment.[13] But for whom is the reconciliation of national identity and religious difference contentious, and why? Does a woman in niqab pose a threat to Canadian values? Who defines Canadian values? Is it the government? As a verb, "othering" refers to a process of identification of difference, naming, categorization, and subsequent exclusion of or domination over those who do not fit a societal norm.[14] Who stands to gain by insisting that a

of Enlightenment (Verso, 1997).

11. Mancini, see note 7, at 411.
12. Part of de-centering patriarchy in the law and the academy involves a commitment to diverse forms of expression, including ethnographic narrative, and centering one's standpoint in one's scholarly work. As a Muslim woman who wears hijab, I have previously shared some of my own experience through spoken word. My piece *Hijab: A Manifesto* appears at the beginning of this article.
13. Fred Litwin, "Fomenting Anti-Muslim Sentiments," *National Post* (15 Oct. 2015), http://nationalpost.com/opinion/fred-litwin-fomenting-anti-muslim-sentiments.
14. john a. powell & Steven Menendian, "The Problem of Othering: Towards Inclusiveness and Belonging," 1 *Othering and Belonging: Expanding the Circle of Human Concern* 14, 17

clash of values does in fact exist and how might this insistence strategically reify the othering of Muslims? I argue that Ishaq's assertion of her right of access to Canadian citizenship as a niqab-wearing woman challenges the extent of Canadians' liberalism and purported embrace of diversity and multiculturalism.

Zunera Ishaq, a Pakistani national and Muslim woman, moved to Canada in 2008 and became a permanent resident on October 25th of that year.[15] Ishaq observes the practice of wearing niqab in public, a veil that covers the entire face save for an opening at eye-level.[16] Her application for citizenship was approved by a judge on December 30, 2013, and she was granted citizenship three days later under subsection 5(1) of the Citizenship Act of 1985.[17] However, under paragraph 3(1)(c) of the Citizenship Act, a person is not considered a Canadian citizen until she or he takes the Oath of Citizenship. The oath reads: "I swear (or affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, her Heirs and Successors, and that I will faithfully observe the laws of Canada and fulfill my duties as a Canadian citizen."[18] On December 12, 2011, Citizenship and Immigration Canada (CIC) released Operational Bulletin 359, "Requirements for candidates to be seen taking the Oath of Citizenship at a ceremony and procedures for candidates with full or partial face coverings."[19] Without explicitly referring to niqabs, the bulletin effectively banned all full-face coverings.[20] Two refusals to comply with the obligation to remove one's face veil would terminate the application for citizenship.[21]

Ishaq had not previously refused to show her face for identification and security purposes.[22] However, the 2011 policy would have forced her to show her face at a public ceremony, the Oath of Citizenship, potentially in the presence of a male judge, officers, and members of the public. Jason Kenney, Minister of Citizenship and Immigration at the time, introduced the policy into the CIC Guide to Citizenship Ceremonies by stating that the ban was "not simply a practical measure," but a matter of "deep principle that goes to the heart of our identity and our values of openness and equality."[23] Kenney went on to describe the citizenship

(2016), https://perma.cc/K6MH-CL4M.

15. *Ishaq v. Canada (Citizenship and Immigration)*, 2015 F.C. 156, ¶ 2 (Canadian Federal Court of Appeal 2015); Douglas Quan, "Zunera Ishaq on Why She Fought to Wear a Niqab during Citizenship Ceremony: 'A Personal Attack on Me and Muslim Women,'" *National Post* (16 Feb. 2015), http://nationalpost.com/news/canada/zunera-ishaq-the-woman-who-fought-to-wear-a-niqab-during-her-citizenship-ceremony.
16. *Ishaq*, 2015 F.C. 156 at ¶ 1.
17. Id. at ¶ 8.
18. Government of Canada, *Oath of Citizenship*, https://perma.cc/KR94-4DEX.
19. Citizenship and Immigration Canada, Operational Bulletin 359, Requirements for candidates to be seen taking the Oath of Citizenship at a ceremony and procedures for candidates with full or partial face coverings (12 Dec. 2011), later codified as Citizenship and Immigration Canada, *CP 15: Guide to Citizenship Ceremonies,* Section 6.5 (as amended 21 Dec. 2011).
20. Id.
21. Id.; see *Ishaq*, 2015 F.C. 156, Annex A: 6.5.3. Candidate returns for another ceremony.
22. *Ishaq*, 2015 F.C. 156 at ¶ 3.
23. Jason Kenney, "Niqabs, burkas must be removed during citizenship ceremonies," *National Post* (12 Dec. 2011), http://nationalpost.com/news/canada/niqabs-burkas-must-be-removed-

oath as a "quintessentially public act" and a "public declaration that you are joining the Canadian family" that must be taken "freely and openly," presumably implying that women who wear niqab either do not come from or belong in such a free and open society.[24] Kenney missed or perhaps ignored the irony of his statement: demanding that women who wear niqab choose between their religious conviction and Canadian citizenship will almost certainly relegate niqab-wearing women to the fringes of public life and remove from them the opportunity for political participation through enfranchisement, altogether doing little to advance Canadian ideals of equality.

Ishaq first requested to reschedule her citizenship ceremony, but later decided to seek a decision from the Federal Court that the unveiling policy was in breach of Section 2(a) and Section 15(1) of the Canadian Charter of Rights and Freedoms and, moreover, that it was unlawful on administrative grounds by limiting the discretion of the citizenship judge.[25] Confronting the assumptions many North Americans hold about the demeanor and political participation of women who wear niqab, Ishaq immediately declared that the governmental policy regarding veils at citizenship oath ceremonies was "a personal attack on me and Muslim women like me," and vowed to advocate for the rights of religious minorities.[26]

The constitutional history of Canada has been shaped by the legacies of the French-Catholic and the English-Protestant settler-colonial "founding people."[27] Legal acts such as the Constitution Act of 1867 and its 1982 amendments reflect this mythology, establishing guarantees for Catholic and Protestant schools (Section 93) and regulating the use of the English and French languages (Section 23).[28] The Charter of Rights and Freedoms, essentially a bill of rights enshrined in the Constitution of Canada and signed into law in 1982, represented a "landmark change of approach because it promoted the idea that Canada is home to diverse communities."[29] Section 2(a) of the Charter codifies freedom of religion as a fundamental freedom and section 15(1) accords equality before and under law and equal protection and benefit of law, both of which Ishaq claimed were violated by the policy banning niqabs.[30] Section 27 of the Charter further instructs that it "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."[31]

Judge Keith Boswell of the Federal Court declared the citizenship policy in

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during-citizenship-ceremonies-jason-kenney.

24. Id.
25. Francesca Raimondo, "Ishaq v. Canada: Faith, Identity, Citizenship," *Regulating Religion E-Journal*, 1, 9 (May 2017), https://perma.cc/LBL8-C8ZE.
26. Douglas Quan, "Zunera Ishaq," see note 15.
27. Raimondo, "Ishaq v. Canada," see note 25, at 17.
28. Constitution Act, VI § 93 (1867); Constitution Act, Canadian Charter of Rights and Freedoms, I § 23 (1982).
29. Raimondo, "Ishaq v. Canada," see note 25, at 17.
30. Constitution Act, Canadian Charter of Rights and Freedoms I §§ 2(a), 15(1) (1982).
31. Id. at § 27.

dispute to be unlawful, as per Ishaq's application, due to its imposition on the discretion of the judge administering the oath.[32] Section 17(1)(b) of the Citizenship Regulations provide for the judge to conduct the citizenship ceremony "allowing the greatest possible freedom in the religious solemnization or the solemn affirmation thereof," and this mandatory duty could not be overridden by the measure introduced by Operational Bulletin 359.[33] Judge Boswell ruled that "'[R]eligious solemnization' is not just about the mere act of taking the oath itself . . . . [R]ather it extends also to how the oath is administered and the circumstances in which candidates are required to take it."[34] He continued, "[H]ow can a citizenship judge afford the greatest possible freedom in respect of the religious solemnization or solemn affirmation in taking the oath if the Policy requires candidates to violate or renounce a basic tenant of their religion?"[35] Judge Boswell ruled that because the contested measure was unlawful on administrative grounds, investigating violations of the Charter of Rights and Freedoms was unnecessary.[36]

Stephen Harper, Prime Minister at the time, vigorously stoked the emerging debate about Ishaq's case. After the Federal Court ruled that the government policy banning niqabs was unlawful, Harper stated, "I believe, and I think most Canadians believe, that it is offensive that someone would hide their identity at the very moment when they are committing to join the Canadian family. This is a society that is transparent, open, and where people are equal," claiming that covering the face during the oath "is not the way we do things here."[37] Harper's statements, like Kenney's before him, deployed a "clash of the civilizations" discourse, pitting the supposedly free and open society of Canada against the "Muslim world."[38] Harper's "not the way we do things here" comment went viral, and Chris Alexander, Minister of Citizenship and Immigration, later used the phrase as a slogan to launch an online petition in support of the Government's plan to challenge the decision before the Federal Court of Appeal.[39]

On April 10, Judge Webb of the Court of Appeal stayed Boswell's ruling until final resolution of the case, preventing Ishaq from taking the Oath of Citizenship while wearing niqab in the meanwhile.[40] Judge Webb explained that a failure to halt the decision process would have allowed Ishaq to take her oath before the Court of Appeal had reached a decision, rendering the court's decision

32. *Ishaq*, 2015 F.C. 156 at ¶ 68.
33. Id. at ¶ 29; see Citizenship Act, SOR 93-246 §17(1)(b); see Operational Bulletin 359, note 19.
34. *Ishaq*, 2015 F.C. 156 at ¶ 53.
35. Id. at ¶ 54.
36. Id. at ¶ 67.
37. Morgan Lowrie, "Harper Says Ottawa Will Appeal Ruling Allowing Veil During Citizenship Oath," *The Globe and Mail* (12 Feb. 2015), https://perma.cc/L5XX-TVZG; Douglas Quan, "Niqab Ban During Oath of Citizenship Escalating into a Full-Fledged Pre-Election Issue," *National Post* (21 Feb. 2015), http://nationalpost.com/news/politics/niqab-ban-during-oath-of-citizenship-escalating-into-a-full-fledged-pre-election-issue.
38. See Samuel P. Huntington, "The Clash of Civilizations?," 72 *Foreign Affairs* 22, 32 (1993).
39. Douglas Quan, "Niqab Ban," see note 37.
40. Raimondo, "Ishaq v. Canada," see note 25, at 9.

of no practical import.[41] But in staying the case on these grounds, the court narrowed the issue raised by Ishaq and the potential ruling even before conducting the legal analysis. The stay made this a case about Ishaq as an individual and her niqab rather than the rights and freedoms of diverse women across Canada who may have wished to enter the "Canadian family" without giving up an aspect of their religious identity. The question was narrowed to one of administrative authority rather than the limits of Canada's embrace of diversity. Judge Webb also considered the harm that would come from a potential delay in the citizenship process for Ishaq and noted with concern that she would not have the right to vote in the upcoming federal election.[42]

Judges Trudel, Webb, and Gleason heard Ishaq's case on September 15, 2015 and delivered their judgment the same day to allow Ishaq to participate in the election.[43] The Court of Appeal upheld the lower court's decision:

> [W]hile we do not necessarily agree with all the reasons given by the Federal Court, we see no basis to interfere with the Federal Court's finding as to the mandatory nature of the impugned change in policy as this finding is overwhelmingly supported by the evidence. It follows that this appeal must be dismissed.[44]

Neither the lower-court decision nor the six-paragraph appeals judgment addressed Ishaq's original defense premised on her niqab being an aspect of her religious identity. They also failed to offer any commentary or pronouncement on the political and civic debates for which Ishaq had become a symbol—debates about the limits of religious freedom and tolerance in Canada, the role of citizenship, and Canadian societal values.[45] On October 9, Zunera Ishaq took the Oath of Citizenship while wearing her niqab and immediately declared that she was going to vote in the upcoming federal election, just six days away.[46]

A. *Ishaq* and "Canadian Values"

In *Ishaq v. Citizenship and Immigration Canada*, Zunera Ishaq used the legal system to assert her agency as a fully veiled Muslim women and challenge Canada's self-image of model multiculturalism. She exposed the potential limits of that multiculturalism, igniting a national conversation about tolerance in Canada. Ishaq's case illustrates the hesitance of Canadian courts to tackle important issues related to the Canadian Charter of Rights and Freedoms. It also

41. Id.
42. Id. at 10.
43. Id.
44. *Ishaq*, 2015 F.C. 156 at ¶ 4.
45. See id. at ¶¶ 1-6.
46. "Zunera Ishaq, Who Challenged the Ban on Niqab, Takes Citizenship Oath Wearing It," *CBC News*, (10 Oct. 2015), http://www.cbc.ca/news/politics/zunera-ishaq-niqab-ban-citizenship-oath-1.3257762.

highlights courts' conservative approach to legal interpretation and analysis, and the resulting inefficacy of the court system for resolving Charter conflicts.

It is surprising that the government launched a petition in support of its position given that it intended to pursue the matter in the courts. What motivated the need for a foray into public opinion when the matter was going to be litigated and resolved by the judiciary? Moreover, instead of appealing the case, the federal government could have simply amended the regulations to say that anyone taking the citizenship oath must do so with their face uncovered. If the government had amended the regulation, future legal challenges would revolve around whether the protection of religious freedom requires the government to accommodate an individual's religious practice during the citizenship oath.

Richard Moon, Professor of Law at the University of Windsor, writes that the government was in fact informed by its legal advisers that banning the niqab was legally indefensible.[47] As suggested by evidence submitted to the court in the original hearing, Moon proposes that the Harper government actually expected to lose the case against Ishaq, but saw potential political advantages to be gained by thrusting the niqab into the upcoming election bullring.[48] In an environment of widespread anti-Muslim sentiment, the government hoped that enough voters would see its vilification of the niqab as part of a larger campaign against terrorism. Relying on the idea of a fundamental incompatibility between Muslims and the West,[49] this effort cast the niqab as a symbol of a repressive culture irreconcilable with Canadian values.[50]

Canada has long touted itself as a model for multicultural engagement, even before its comparatively liberal politics were brought into greater contrast by its southern neighbor's election of Donald Trump as president.[51] Indeed, in an affidavit filed with the court, Ishaq stated that her family chose to come to Canada because of its reputed tolerance for religious and cultural difference.[52] With job offers in Norway and Dubai, the family could have settled elsewhere.[53] Ishaq's challenge implicated more than Kenney and the Conservative Harper government's attempted discrimination through the neutrally-worded bulletin, which would have almost exclusively impacted Muslim women. It was a call to the Canadian legal system to squarely address the practical role of the Charter of Rights and Freedoms in Canadian social and political life, particularly at the significant occasion of declaring one's intention to become a Canadian citizen.

47. See Richard Moon, "The Government Is Sure to Lose Its Appeal in the Citizenship Oath-Niqab Case. Maybe That's the Point," *National Post* (17 Mar. 2015), http://nationalpost.com/opinion/richard-moon-the-government-is-sure-to-lose-its-appeal-in-the-citizenship-oath-niqab-case-maybe-thats-the-point.
48. See id.
49. See id.
50. See id.
51. See Michael Dewing, *Canadian Multiculturalism*, Library of Parliament Background Papers, https://perma.cc/QRZ4-UM42.
52. See Quan, "Niqab Ban," see note 37.
53. See id.

Reductionist conversations about Muslim women, and what they purportedly represent, rarely acknowledge the complexity and multi-dimensionality inherent in all people. Discourse about Muslim women in western societies often fails to move beyond an obsession with veiling and women's dress. Ishaq's activism asserted Muslim women's agency as a force for positive change. She demonstrated the potential of advocacy that is vested in people who have historically been relegated to the margins of our societies. The lived experiences or marginalized individuals connect and highlight complex challenges that demand sincere investigation of the ways in which our social, political, and legal systems differentially impact certain communities of people. Ishaq stated that she was determined to fight the policy not only to exercise her right to religious freedom but also because she was concerned with potential future restrictions on other "distinguishing cultural practices," such as forcing Sikhs to remove their turbans, if the order were to go unchallenged.[54]

By choosing to pursue litigation and overturn the government's new rule on face coverings, Zunera Ishaq also exposed the prevalence of ethno-national conceptions of Canadian identity in social and political discourse, igniting a national conversation about the degree to which the supposed Canadian commitment to diversity actually extends. Ishaq paid a price: while she successfully overturned the ban in the courts, Harper made Ishaq a focal point in his re-election campaign. Harper fanned the flames of bigotry by inviting 'real' Canadians to coalesce as an in-group defined against the backward, Muslim Other and her associated cultural and religious baggage.[55] Ishaq likely did not anticipate becoming the living effigy of the Conservative's federal election campaign when she moved to Canada. She described the "beautiful part of Canada" as "every person here is free to live in a way in which he or she feels it is right or not . . . It's my personal faith so let me do what I wish to do."[56]

The discriminatory consequences of the government's statements on Muslim women who wear full-face veils also sharply contrast with the so-called Canadian conception of equal religious citizenship. In this framework, "religious freedom and religious equality rights are allied in advancing the right of religious persons to participate equally in Canadian society without abandoning the tenets of their faiths."[57] However, when asked for comment on the Ottawa's appeal of the lower court's decision allowing the niqab, CIC Minister Chris Alexander yoked the practice of wearing niqab to domestic violence, human smuggling, and "barbaric practices like polygamy, genital mutilation," and "honor killings," insisting that the government's appeal of the decision was motivated by concern for women.[58]

54. Douglas Quan, "Zunera Ishaq," see note 15.
55. See id.
56. Id.
57. Bruce Ryder, "The Canadian Conception of Equal Religious Citizenship," in *Law and Religious Pluralism in Canada*, 87, 87 (ed. Richard Moon, UBC Press, 2008).
58. Andrew Foote, "Niqab Appeal by Ottawa is Questioned Over Motivation," *CBC News*, 13 Feb. 2015, http://www.cbc.ca/news/politics/niqab-appeal-by-ottawa-is-questioned-over-

He declared his feminist sympathies and his "worry when some of those defending the idea of keeping a woman behind niqab in a citizenship ceremony are also those who say that we don't need these protections for women from violence and from abuse." Through this statement, Alexander made an unsubstantiated and dangerous assertion that supporters of the to wear niqab also support domestic violence. This baseless statement feeds into an image of Muslims in the Canadian consciousness as a people whose values are diametrically opposed to that of the morally superior in-group.[59] In reality, any ban on wearing the veil would not favor the emancipation of women. On the contrary, it would limit their ability to participate actively in society by forcing a choice between faith and access to citizenship.

Interveners at the court submitted evidence demonstrating that the face veil policy affects approximately 100 women per year.[60] Given that the oath takes less than one minute to recite, granting alternative accommodation for these women to take the oath in private in front of a female citizenship judge would likely not be onerous. In fact, this is what was done prior to the implementation of the policy, again suggesting strong political motivations for the government's pursuit of the case. The Harper government repeatedly argued that the applicant did not have to pursue Canadian citizenship if she did not wish to comply with the unveiling policy, noting that she would still have the benefits of permanent residence but ignoring the fact that she would remain disenfranchised. Ishaq's determination to challenge this policy in a time of heightened Islamophobia in Canada[61] was an assertion of her political rights and of her agency amid rhetoric suggesting that as a Muslim woman—and particularly as a veiled Muslim woman—she had none. Indeed, much of the government's rhetoric against Ishaq's position referenced this underlying clash of values, defining citizenship as a privilege afforded to those who conform to a specific interpretation of women's rights.

Ultimately, Canadian voters tired of Trump in sheep's clothes, choosing instead to elect Justin Trudeau, a suave neoliberal who would later help Syrian refugee children into their donated winter coats at the airport and receive a standing ovation from oil executives for promising to exploit the full potential of the tar sands.[62] On November 16, 2015, the newly elected Liberal Government formally withdrew the appeal request to the Supreme Court on the niqab case.[63]

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motivation-1.2956607.

59. See id.

60. See Juan De Villa, *Veils, Oaths, and Canadian Citizenship: Ishaq v Canada*, The Court.ca, 2 Mar. 2015, https://perma.cc/JS5C-DZNE.

61. See Lina Khatib, *Working Paper: The Right to Testify in Niqab in a Sexual Assault Case*, The Tessellate Institute, https://perma.cc/UT72-V49U.

62. See Ian Austen, "Syrian Refugees Greeted by Justin Trudeau in Canada," *The New York Times* (11 Dec. 2015), https://perma.cc/V9VW-X5TK; Bill McKibben, "Stop Swooning over Justin Trudeau. The Man Is a Disaster for the Planet," *The Guardian* (17 Apr. 2017), https://perma.cc/93EE-S7WH.

63. See Sean Fine, "Liberal Government Drops Supreme Court of Canada Niqab Appeal," *The Globe and Mail* (16 Nov. 2015), https://perma.cc/YW3F-MGJ8.

John McCallum, Minister of Immigration, Refugees and Citizenship, and Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, released a statement, declaring "Canada's diversity is among its greatest strengths, and today we have ensured that successful citizenship candidates continue to be included in the Canadian family. We are a strong and united country because of, not in spite of, our differences."[64]

B. The Significance of *Ishaq*

At no point in the legal discussion framing *Ishaq v. Citizenship and Immigration Canada* was there any meaningful investigation into the protections granted by the Canadian Charter of Rights and Freedoms and their relevance or applicability to the case at hand. Courts have found the State to be in contravention of Section 2(a) of the Charter not only when taking coercive measures in relation to religion, as in restrictions or obligations to follow religious practices, but also when explicitly or implicitly favoring a certain doctrine, as this suggests that those who do not adhere to that particular creed are not fully part of the community. Preferential treatment can be demonstrated "when a religious symbol is displayed in State institutions such as Parliament, schools, and hospitals, or when a religious practice is carried out in an institutional context (prayers in public schools or at the beginning of a municipal council session)."[65] Partiality is also evident "when a non-mainstream religious practice or symbol is limited or banned," explicitly or through a facially-neutral rule like the ban on covering one's face that Ishaq challenged.[66] Following the traditional practice of avoiding important questions of law if a dispute can be resolved on other, technical, grounds, the Court here stated that a determination on the Charter issues was unnecessary for the disposition of this case.[67]

The federal court's analysis of the 2011 policy was deeply insufficient in capturing the social and political significance of demanding that a woman unveil in public in order to become a citizen. Ultimately, the court declared several sections of the policy unlawful, including Sections 6.5.1 to Section 6.5.3 of the policy, part of Section 13.2 of the Citizenship Manual, and the instruction in Section 16.7 to "those wearing a full or partial face covering that now is the time to remove it." Paragraph 36 of the appeals court decision stated that:

> with respect to subsection 15(1) of the Charter, the Respondent concedes that the Policy mostly affects Muslim women. However, the Respondent contends that distinction is not discriminatory. There is no proof of any pre-existing disadvantage, stereotype or prejudice that is perpetuated by requiring the

64. Statement from the Minister of Immigration, Refugees and Citizenship and the Minister of Justice, 16 Nov. 2015, https://perma.cc/L9YZ-SXQ5.
65. Raimondo, "Ishaq v. Canada," see note 25, at 7.
66. Id.
67. *Ishaq*, 2015 F.C. 156 at ¶ 5.

> Applicant to show her face while she takes the citizenship oath. The effects are not onerous, and the Applicant has taken her veil off in public for a driver's license even though she does not drive.[68]

It is unclear how the court arrived at its conclusions that no disadvantage would result from an adverse ruling and that the effects of a public unveiling would not be "onerous."

"It's very important to stand up for your right. If you will not stand up for your right you will not get it."[69] These were Ishaq's first words as a Canadian citizen, after taking her Oath of Citizenship while wearing niqab.[70] I recall taking my own citizenship oath around the time the national debate raged around the Ishaq case. I almost decided to wear a face veil to my ceremony as an expression of solidarity with Zunera Ishaq and as a challenge to the court to publicly exclude me from the day's proceedings. I did not ultimately go forward with this for several reasons, including my discomfort with the temporary appropriation of a religious veil to which I was uncommitted. I did, however, wear my hijab, and continue to do so. The Canadian Government's singling out of Zunera Ishaq and transformation of her into a symbol of barbarity affected me deeply. The suggestion by someone who has no experience of wearing hijab or niqab that removing a religious veil for a public ceremony is not burdensome struck me as a remarkable dismissal of everything that the concepts of hijab and niqab mean for different women. For the government, the veil was apparently perceived as little more than a challenge to Canadian values, with no room to engage with the idea that the practice might represent freedom from the commodification and objectification of women's bodies, an expression of self-love, a commitment to one's religious identity, and so much more. There was no recognition of the strength and determination that it takes for a woman to wear hijab or niqab in Canada, faced with racism and Islamophobia as a near-daily experience, and the consequent resilience involved in constant recommitment to wearing the veil. Why was there no place for this testimony in the court?

III. *R. v. N.S.*: TESTIFYING WITH NIQAB

In 1992, when N.S. was sixteen years old, she revealed to a teacher that between the ages of six and twelve she had been repeatedly sexually assaulted by her uncle and her cousin.[71] At the time, family members insisted that the matter

68. Id. at ¶ 36.

69. Tristin Hopper, "Zunera Ishaq—the Woman Who Fought to Overturn Niqab Ban—Took Citizenship Oath Wearing One," *National Post* (9 Oct. 2015), http://nationalpost.com/news/canada/zunera-ishaq-the-woman-who-made-the-right-to-wear-a-niqab-during-citizenship-ceremonies-a-primary-campaign-issue-is-now-a-canadian-citizen.

70. Id.

71. Barbra Schifler Commemorative Clinic, *The Barbara Schifler Clinic's Intervention at the Supreme Court of Canada N.S. v. R. (SCC): Backgrounder*, 1, https://perma.cc/AC7N-9GWG.

not proceed and the police did not press charges.[72] Fifteen years later, in May 2007, N.S. asked the police to reopen her case.[73] N.S.'s uncle and cousin were subsequently both charged with indecent assault, gross indecency, and sexual assault. Her uncle was further charged with having sexual intercourse with a person under fourteen years of age.[74]

N.S. wears niqab.[75] At the conclusion of the preliminary inquiry, at the eleventh hour, the defendants asserted that they were entitled to view N.S.'s full 'demeanor' while she gave her testimony and demanded that N.S. be required to remove her niqab in order to participate as a witness in her case.[76]

In seeking an order from the court that N.S. be compelled to remove her religious dress, her alleged abusers claimed that her niqab impeded their counsel's ability to "effectively challenge the witness" and threatened their constitutional right to assert a full answer and defense to the allegations.[77] Addressing the preliminary inquiry judge directly, N.S. explained that she wore niqab according to her sincere interpretation of the dictates of her religion and that it would be compromising for her to remove this religious veil in an open courtroom that was "full of men."[78] Refuting defense counsel's assertion that exposing her face would add evidentiary value, N.S. explained that the Court would have sufficient opportunity to observe her body language as she offered her testimony and that counsel would have direct eye contact with her during cross-examination.[79] But faced with the possibility of a deprivation of liberty, the accused men argued that the case implicated a constitutional interest that could be suspended only "in accordance with principles of fundamental justice" and argued that even sincere religious beliefs were not enough to overcome what they interpreted as a constitutional right to "face-to-face" confrontation of the witness.[80]

The Supreme Court of Canada's *Amselem* test for demonstrating the necessity of religious accommodation requires the claimant to demonstrate that they sincerely hold the particular belief for which they are seeking accommodation.[81] The non-triviality of a belief is determined only by ascertaining that the belief is not feigned and that it is made in good faith.[82] In this case, N.S. did not even have an opportunity to demonstrate the sincerity of her belief: N.S.'s comments during the preliminary inquiry as to niqab comprising a part of her core

72. Id.
73. Id.
74. Id.
75. Id.
76. Faisal Bhabha, "R. v. NS: What Is Fair in a Trial? The Supreme Court of Canada's Divided Opinion on the Niqab in the Courtroom," 10 *Osgoode Legal Studies Research Paper Series* 871, 872 (2014).
77. Id.
78. Id. (quoting *Transcript of Preliminary Hearing*, quoted in *R. v. N.S.*, 102 O.R. 3d. 161 (Court of Appeal for Ontario (Canada)) 2010), note 3 ¶ 5.).
79. Id.
80. Bhabha, see note 76, at 872.
81. *R. v. N.S*, 102 O.R. 3d. 161, ¶¶ 63, 67 (Court of Appeal for Ontario (Canada)) 2010).
82. *Syndicat Northcrest v. Amselem*, 2 S.C.R. 551, ¶ 53 (Supreme Court of Canada 2004).

belief system were unsworn, since the presiding judge had refused to administer the oath to N.S. while her face was veiled.[83] After this informal, unsworn investigation, the Ontario Court of Justice ordered N.S. to remove the niqab before testifying. To the court, the fact that N.S. had unveiled for security and identification purposes while obtaining her driver's license and at international border crossings effectively demonstrated the inconsistency, and therefore insincerity, of her belief.[84] Both the Superior Court of Justice and the Court of Appeal for Ontario reviewed the order, quashing it and agreeing that the matter was mishandled by the lower court.[85] However, the higher courts disagreed as to what the appropriate procedure for determining religious sincerity would be and remanded the matter to the lower court for re-examination.[86]

In sexual assault trials, as well as trials for sexual harassment and other forms of gender-based violence, where forms of extrinsic evidence may be scarce, the testimony of the complainant as a victim is almost essential in order to produce a conviction. On appeal to the Court of Appeal for Ontario, Justice Doherty writing for the panel framed the issue as "an apparent conflict between the constitutional rights of a witness in a criminal proceeding and the constitutional rights of the accused in that same proceeding."[87] Failing to recognize, let alone unsettle, the Eurocentric and patriarchal assumptions rooting their analysis, the justices took for granted that a witness testifying in niqab would pose a threat to trial fairness.[88] The justices refer to the "centuries" of history of the operation of the criminal justice system and declare that a "principled approach" to the admission of evidence as one where the trier of fact is able to observe the witness's demeanor.[89] Notwithstanding the numerous examples of witness testimony regularly offered and accepted without the witness's physical presence in the courtroom, the justices of the court were unconvinced that the defense counsel might be able to thoroughly cross-examine the witness were she to be able to obscure her expressions from the court.[90]

The Court of Appeal found that the niqab did implicate constitutional rights and prompted a duty of religious accommodation.[91] But rather than agreeing to be subject to a pretrial hearing in which she must explain and defend her religious attire as a condition for permission to testify in the case in which she was the victim, N.S. challenged the Court of Appeal finding, seeking "outright recognition of a right to testify in a niqab."[92]

83. Bhabha, see note 76, at 873.
84. *R. v. N.S.* 102 O.R. 3d. 161 at ¶ 90.
85. Barbra Schifler Commemorative Clinic, *Backgrounder*, see note 71, at 1; *R. v. N.S.*, 102 O.R. 3d. 161 at ¶ 91-96.
86. *R. v. N.S.*, 102 O.R. 3d. 161 at ¶ 91-96.
87. Id. at ¶ 1.
88. Id. at ¶ 54.
89. Id. at ¶ 56.
90. Id.
91. Id. at ¶¶ 95-98.
92. Bhabha, see note 76, at 873.

N.S.'s case drew significant public attention as it progressed through various stages of the legal system. The issue of whether a woman should be permitted to testify while wearing niqab implicated "polarized public discourse around multiculturalism and the scope of public tolerance."[93] *The National Post*'s Barbara Kay, well known for her commentary on public issues, agreed that face cover for women "is not commensurate" with equality of the sexes, a fundamental Canadian value.[94] Kay informed Canadians that the custom of wearing niqab continues to be observed "only amongst tribes or in countries where women are second-class citizens at best, and often chattel, to be treated, or even disposed of, by their male relatives as they see fit,"[95] dismissing the hundreds of Canadian women who wear niqab. She praised the regulation against niqab as a "welcome first step to integrating women into their new roles as human beings who are fully equal to men," and called upon Kenney to go a step further and adopt Quebec's controversial and exclusionary Bill 94, which would proscribe face cover for all women giving or getting government-funded services, for all of Canada.[96] In addition to being insulting and dismissive, Kay's commentary co-opts feminist discourse in the furtherance of Islamophobia.

The Justices of the Supreme Court of Canada were divided into three camps, unable to agree on the appropriate analysis for determining whether to provide accommodation for a witness to wear niqab nor on the values and interests that should be taken into consideration in making the decision.[97] The majority argument, written by Chief Justice McLachlin and endorsed by Justices Deschamps, Fish, and Cromwell of the seven-member panel, occupied the middle ground between the starkly opposed concurring judgment of Justice LeBel, joined by Justice Rothstein, and Justice Abella's dissent.[98] The majority judgment built on Justice Doherty's proportionality approach articulated in the Court of Appeal opinion, in turn taken from the Supreme Court's jurisprudence validating government intrusions on Charter rights.[99]

93. See, e.g. Sheema Khan, "Hate It If You Want, But Don't Ban The Niqab," *The Globe and Mail* (14 Dec. 2011), https://perma.cc/ZPG5-4JY6. For a contrary, contemporaneous view, see, e.g. Barbara Kay, "Feminists Back Women As Possessions in Supreme Court Case," *National Post* (9 Dec. 2011), http://nationalpost.com/opinion/barbara-kay-feminists-back-women-as-possessions-in-supreme-court-case.
94. Barbara Kay, "New Niqab Law Puts Canadian Values First," *National Post* (12 Dec. 2011), http://nationalpost.com/opinion/barbara-kay-new-niqab-law-puts-canadian-values-first.
95. Id.
96. Id.
97. *R. v. N.S.*, 3 S.C.R. 72 (Supreme Court of Canada 2012).
98. Id.
99. *R. v. Oakes*, 1 S.C.R. 103 at ¶ 74 (Supreme Court of Canada 1986).

The proportionality approach articulates a four-factor framework for trial judges to use when deciding whether to allow a witness to testify in niqab.[100] The test asks:

1. Would requiring the witness to remove the niqab while testifying interfere with her religious freedom?
2. Would permitting the witness to wear the niqab while testifying create a serious risk to trial fairness?
3. Is there a way to accommodate both rights and avoid the conflict between them?
4. If no accommodation is possible, do the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so?[101]

Not included in the Canadian courts' analysis is an explanation of how and for whom deleterious effects are evaluated.

The court described the primary reasons for forcing a witness to remove her niqab as "preventing harm to the fair trial interest of the accused and safeguarding the repute of the administration of justice."[102] The court weighed this against two categories of potential negative outcomes that could result from limiting a Charter right to religious freedom.[103] The first negative effect involved the direct and personal impact of a failure to accommodate on the subject. For this outcome, the court considered factors such as the "value of adherence to a religious conviction, or the injury caused by being required to depart from it," which as the court described did not depend on whether the practice was voluntary or mandatory under religious doctrine, the importance of the practice to the claimant, and the "degree of state interference with the religious practice."[104] The second negative effect involved the "broader societal harms of requiring a witness to remove the niqab in order to testify," particularly for sex crimes prosecutions, which the Court described as being "vigorously pursued" by the justice system in recent years.[105] This inquiry into this effect focused on the wider consequences of a court order to unveil, including causing potential complainants and witnesses to be "reluctant to report offenses and pursue their prosecution, or to otherwise participate in the justice system."[106]

Ultimately the court placed the burden on the victim to defend the extent of her religious commitment to wearing the veil, rather than on the accused to

100. See *Dagenais v. Canadian Broadcasting Corp.*, 3 S.C.R. 835, 878 (Supreme Court of Canada 1994).
101. *R. v. N.S.*, 3 S.C.R. 72 at ¶ 9.
102. Id. at ¶ 38.
103. Id. at ¶ 36-37.
104. Id. at ¶ 36.
105. Id. at ¶ 37.
106. Id.

demonstrate why unveiling would be necessary to establishing his guilt or innocence. Despite acknowledging that the evidentiary record shed "little light on the question of whether seeing a witness's face is important to effective cross-examination and credibility assessment and hence to trial fairness," McLachlin unabashedly declared that the niqab thwarted trial fairness by preventing the court from viewing the witness's face during cross-examination.[107] The majority did not claim to have created an explicit absolute ban on niqabs, couching its decision in an assertion that it would only be justifiable to compel the removal of the niqab where the risk to trial fairness is "real and substantial."[108] Given that a victim's testimony in a sexual assault trial is always going to be contested and controversial, the practical effect of the majority decision was indeed to create a blanket ban on a victim-witness wearing the niqab in future sexual assault cases.[109]

The majority's decision unequivocally pushes women like N.S. "outside of Charter protection."[110] Indeed, in applying the majority's opinion to N.S.'s case on April 24, 2013, Justice Weisman of the Ontario Court of Justice concluded, "having followed the directions of the Supreme Court on this voir dire, I find that I am obliged to require N.S. to remove her niqab while testifying at the preliminary inquiry."[111] Jason Kenney suggested during the Ishaq debate that the openness of Canadian society would be enhanced by banning women in niqab from participation in it. But in reality, the practical effect of forcing the removal of niqab is to exclude certain women from exercising their fundamental rights, including their ability freely to demand justice for crimes committed against them.

Embedded in LaBel's concurrence, joined by Rothstein, is an assumption that the law is "neutral" and objective, not a cultural force making claims against a religious practice, the subject of its encounter. The concurrence reached the same outcome as the majority but rejected the majority's holding that a witness should be permitted to testify in niqab subject to a case-by-case proportionality exercise. As Faisal Bhabha noted:

> [f]or Justice LeBel, only a "clear rule" could provide the necessary constitutional assurances of trial fairness. From this perspective, the balancing of interests was settled: legal tradition regarding participation in the trial process was sufficiently tied to foundational common law and constitutional values that the niqab should never be accommodated.[112]

LeBel conditioned the respect for differences on the "preserv[ation] of common values of Canadian society."[113] Balaclava-clad Canadians facing cold winters apparently notwithstanding, LeBel defined bare-faced communication to be a

107. Id. at ¶ 20-21.
108. Id. at ¶ 28 (citing *Dagenais*, 3 S.C.R. at 878).
109. Bhabha, see note 76, at 876.
110. Id. at 879.
111. Id. at 876, note 36.
112. Id. at 877; *R. v. N.S.*, 3 S.C.R. 72 at ¶¶ 67, 69.
113. *R. v. N.S.*, 3 S.C.R. 72 at ¶¶ 67, 69.

"core common value," recalling the repugnance many people including feminists feel when they encounter a woman who covers her face.[114]

Abella's dissent took the opposite position, refusing to accept that the niqab poses a threat to a fair trial without investigating the assumptions underlying that presumption, and rebuffing the idea of a ban, whether implicit or explicit.[115] While the majority mostly ignored the sources provided by many of the interveners in the case, many of which cast doubt on the value of demeanor evidence, Abella relied on them.[116] Moreover, she pointed out that even if a rule of bare-faced examination exists at common law, there are frequent exceptions to the rule, citing examples of courts that "regularly accept the testimony of witnesses whose demeanor can only be partially observed."[117] These include blind or deaf litigants, those who require the use of a language interpreter, those who have physical or mental disabilities inhibiting their cognitive or expressive functions, children, or those simply unable to be present and instead give evidence by telephone.[118]

LeBel's concurrence distinguished between people with physical disabilities that impair communication and women wearing niqab, explaining that for people with disabilities the accommodation is an assistive mechanism that promotes their communication, in contrast to a veil that "does not facilitate acts of communication."[119] However, LeBel did not explain how excluding niqab-wearing women who would otherwise testify would "facilitate" communication.[120] Abella, noted the dissonance between the stated Charter values of inclusion and respect for religious diversity, and the practical implications of the majority judgment:

> [T]he majority's conclusion that being unable to see the witness' face is acceptable from a fair trial perspective if the evidence is "uncontested," essentially means that sexual assault complainants, whose evidence will inevitably be contested, will be forced to choose between laying a complaint and wearing a niqab, which, as previously noted, may be no meaningful choice at all."[121]

A. Sexual Assault and the Law: Failing (Muslim) Women

Sexual assault continues to be "vastly under-reported and under-prosecuted, especially amongst marginalized girls and women,"[122] which creates a serious

114. Bhabha, see note 76, at 877.
115. Id.; *R. v. N.S.*, 3 S.C.R. 72 at ¶ 96.
116. Bhabha, see note 76, at 877; *R. v. N.S.*, 3 S.C.R. 72 at ¶¶ 98-108.
117. *R. v. N.S.*, 3 S.C.R. 72 at ¶ 102.
118. Id. at ¶¶ 92, 102-104.
119. Id. at ¶ 77.
120. Id. at ¶ 77.
121. Id. at ¶ 96.
122. Khatib, see note 61, at 7.

barrier to justice for survivors.[123] Due to legal processes and established procedures that work to discredit and re-traumatize witness-survivors, sexual assault is a difficult crime to move through the justice system.[124] When the crime is committed within a family, girls and women are often extremely reluctant to or are discouraged by their family members from reporting to the police, as was the case for N.S., who waited over two decades before meeting her alleged abusers in a courtroom.[125] Barriers to reporting include:

> 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.[126]

As confirmed by stories of survivors who have had the courage, support, and resources to face their attackers and defense counsel in an adversarial legal environment, "courtrooms have not been safe spaces for women who have told their stories of sexual violence."[127] Survivors may subsequently face attacks on their credibility and irrelevant invasive questioning about their sexual habits and dress code.[128] Women's descriptions of their assaults are interpreted through rape mythologies and compared to stereotypes of "who she should be in order to be recognized, in the eyes of the law, as having been raped; who her attacker must be to be recognized, in the eyes of the law, as a potential rapist; and how injured she must be in order to be believed."[129]

By interpreting the case as a "conflict of rights" requiring "balancing," each level of the judiciary pit the protection of minorities against the protection of the criminally accused.[130] This framing created a false dichotomy between freedom of religion, and perhaps more specifically religious freedom as expressed by religious *minorities*, and trial fairness, rooted in the uncritically-assumed utility of the court's traditional adversarial system.[131] The majority opinion also evaluated trial fairness as properly "emphasiz[ing] systemic and institutional integrity," purportedly concentrating on "public interest considerations and prioritiz[ing] the maintenance of confidence in the criminal justice system as a whole."[132] But the

123. Barbra Schifler Commemorative Clinic, *The Barbra Schlifler Clinic's Intervention Press Release*, (20 Dec. 2012).
124. Khatib, see note 61, at 7.
125. Id.
126. *R. v. Seaboyer; R. v. Gayme*, 2 S.C.R. 577, ¶ 139 (Supreme Court of Canada 1991).
127. Natasha Bakht, "What's in a Face? Demeanour Evidence in the Sexual Assault Context," presented at Sexual Assault Law, Practice and Activism in a Post-Jane Doe Era, 3 (9 Feb. 2010), https://perma.cc/MD8U-NWCV.
128. Id. at 4-5.
129. *Seaboyer*: *Gayme*, 3 S.C.R. 577 at ¶ 140.
130. Bhabha, see note 76, at 878.
131. Id. at 878-79.
132. Id.; *R. v. N.S.*, 3 S.C.R. 72 at ¶ 38 (emphasizing the importance of preserving "public confidence in the justice system.").

opinion raises questions of who is considered to be the "public" in the eyes of the majority.

With fairness defined as an "abstract and idealized standard" of defendants' rights, most of the Justices failed to consider the perspectives of other participants in the trial process, including how vulnerable community members and victims of sexual assault perceive the pursuit of justice in the court.[133] Without the niqab, N.S. would be testifying in an environment strange and uncomfortable at best, and humiliating and re-traumatizing at worst. It is very common for individuals, including those in the legal profession, to believe that they can accurately determine when they are being lied to, but detecting deceit in facial expressions is not part of legal education or training.[134] A trier of fact could misinterpret embarrassment and discomfort as uncertainty and unreliability and be misled by her demeanor. Furthermore, if the state determines that it cannot call upon a witness to testify if she is forced to remove her niqab, evidence will be lost, leading to a result that hardly serves the public interest in the administration of justice. Abella's dissent responded to the majority's articulated concern with public confidence in the justice system, stating that trial fairness must go beyond evaluating the best interests of the defendant and consider "fairness in the eyes of the community and the complainant" as well.[135]

Prompted by a woman asserting her rights from the margins and demonstrating the inadequacy of the current system to meaningfully account for personal characteristics of actors within it, Abella encouraged a deeper and more holistic inquiry into what justice looks like for different people with different personal characteristics.[136] It is unlikely that the European men who drafted the rules governing courtrooms would have considered a face veil to be an essential part of one's clothing, such that removal of the garment would constitute an exposure and an invasion of privacy.[137] The majority, on the other hand, disregarded an analysis of what fairness might mean in different cultural contexts or of how "neutral" rules contribute to systemic social exclusion. They ignored the fact that the rule of law is itself a cultural system; even while managing or

133. Bhabha, see note 76, at 879.

134. Bakht, see note 127, at 6.

135. *R. v. N.S*,. 3 S.C.R. 72 at ¶ 95, (citing *R. v. Mills*, 3 S.C.R. 668, ¶ 72 (Supreme Court of Canada 1999)).

136. Bhabha, see note 76, at 877.

137. Bakht, see note 127, at 10; see *Muhammad v. Enterprise Rent-a-Car*, No. 06-41896-GC (Mich. 31st Dist. Ct. 2006). Ginnah Muhammad brought suit in Michigan against Enterprise Rent-A-Car, seeking relief for $2,750 assessed damages to a rental car that she claimed was caused by thieves. Rather than discussing her claim, Judge Paul Paruk gave her the blunt choice of removing her 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." *Muhammad* transcript at 3-4. Overlooking the problematic zeal with which Judge Paruk interpreted his ability to "see the truth," Ginnah Muhammad couched her refusal to remove the niqab in striking language: "I wish to respect my religion and so I will not take off my clothes." *Muhammad* transcript at 6. Muhammad's small claims dispute was dismissed because she refused to take off her clothes.

adjudicating cultural difference, it is not independent of culture.[138]

The court's narrow "balancing of interests" analysis and shallow engagement with the effects of forced unveiling lends a disingenuous quality to its arguments about preserving the truth-seeking function of the criminal trial. After making the generalized and unreserved statement that "wearing of a niqab in public places is controversial in many countries including Canada," the appeals court trivialized the position of niqab-wearing witnesses by analogizing to them to witnesses wearing dark sunglasses:

> Take for example, a witness who is wearing dark sunglasses when that witness takes the stand. As a matter of course, a preliminary inquiry judge would ask the witness why he or she was wearing sunglasses. There are several possible responses. The witness may be wearing sunglasses as a fashion statement in the exercise of his or her right to freedom of expression. The witness may be wearing sunglasses because a disability requires the witness to shield his or her eyes from the bright lights of the courtroom. The witness may be wearing sunglasses to disguise his or her appearance out of fear that the accused may seek retribution against that witness. All of these explanations can be expressed in terms that invoke constitutional values. The party seeking to cross-examine the witness may argue that those sunglasses inhibit the questioner's ability to fully assess the witness's reaction to the questions and effectively cross-examine the witness. This, too, impacts on constitutional values.[139]

This analogy is not only weak but inappropriate. First, if sunglasses were necessary due to medical necessity, it is highly unlikely that a court would ever order them removed. Moreover, wearing sunglasses as a fashion statement is not comparable to sincere religious belief. The court opinion fails to sincerely consider N.S.'s religious beliefs, perhaps reflecting and even legitimizing negative stereotypes of an already unfairly maligned minority community in contemporary Canada. Demanding that a Muslim woman remove her niqab is inappropriate and unnecessary, and would moreover be a traumatic invasion of her privacy and personal security, almost certainly influencing whether or how she offers her testimony and ultimately threatening the truth-seeking function of the court.

One of the interveners attempted to emphasize the significant "discomfort, anxiety and stress" that N.S. would be likely to experience without her niqab, which would be likely to "adversely impact the quality of her evidence."[140] Indeed, it is hard to imagine how this might be contested. However, the authors go on to say, "any witness would behave differently if asked to testify without, for example, his or her shirt on."[141] This is also unnecessary to controvert, however, the authors,

138. Benjamin L. Berger, "The Cultural Limits of Legal Tolerance," 11:2 *Canadian Journal of Law and Jurisprudence* 245, 245-47 (2008), https://perma.cc/E3F7-CXLZ.

139. *R. v. N.S.*, 102 O.R. 3d. 161 at ¶ 41-42.

140. Khatib, see note 61, at 8.

141. Id.

just like the court, fail deeply to engage in the relevant analysis of what it would mean for a woman in niqab to unveil in public. Testifying without a shirt on is almost as poor an analogy as the attempted dark sunglasses analogy and begs inquiry into the hesitancy of the actors involved in this case to make room for the voices and testimony of Muslim women who wear niqab.

As offensive, inappropriate and disorienting as a request to remove one's shirt would be, it is not laden with Orientalist and imperialist histories of forced unveiling of Muslim women. Contemporary demands to unveil recall the anti-veil campaigns conducted in the Middle East by the colonial powers. Lord Cromer, the founder and president of the English Men's League for Opposing Women's Suffrage, vehemently condemned how Islam treated women, in his capacity as British consul general in Egypt from 1883 to 1907.[142] While Christianity "elevated" women, Cromer thought, Islam "degraded" them, and it was this degradation of women, expressed in the practices of veiling and seclusion that was "the fatal obstacle" to the Egyptian's "attainment of that elevation of thought and character which should accompany the introduction of Western civilization."[143]

In Algeria, the French strategy of forced unveiling underscored the confirmation and consolidation of colonial rule. One of the most demonstrative examples of the symbolic import of the veil in colonial Algeria appears in the description of a ceremony that took place in Algiers in 1958. To prove to the French government that they had the support of the local population, a group of rebellious generals gathered together "a few thousand native men . . . from nearby villages, along with a few women who were solemnly unveiled by French women" as a demonstration of their loyalty to France.[144] As Leila Ahmed posits, the ideas of feminism in the colonial era "functioned to morally justify the attack on native societies and to support the notion of the comprehensive superiority of Europe."[145]

Contemporary imperial feminist appeals to gender equality through unveiling, like the statements put forth by Jason Kenney and Barbara Kay, extend this colonial legacy and legitimize anti-Muslim racist bigotry, crafting it into acceptable discourse to be mobilized by serious political and institutional actors. Imperial feminism, or perhaps more accurately, gendered orientalism, centers white narratives and credits the West with ability and responsibility to effect women's empowerment, ignoring the systemic misogyny of Western nations and stripping women of color of their agency.

Is there room in the court's "objective" process to account for a contextual approach to understanding what it might mean for N.S. to remove her veil? A contextual investigation would carefully consider the nature of the allegations that N.S. was making as well, faced with the task of describing intimate and painful

142. Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate*, 152-53 (Yale University Press, 1993).

143. Id.

144. Marnia Lazreg, *The Eloquence of Silence: Algerian Women in Question*, 135 (Psychology Press, 1994).

145. Ahmed, see note 142, at 155.

details of her childhood in front of the men who sexually assaulted and abused her for six years as a child. It would also raise the question of why the accused men had vested such an interest in having N.S. remove her niqab, an issue that was not raised until just before trial,[146] even though, as members of her family, they knew of N.S.'s choice to veil her face well before they were even charged with a crime. The attempt to unveil N.S. might plainly be read as a strategy of intimidation, or an attempt to prolong the trial and incite a political debate, ironically rooted in a more complete understanding of the significance of unveiling to N.S and using this against her.[147] As Natasha Bakht explains:

> 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 relive their horrifying experiences of rape and sexual abuse. Having to confront this situation without one's usual clothing is both perverse and grossly insensitive.[148]

Forcing veiled women to unveil impedes access to justice for women who wear niqab by dissuading them from reporting sexual assaults, and, as a result, "effectively isolating them as a class of individuals that is denied legal recourse for sexual violence."[149] The witness must now choose whether to abandon a religious conviction in order to deliver a fair trial to the accused, knowing that the more central her evidence to the likelihood of conviction, the less likely she is to be permitted to testify in niqab. If she chooses not to testify, the state will have to either withdraw their prosecution for lack of evidence or ask the court to force the witness to unveil and give her evidence.[150] Forced removal of witnesses' niqabs will limit personal expression, liberty and dignity, with particular impact on vulnerable minorities. Rape is already an underreported crime;[151] the case of N.S. highlighted what many already know to be true about the justice system's endemic failure to facilitate justice for those affected by sexual violence.

Claimed commitments to constitutional values and the suggestion that N.S. lacked the evidence to challenge established courtroom practice bolstered the majority's narrow test and the concurrence's outright prohibition on accommodating the niqab.[152] This is unsurprising, given the legal system's preference for precedent. However, it is significant that "all of the Justices appear to have agreed with the principle that even strict rules regarding trial fairness require flexibility. Such flexibility not only helps to mitigate for individual variation and different needs, but also to correct the trajectory of institutional

146. Khatib, see note 61, at 8.
147. Id.
148. Bakht, see note 127, at 10.
149. Barbra Schifler Commemorative Clinic, *Backgrounder*, see note 71, at 1.
150. Bhabha, see note 76, at 879.
151. Barbra Schifler Commemorative Clinic, *Backgrounder*, see note 71, at 1.
152. Bhabha, see note 76, at 880.

inertia."[153] The European men who informed what we now consider to be conventional courtroom practice were not likely to have anticipated Canada's future diversity, let alone the ways in which their rules and processes would affect niqab-wearing Canadian women. "The numerous exceptions to conventional courtroom rules, emphasized by many interveners and highlighted in Justice Abella's judgment, suggest that trial fairness has long been an elastic concept," adapting to real-world circumstances and accommodating new and unanticipated needs.[154]

Allowing N.S. and other women who wear niqab to do so in court could demonstrate recognition and acceptance of minority beliefs and practices, and a meaningful embrace of the multicultural heritage of Canada recognized in Section 27 of the Canadian Charter of Rights and Freedoms. Iris Marion Young identifies the "paradox of experiencing oneself as invisible at the same time that one is marked out and noticed as different" as the central experience of cultural imperialism, the practice of imposing one's cultural norms or preferences over a less powerful other.[155] N.S. ended up testifying without her niqab in a courtroom closed to the public and the prosecution later dropped the sexual assault charges against those accused.[156] As the national conversation that would accompany the later case of Zunera Ishaq would suggest, perhaps Canadians were not interested in a meaningful commitment to their celebrated acceptance of multiculturalism such that fully veiled Muslim women would be afforded the same rights of participation expected by other Canadians.

Many of the interveners at the Supreme Court of Canada framed the case of N.S. as being "about Charter rights, inclusion and access to justice."[157] In a socio-political context where women who wear niqab are often targets of discrimination and acts of hatred because of how they are dressed, the intervenors warned that the Supreme Court of Canada's decision may not only have specific application in the case of N.S. and similar cases to hers, but also broader consequences for public policy with respect to the potential restriction of public engagement and participation for those who wear niqab in public spaces. The decision implicated not only citizenship, but also voting rights and the ability to receive social services.[158]

Both the majority and concurrence focused on a balancing-of-interests analysis, ignoring the information provided by many of the interveners. However, a developing body of case law and social science scholarship suggests that the "inherent unreliability" of demeanor evidence should concern judges who are

153. Id.

154. Id.

155. Iris Young, "Five Faces of Oppression," in *Oppression, Privilege, & Resistance*, 37, 56, (eds. Lisa Heldke and Peg O'Connor (Boston: McGraw Hill, 2004).

156. Alyshah Hasham, "Woman to Remove Niqab to Testify in Toronto Case," *The Toronto Star* (13 Jan. 2014); Sam Pazzano, "Charges Tossed in Case that Brought Niqab Fight to Supreme Court," *Toronto Sun* (17 Jul. 2014), https://perma.cc/U4XL-DDXA.

157. See e.g. Khatib, see note 61, at 3.

158. Id. at 3.

genuinely committed to the effectuation of justice in their courtrooms about its excessive use.[159] Because certain modes of behavior or facial expressions have no static or universal meaning, credibility assessments will almost always reflect cultural biases, demonstrating the operation of cultural bias in the legal system and its barrier to the equitable administration of justice. For example, a commonly-held behavioral assumption in Western societies is that avoiding eye contact is an indicator of dishonesty, but in many Aboriginal communities in Canada, "direct eye contact is seen as rude and gaze aversion is seen as respectful, especially to authority."[160] In a context where courts are considered to be "objective" spaces and, therefore, uncritically replicate patriarchy, reliance on demeanor evidence can be especially detrimental to sexual assault victims as it can unfairly disadvantage complainants "whose attitude and disposition does not accord with fixed conceptions of the appropriate reactions to sexual assault."[161]

Some interveners (equivalent to amici in the United States) suggested that placing an inordinately strong emphasis on demeanor evidence in effect accuses visually impaired judges and lawyers of ineffectiveness because they are unable to view the facial demeanor of the witnesses.[162] "[I]f the court can accept evidence from someone who is deceased or absent through hearsay, are we in a sense giving preference to a dead witness over a witness wearing niqab?"[163] Other acceptable evidence where demeanor is not visible includes the testimony of absent witnesses whose transcripts are read, audio recordings admitted for the truth of their contents, and video statements and CCTV live testimony that are not in high definition.[164] According to Bakht, the use of demeanor 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 and dismiss their allegations as untrue."[165] Since judges rarely state the reasons for their assessment of a witness's credibility based on their demeanor, this opacity makes their pronouncements less subject to accountability and consequently more pernicious.[166] Just as women are likely to be systematically disadvantaged by demeanor evidence, "the quiet hegemony of white supremacy and patriarchy will protect some men's accounts such that his appearance, attitude and disposition work in his favor."[167]

Considerable psychology law research has been devoted to testing assumptions underlying legal decisions and laws.[168] N.S. may have lacked the

159. Bakht, see note 127, at 5.
160. Khatib, see note 61, at 6.
161. Bakht, see note 127, at 7.
162. Khatib, see note 61, at 6.
163. Id.
164. Id. at 11.
165. Bakht, see note 127, at 7.
166. Id.
167. Id.
168. See, e.g. Mark A Costanzo, "Using Forensic Psychology to Teach Basic Psychological Processes: Eyewitness Memory and Lie Detection," 40 *Teaching of Psychology* 156 (2013);

evidence to rebut the presumptions of established courtroom practice at the time, but there has since been specific research into the relationship between face-veiling and people's ability to recognize truth from falsity. Leach et al. examined the notion embedded in court decisions about niqab that a fact-finder's ability to detect deception among witnesses is compromised by the niqab. They found no empirical evidence in the lie detection literature suggesting that a niqab should impair lie detection because it conceals portions of the wearers' face. In fact, they concluded that research suggests that the opposite could occur.[169]

In two studies conducted in Canada and in the Netherlands, the researchers examined participants' lie detection accuracy, response biases, and decision strategies when evaluating the testimony of eyewitnesses in three veiling conditions: niqab, hijab, and without any veil.[170] Participants were more accurate at determining veracity of testimony when witnesses wore niqabs than when witnesses did not wear veils.[171] Discrimination between lie- and truth-tellers was no better than guessing in the latter group.[172] The researchers thus concluded that seeing a person's face does not appear to be necessary for lie detection: "banning the niqab because it interferes with one's ability to determine whether the speaker is lying or telling the truth is not supported by scientific evidence."[173] When the data challenges "common sense," the failures of the court system to adapt its norms in light of new findings significantly undermines its already-tenuous claims to objectivity.

The case of N.S. and her insistence on giving her testimony while wearing niqab put the criminal trial system itself on trial in many ways.[174] Would it be possible to meet conventional standards of justice while adapting traditional courtroom practices to accommodate the reality of a multicultural, pluralistic society and to remain consistent with Charter values of religious freedom and inclusion? In *N.S.*, despite the fact that having witnesses bare their faces was "the accepted norm in Canadian criminal courts," the Court also acknowledged that that "credibility assessments based on demeanor can be unreliable and flat-out wrong."[175] Choosing to ignore this dearth of evidence, and likely influenced by Eurocentric biases and conceptions underlying appropriate courtroom practice, the case of N.S. did not persuade the Court to apply their doctrine of circumventing

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M. Costanzo and D. Krauss, *Forensic and Legal Psychology: Psychological Science Applied to Law* (Worth 2012); Gerardo Salvato, Roy Dings, and Lucia Reuter, "Culture, neuroscience, and law," 5 *Frontiers in Psychology* 1 (2014); Guy Davidov and Maayan Davidov, "How Judges Use Weapons of Influence: The Social Psychology of Courts," 46 *Israel Law Review* 1, 7-24 (2013).

169. Amy-May Leach et al., "Less Is More? Detecting Lies in Veiled Witnesses," 40 *Law and Human Behavior* 401, 402 (2016).
170. Id. at 403.
171. Id. at 405.
172. Id. at 407.
173. Id. at 408.
174. Bhabha, see note 76, at 881.
175. *R. v. N.S.*, 3 S.C.R. 72 at ¶¶ 53, 55.

traditional rules when they have exclusionary effects.[176] As a result, "it remains unclear from the majority judgment what trial fairness means beyond its discomfort with the niqab."[177]

Interveners at the Supreme Court of Canada urged that the onus should be on the defendant to prove that his rights would be impacted by the complainant giving testimony while wearing niqab. They held the court responsible for the protection of N.S.'s Charter rights and interests, rather than requiring her to justify her religious conviction in order to have the right to religious freedom protected. Within the narrower context of religious accommodation, Abella noted the discriminatory impact of denial of accommodation:

> As a result, as the majority notes, complainants who sincerely believe that their religion requires them to wear the niqab in public may choose not to bring charges for crimes they allege have been committed against them, or, more generally, may resist being a witness in someone else's trial. It is worth pointing out as well that where the witness is the accused, she will be unable to give evidence in her own defense. To those affected, this is like hanging a sign over the courtroom door saying "Religious minorities not welcome."[178]

CONCLUSION

Emotionless, strictly academic, and so-called objective arguments about the experience of wearing niqab fail to take into account the personal struggle that a Muslim woman encounters when she chooses to be present in public with hijab of any sort, and especially niqab. For some women, covering in public in the United States or Canada in a way that makes them readily identifiable as Muslim has lent greater significance to the daily decision to cover, a result of the sharp politicization of the image of the Muslim woman in Western societies as variously or simultaneously oppressed, submissive, or terrorist. Laden with Orientalist and imperialist history, the act of unveiling in public is not as simple as rolling up one's sleeves on a hot day, and for some it may even feel like a betrayal of the daily struggle or process of re-commitment demanded by living in a place where anti-Muslim sentiment is increasingly manifesting as physical violence.

Blaming Islam for patriarchy follows a well-known standard of rhetoric that, as Yael Tamir puts it, "leads us to condemn other societies while minimizing the deficiencies of our own."[179] Failing to acknowledge the cultural posture of our courts "obstructs fruitful cross-cultural criticism, and fosters social hypocrisy, perhaps even moral obtuseness and parochialism."[180] If there is a genuine commitment to fair trials and truth-seeking, then the courts must recognize that

176. Bhabha, see note 76, at 881.
177. Id. at 879.
178. *R. v. N. S.*, 3 S.C.R. 72 at ¶ 94 (Abella, dissenting).
179. Yael Tamir, "The Author's Reply to Critics of Her Article 'Hands Off Clitoridectomy,'" *Boston Review*, 3 (Oct.-Nov. 1996).
180. Id.

upholding the status quo inhibits this function. The status quo did not arise in a vacuum, but was and continues to be informed by white male ways of knowing and of understanding the world. Muslims are already a globally targeted community. As Bakht concludes:

> 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.[181]

If Western legal systems are sincerely committed to gender equality, they must ensure that all women, from all cultures and religions, enjoy their rights to education, to work, to participate, and to be represented unimpeded, rather than vilifying and isolating them for their dress. The use of feminist language in populist rhetoric surrounding the cases of Zunera Ishaq and N.S. is not accompanied by any serious commitment to gender equality. By demanding a Muslim woman unveil as a prerequisite for citizenship or the opportunity to seek justice in the case of her own sexual assault, and couching this demand as an issue implicating national values, an "otherwise frankly racist discourse" is thinly camouflaged as the "insurmountability of cultural differences."[182] Court processes must be "subjected to continuous critical scrutiny to ensure that they evolve congruently with advancing knowledge and insight into the unique plight of complainants."[183]

181. Bakht, see note 127, at 11.
182. Mancini, see note 7, at 415.
183. Bakht, see note 127, at 12.