

Whether Angel or Devil: Law's Knowing and Unknowing
of Veiled Muslim Women in the case of R v. N.S.

by

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Abstract

In this thesis, I examine the recent Canadian Supreme Court case of *R v. N.S.*, wherein a woman sought to have her right to wear a face-veil while testifying affirmed by the Court, under her *Charter* rights to freedom of religion. This case involves questions of religious freedom and fair trial rights, the rights and roles of sexual assault victims and witnesses, and the bounds of accommodation and toleration. I argue that the discourse in the case, from legal actors such as counsel for N.S. and the accuseds, Crown attorneys, and the justices of the Court, operates as a lens through which conceptions of identity, otherness, nationhood, and veiled Muslim women become refracted and known. Ultimately, I claim that these forms of knowledge not only construct and reinscribe binary modes of thinking about veiled Muslim women, but also allow for and result in the eliding of N.S.'s subjectivity and agency.

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“Whoever does not thank people, does not thank God”.

Prophet Muhammad ﷺ

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Introduction

It is considered rude, in a Western country, to hide one's face. We wear masks when we want to frighten, when we are in mourning or when we want to conceal our identities. To a Western child — or even an adult — a woman clad from head to toe in black looks like a ghost. Thieves and actors hide their faces in the West; honest people look you straight in the eye.¹

Annie Applebaum, in an editorial in *The Washington Post*

It sometimes seems as if we need Shariah as Westerners have long needed Islam: as a canvas on which to project our ideas of the horrible, and as a foil to make us look good”²

Noah Feldman, in an editorial in the *New York Times*

In recent years, the image of the veiled Muslim woman, represented by the blue burqas of Afghanistan, or the black chadors of Iran, have steadily gained political purchase, given as they are to eliciting visceral reactions which operate as handy tools for states pursuing neo-colonialist projects of expansion.³ In recent years, France, Belgium, and Italy have all passed laws banning the wearing of the niqab⁴ in public, and in

¹ Anne Applebaum, “Veiled Insult”, *The Washington Post*, October 24, 2006, accessed February 6, 2013, <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/23/AR2006102300976.html>.

² Noah Feldman, “Why Shariah”, *The New York Times Magazine*, March 16, 2008, accessed January 11, 2013, http://www.nytimes.com/2008/03/16/magazine/16Shariah-t.html?pagewanted=all&_r=0.

³ Myra Macdonald, “Muslim Women and the Veil”, *Feminist Media Studies* 6, no. 4 (2006): 10. See also Lila Abu-Lughod, “Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others”, *American Anthropologist* 104, no.3 (2002): 783-790 and Kevin J. Ayotte and Mary E. Husain, “Securing Afghan Women: Neocolonialism, Epistemic Violence, and the Rhetoric of the Veil”, *Feminist Formations* 17, no.3 (Fall 2005): 112-133.

⁴ Generally speaking, the word “niqab” refers to a piece of material placed over the lower and upper halves of the face, with a gap left for the eyes and bridge of the nose. Conversely, the hijab is a piece of cloth that covers only the head of the wearer.

Holland, Spain, and Britain, there is significant support for doing the same.⁵ In Canada⁶, anti-veiling legislation has largely been confined to Quebec⁷; in 2010, the province passed Bill 94, which banned the wearing of the niqab for women working in the public sector, as well as for those women interacting with or seeking services from government officials. Quebec has also banned the niqab from polling stations.⁸ In the debates about Bill 94, the niqab (as well as the headscarf), was described by provincial government officials as emblematic of the “submission of women, of regression, and a subjugation of all [Canadian] freedoms”, and as an “ambulatory prison”.⁹ More recently, a regulation introduced by the federal Citizenship and Immigration Minister, Jason Kenney, requires

⁵ Martha C. Nussbaum, *Is Multiculturalism Bad for Women?*, (Princeton: Princeton University Press, 1999), 3, 104. France in particular has undergone protracted debates about the practice of Islamic veiling and how it is thought to negatively impact both the functioning of the secularized public spaces of the state and national identity. See Blandine Chelini-Pointe, “Religion in the Public Sphere: Challenges and Opportunities”, *Brigham Young University Law Review* 3 (2005): 611-628.

⁶ In Canada, surveys indicate that the idea of banning the niqab enjoys wide-spread, bi-partisan support. Survey results from Forum Research showed widespread support for a niqab ban, with 81% of respondents in favour, while a majority of the survey’s 1,160 respondents from every major category – sex, age, region, and political persuasion – agreed. See Teresa Smith, “Niqab Prompts Strong Response”, *Winnipeg Free Press*, December 17, 2011, accessed July 12, 2012, <http://www.winnipegfreepress.com/canada/niqab-prompts-strong-response-135787188.html?device=mobile>.

⁷ In 2009, a niqab-wearing Muslim woman in Quebec was expelled from a government-sponsored French class for refusing to remove her niqab. In response, Quebec Immigration Minister Yolande James said that when receiving public services, a person’s face must be shown. James stated, “[H]ere our values are that we want to see your face”. See “6 Niqab Legal Controversies in Canada”, *CBC News*, December 20, 2012, accessed January 12, 2013, <http://www.cbc.ca/news/canada/story/2012/12/19/f-niqab-list.html>.

⁸ “6 Niqab Legal Controversies in Canada”, *CBC News*, December 20, 2012, accessed January 12, 2013, <http://www.cbc.ca/news/canada/story/2012/12/19/f-niqab-list.html>.

⁹ Charlie Gillis and Martin Patriquin, “About Face”, *Macleans*, April 2010, accessed February 7, 2013), <http://www2.macleans.ca/2010/04/07/about-face/>.

Muslim women who wear a niqab and who are seeking citizenship to remove their face-covering while taking the oath of citizenship.¹⁰

Largely negative conceptions about Muslim veiling practices not only contribute to such legal censure, but also “exercise discursive power over perceptions of Islam and Muslim women”.¹¹ As Sherene Razack notes, “a message of cultural inferiority and dysfunction is so widely disseminated that when we in the North see a veiled woman we can only retrieve from our store of information that she is a victim of her patriarchal culture or religion”.¹² The manner with which forms of Islamic veiling, especially the niqab, are problematized and regulated is an indication of their potent ability to “evoke mixed emotions of fear, hostility, derision, curiosity, and fascination”.¹³ Research has shown that post-9/11, representations of Muslim veiling practices have shifted from framing the veil as “an object of mystique, exoticism and eroticism [to a] xenophobic, more specifically Islamophobic, gaze through which the veil is seen as a highly visible sign of despised difference”.¹⁴ Nora Gresch and Birgit Sauer note that, in the European context, debates around veiling

[are] used to construct an imagined community, [and] a national imaginary and to draw and reconfigure boundaries of belonging: the body practice of covering symbolizes and defines who belongs and who does not belong, who is a ‘normal’

¹⁰ Laura Payton, “Face Veils Banned for Citizenship Oath, *CBC News*, December 12, 2011, accessed July 13, 2012, <http://www.cbc.ca/news/politics/story/2011/12/12/pol-kenney-citizenship-rules.html>.

¹¹ *Ibid* 19.

¹² Sherene H. Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics*, (Toronto: University of Toronto Press, 2007), 7.

¹³ Macdonald, “Muslim Women and the Veil”, 8.

¹⁴ Allison Donnell, “Visibility, Violence and Voice? Attitudes to Veiling post-11 September”, in *Veil: Veiling, Representation and Contemporary Art*, ed. David A. Bailey and Gilane Tawadros (London: Institute of International Visual Arts, 2003), 123. It should be noted that in this passage, Donnell is referring specifically to the headscarf, but, conceivably, the relevance of her assertions only increase if applied to the niqab.

citizen and who is not – and hence who has access to rights and who has not. Exclusive citizenship argumentations interpret publicly visible religious symbols and the body of covered Muslim women as signs of non-belonging which legitimize exclusion.¹⁵

Generally speaking, it is possible to identify key ideas, informed by specific and implicit modes of knowing veiled Muslim women, which are used to argue against the presence of specifically the niqab in Western societies.¹⁶ Among them are the notions that it symbolizes the oppression of Muslim women (veiled Muslim women are in need of rescue);¹⁷ it is seen as a physical symbol of a refusal to integrate into society (veiled Muslim women are irascible and troublesome bodies, who embody and express a normativity that is contrary to the norms of the larger polity);¹⁸ the niqab is also constructed as being repulsive and eliciting a visceral reaction (veiled Muslim women are consummate 'others' who give rise to anxieties);¹⁹ similarly, the niqab is seen as an issue

¹⁵ Nora Gresch and Birgit Sauer, “Politics, Religion and Gender: Governing Muslim Body Covering in Europe”, *Antropologija*, 12, no.2 (2012): 179.

¹⁶ Natasha Bakht, “Veiled Objections: Facing Public Opposition to the Niqab”, in (ed.) Lori Beaman, *Reasonable Accommodation: Managing Religious Diversity*, (Vancouver: UBC Press, 2012), 75.

¹⁷ See Susan Moller Okin, “Is Multiculturalism Bad for Women?” in *Is Multiculturalism Bad for Women?*, ed. Joshua Cohen, Matthew Howard, and Martha C. Nussbaum (Princeton, NJ: Princeton University Press, 1999), 7-27. Mohja Kahf has shown that the dominant narratives within Western discourse about Muslim women, from the eighteenth century until today, “basically states, often in quite sophisticated ways, that the Muslim woman is being innately oppressed; it produces Muslim women who affirm this statement by being either submissive nonentities or rebellious renegades – rebellious against their own Islamic world, that is, and conforming to Western gender roles”. See Mohja Kahf, *Western Representations of Muslim Women: From Termagant to Odalisque*, (Austin: University of Texas Press, 1999), 177.

¹⁸ Jasmin Zine traces the “politics of knowledge production as it relates to Muslim women” and notes that “Muslim women’s bodies are being positioned upon the geopolitical stage not as actors in their own right, but as foils for modernity, civilization and freedom”. See Jasmin Zine, “Muslim Women and Politics of Representation”, *The American Journal of Islamic Social Sciences* 19, no.4 (2002): 2.

¹⁹ See Martha C. Nussbaum, *The New Religious Intolerance: Overcoming the Politics of Fear*, (Cambridge: Belknap Press, 2012).

of identity related to security considerations (veiled Muslim women's identities are erased – they cannot safely be identified *as anyone*)²⁰; finally, the niqab cuts off communication and social interaction (veiled Muslim women are muted and exist somewhere outside of social and communicative space).²¹ These tropes are heavily influenced by a meta-narrative which constructs Muslim women as victimized and as lacking in agency.²²

“The expository tenets of the narrative” rely mainly on the underlying assumption that “Islam [is] innately and immutably oppressive to women, [and] that the veil epitomize[s] that oppression”.²³

Fixations over the dress of Muslim women, especially of those living in Western states, seem to be animated by ways of knowing these women in a manner which allows for a range of fears and anxieties to become projected onto them²⁴; these women, being readily identifiable, become sites upon which these anxieties are named and exercised; in the process of being both the object and subject of anxiety and fear, they become and remain known and knowable. While this working-out of anxieties and fears may also be linked to the relatively recent increase in immigration by groups from Muslim-majority countries to Western nations, pre-dating these population shifts is the presence of a

²⁰ Bakht, “Veiled Objections: Facing Public Opposition to the Niqab”, 81

²¹ Ibid. 75.

²² Mohja Kahf, *Western Representations of Muslim Women*, 1.

²³ Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven, Yale University Press, 1992), as cited in Kahf, *Western Representations of Muslim Women*, 1.

²⁴This trend is not limited to women’s dress, nor to Europe. See BBC News, “Swiss Voters Back Ban on Minarets”, November 29, 2009, accessed December 12, 2012, <http://news.bbc.co.uk/2/hi/8385069.stm>, and Michael Barbaro, “Debate Heats up about Mosque Near Ground Zero”, *The New York Times*, July 30, 2010, accessed February 4, 2013, <http://www.nytimes.com/2010/07/31/nyregion/31mosque.html?pagewanted=all>.

consistent, long-standing discourse around the idea of the veiled Muslim woman²⁵, to the extent that geopolitical events merely serve to reanimate and re-inscribe specific ways of knowing and speaking about her. Under these circumstances, veiled Muslim women are more readily susceptible to becoming targets of regulations which seek to manage and correct them.²⁶

The recent Supreme Court of Canada case of *R. v. N.S.*²⁷ captures many of the tensions and anxieties surrounding questions about the ‘place’ of the niqab in Canadian society. The case, in brief, involves a woman claiming to be a victim of familial sexual assault, seeking to have her right to testify during trial while wearing her face-veil affirmed by the Supreme Court. In this thesis, I contend that the discourse in the N.S. case, emerging from various actors such as legal counsel on both sides, court-approved interveners, and Supreme Court Justices, provides a compelling glimpse into the ways knowledge is produced about veiled Muslim women. Appreciating these fascinating and sometimes surprising maneuvers, I argue, is vital to understanding how and on what terms such knowledge is created and/or sustained, as well as how the claims of N.S. are

²⁵ I use terms such as “veiled Muslim women” and “niqab-wearing women” somewhat interchangeably throughout, with an understanding that the latter necessarily implies the former. I appreciate that referring to N.S. as a “niqab-wearing woman” may raise concerns about reproducing a hierarchical construction of her identity (i.e. she is first and foremost a “niqab-wearer”). However, I employ this term partly for stylistic reasons, and also in order to emphasize just *who* everyone is speaking and creating knowledge about, while acknowledging that N.S.’s niqab is not necessarily her primary or even most relevant identity.

²⁶ Liz Fekete, in reference to the European context, notes that these measures “include the recasting of citizenship laws according to security considerations; the introduction of compulsory language and civics tests for citizenship applicants, codes of conduct for the trustees of mosques, (in addition to the) cultural code of conduct for Muslim girls and women.” See Liz Fekete, “Anti-Muslim Racism and the European Security State”, *Race and Class* 46, no.1 (2004): 4

²⁷ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726.

shaped, understood, and ultimately, responded to. I contend that a closer, contextualized reading of the discourses at play in the case also reveal the intriguing ways in which both N.S. and her claim become shifting, malleable landscapes, shaped and re-shaped by productive and authoritative forms of “knowing” and “un-knowing”, through attempts by various actors to come to grips with complex, intersecting, and overlapping issues.

Through asking specific questions of the court documents, I seek to understand who N.S. is thought to be and who she becomes, as she is interchangeably and simultaneously a concrete subject with a concrete legal claim and an amorphous site of interrogation onto which different ways of knowing her are brought to bear and the figure of the veiled Muslim women is constructed. I seek to uncover the various forms of knowledge which are produced about N.S., her multiple and intersecting identities, and her niqab, as well how these relate to ideas of tradition, nationhood, and national values. Additionally, I explore who is accepted as an authority and/or expert in the production of this knowledge. I focus on the efforts of certain legal actors to disrupt dominant ways of knowing N.S. in favour of a more nuanced understanding of the context surrounding her case, and the ways in which these efforts are contended with by other actors and the various justices of the Supreme Court, both in the majority and concurring decisions and the dissent. Ultimately, I make the claim that the central problem which emerges from this case is to be found in the *kind* of knowledge (both empirical and normative) which is both affirmed and produced through a variety of lenses that all fixate on N.S.'s niqab as the symbolic and physical representation of problematic “otherness”: these forms of knowing not only reaffirm binary modes of thinking which reinscribe tropes about “the

veiled Muslim woman”, but they also allow for and result in the eliding of N.S.’s subjectivity and agency.

I. Structure

In my first chapter, I describe the N.S. case and its journey to the Supreme Court of Canada. I then explore, through a survey of the pertinent literature and research, the historical discursive framing of Muslims in Western sources, with a specific emphasis on the framing of veiled Muslim women and the modes of knowledge which emerge and endure about them; in doing so, I wish to carve out the epistemological space these women have occupied. I explore common framings of veiled Muslim women, and show how these constructions depend on and affirm knowing them as “alien”, “problematic”, and “other”. These representations not only work to create, frame, and contextualize veiled Muslim women, but also operate as potent instruments of productive knowledge related to this group. They also serve as examples of *how* knowledge is brought to bear on the figure of the veiled Muslim woman. Providing such a context also provides a framework within which N.S.’s encounter with the courts can be understood.

In Chapter II, I examine the negotiation and construction of N.S.’s identit(ies) by the various legal actors involved in the case. I ask, how are N.S.’s intersecting identities navigated by legal actors? At what point, and why, are certain identities brought to the fore, while others recede? How malleable do N.S.’s identities prove to be? How and what kind of knowledge is produced about certain identities? Where, and for what conceivable reasons, do we encounter *silence* with regards to issues of identity? What is un-known (or un-knowable) about N.S.’s identities? I also explore the role

intersectionality plays in the (de)construction of and knowledge about N.S.'s identit(ies). I critique the use of "intersectional lenses" by legal actors by considering the extent to which what emerges from its use works to reinforce dominant modes of knowing and elide over other important considerations of identity, as well as to construct N.S as affixed permanently to the category of a troublesome "*other*". I make the claim that the historical construction of Muslim women as bodies which bear the mark of concrete "otherness" endures and comes to shape the ways in which N.S.'s multiple, intersecting identities are known, un-known, and contended with. I also demonstrate how certain forms of knowing result in legal actors not only ignoring other facets of her identity, but also in the re-inscription of tropes of oppression. Similarly, silence and absence with regards to N.S.'s identit(es) works to do the same, while also resulting in the discursive assertion of dominance by some legal actors.

Chapter III is concerned with understanding how N.S.'s physical veil — her niqab — is framed and navigated by legal actors, both figuratively and practically. How is the notion of (in)visibility with relation to the niqab shaped by different actors? Is (in)visibility construed as a functional imperative of social and communicative space, as a measure of personhood, or as a barometer of the credibility of legal claims (or as a combination thereof)? Does "seeing" become conflated with "hearing", and if so, how and why? What do different understandings of the niqab tell us (or do not tell us) about "faces" in general, and specifically, about the faces of niqab-wearing women? What does it mean to be "visible" for some legal actors, and what does it mean to be "invisible"?

In Chapter IV, I trouble the concept of "demeanour" as it used in this case, and examine how this concept becomes linked to the perceived ability or *dis*-ability of N.S. to

act (or behave) in certain ways. How and why are concepts of demeanour shaped in relation to the specific circumstances of the case? How does demeanour work to produce ideas about who can be known, heard, or seen? What is the value assigned to demeanour? Who or what type of knowledge is accepted as authority in relation to demeanour evidence? I argue the discourse surrounding the concept of demeanour, while seemingly a functionalist exploration of how demeanour physically works and/or may be “read”, upon closer analysis uncovers how speaking about demeanour works to produce subtle and productive forms of knowledge about N.S. Through differing ideas about demeanour, legal actors make pronouncements about nationhood and community, as well as underlying values and virtues; in the process, they also produce knowledge about N.S.’s place (or dis-placement) in relation to them. I contend that while some legal actors find that national values can encompass N.S. and her claims, others use them to mark her as strange and as other, and in the process, push her further outside the boundaries of community and nationhood.

I focus on the above three aspects — identity, the niqab, and demeanour — as a result of my reading and analysis of all of the formal, institutionalized, and legal “talk” which occurred in this case. I approached these discourses with an eye towards extracting information about what was both explicitly and implicitly stated by legal actors *about* N.S.; in other words, I chose to concentrate on those elements of discourse which worked to frame and construct understandings of N.S. not merely as a claim-maker, but also as a person and subject. In moving through the questions and considerations raised in my examination, it is my intention that each chapter will build upon the preceding one, and what is learned from one chapter will re-emerge in a discussion in later ones, so that

the net result is a layered, interconnected analysis of the case which reflects the layered, interconnected complexities at play.

Chapter I: Setting the Stage - The N.S. Case and Research Approach

I. The Case

The *R. v. N.S.* case, after working its way through the Ontario Superior Court and the Ontario Court of Appeal, was argued before the Supreme Court of Canada in December of 2011. According to the various legal actors involved, the following information is agreed upon as representing the “facts” of the case.¹ In May of 2007, N.S., a 32- year old woman, asked the Toronto police to reopen an investigation into what she alleged was repeated and prolonged sexual abuse suffered from the age of six onwards, at the hands of her uncle and cousin.² The case originates from 1992, when N.S. first complained to a teacher about this abuse. While the police initially opened a case file into the matter, at the insistence of her father the matter was not pursued. N.S. approached the police again in 2007, asserting that her father had mishandled the case and that she wished to pursue charges against her family members.³ Following an investigation, her uncle and cousin were charged with having sexual intercourse with a child under 14, gross indecency, indecent assault, and sexual assault.⁴

Initially, when the case came to trial, the defendants did not indicate that they had any issue with regards to N.S. wearing a face-veil while testifying. However, during the preliminary inquiry stage⁵, they raised an objection to her doing so. Counsel for the

¹ It is perhaps useful to note here that all of the legal actors in the case, from the defendants, to interveners and judges on all levels of the court system, agree on the facts of the case as set out by N.S.’s attorney.

² *R v. N.S.*, 2009 O.J. 1766, (Factum of the Respondent Crown at para. 3).

³ *R v. N.S.*, 2009 O.J. 1766, at para. 80.

⁴ *R v. N.S.*, 2009 O.J. 1766, (Factum of the Respondent Crown at para. 3).

⁵ Preliminary inquiries are conducted with the intention of streamlining the process of a trial. The presiding judge, as well as counsel for the accused and the Crown, reviews the evidence, while witnesses are also called; inquiries into evidence and/or the questioning

accuseds argued that this would violate their clients' *Charter* and common law rights to full answer and defense, as well as impede their own ability to effectively cross-examine the complainant.⁶

At the preliminary inquiry court, presided over by Justice Weisman, N.S. was informed that the judge wished to question her about her refusal to remove her niqab, in order to ascertain the sincerity and strength of her beliefs. Justice Weisman stressed that this was an informal questioning, and N.S. was allowed to testify at this stage with her face-veil on (although her counsel was not present). When asked how strong her position was, N.S. replied:

It is a respect issue, one of modesty and one of — in Islam we call honour. The other thing is — the accuseds in the case are from the same community, they all go to the same place of worship as my husband as well and I have had this veil on for about five years now and it is — my face does not make any special, you know, like I know that — you know, there's body language, there's eye contact. I mean, I can look directly at the defence counsel, that is not a problem. It is part of me and showing my face to — and it is also about — the religious reason is not to show your face to men that you are able to marry. It is to conceal the beauty of a woman and, you know, we are in a courtroom full of men and one of the accused is not a direct family member. The other accused is a direct family member and I, you know, I would feel a lot more comfortable if I didn't have to, you know, reveal my face. You know, just considering the nature of the case and the nature of the allegations and I think, you know, my face is not going to show any signs of - it is not going to help, it really won't.⁷

of witnesses are narrowed to include only issues that will be addressed at trial. Arguments which are found to have no evidentiary basis can be excluded from the actual trial.

⁶ See *R v. N.S.*, 2010 ONCA 670, (Factum of the Court Intervener Women's Legal Education and Action Fund at para 13). Section 11 (d) under the *Canadian Charter of Rights and Freedoms*, reads "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." "Canadian Charter of Rights and Freedoms", Justice Laws Website, accessed July 12, 2012, <http://laws-lois.justice.gc.ca/eng/Const/page-15.html#h-39>.

⁷ *R.v. N.S.*, 2009 O.J. 1766, at para 29. It is important to note that the above excerpt is a portion of the only testimony given by N.S., and that it was conducted last-minute, without the presence of her counsel, and on a purportedly informal basis. Regardless,

In considering N.S.'s claim, Justice Weisman stated that he took into account the strength of her religious belief, and, consequently, how central the constitutional right to religious freedom was to her claim. He also noted that he had become aware of the fact that N.S. possessed a driver's licence with a photograph of her unveiled face on it, and that the act of posing for a licence photograph, which could subsequently be shown to males, was not consistent with a strong belief about not showing her face.⁸ With these factors in mind, Justice Weisman's final decision was that N.S. would have to remove her niqab, as her belief was apparently not very strong, nor was it immune to exceptions, and her insistence on wearing it seemed to be based more so on comfort than on any other factors.⁹

The decision of the preliminary court was appealed to the Ontario Superior Court of Justice, where N.S. sought remedy under sec. 24 (1) of the *Canadian Charter of Rights of Freedoms*.¹⁰ Justice Marrocco, the presiding judge in this court, took into account a number of factors when deciding the matter, including whether the preliminary judge had

what she stated at this stage served as an important basis for the contextualization her freedom of religion claim, for both the legal actors involved as well as at all levels of the courts.

⁸ In oral arguments before the Supreme Court, N.S.'s lawyer, David Butt, mentions that she is employed as a bus driver. This fact never emerges before this later stage. However, N.S.'s possession of a licence, and her "willingness" to have her photograph taken for it, may have less to do with the strength of her religious belief, and more so with a matter of economic necessity. See *R. v. N.S.*, 2011 SCC No. 33989, (Transcript of Oral Arguments, at 27, line 4-5).

⁹ *Ibid.*, at paras 33, 34.

¹⁰ Section 24. (1) of the Charter states "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances". See "Constitution Acts, 1867 to 1982", Government of Canada: Justice Laws Website, accessed July 12, 2012, <http://laws-lois.justice.gc.ca/eng/charter/page-2.html>.

jurisdiction to make the initial order, and the amount of weight that should be given to demeanor evidence when evaluating witnesses.¹¹ He also noted that in deciding this case, consideration was given to the multicultural context in which N.S.'s claim takes place. Marrocco stated that, while multiculturalism policy and the realities of modern Canadian society demand that "we cannot have a group within our society which is invisible to the criminal justice system due to its beliefs", this concern is to be balanced against the need to avoid "accommodations, which, for a minority of Canadians, increase the number of identity markers and lead to self-selected segregation".¹²

Justice Marrocco quashed the order of removal set by Justice Weisman; in justifying his position, he pointed to the fact that despite Weisman's assurance to N.S. that he would be questioning her on an "informal basis", he proceeded to base his decision on the answers she provided during this questioning.¹³ He also dismissed the findings of Justice Weisman about the "strength" of N.S.'s beliefs. Marrocco noted that unwarranted weight was given to the driver's licence photo of N.S., as further inquiry into her religious beliefs could have shown that there are limits and exceptions to her beliefs which do not necessarily prove her to be insincere or hypocritical. A failure to properly ascertain the limits and expectations of her beliefs may have also, in his words, "resulted in the preliminary Justice mischaracterizing the Applicant's evidence as an assertion that wearing the veil was a matter of comfort".¹⁴ However, he did not go so far as to establish N.S.'s right to wear her niqab while testifying. Instead, as an extension of

¹¹ Ibid, at paras 77 and 83, 108-116,

¹² Ibid, at para 141.

¹³ Ibid, at paras 82, 86.

¹⁴ Ibid, at paras 98, 100.

the Superior Court's supervisory jurisdiction, Justice Marrocco directed the matter back to the preliminary inquiry stage, and also outlined a series of procedural tests which would supposedly serve the purpose of ascertaining N.S.'s ability to give testimony as a witness while wearing her niqab.¹⁵

The decision of the Superior Court was appealed by N.S., and the matter was sent to the Ontario Court of Appeal. The Court of Appeal, in a decision written by Justice Doherty, upheld the quashing of the preliminary judge's order, but also did not go so far as to establish N.S.'s unequivocal right to wear her niqab while testifying. Instead, the Court of Appeal, after fashioning a procedural test which would purportedly help preliminary judges investigate the matter and determine whether or not a niqab could be

¹⁵ The procedure he described would take the following form: 1) an initial hearing, at the preliminary level, would consist of a *voir dire* as to whether N.S.'s relevant religious beliefs are valid and sincerely-held. During this stage, the burden would be on N.S. to prove that her Charter right to freedom of religion had been triggered - if she failed to do so, the preliminary inquiry court would have the authority to have her remove her niqab. 2) If she successfully established the sincerity of her beliefs, "to the satisfaction of the court", a second hearing would then be held to ascertain whether the accused's right to fair trial was protected, despite N.S.'s wearing of a niqab. If, after questioning and cross-examination, it is apparent to the preliminary inquiry judge that the accused's right to fair trial has been infringed, he or she may rule that N.S.'s evidence not be admitted. 3) If the second stage has assured that the right to fair trial for the accused has not been infringed upon, the preliminary inquiry may proceed, with N.S. subject to being examined and cross-examined as to the details of her allegations. 4) Assuming that the previous stages of the preliminary inquiry lead to a committal to trial, the process would then begin anew, this time on a pre-trial basis. There would be another *voir dire*, conducted by the judge, to again determine the sincerity and voluntariness of her religious beliefs, during which she may be questioned about how she practices her faith, the level of sincerity she has with regards to a practice, and whether her religious practices demand specific conduct. 5) Assuming that religious sincerity has been established, N.S. would then be subject to yet another pre-trial *voir dire*, where she will again be examined by both Crown and defence attorneys. During this stage, the court will again make a decision as to whether she may keep her niqab on during testimony. 6) If the court finds that she may testify while wearing the niqab, her evidence will be heard. See *R v. N.S.*, 2009 O.J. 1766, paras. 89, 91, 100-07, 143.

worn by witnesses, also sent the matter back to the preliminary stage.¹⁶ N.S. also appealed this ruling to the Supreme Court of Canada for a final decision. She sought a remedy before the Supreme Court under the *Canadian Charter of Rights and Freedoms* sec. 2 (a). Section 2 of the *Charter* lists what are called “fundamental freedoms”. They include freedom of religion, freedom of conscience, freedom of expression, freedom of belief, freedom of peaceful assembly and freedom of association. Section 2 (a) specifically pertains to freedom of conscience and religion. These rights are not absolute; section 1 of the *Charter* states “the *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. This caveat allows for the federal or provincial governments to place limited restrictions on the rights and freedoms set out by the *Charter*. Additionally, the notwithstanding clause of the *Charter* allows for the possibility of the temporary nullification or suspension of these rights.¹⁷

II. Framing the Case

N.S. and her lawyer, David Butt, crafted an argument in favour of allowing her to wear the niqab that involved multiple, intersecting claims. In arguments before both the lower and Supreme Courts, Butt stated that N.S.'s religious practices should not be

¹⁶ *R. v. N.S.*, 2010 ONCA, at para. 670.

¹⁷ “Constitution Acts, 1867 to 1992”, Government of Canada: Justice Laws Website, accessed July 12, 2012, <http://laws-lois.justice.gc.ca/eng/charter/FullText.html>, and “Charter of Rights and Freedoms: An Overview”, The Canadian Bar Association: British Columbia Branch, accessed July 12, 2012, http://www.cba.org/bc/public_media/rights/230.aspx.

subject to intensive questioning, as her freedom of religion rights are established and could not be shown to conflict substantially with the rights of the defendants. In addition, Butt argued that, “[N.S.] should be entitled to wear her niqab out of respect for her dignity and vulnerable position as a sex assault complainant, and because the veil does not impair a full assessment of her reliability”.¹⁸ Building on this latter point, Butt also argued the unreliability, unpredictability, and culturally contingent nature of demeanour evidence. He also placed N.S.'s legal claim within the context of what he called “3 elephants in the room”. These “elephants” are: N.S.'s marginalized identit(ies), negative perceptions related to the niqab, and a legal culture of mistreating sexual assault witnesses.¹⁹ Intervenors on the side of N.S. followed these lines of reasoning, and augmented his arguments in various ways: for example, by articulating the need for an intersectional, context-sensitive lens, and/or a rights-based approach that emphasizes freedom of religion for marginalized groups. The Crown largely took the middle ground and supported the findings of the Court of Appeal, while also advocating for a contextual, case-by-case analysis.²⁰ The accuseds and their supporting intervenors, on the other hand, framed the case as being a question of protecting the rights of defendants to their full answer and defence rights, as well as a matter of protecting the sanctity of the court process and the Canadian values which underlie it. They also attempted to undercut N.S.'s claim to religious freedom, by calling into question whether she had successfully established a claim that triggered this right.

¹⁸ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Applicant at para. 1).

¹⁹ *Ibid.*, at paras. 48-65).

²⁰ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Respondent Crown at para. 8).

In December 2012, the Supreme Court of Canada handed down its decision. In a rare 4-2-1 split, the Court dismissed N.S.'s appeal; while the Justices found that, under certain circumstances, women could wear a face veil when testifying, an unequivocal right to do so could not be established. In effect, the decision, which largely affirmed the rulings of the lower courts, meant that the matter was to be remitted back to the preliminary inquiry stage, wherein a four-step analysis designed by the Court should be used to measure "all factors and determine whether, in the case at hand, the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so."²¹ The majority ruling, written by Chief Justice Beverley McLachlin, directed trial judges to ask four questions: would requiring the witness to remove the niqab while testifying interfere with her religious freedom? Would permitting the witness to wear the niqab while testifying create a serious risk to trial fairness? Is there a way to accommodate both rights and avoid the conflict between them? And, finally, if no accommodation is possible, do the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so?²²

Justices Marshall Rothstein and Louis LeBel, while aligning with the majority ruling, indicated in their concurring decision that they were strongly in favour of a clear rule *against* witnesses being able to wear a niqab while testifying. Such a rule, the Justices argued, would be "consistent with the tradition that justice is public and open to all in our democratic society."²³ The lone dissent came from Justice Rosalie Abella, who argued in favour of allowing witnesses to wear a niqab, with the one caveat that there be

²¹ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 8.

²² *Ibid.*, at para. 9.

²³ *Ibid.*, at para. 78.

no pressing or relevant need to establish their identity.²⁴ The decision of the Court was far from decisive, and the issue of witnesses wearing the niqab while testifying remains a legal work-in-progress. Many questions remain about the workability of the Court's procedural framework, and the finding of the preliminary judge will set a precedent going forward for how niqabs in Canadian courtrooms will be treated.

From a purely legalistic perspective, and on its surface, the *R. v. N.S.* case is one of competing *Charter* rights, wherein freedom of religion and the right to a fair trial collide with one another and require the formulation of a legal procedure which would allow for their proper balancing. However, this case is not simply a matter of law or *Charter* rights: for many, *R. v. N.S.* is a case which encapsulates a perfect storm of a range of social and political issues, from the “threat” of religious fundamentalism and “non-liberal”²⁵ beliefs in liberal states, to the boundaries of tolerance in increasingly diverse societies, as well as minority rights and the question of whether, and how, accommodation towards minorities should be measured and extended. For others, the case is significant because it raises important questions about law's ability to protect

²⁴ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at paras. 82-3.

²⁵ I am using the term “non-liberal” as defined by Monique Deveaux. She uses it to refer to “traditional groups adhering to practices that reflect and reinforce conservative cultural (often religious) norms, roles, and worldviews. (For example), the customs of traditional groups are non-liberal (if) they stipulate strict social hierarchies and very pronounced sex-role differentiation”. See Monique Deveaux, “A Deliberative Approach to Conflicts of Culture”, *Political Theory* 31, no. 6 (December 2003): 803. The characterization of Muslims as “non-liberal” is reflected in, for instance, certain strands of feminist theory, aimed at “highlight(ing) the prima facie tensions between a commitment to gender equality and many religious practices and traditions”. See Andrea Baumeister, “The Use of ‘Public Reason’ by Religious and Secular Citizens: Limitations of Habermas’ Conception of the Role of Religion in the Public Realm”, *Constellations* 18, no. 2 (June 2011): 222

sexual assault complainants/witnesses and ensure access to marginalized citizens and those who are significantly impacted by inequality.²⁶

III. Literature Review

My analysis of the N.S. case depends on research which is located at the cross-section of literatures related to Orientalist critiques, post-colonial studies, and the discursive representation of Muslims; specifically, I look at research relating to Muslim women and the veil in Western discourses, in addition to research pertaining to law and the production of knowledge and the relationship between national imaginaries and conceptions of “others”. I draw on literature from these areas because they allow me to orient N.S. as both an abstract and embodied subject, and to establish that N.S. comes before the court within a pre-existing discursive framework that shapes and produces knowledge about Muslims and, specifically, veiled Muslim women, while also providing a backdrop to, and an explanation of, the ways various legal actors come to know her.

Post-colonial theorist Edward Said, in his work *Orientalism*, critiques the ways in which Western-rooted knowledge produced a set of knowledge about “the Orient” and its peoples (Arabs/Muslims²⁷) which allowed for them to become both constructed and managed. Said describes this knowledge — Orientalism — as a system which contains within it guidelines for the distillation of the idea of the Orient,²⁸ the boundaries of which

²⁶ See Natasha Bakht, “NS and Women's Equality”, Blogging for Women's Equality, accessed January 26, 2013, <http://www.bloggingforequality.ca/2013/01/ns-and-womens-equality.html>.

²⁷ I am aware of the fact that these descriptors are in no way mutually inclusive. I combine them only to emphasize the manner in which they are often, consciously or not, conflated by Orientalist thought.

²⁸ Edward Said, *Orientalism*, (Middlesex: Penguin Press, 1978), 6. See also Edward Said, *Culture and Imperialism* (New York: Alfred A. Knopf, 1993), and *Covering Islam:*

work to create a “set of constraints upon and limitations of thought” pertaining to the Arab/Muslim.²⁹ To the Orientalist, while the Orient is an *idea*³⁰, it is neither neutral nor is it objective; “by definition it is a partial and partisan subject.”³¹ Orientalism is also a method of *discourse* that produces ways of viewing/knowing Eastern subjects in multiple, monolithic ways: politically, culturally, and, most relevantly for the purpose of this thesis, ideologically and imaginatively.³² “These representations [are] structured largely according to certain discursive formats which developed over time, but which accrued truth-value to themselves through usage and familiarity.”³³

Said and other post-colonial theorists³⁴ note that Western Orientalist sources have traditionally been able to *produce* knowledge about Muslims³⁵; with this constructive power comes the ability to mould and project meaning onto identities believed to embody

How the Media and the Experts Determine How We See the Rest of the World, (New York: Random House, 1997).

²⁹ Ibid, 4.

³⁰ Ibid, 5.

³¹ Ziauddin Sardar, *Orientalism*, (Philadelphia: Open University Press, 1999), vii.

³² Ibid, 40.

³³ Sara Mills, *Discourse: The New Critical Idiom*, (New York: Routledge, 1997), 107. See also Sardar, *Orientalism*. Sardar focuses on the aspect of desire which he believes underpins the discursive relationship between the Occident and Orient. He states that “orientalist scholarship was – is – the scholarship of the politics of desires: it codifies western desires into academic disciplines and then projects these desires onto its study of the Orient”. Sardar, *Orientalism*, 5.

³⁴ See Talal Asad, *Genealogies of Religion: Disciplines and Reasons of Power in Christianity and Islam*, (Baltimore: The John Hopkins University Press, 1993) and Ziauddin Sardar, *Orientalism*.

³⁵ See Talal Asad, who problematizes *how* Western conceptualizations of religion, specifically Islam, come about, and how they come to be projected onto Muslim subjects. Asad argues that Western knowledge and discourse created a concept of ‘religion’ within the context of Western mores, and also created a concept of “Islam” within this same context. Talal Asad, *Genealogies of Religion*, and Asad, “The Idea of an Anthropology of Islam”, *Occasional Paper Series*, Centre for Contemporary Arab Studies, Georgetown University, March 1986.

difference and foreignness.³⁶ Creating and displaying knowledge about something implies that one is *capable* of doing so in the first place; in other words, forming “knowledge means rising above immediacy, beyond self, into the foreign and distant”.³⁷ Knowledge thus may become a form of domination in the hands of the powerful³⁸, as it operates as a tool by which to create subjects which are and remain ontologically stable in the mind of the knower. With this understanding, the idea of the “Muslim” is mediated and contingent, while also remaining largely invisible until animated by forces which both create and enliven her as a knowable subject. This form of subjectivity “reinforces an important epistemological cornerstone of imperialism: the colonised possess a series of knowable characteristics and can be studied, known, and managed accordingly.”³⁹ Said’s work⁴⁰ also focuses in large part on the role of discourse and discursive structures

³⁶ Said, *Orientalism*, 44.

³⁷ Ibid, 32.

³⁸ Theo Goldberg has noted that “racialized power is primarily conceived through conceptual orders like the Primitive, the Third World, and the Underclass [and that] power is here expressed, managed, and extended in and through representing racial Others to themselves and the world”. See Theo Goldberg, *Racist Culture: Philosophy and the Politics of Meaning*, (Massachusetts: Blackwell Publishers, 1993), 174.

³⁹ Sherene H. Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms*, (Toronto: University of Toronto Press, 1998), 10.

⁴⁰ Said’s work, while remaining a cornerstone of the field of post-colonial studies, has been subject to a number of criticisms, revolving mainly around what seems to be the creation of essentialist, monolithic characterizations of the Occident (and, in some cases, the Orient), as well as a homogenization of the kinds of discourses that emerged about this subject. See Mills, *Discourse*, 119. Peter Hulme also emphasizes that there was no single colonial discourse; rather, during the time of European expansion and imperialism, there existed a wide array of discourses, some of which did not reify the Occident nor denigrate the Orient. See Peter Hulme, *Colonial Encounters: Europe and the Native Caribbean 1492–1797*, (London: Methuen, 1986) Similarly, Dennis Porter chooses to focus on the disunity and disjunctions within colonial discourses, and indicates that they can be read as examples of counter-hegemony, thus calling into question what is often suggested by Said’s work: that there is a static and oppressive set of colonial discourses about the Orient which can be identified in history and traced through to the present day. See Dennis Porter, “Orientalism and its Problems”, in *Colonial Discourse and Post-*

which “informed the way knowledge was produced, so that seemingly ‘objective’ statements were, in fact, produced within a context of evaluation and denigration.”⁴¹

Homi Bhabha, in the same vein as Said, argues that “the objective of colonial discourse is to construe the colonised as a population of degenerate types on the basis of racial origin, in order to justify conquest and to establish systems of administration and instruction.”⁴² However, he departs from Said in noting that the work of Orientalists is never quite realized, as in the process of “othering”, the Orientalist actually draws this “other” *in* by producing knowledge about them; in other words, “colonial discourse produces the colonised as a social reality which is at once an ‘other’ and yet entirely knowable and visible.”⁴³ In addition, a number of post-colonial scholars, although drawing on Said’s basic concepts, have criticized his failure to account for the ways in which women (both Occidental and Oriental) figured into colonial projects.⁴⁴ For example, Reina Lewis’s *Gendering Orientalism* studies the role European women played in constructing such ideas as the “harem”, through travel writings and artwork.⁴⁵ Meyda

Colonial Theory: A Reader, ed. Patrick Williams and Laura Chrisman, (New York: Columbia University Press, 1994), 150-161 and Mills, *Discourse*, 119. Finally, Gayatri Spivak also troubles the sense of homogeneity about the colonial subject which can be read into Said’s work, and emphasizes that within colonial texts, the voice of non-elite colonial subjects is often erased. She goes on to ask whether certain voices (i.e. the voices of the ‘subaltern’) are recoverable from these texts and can be heard. See Gayatri Spivak, “Can the Subaltern Speak”, in (eds.) Cary Nelson and Lawrence Grossberg, *Marxism and the Interpretation of Culture*, (Urbana: University of Illinois Press, 1988).

⁴¹ Mills, *Discourse*, 109.

⁴² Homi Bhabha, *The Location of Culture* (New York: Routledge, 1994), 70.

⁴³ *Ibid*, 70-71.

⁴⁴ See also Chandra Mohanty, “Under Western Eyes: Feminist Scholarship and Colonial Discourse”, in *Third World Women and the Politics of Feminism*, ed. Chandra Talpade Mohanty, Ann Russo, and Lourdes Torres (Bloomington: Indiana University Press, 1991).

⁴⁵ Reina Lewis, *Gendering Orientalism: Race, Femininity and Representation*, (New York: Routledge, 1996).

Yegenoglu, in *Colonial Fantasies*, focuses on how Muslim women's veils were the ultimate symbol of Orientalist fantasies and fetishes about the "Oriental" woman, while also working simultaneously to secure its opposing identity: the "free", "autonomous" Western woman.⁴⁶

Against the literature troubling representations of Islam, Muslims, and veiled Muslim women, there is a vast array of sources which reassert Orientalist-style discourses by emphasizing the apparent binaries that exist between "West" and "East". Perhaps most well known in this area is Samuel P. Huntington's *The Clash of Civilizations and the Remaking of the New World Order*. Huntington posited that certain "civilizations" were on an inevitable path towards conflict, due to their inherent and irreconcilable differences. This clash would give rise to a series of antagonisms that would eventually come to dominate the arena of global politics. The most volatile and potentially destructive of these clashes would emerge from a confrontation between "Western" and "Islamic" civilizations.⁴⁷ Similar theories are included in Benjamin Barber's *Jihad vs.*

⁴⁶ Meyda Yegenoglu, *Colonial Fantasies: Towards a Feminist Reading of Orientalism*, (New York: Cambridge University Press, 1998).

⁴⁷ Samuel P. Huntington, "The Clash of Civilizations?", *Foreign Affairs* 72, no. 3 (1993): 22–49 and Huntington, *The Clash of Civilizations and the Remaking of World Order*, (New York: Simon & Schuster, 1996). Huntington's work still has significant political purchase. In a study carried out on the usage of this term in the New York Times in the months following highly politicized events between the Western and Arab world, Bantimaroudis and Kampanellou found a direct correlation between the reporting of these events and a rise in the use of either the term "clash of civilizations" or the central tenets of Huntington's thesis to frame the way the event was described. See Philemon Bantimaroudis and Eleni Kampanellou, "The Cultural Framing Hypothesis: Cultural Indicators in the New York Times from 1981 to 2007", *Media, War and Conflict* 2, no. 2 (2009): 186, 172.

*McWorld*⁴⁸, and Francis Fukuyama's *The End of History and the Last Man*⁴⁹, the latter of which notes that Islam "has virtually no appeal outside of those areas that were culturally Islamic to being with [and Muslims] cannot challenge liberal democracy on its own territory on the level of ideas."⁵⁰ These texts are instructive insofar as they provide examples of the way Orientalist-style frameworks continue to inform current political analyses,⁵¹ while the work of post-colonial scholars provides a conceptual basis from which it is possible to understand the relations of domination and knowledge production which permeate colonial encounters and inform these frameworks.

⁴⁸ See Benjamin R. Barber, *Jihad vs. McWorld*, (Ballantine Books, 1996), and Barber, "Jihad vs. McWorld", *The Atlantic Monthly* (March 1992).

⁴⁹ Francis Fukuyama, *The End of History and the Last Man*, (New York: Free Press, 1992).

⁵⁰ Ibid, 46. Fukuyama also uses a culturally essentialist lens to explain the lack of democracy in Muslim countries, as an extension of the innate incompatibility between Islam and modernity. It is worth noting here that these ways of imagining continue to hold sway; in 2006, a Pew Global Attitudes Project found that the perception of "Muslims as fanatical, violent, and as lacking tolerance" continues to inform the lens through which this group is viewed. See Mohammed El-Nawawy and Shawn Powers, "Al-Jazeera English and Global News Networks: Clash of Civilizations or Cross Cultural Dialogue" *Media, War and Conflict* 2, no.3 (2009): 266. Compounding these findings is the salient fact that, for the first time in modern history, there are large numbers of Muslims living permanently in non-Muslim states; for example, Islam is now Europe's second largest religion, after Christianity. The process of 'acclimatization' this population has experienced has, in some cases, enlivened the concept of a 'culture clash'. For more information on the dynamics of these populations and the history of their settlement, see ed. Shireen T. Hunter, *Islam: Europe's Second Religion: The New Social, Cultural and Political Landscape*, (Connecticut: Praeger Publishers, 2002).

⁵¹ For a body of literature that calls into question the notion that there are insurmountable and inherent differences between Western and Islamic thought, politics and culture, see Abdullahi Ahmed An-Na'im *Islam and the Secular State: Negotiating the Future of Shari'a* (Cambridge: Harvard University Press, 2008) and *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law (Contemporary Issues in the Middle East)*, (Syracuse: Syracuse University Press, 1996). See also Tariq Ramadan, *Western Muslims and the Future of Islam*, (New York: Oxford University Press, 2004); *Islam, the West and the Challenges of Modernity* (Leicester: The Islamic Foundation, 2009); *Radical Reform: Islamic Ethics and Reform*, (New York: Oxford University Press, 2009).

The literature concerning the representation of Muslim women (veiled and unveiled) in Western discourses draws heavily from post-colonial critiques, and focuses on the “narrative[s] [which] ha[ve] a genealogy and logic of [their] own, emerging from developments in Western representations of gender, of the self, and of the foreign or Other.”⁵² Mohja Kahf’s *Western Representations of Muslim Women: From Termagant to Odalisque*, studies the tropes within Western literature which construct knowledge about the “Muslim woman”. Kahf argues that different manners of depiction – from the Muslim woman as wanton, troublesome and in need of subduing, to a more “diminished figure” who suffers from gendered oppression and segregation, occurred concomitantly with the historical power struggles between Western and Islamic empires. In other words, during periods of Islamic domination and expansion, literary representations tended to present these women as disruptive, wild, and out of control, while during the era of Western expansion into Muslim-populated lands, this same figure becomes in need of rescue and protection from her own culture, religion, and men.⁵³ Myra Macdonald, drawing on Barbie Zelizer’s idea of Western culture as being “ocular-centric or vision-based,”⁵⁴ traces the relationship between colonial discourses and historical and current constructions of the veils of Muslim women, as well as the manner in which Muslim women have been represented in different forms of discourse (media and literature, for

⁵² Kahf, *Western Representations of Muslim Women*, 2.

⁵³ As Kahf notes, the impetus for the latter form of representation, or the “subjugated Muslim woman [,] concurred with the build-up of British and French empires in the nineteenth century, which, in subjugating whole Muslim societies, had a direct interest in viewing the Muslim woman as oppressed”. Kahf, *Western Representations of Muslim Women*, 6.

⁵⁴ ed. Barbie Zelizer, *Visual Culture and the Holocaust*, (London: The Athlone Press, 2001).

example).⁵⁵ I also use Imogen Tyler's notion of the "figure" to convey how "at different historical and cultural moments specific 'social types' become over determined and are publicly imagined (are figured) in excessive, distorted, and caricatured ways." Linked to underlying social anxieties about "others", these figures are not only representational, but are also a result of "constitutive and generative process[es]."⁵⁶ These texts allow me to properly position myself with regards to the concept of representation as it pertains to Muslim women, as well as to understand the impact of historical and socio-political trends in this area.

There is an enormous body of literature on current issues surrounding Muslim women and veiling practices, ranging from arguments that such practices are symbols of gendered oppression and segregation⁵⁷ to more ethnographic studies of female Muslim subjectivity which focus on the multiple and varying reasons behind these practices, as well as their socio-political contexts and ramifications.⁵⁸ Falling into this latter camp,

⁵⁵ Myra Macdonald, "Muslim Women and the Veil", *Feminist Media Studies* 6, no. 1 (2006): 7-23.

⁵⁶ Imogen Tyler, "Chav Mum Chav Scum: Class Disgust in Contemporary Britain", *Feminist Media Studies* 8, no. 1, (2008): 18-19.

⁵⁷ See Catherine MacKinnon, "Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence," *Signs* 7, no. 3, (Spring 1982): 515-544, Fatima Merssini, *Beyond the Veil: Male-Female Dynamics in Modern Muslim Society*, (Bloomington: Indiana University Press, 1983) and *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam*, (Canada: Perseus Books Publishing, 1987); See also Phyllis Chesler, "Ban the Burqa? The Argument in Favour", *Middle East Quarterly* xvii, no. 4, (Fall 2010): 33-45, and Susan Moller Okin, "Is Multiculturalism Bad for Women?" in *Is Multiculturalism Bad for Women?*, eds. J. Cohen, M. Howard, and M. Nussbaum (Princeton: Princeton University Press, 1999).

⁵⁸ See Katherine Bullock, *Rethinking Muslim Women and the Veil: Challenging Historical & Modern Stereotypes*, (Virginia: The International Institute of Islamic Thought, 2002), Nilufer Gole, *The Forbidden Modern: Civilization and Veiling*, "The Public Visibility of Islam and European Politics of Resentment", "Islam in Public", and Homa Hoodfar, "The Veil in their Minds and on our Heads: the Persistence of Colonial Images of Muslim Women", *Resources for Feminist Research* 22., no.3/4 (Fall

Homa Hoodfar seeks to displace dominant ways of thinking about Islamic veiling practices which, to varying degrees, link them to pre-modern systems of oppression and religio-cultural expectations of subservience. Hoodfar argues that these perceptions about veiling are closely linked to and a result of the continuing power of colonialist imagery. She relies on ethnographic research studies to demonstrate that veiling may be both an empowering and emancipatory tool; Hoodfar also criticizes the manner in which knowledge about the veil in Western discourse remains largely static, thereby denying the multiple complexities which inform its practices.⁵⁹ Katherine Bullock, drawing on Marnia Lazreg, who notes how historically “the veil has held obsessive interest for many a [Western] writer”⁶⁰, studies how Canadian media representations of Muslim women are problematic and Orientalist.⁶¹ Against this, Bullock draws on the lived experiences of veiled Muslim women to create a positive, agentic notion of the Islamic veil.⁶² She also provides examples of how these women have attempted to gain control of the discourse

1992/Winter 1993): 5-18.

⁵⁹ Homa Hoodfar, “The Veil in their Minds and on our Heads: the Persistence of Colonial Images of Muslim Women”, *Resources for Feminist Research* 22, no.3/4 (Fall 1992/Winter 1993): 5-18. See also eds. Sajida Alvi, Homa Hoodfar, and Sheila McDonough, *The Muslim Veil in North America: Issues and Debates*, (Toronto: Women's Press, 2003).

⁶⁰ Marnia Lazreg, “Feminism and Difference: The Perils of Writing as a Woman on Women in Algeria”, *Feminist Studies* 14, no. 1 (1988): 85.

⁶¹ Katherine Bullock and Gul Joya Jafri, “Media (Mis)Representation: Muslim Women in the Canadian Nation”, *Canadian Women Studies* 20, no.2 (2000): 35-40. See also Nilufer Gole, who describes veiled Muslim women as “forbidden modern[s]”, notes that “no other symbol than the veil reconstructs with such force the ‘otherness’ of Islam to the West”, and emphasizes how its “public visibility is approached as a radically disruptive, transgressive, provocative form of agency”. Nilufer Gole, “The Public Visibility of Islam and European Politics of Resentment: The Minarets-Mosques Debate”, *Philosophy & Social Criticism* 37, no.4 (2011): 383-384. See also Gole, “Islam in Public: New Visibilities and New Imaginaries”, *Public Culture* 14, no.1 (2002): 173- 181.

⁶² See Bullock, *Rethinking Muslim Women and the Veil*.

surrounding the veil by narrating their own experiences and linking veiling to larger notions of identity and community.⁶³

The literature concerning the relationship between Western states and veiled Muslim women⁶⁴ suggests that policies of exclusion and marginalization, oftentimes informed by categorical norms and/or anxieties about “alien” encroachments, are increasingly enacted against those who display overt, highly visible symbols of Islamic religiousness in public spaces⁶⁵ (what is “overt” or “visible” changes depending on the context; in France, for example, the hijab is considered beyond the bounds, while in Canada, regulatory efforts are largely focused on the niqab).⁶⁶ In this vein, Martha

⁶³ See Chapter 5, “An Alternative Theory of the Veil”, in Bullock, *Rethinking Muslim Women and the Veil*, 183-219. See also eds. Sajida Alvi, Homa Hoodfar, and Sheila McDonough, *The Muslim Veil in North America: Issues and Debates*.

⁶⁴ For discussions on issues related to socio-political realities facing Muslim women, veiled and unveiled, in pre and post-colonial Muslim-majority countries, see Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate*, (New Haven: Yale University Press, 1992), Lila Abu-Lughod, “Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others”, *American Anthropologist* 104, no.3 (2002): 783-790, and Fatima Mernissi, *Beyond the Veil and The Veil and the Male Elite*.

⁶⁵ See Cecile Laborde, “State Paternalism and Religious Dress Code”, *International Journal of Constitutional Law* 10, no. 2 (2001): 398-410; Erica Howard, “Banning Islamic Veils: Is Gender Equality a Valid Argument?”, *International Journal of Discrimination and the Law* 12, no.3 (2012): 147-165; Kathleen M. Moore, “Visible through the Veil: the Regulation of Islam in American Law”, *Sociology of Religion* 68, no.3 (2007), 237-251; eds. Sieglinde Rosenberger and Brigit Sauer, *Politics, Religion and Gender: Framing and Regulating the Veil*, (New York: Routledge, 2011); Joan Wallach Scott, *Politics of the Veil*, (Princeton: Princeton University Press, 2007).

⁶⁶ See Brenna Bhandar, “The Ties that Bind: Multiculturalism and Secularism Reconsidered”, *Journal of Law and Society* 36, no.3 (2009): 301-326; Blandine Chelini-Pointe, “Religion in the Public Sphere: Challenges and Opportunities”; Linda Duits and Leisbet Van Zoonen, ‘Headscarves and Porno-Chic: Disciplining Girl’s Bodies in the European Multicultural Society’ *European Journal of Women’s Studies* 13, no.2 (2006): 103-17; Liz Fekete, “Anti-Muslim Racism and the European Security State”; Nilufer Gole, “The Public Visibility of Islam and European Politics of Resentment”; Karim Karim, *Islamic Peril: Media and Global Violence*, (Montreal: Institute of Policy Alternatives, 2003).

Nussbaum and Sherene Razack focus on the increasing fear and anxiety around the presence of sizable Muslim minority populations in the West, as well as the proliferation of social and political discourse which marks them as “other” and as existing somewhere outside of the political community. Nussbaum describes recent cases involving European states targeting the wearing of the niqab in public, and how and why legal regulations against the face-veil were “treated (with) the utmost urgency, and as addressing a public crisis of profound significance”.⁶⁷ Razack argues that the “profound suspicion” with which Muslims are viewed is both informed by and leads to their construction as essentially “other” and as standing in opposition to Western norms.⁶⁸ She further notes that Muslim women are often “socially constructed on the horns of this dilemma;”⁶⁹ they are seen as “imperilled” and in need of, if not rescue, then correction and/or assistance so as to better align with the demands of Western modernity. In this way, Muslim women serve both as the symbolic representation of their religion’s place within modernity⁷⁰, as well as the justification for “emancipatory” efforts aimed at them. My research speaks to Razack’s work, as it looks at many of the same issues from a post-colonial perspective: legal and social responses to Muslims in the West, legal sanctioning of exclusionary and coercive tactics aimed at Muslim women, and the resurrection (or deepening) of myths, tropes, and stereotypes about Muslims. Razack connects these elements to a broader thesis concerning how they are employed to justify the current “War on Terror”, and looks extensively at how they function with relation to Muslim males. My thesis focuses

⁶⁷ Nussbaum, *The New Religious Intolerance*, 3-4.

⁶⁸ Razack, *Casting Out*, 9.

⁶⁹ *Ibid*, 18.

⁷⁰ *Ibid*, 9, 16.

exclusively on the relationship between Muslim women, and even more specifically, on “veiled Muslim women”, knowledge, and law. I also approach this topic in an inverted manner. In other words, I look at pre-existing structures of representation and how they create a discursive framework, and then move to ask how and in what ways legal knowledge tells us about N.S. and her niqab. I focus on the processes through which legal actors create knowledge about N.S., rather than on what the case tells us about legal actors (even though the latter element emerges as an outgrowth of the former).

Natasha Bakht’s intersectional work on the N.S. case focuses on its implications for matters related to equality, identity, and the protection of victims of sexual assault, especially those who are racialized.⁷¹ She also troubles certain legal categories of evidence, such as “demeanour”, and questions the extent to which they are relevant, culturally contingent, and problematic in this context. Bakht argues that women wearing the face-veil can, and ought to be, accommodated within Canadian courtrooms, without any detrimental impact on “justice”.⁷² She also traces the genesis of the central arguments made against the niqab, and provides examples where these arguments have been deployed in attempts to banish the niqab from Western states, including Canada.⁷³

⁷¹ Natasha Bakht, “What’s in a Face? Demeanour Evidence in the Sexual Assault Context”, in *Sexual Assault Law, Practice, and Activism in a Post-Jane Doe Era*, ed. Elizabeth Sheehy, (Ottawa: University of Ottawa Press, 2010).

⁷² Natasha Bakht, “Objection Your Honour! Accommodating Niqab-Wearing Women in Courtrooms”, in *Legal Practice and Cultural Diversity*, ed. Ralph Grillo et. al., (Surrey: Ashgate Publishing, 2009), 115-133.

⁷³ Natasha Bakht, “Veiled Objections: Facing Public Opposition to the Niqab”, in ed. Lori Beaman, *Reasonable Accommodation: Managing Religious Diversity*, (Vancouver: UBC Press, 2012), 70-109. See also Bakht, “Victim or Aggressor? Typecasting Muslim Women for their Attire” in ed. N. Bakht, *Belonging and Banishment: Being Muslim in Canada*, (Toronto: TSAR Publications, 2008), 105-113. Lori Beaman also argues that there is a distinct aura of colonial privilege which permeates the lower court’s decisions regarding the case; it is implied that “‘we’ will accommodate ‘you’ [and] that [this]

These works are helpful in situating the N.S. case within a Canadian legal context that is shaped by specific socio-political considerations; however, I make broader claims and explorations about *how* and *why* knowledge is produced. I also fill a gap in the research pertaining to demeanour evidence. Rather than focusing on the legal or scientific validity or invalidity of demeanour evidence, or the niqab's functional impact on it, as Bakht does, I explore *how* and *what kind* of knowledge about demeanour and demeanour evidence is constructed and deconstructed in relation to N.S., and what kind of knowledge about N.S. is produced in the process.

As to whether the N.S. case can tell us anything about how knowledge about national values is produced in a context of 'otherness'⁷⁴, my research will speak to existing literature relating to Canadian national imaginaries; specifically, the works of Eva Mackey, Himani Bannerji, and Sunera Thobani. Mackey argues that the centrality of the notions of tolerance and inclusion to the self-imagining of the Canadian nation belies the ways in which these notions have in fact served to reinforce exclusion, as well as dominant, hierarchical ideologies of difference.⁷⁵ Bannerji focuses on the *idea* of

singles out niqab-wearing women as women asking for special privilege, which allows space for arguments based on colonial fear and racism rather than on any genuine inequality". See Lori Beaman, "It Was All Slightly Unreal: What's Wrong with Tolerance and Accommodation in the Adjudication of Religious Freedom?", *Canadian Journal of Women and the Law* 23, no. 2 (2011): 442

⁷⁴ It is important to note that, of course, the Muslim "other" is not the *only* "other" to be considered, especially in the Canadian context, where Indigenous peoples and other migrant communities have and continue to be used as that particular foil. However, I am looking here specifically at the historical and representational relationship between what are two admittedly broad, general, and monolithic categories: Islam and the West, and I argue that it is apparent, in the current social and political climate, that the "Muslim other" occupies a marked place in the Western imagination, and is also the very real target of new forms of legal sanction and regulation.

⁷⁵ Eva Mackey, *The House of Difference: Cultural Politics and National Identity in Canada*, (University of Toronto Press, Toronto: 2002).

“Canada” which emerges from social and cultural forms of national identity. She disrupts this identity by approaching it from the perspective of those who are “on the receiving end of the power of Canada and its multiculturalism”.⁷⁶ Thobani’s *Exalted Subjects* focuses on the role race plays in the making and reproducing of Canadian national identity. Thobani concentrates on what she calls “strange encounters” between immigrants and Canadian white settler society. Thobani argues that there is a process of “exaltation” that occurs, wherein the state characterizes certain subjects as authentically Canadian, while those who are “others” (for example, racialized, immigrant groups), and the alien values and norms they adhere to, are constructed as being outside of the bounds of Canadianness. Thobani argues that these constructions not only erase colonial violence and continuing practices of domination and discrimination, but also make the exclusion of these “others” a matter of national self-preservation; in this way, Canada is able to self-identify as a tolerant, multicultural society, while still engaging in the singling out of “others”. Law, in this context, works as a tool of domination, as it allows for the control and regulation of these “others”, while at the same time creating the structures which continue to exalt the Canadian national subject. Thobani also concentrates on the role gender plays in these encounters, and she uses an intersectional lens to examine how the bodies of women of colour are the focus of the working out of anxieties related to nationalism and “others”.⁷⁷ These texts allow me to explore the relationship between ideas of national identity and “other”, as well as how a valorized

⁷⁶ Himani Bannerji, *Dark Side of the Nation: Essays on Multiculturalism, Nationalism and Racism*, (Toronto: Canadian Scholars Press, 2000).

⁷⁷ Sunera Thobani, *Exalted Subjects: Studies in the Making of Race and Nation in Canada*, (Toronto: University of Toronto Press, 2007).

concept of the former may function as “a highly particularized ideological form of domination”.⁷⁸ In this vein, I show how knowledge produced in the N.S. case about Canadian national identity and underlying values provides tools by which to measure, affirm, and know difference.

My research will address a gap in the literature on post-colonialism, representations of veiled Muslim women, and law. While there have been separate works on Orientalist-style discourse and knowledge production, on the impact of this type of discourse and knowledge on literary and media constructions of veiled Muslim women, and studies of legal regulations related to the veil in Western states, I combine these areas in order to uncover how, in the case of N.S., legal actors, through a variety of techniques of knowing (and also *not* knowing), produce knowledge about N.S. and her niqab. In understanding how, I show the tensions between the surface appearances and underlying complexities of the case; this allows for a greater appreciation of how knowledge of this “other” is formed and reformed, constructed and deconstructed, known and un-known. This process also, importantly, sheds light on whether there are limits to the discursive and knowledge-making ability of legal actors in this specific case. More concretely, my research will fill a gap related to understanding both the *how* and *why* behind the production of legal knowledge about veiled Muslim women: in the latter case, by tracing the ways legal actors contend with N.S. and her niqab, and in the former, by connecting these to underlying discursive contexts and structures animating the manner in which the “veiled Muslim woman” is thought of.

⁷⁸ Himani Bannerji, “On the Dark Side of the Nation: Politics of Multiculturalism and the State of Canada,” *Journal of Canadian Studies* 31, no.3 (Fall 1996): 103-128.

IV. Clarifying Contextualization

The above survey of relevant research and literature allows for the contextualization and framing of the climate within which the N.S. case is being heard. In drawing this picture, I do not seek to make any claims with regards to *knowing* or *defining* in a monolithic way “Muslim women”, or specifically, veiled Muslim women. I instead make the claim that within Western countries, including Canada, historically and currently, there exists a discursive framework or mode of knowing within and through which veiled Muslim women are placed, defined, and understood. As Razack notes, “without history or context, each encounter between unequal groups becomes a fresh one, where the participants start from zero, as one human being to another, each innocent of the subordination of others.”⁷⁹ In other words, articulating context allows for awareness and sensitivity to the fact that N.S. does not approach the courts in a vacuum, or as a neutral, uncontroversial, or unproblematic figure, and also serves to highlight the relations of domination and subordination which may be at play. As this picture is being drawn, what may emerge as a glaring omission is any acknowledgment of agency. Where in this construction is there room left for individuals to exercise independence and resist domination and subordination, and, if discovered, would this not also contribute to the ways in which these actors are known and become knowable? To answer these concerns, we may return to Said and his study of Orientalism. In his discussion of this field, Said is not saying that the idea of the “Orient” which emerges, along with the forms

⁷⁹ Sherene Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms*, (Toronto: University of Toronto Press, 1998), 8

of knowing which sustain these categories, is in fact representative of objective truth. As noted, the “Orient” is a *creation*, and it exists separately from the actual physical and social space it purports to describe. In this same way, the “veiled Muslim woman” exists as a conceptual and categorical entity separate from the lived realities of individual Muslim women. That is also not to say that these creative and constructive forces do not have actual consequences; as noted by Armando Salvatore, for example, “the control of the discourse on Islam by journalists, politicians and scholars shows the limits of the ability of Muslim actors to represent themselves in plural ways, and therefore to carve out a differentiated public space for themselves”.⁸⁰

To that end, contextualizing the place of veiled Muslim women in Western liberal states must be understood against a specific political and social backdrop which frames these women as occupying an ontological space which is characterized by their assignment to the boundaries of social and political community.⁸¹ In turn, framing them as such is also what renders these women intelligible and knowable in the context of Western states. In this sense then, veiled Muslim women are both problematically strange and inherently identifiable, at once alien subjects and subjects of perfect knowledge. Potentially then, N.S. does not emerge as a general subject, but a very specific subject who, through *looking* and *acting* Muslim in a very specific and

⁸⁰Armando Salvatore, “Making Public Space: Opportunities and limits of Collective Action among Muslims in Europe”, *Journal of Ethnic and Migration Studies* 30, no. 5 (2004):1027.

⁸¹Such a way of thinking about Muslims and, specifically, Muslim women, is demonstrated in recent events in Herouxville, Quebec, where in 2007, the rural town of 300 issued a “code of conduct” aimed at “immigrants”. This edict formally declared that the town banned the stoning of women or the maiming of them with acid, as well as the wearing of the face veil. See Dene Moore, “Quebec Town Bans Kirpan, Stoning Women”, *Globe and Mail*, January 30, 2007, A12, as cited in Razack, *Casting Out*, 5.

“problematic” way, carries with her the weight of powerful, visceral forms of knowledge about her and her niqab. It is thus possible to see how the veiled Muslim woman both *is* and *becomes* known in concrete (she is problematic and an “other”), amorously malleable (sometimes she is a menacing threat, other times she is in need of rescue), and contradictory (she is both readily identifiable, yet engages in practices which inhibit access to her, thus cutting her off being truly knowable⁸²) ways. I am aware that, in establishing this context, there is an apparent contradiction or problem which arises in my project. It seems that there is discursive closure⁸³, and if this is the case, what more can we learn from legal actors? However, I do not make the claim that such ways of knowing veiled Muslim women are representative of fact; while they may be *a kind of* truth, they are not absolute or exclusive. I have merely shown that there is a framing that currently exists and that is *constructive*; even so, not all actors behave accordingly, and subversion and agency are possible. I focus on *how* and *why* veiled Muslim women have come to and continue to be known, represented, and constructed by authoritative sets of discourses, which, in turn, may serve to give justificatory heft to structures of dominance which restrict (not erase) that agency. Contextualization, in this scenario, is meant to show *how* the figure of the veiled Muslim woman is generally constructed and deconstructed, becomes so easily a sight upon which knowledge is brought to bear, and

⁸² Katherine Bullock argues that the “veil’s role as a gaze inhibitor makes it the focus of attack in Western discourse, [and that] just as it was an essential part of the colonial project that native women unveiled, it remains today a central project of ‘modernity’ that Muslim women unveil”. See Katherine Bullock, “The Gaze and Colonial Plans for the Unveiling of Muslim Women”, *Studies in Contemporary Islam* 2, no.2 (2000): 2-3.

⁸³ Gordon Nakagawa, “What Are We Doing Here With All these Japanese?": Subject Constitution and Strategies of Discursive Closure Represented in Stories of Japanese American Internment”, *Communication Quarterly* 38, no. 4 (1990): 389.

how modes of knowing can serve as tools for the continuation of dominant, hierarchical, and dichotomous categorizations. Providing such a context now will also allow for us to trace the reoccurrences and disjunctures related to modes of thinking and knowing about N.S. and niqab which emerge from legal actors.

V. Theoretical Framework and Methodology

I employ a Foucauldian concept of discourse, wherein it is understood as a system of representation - a mass of statements which create a modality of language, a way of talking *about* a thing which is then constructed, defined and represented as an object of that discourse. According to Foucault, discourse can be thought of as “practices that systematically form the objects of which they speak”.⁸⁴ Discourse is thus *productive*, as opposed to “exist[ing] in and of itself and [capable of being] analysed in isolation”.⁸⁵ Discourses also contain within them tacit rules for how we speak about something that then contributes to how that thing comes to be known. Rules thus dictate what qualifies as an intelligible way to speak about or know some entity, while simultaneously allowing for that thing to become known through these constructions. What follows then is a notion of discourse as containing within it relations of power, so that the discursive formations which emerge hinge upon relations of power which allow for some to produce knowledge about others. While discourses also work to shape the manner in which ideas are set in motion and put into practice, they are especially important as a tool for

⁸⁴ Michel Foucault, *The Archaeology of Knowledge*, trans. Sheridan Smith, A. M. Tavistock, (Routledge: London, 1969), 49, as cited in Mills, *Discourse*, 17.

⁸⁵ Mills, *Discourse*, 17.

controlling the conduct of the subject the discourse seeks to know.⁸⁶ The productive force that accompanies this ability to create and disseminate discursive formations also works to create a kind of truth.⁸⁷ Discourse then, especially as it pertains to the construction of ‘others’, is an especially vigorous tool, as it works to *create* subjects to be known, as well as defined spaces within which the subject is known in ways that makes sense to this particular framework/mode of thinking.⁸⁸ I employ the methodology associated with identifying discursive structures, through recognizing “the systematicity of the ideas, opinions, concepts, ways of thinking and behaving which are formed within a particular context, and the effects of those ways of thinking and behaving”.⁸⁹

I approach the discourses produced by legal actors animated by cultural legal theories which “look at law not as rules and policies but as stories, explanations, performances and linguistic exchanges — as narratives and rhetoric”.⁹⁰ In this sense, the

⁸⁶ Stuart Hall, “Representation”, in *Representation: Cultural Representations and Signifying Practices*, ed. Stuart Hall, (Thousand Oaks: Sage Publication, 1997), 30-34.

⁸⁷ Ibid, 36.

⁸⁸ Ibid, 43.

⁸⁹ Mills, *Discourse*, 17. It is important to note that this notion of discourse has come under criticism because it seems to imply that there is nothing which can exist outside of discourse, thus creating a circular, self-referential modality which undermines the materiality of human experience. However, Mills clarifies that Foucault is really emphasizing that “the only way we have to apprehend reality is through discourse and discursive structures”. This is also not to say that there is only one kind of discourse – there can, in fact, be tensions between sets of discourse, as well as hybrid forms of it. In fact, post-colonial theory has, as Mill shows, changed the way in which it is thought of; “discourse is now characterized as being open to different interpretations and thus open to resistance, even when at its most seemingly powerful it is no longer assumed that the dominant meaning of the discourse is the only meaning available within [a] text; instead, the knowledges which are excluded by discourses are just as important as those which are figured within [a] text”. See Mills, *Discourse*, 54, 128-9

⁹⁰ Paul Gewirtz, “Narrative and Rhetoric in the Law”, in ed. P. Brooks and P. Gewirtz, *Law’s Stories: Narrative and Rhetoric in Law*, (New Haven: Yale University Press, 1996), 2. See also Matthew D. Adler, “Expressive Theories of Law: A Skeptical Overview”, *University of Pennsylvania Law Review* 148, no. 5 (2000): 1363-1502, and

discourse produced by legal actors is understood as closely linked to law's propensity towards constructing stories — in this case, about veiled Muslim women. Rosemary Coombe notes that law is not passive; it is not removed from the formation of meaning and knowledge about extra-legal subjects such as culture and identity. She further states that law is an active participant in the creation of meanings and acts “as a central locus for the control and dissemination of those signifying forms with which difference is made and remade”.⁹¹ Seeing law in these ways allows not just for an examination of the ways in which legal knowledge may, through the above tools, construct, affirm, and/or disrupt knowledge about veiled Muslim women. It also allows me to look at law as a distinct space with attendant language⁹², norms, rituals, and categories. I also analyze the legal documents through an intersectional lens. The theory of intersectionality offers “a method for examining how individuals and groups [are] positioned within matrices of domination”, as well as understanding how multiple “oppressions converge to position individuals or groups at unique points of disadvantage.”⁹³ Moreover, intersectionality reveals how categorical and hierarchical understandings of identity fail to capture the

James Boyd White, “Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life”, *The University of Chicago Law Review* 52, no. 3 (1985): 684-702.

⁹¹ Rosemary Coombe, "Contingent Articulations: A Critical Cultural Studies of Law," in *Law in the Domains of Culture*, in ed. Austin Sarat and Thomas R. Keams, (Ann Arbor: University of Michigan Press, 1998), 21.

⁹² See also Lucinda Finley, who examines the way legal language and reasoning were created and sustained by patriarchal, male interests, thus creating a social and legal reality wherein gendered hierarchies of power are normalized. Lucinda M. Finley, “Review Essay: The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified: A Review of *Feminism Unmodified: Discourses on Life and Law*, by Catherine McKinnon”, *NorthWestern University Law Review* 82, no.2, (1988): 352-386.

⁹³ Doris Buss, “Sexual Violence, Ethnicity, and Intersectionality in International Law”, in *Intersectionality and Beyond: Law, Power and the Politics of Location*”, ed. Emily Grabham et al., (Routledge: New York, 2009), 109, 112.

complexity of people's lived experiences. Kimberlé Crenshaw shows how race and gender, and patterns of racism and sexism, intersect and converge in the experiences of women of colour and create distinct forms of oppression. She notes that "because of their intersectional identity as both women and women of colour within discourses that are shaped to respond to one or the other", marginalization can be experienced within both gender and racial "groups".⁹⁴

It is necessary to say a few words of explication as to why I choose to look at law and legal actors and their role in knowledge production about N.S. (and not, for example, at media sources or political actors). As Lori Beaman states, "it is law's privileged status in relation to truth that renders it a critical site of examination. Law holds itself out as a producer of truth, weighing and assessing evidence to reach a reasoned, objective conclusion, while at the same time encoding fear and moral panics".⁹⁵ Law can also be understood as "a special mask that we collectively made, one that mutes the "true face" of power and subordination, of conformity and deviance, of acceptance and ostracism".⁹⁶ Understanding law in this manner, and drawing on Razack, I too contend that it is vital to understand *how* "relations of domination and subordination stubbornly regulate encounters in courtrooms, [and] the conditions of communication and knowledge production that prevail, calculating not only who can speak and how they are likely to be

⁹⁴ Kimberlé Williams Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color", *Stanford Law Review* 43, no. 6 (1991): 1244. See also Patricia Hill Collins, "Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought, *Social Problems Special Theory Issue* 33, no. 6, (1986):14-32.

⁹⁵ Lori G. Beaman, *Defining Harm: Religious Freedom and the Limits of Law*, (Vancouver: University of British Columbia Press, 2008), 6.

⁹⁶ Rachel F. Moran, "Law and Emotion, Love and Hate", *Journal of Contemporary Legal Issues* 11, no. 2 (2001), 747.

heard but also how we know what we know and the interests we protect through our knowing.”⁹⁷

I also understand law as being inextricably connected to overarching social practices and culture. Naomi Mezey notes that law and culture cannot be divorced from one another, as law’s “meaning-making” power implies that “social practices are not logically separable from the laws that shape them and that social practices are unintelligible apart from the legal norms that give rise to them”.⁹⁸ In this way, I understand law as not only working to shape social and cultural practices and symbols, but also that “all of these things also shape law by changing what is socially desirable, politically feasible, [and] legally legitimate”.⁹⁹ Mezey further notes that “law’s power is discursive and productive as well as coercive. Law participates in the production of meanings within the shared semiotic system of a culture, but it is also a product of that culture and the practices that reproduce it.”¹⁰⁰ An understanding of the deep, symbiotic relationship between law and culture means also to acknowledge the role that legal actors have in the creation of “culturally specific meanings and that legal symbols embedded in culture feed back into law.”¹⁰¹ Such an interpretation of law, “as metaphor and symbol, [is to] understand [it] as part of a larger set of social discourses of which [it is] an inextricable part.”¹⁰²

⁹⁷ Razack, *Looking White People in the Eye*, 10.

⁹⁸ Naomi Mezey, “Law as Culture”, *The Yale Journal of Law & the Humanities* 13, (2001): 46.

⁹⁹ *Ibid*, 46.

¹⁰⁰ *Ibid*, 47.

¹⁰¹ *Ibid*, 58.

¹⁰² *Ibid*, 63.

I specifically concentrate on legal actors, as they are “the decision makers [and] elites who are the describers and imaginers, [and] whose gazes construct”¹⁰³ the ways in which N.S. comes to be known.¹⁰⁴ The texts that these legal actors produce and the language they employ “contributes to the discursive construction of ‘the facts’ and ‘the truth’ from which deconstruction can begin. Gaps in the story are revealed by attending to tensions within and between discourses and to the resistances to the process of fact production.”¹⁰⁵ I also rely on the discourse of legal actors due, in part, on an inability to rely on the discourse of N.S. herself; her voice, besides the brief, spur-of-the-moment testimony before the preliminary inquiry court, is glaringly absent from much the talk which proliferates from this case. It is an unfortunate side effect of this gap that I, as a researcher, become complicit in the act of speaking for and about N.S., and, in the process, creating knowledge about her. However, it is my hope that my approach, along with the framework and context I have drawn around my analysis of this case, will allow me to avoid the reinscribing of dominant ways of knowing veiled Muslim women.

For the sake of coherence and comprehension, it is necessary to attempt to categorize the large amount of legal documents (and the discourses contained therein) this case has produced via the various legal actors involved. In doing so, I do not wish to

¹⁰³ Razack, *Looking White People in the Eye*, 88.

¹⁰⁴ I connect knowing and imagining as Charmaine Pereira does. Pereira notes that while “knowing and imagining are conventionally thought of as partitioned from one another in away similar to the partitioning of the ‘natural sciences’ and the ‘arts’ through a dualism entrenched in Western analytical philosophy, a recognition of the extent to which knowing is itself dependent on the exercise of imagination” allows for this dualism to be transcended. See Charmaine Pereira, “Between Knowing and Imagining: What Space for Feminism in Scholarship on Africa?”, *Feminist Africa* 1 (2002): 9

¹⁰⁵ Beaman, *Defining Harm*, 2.

imply that such an arrangement is representative of legal actors knowing N.S. in a similarly ordered, neat way; indeed, my analysis highlights how ways of knowing dovetail and diverge at multiple junctures between and within the discourses of the multiple actors. For example, in some instances, actors at once affirm and at other times disrupt ways of knowing N.S. within the same document, while issues related to the niqab inevitably raise questions related to demeanour evidence, and vice versa. It is my hope that arranging the knowledge which emerges from the discourse produced by legal actors under broad, non-exclusive categories will allow for tensions and gaps to show themselves, to shine light on the multiple, competing ways she is framed, and for the theorization of why and how these ways of knowing come into being. I will streamline the process by dividing the actors into four sub-groups: (1) the lawyers and interveners for N.S. (2) the lawyers and interveners for the defendants, (3) the Crown and 4) the Justices of the Supreme Court (the majority, concurring, and dissent decisions). I examine facta from all eight interveners involved in this case, six of whom mediate on behalf of N.S. Intervenors for N.S. are as follows: the Barbra Schlifer Commemorative Clinic, the Canadian Civil Liberties Association, the Canadian Council on American-Islamic Relations, the Ontario Human Rights Commission, the South Asian Legal Clinic of Ontario, and the Women's Legal Education and Action Fund. Intervening on behalf of the accuseds are the Criminal Lawyers' Association and the Muslim Canadian Congress. It should be noted that legal facta are strategic documents; in other words, they are not intended to be objective, neutral observations of the facts or law at play. They are intended to argue a point, from a specific perspective, and to frame the case with supporting arguments in a way that best assists the "side" they are representing, as well as

to convey the particular political agendas of specific actors. To that end, it is no surprise that a feminist organization would advocate for an emphasis on the gender and sexual assault dimensions of the case, while a criminal defence attorney's organization would take a perspective that privileges the rights of defendants to a fair trial. However, despite their individual motivations, I believe that these documents provide fertile ground for mining information and indicators about how and why N.S. becomes known. Moreover, the various forms of knowing about N.S. do not come from nowhere; they are informed and sustained by what I earlier called a pre-existing discursive framework, within which the idea of the "veiled Muslim woman" is constructed and maintained.

Chapter II – IDENTITY CONSTRUCTION AND NEGOTIATION

Introduction

As discussed in more detail in the previous chapter, the theory of intersectionality demands that attention be given to the ways in which multiple and interconnected patterns of discrimination emerging from multiple identities contributes to experiences of marginalization. In this chapter, I examine the negotiation and construction of N.S.'s multiple and intersecting identities by legal actors. I first look at whether and how N.S.'s intersecting identities are acknowledged and/or navigated. I ask at what point, and why, are certain identities brought to the fore by legal actors, while others are left to recede? Are certain identities elided, and why? I then consider how and what kind of knowledge about both N.S. and specific identities are produced through these processes. What is known (and sometimes not known) about each of N.S.'s intersecting identities? What does silence on issues related to identity indicate? Ultimately, I seek to not only answer these questions, but also show to what extent the pre-existing discursive context which shapes how veiled Muslim women become known as “others” endures and shapes the ways in which N.S.'s identities are known, un-known, and contended with. I show how N.S. and her identities emerge within two distinct constructions: as concrete (i.e., as marginalized, on the fringes, existing outside of social space, and reliant on the courts to provide her with a voice) or as opaque (i.e., as amorphous, undefined, un-known, and *unknowable*). I also contend that both these forms of knowing work to re-inscribe common ways of knowing about veiled Muslim women. In order to achieve this, I first describe the various arguments and constructions put forth by legal actors relating to the

issue of identity, and then move into analyzing and contextualizing the information that has emerged through this process.

I. The Actors

1.1 *N.S.'s Attorney & Interveners*

N.S.'s attorney and supporting interveners profess to focus on the implications of N.S.'s intersecting identities: as a complainant in a sexual assault trial, as a Muslim and a niqab-wearer, and as a member of an ethno-racial, religious minority group. While in some instances, these legal actors do address the intertwined nature of these identities, at others, specific identities are constructed as central and used to serve as the crux of their arguments. More often than not, these central identities are closely linked to organizing tropes of victimhood and victimization, as related to conceptions of veiled Muslim women.

N.S.'s main counsel, David Butt, seems to give equal weight to understanding and contextualizing her as both a complainant in a sexual assault case and as a Muslim niqab-wearer; the combination of these two identities informs not only her circumstances, but also give rise to the need for a response from the court which recognizes and asserts her unequivocal freedom of religion rights. Her multiple identities also demand that that the courts work to alleviate the multiple forms of marginalization she suffers as a result.¹ Butt, in an evocative turn of phrase, notes that N.S.'s specific identity as a veiled Muslim woman is an "elephant in the room, but like all such elephants, once acknowledged can

¹ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Applicant at para 54).

readily be managed.”² Butt also emphasizes N.S. as a sexual assault complainant, appearing before the courts in the context of a criminal justice system with a historically problematic treatment of such complainants. Under Butt’s framing, because N.S. suffers from a “unique plight”³ as a niqab-wearing sexual assault complainant, her identity as a niqab-wearer is especially in need of protection, insofar as she supposedly relies on this religious garment to provide succor during this difficult time.⁴ For Butt, and as we will see with other actors, linking N.S.’s identity as a niqab-wearer to her identity as a sexual assault complainant works to frame an order of removal as containing a multi-layered effect: unveiling her as a Muslim (and thus infringing on her religious freedom rights) and, more traumatically, unveiling her as a sexual assault complainant (so that the court becomes complicit in ordering what would be tantamount to an assault on her bodily integrity). Butt’s description and deployment of N.S.’s multiple identit(es) has the effect of not only infantilizing N.S. (her identity as a niqab-wearer gains currency via her apparent reliance on the face-veil as a kind of pacifier during times of high stress), but also of understanding these identit(es) primarily via their propensity to give rise to multiple opportunities for further marginalization.

² Ibid, para. 48.

³ Ibid, at para 3.

⁴ Ibid, at para 53.

Interveners such as The Women’s Legal Education and Action Fund (hereinafter, LEAF⁵), and the Barbra Schlifer Commemorative Clinic⁶ (hereinafter, the Clinic), both organizations advocating for women, emphasize the implications of the case being one involving sexual assault⁷, and work to provide the perspectives of sexual assault complainants.⁸ As a result, N.S. as a sexual assault victim/complainant takes center stage, and other aspects of her identity are either subsumed under this one, or given less attention. To be sure, both LEAF and the Clinic emphasize that N.S.’s multiple identities (as “markers of discrimination”⁹) create multiple sites upon which discriminatory stereotypes and/or prejudices are acted out. She faces multiple burdens: on the one hand, as a sexual assault complainant, she is vulnerable to a legal system which has

⁵ LEAF is a non-profit feminist organization working in the area of law, formed in 1985, with a focus on articulating for the courts the multiple and intersecting ways in which women experience oppression and ameliorating law’s contribution to this oppression. “The challenge has been to bring details about women’s daily lives into the courtroom, a forum constructed to negate or silence such realities”. See Sherene Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms*, (Toronto: University of Toronto Press, 1998), 37.

⁶ The Barbra Schlifer Commemorative Clinic offers legal assistance for women experiencing violence, and is an advocacy group for social changes and law reform benefiting women. See Barbra Schlifer Commemorative Clinic, “The Schlifer Clinic: About Us”, accessed June 10, 2013, <http://schliferclinic.com/about-us/>.

⁷ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener Women’s Legal Education and Action Fund, at para.1) and *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, Factum of the Intervener, Barbra Schlifer Commemorative Clinic at para. 3).

⁸ For the Canadian Civil Liberties Association, N.S.’s identity as a sexual assault complainant make this issue especially problematic, as “abused women from immigrant and visible minority communities are even more intimidated by the law enforcement and justice systems in Canada (and) forcing women to testify without their niqab may further discourage them from bring forward complaints of sexual assaults and other crimes”. See *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener Canadian Civil Liberties Association at paras. 26-27).

⁹ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener Women’s Legal Education and Action Fund at para. 15).

traditionally treated such complainants unfairly¹⁰, while, on the other, being from a minority religious and ethno-racial religious group, “brings to light an additional and particularly oppressive burden.”¹¹ With the intersectional perspective these interveners, especially LEAF, use, identities are described as containing separate implications for discrimination and barriers, which, when combined, work to heighten the “alienation, discrimination and exclusion from Canadian society and its institutions”¹² N.S. experiences. In addition, the Clinic marks a difference between N.S. as a Muslim woman and N.S. as a *niqab-wearing* Muslim woman; under the former label, she faces discrimination and exclusion because of her religion, gender, and ethno-racial identities, while the latter identity worsens these impacts by giving rise to “additional stigmatization, prejudice and stereotyping”¹³. However, for LEAF in particular, and as an extension of their self-identification as a feminist organization concerned with the legal system’s treatment of women, the historical marginalization and re-victimization of sexual assault victims during legal processes drives their framing of N.S.

Given the history of the law’s treatment of sexual assault victims,¹⁴ LEAF argues that an order of removal would continue the tradition of legal practices which are

¹⁰ While the credibility of most, if not all, witnesses is subject to challenge in trials, the credibility assessments of sexual assault victims are impacted by “myths and stereotypes surrounding ‘ideal’, ‘real’, or ‘genuine’ victims of sexual assault”, which “play out in often harmful and discriminatory ways”. See Melanie Randall, “Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance, and Victim Blaming”, *Canadian Journal of Women and Law* 22, no. 2 (2010): 397-434.

¹¹ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener Barbra Schlifer Commemorative Clinic at para. 2).

¹² *Ibid.*, at para. 38.

¹³ *Ibid.*, at para. 29.

¹⁴ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener Women’s Legal Education and Action Fund at para 2).

designed to “humiliate, degrade and intimidate complainants”; these burdensome circumstances would be compounded by the possibility of N.S. having to face prolonged inquiries into the “validity, sincerity and voluntariness of [her] religious practice.”¹⁵ Moreover, it opens up the door for a two-pronged attack on N.S.’s credibility and sincerity, as both a victim of sexual assault and as a religious adherent, thus creating the conditions for a particularly pernicious and new form of “virtue testing”.¹⁶ In other words, N.S. would face serious challenges to her credibility because of both the entrenched and problematic manner in which the credibility of sexual assault witnesses is attacked by counsel, and because her freedom of religion claim can be upended if it is shown that she lacks the adequate sincerity in her faith. In concentrating on the troubling manner in which the notion of sincerity (and the scrutiny it brings with it) has been levied against sexual assault complainants, N.S.’s identity as “a racialized woman from a stigmatized religious/racial minority”, is given deeper dimension via her identity as a sexual assault complainant. Her situation is compared to the experiences of Aboriginal and racialized women who have historically experienced having their innocence,

¹⁵ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener Women’s Legal Education and Action Fund at paras 20-1). LEAF also notes that N.S.’s identity as a sexual assault complainant exists within a legal context rife with stereotypes about such victims and how they should and should not act as witnesses. They call attention to myths around the “un-rapeability” of certain women, and around the supposed unreliability of sexual assault witnesses, who face accusations of exaggerating and/or lying about their experiences. See *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener Women’s Legal Education and Action Fund at para. 14). The Clinic also argues that such myths and stereotypes about sexual assault victims are, in this case, compounded by existing myths and stereotypes about N.S.’s ethno-racial/religious identity. See *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener Barbra Schliker Commemorative Clinic at para. 12).

¹⁶ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener Women’s Legal Education and Action Fund at para. 22).

credibility, and worth more closely scrutinized and subjected to judgement than have non-minority women.¹⁷

When interveners for N.S. switch their focus to emphasizing her identity as a Muslim woman who wears a niqab, they define this identity mainly through descriptions of exclusion and outsidership. For example, the idea put forth by some, that an order of removal would in fact help to protect Muslim women, is described as yet another way to “marginalize and stigmatize this already disadvantaged group of women.”¹⁸, while the Clinic notes that it would “exacerbate[e] their existing social exclusion by impeding their access to the criminal justice system.”¹⁹ This exclusion would not only convey the message that niqab-wearing women are not worthy of the same levels of respect, consideration and concern as other citizens, but would also work to deepen the already marginalized status of these women and the barriers they face in accessing justice.²⁰

At other instances, N.S.’s identity as a Muslim woman is also what marks her as distinctively vulnerable. For LEAF, her specific identity as a Muslim, in this particular time in history, marks her as a “distrusted and marginalized minority”, and makes the implications behind an order of removal particularly important to consider. In other words, an order of removal would potentially be experienced as an “enactment of

¹⁷ Ibid, at para. 15. Similarly, the Clinic notes that N.S.’s identity as a sexual assault complainant makes her vulnerable to myths and stereotypes about such complainants, compounding the discrimination she already faces because of her ethno-racial identity. See *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener Barbra Schlifer Commemorative Clinic at para. 12).

¹⁸ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener Women’s Legal Education and Action Fund at para. 28).

¹⁹ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener Barbra Schlifer Commemorative Clinic at para. 7).

²⁰ Ibid, at para. 39.

dominant society's sense of cultural/racial/religious superiority over the Muslim minority", or an attempt to bring N.S., existing somewhere on the fringes, into "secular life."²¹ N.S.'s identity as a Muslim, niqab-wearing woman is also set against "post-9/11 Western society (where it is) often perceived as an affront to Western values and traditions."²² LEAF also finds that "the psychological harm and violation of personal integrity" occasioned by an order of removal is "uniquely raced and gendered"²³ *because* N.S. is uniquely raced and gendered; she *only* wears the niqab because she is a Muslim woman, and her niqab (along with her racialized identity) is worn *because* she is a Muslim. Similarly, the Ontario Human Rights Commission (hereinafter, the Commission), expressly states that "N.S.'s religion and gender cannot be considered separately but must be viewed in an intersectional manner."²⁴ For the Commission, gender and religion are inextricably bound up in one another, as only Muslim women wear the niqab, and the crime alleged to have been committed against her is inextricably linked to the fact that she is a woman, while "she is also faced with a potential impediment to her ability to seek redress because she is a Muslim woman."²⁵ Gender equality rights and religious rights are equally triggered and demand equal recognition.²⁶

The Commission, like Butt, also identifies N.S. as "uniquely vulnerable", with her vulnerability stemming not only from being an alleged victim of sexual assault, but also

²¹ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener Women's Legal Education and Action Fund at para. 26).

²² *Ibid.*, at para. 28.

²³ *Ibid.*, at para. 26.

²⁴ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener Ontario Human Rights Association at para. 20).

²⁵ *Ibid.*, at para. 22.

²⁶ *Ibid.*, at para. 26.

from being a member of a minority group “that experiences significant stigma in Canada and around the world.”²⁷ Recent international and domestic legal regulations involving the hijab and niqab are indicative of her marginalized and vulnerable status — the Commission notes that while the actual percentage of niqab-wearing women in Western countries is miniscule, their presence attracts a disproportionate amount of attention, both from the media and from state governments. This largely negative attention, which gives rise to and encourages efforts to eliminate the niqab from non-Islamic countries, also highlights the barriers to equal participation niqab-wearing women face.²⁸ In this way, “niqab-wearing women bear the brunt of societal intolerance and distrust towards Muslims.”²⁹

The Council on American-Islamic Relations (hereinafter, CAIR), an organization dedicated to promoting and protecting the civil rights of Muslims in North America, also asserts that an intersectional lens is necessary in order to give proper attention to N.S.’s status as “a member of a minority within a minority (with) intersecting sex equality and religious and cultural equality interests at stake.”³⁰ However, for CAIR, it is N.S.’s identity as a religious minority that takes center stage in their framing. N.S. is not only an outsider to dominant society; her niqab pushes her even to the fringes of her *own*

²⁷ Ibid, at para. 20.

²⁸ Ibid, at para. 24.

²⁹ Ibid, at para. 23. The Commission also argues that even if it were the case that some women were compelled by external forces to wear the niqab, their already vulnerable and burdened status would be further exacerbated by the construction of even more barriers to access to justice, while they would be made further vulnerable to sexual and violent crimes. See *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener Ontario Human Rights Association at footnote 27).

³⁰ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener Canadian Council on American-Islamic Relations at para. 11).

community. CAIR notes that when she “ventures” out of her home, she faces the potential of being mocked, harassed, and assaulted.³¹ CAIR further frames N.S.’s multiple identities as giving rise to an “impossible choice”. If an order of removal is given, she would be made to choose between “walking away from her religious convictions as a person of faith, and walking away from the pursuit of justice as a victim of an alleged sexual assault.”³² Her difference is thus further emphasized as resulting in undue disadvantage³³: as a niqab-wearing Muslim woman, N.S. would face a burden *unlike* those suffered by any others, and this would be an “invidious burden.”³⁴

For the South Asian Legal Clinic of Ontario (hereinafter, SALCO),³⁵ N.S.’s identity as a ethno-racial/religious minority operates as the crux of this matter, and it is this identity which ultimately demands of the court an answer that would adequately address problems related to access to justice and barriers for such minorities. Her identities are what the SALCO calls “subjective factors”: she is a racialized person, belonging to “an ethnic, linguistic and religious minority in Canada, which has been the victim of discrimination, violence and negative stereotyping, especially since 9/11.”³⁶ SALCO emphasizes that an order of removal would result in N.S. becoming further

³¹ *Ibid*, at para. 1.

³² *Ibid*, at para. 10.

³³ *Ibid*, at para. 22.

³⁴ *Ibid*, at para. 23.

³⁵ The South Asian Legal Clinic of Ontario is an organization providing culturally and linguistically appropriate legal services for low-income South Asians in the province. See SALCO: The South Asian Legal Clinic of Ontario, “About SALCO: Our History”, accessed June 27, 2013, <http://www.salc.on.ca/sw00as2.html>.

³⁶ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener South Asian Legal Clinic of Ontario at para. 4).

marginalized and disenfranchised, and the net result would be to discourage Muslims as a whole from interacting with the justice system.³⁷

What is most striking about the SALCO factum is their statement that while “N.S. does not *appear* to have encountered any barriers in accessing justice, nonetheless there are significant subjective barriers to accessing justice issues in this case.”³⁸ There is then, a marked difference between the facile appearance of the case and what they appear to *know* as the underlying truth of the matter. Importantly, with this statement, SALCO neglects to acknowledge the very real barriers N.S. experienced in bringing this case to court after so many years; while these impediments are not linked to any specific ethno-racial identity, but are instead the result of familial resistance, the point here is that N.S. as having suffering from subjective barriers related to her ethno-racial/religious identity is stressed at the apparent detriment of other aspects of her identity, which may also gave rise to experiencing barriers. In any event, SALCO also takes umbrage with the language contained in the decision of the Court of Appeal, wherein Justice Doherty stated N.S. is “a minority that *many believe* is unfairly maligned and stereotyped in Canada”. SALCO notes that this “tentative language suggests there is some question about the treatment of Muslims in Canada.”³⁹ With this assertion, there should be no doubt about the fact that N.S.’s identity as a niqab-wearing Muslim woman marks her as suffering from substantial disadvantages, and makes her vulnerable to attack, stereotypes, and paternalistic legal manoeuvres.⁴⁰ N.S. is not simply a niqab-wearing Muslim woman

³⁷ Ibid, at para. 4.

³⁸ Ibid, at para. 28.

³⁹ Ibid, at para.33.

⁴⁰ Ibid, at para. 41.

who is a complainant in a sexual assault trial. Each of her additional identities contains their own set of markers which, taken individually, result in experiences of barriers and prejudice; taken together, and coalescing in the figure of N.S., these multiple identities render her vulnerable to attack on several fronts: she is a Muslim, which means she “faces discrimination, hatred and violence”, and as a niqab-wearing Muslim woman, she “faces prejudice and stereotyping”, while as a sexual assault complainant she “faces the trauma of reliving her assault, the fear of reprisal, a risk of exclusion and stigmatization within her own community and a likely attack on her credibility.”⁴¹ It is interesting here that in the case of the latter identity, SALCO notes that this gives rise to N.S. potentially experiencing exclusion *within* her own already marginalized and excluded community. N.S. is pushed further and further to the limits of social space by these forms of knowing her.

As Anne McClintock notes, “race, gender and class are not distinct realms of experience, existing in isolation from each other.” Rather, these elements come to life through the sometimes contradictory and conflicting relations they share to one another, through what McClintock calls “articulated categories.”⁴² As seen in the forms of knowing which emerge from the above characterizations and negotiations of N.S.’s identities, there is an “intimate, reciprocal and contradictory relation[ship]”⁴³ that exists between elements of gender, race and religion. In some instances, legal actors construct one identity (N.S. as a sexual assault victim, or N.S. as a woman), as the “organizing

⁴¹ Ibid, at para. 41.

⁴² Anne McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest*, (New York: Routledge, 1995), 5.

⁴³ Ibid, 5.

trope”,⁴⁴ which has the effect of creating a hierarchical understanding of N.S.’s multiple identities. I contend that the representations of N.S. and her multiple, intersecting identities by these legal actors results in an organizing trope that centers on N.S. as a victim, and as characterized almost solely by experiences of exclusion, marginalization, and victimization. While all the actors, some to a lesser or greater extent than others, argue that core identities (such as sexual assault complainant/victim and veiled Muslim woman) work in collusion to exacerbate existing social realities, there is a marked difference in the manner in which she is described or known as excluded, marginalized, and victimized. For example, for LEAF and Butt, a central (albeit not only) identity which must be contended with is N.S. as a sexual assault victim, while for SALCO and CAIR, N.S. as a racial, ethnic, and religious minority is what must drive and inform understanding of the implications of this case. In each perspective, N.S.’s other identities work to supplement the pre-existing framework of oppression within which she can be understood. Her identities serve as a kind of prism – depending on the perspective taken and who is doing the looking, each takes on a different meaning, both independently and in combination with one another. Whichever facet of identity serves as supporting the core of their arguments, and which serves as supplemental evidence, the net result is that at all turns N.S. is imagined as experiencing marginalization, exclusion, and victimization, in a multi-layered and omnipresent manner. Her identities becomes known as reasons for and extensions of these various forms of discrimination, and it is this “super victim” status which serves as a catalyst for the various arguments of legal actors. Tangentially, we also come to know N.S.’s agency through knowing her as a victim: it

⁴⁴ Ibid, 7.

seems to move on a scale of *some* agency (i.e. she seeks to exercise her freedom of religion right) to *none* (i.e. she is forestalled by the marginalization and isolation she experiences at every turn). The amorphous conception of agency that arises from these actor's constructions raises compelling questions: how are we to recognize N.S.'s agency in this matter and still maintain that she cannot remove her niqab? Does her agency become completely subsumed by her victim status, and, if so, how should we then perceive her claim? If she can willingly remove her niqab, does this make her less of a victim? I will address, later on in this chapter, the implications that can be mined from knowing N.S. as a "super victim".

1.2 Counsel & Interveners for the Accuseds

From the factum provided by the accuseds attorneys⁴⁵, we, on the face of it, learn little about N.S.'s identities, and less so about how these potentially come to impact on her claim or the court's response to it. There is silence, and yet, in this void, N.S. becomes constructed and knowable – although, in this instance, some "facts" which may lead to such knowledge are presented as undefined and open to speculation. For example, her niqab itself is framed as an unknown entity, because we do not know enough to even establish it as part of a religious practice. It is argued that "it is unclear

⁴⁵ The Criminal Lawyers' Association similarly has little to say about any of N.S.'s identities, nor is any mention made of any socio-political context which would need acknowledging by the courts. In this sense, N.S. again presents as an opaque figure, and the closest we get to touching upon her identity is again when doubt is cast on whether or not she has established her claim. According to the association, the preliminary inquiry resulted in "an insufficient factual basis upon which to determine N.S.'s application". See *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener Criminal Lawyers' Association at para. 3).

whether or not [N.S.] sees wearing the niqab as a mandatory religious requirement or as a personal preference and a matter of comfort;”⁴⁶ this framing has the effect of displacing her religious identity, as well as the role this identity should play in considerations of her claim. Counsel for the accuseds note that N.S. had previously removed her niqab for a driver’s license photo; this gives rise to questions about whether she *always* wears her face-veil in public, or, would she, like many other niqab-wearing woman, choose to unveil in order to fulfill “important civic functions.”⁴⁷ Somewhat ironically, N.S. is thus granted more agency by this legal actor than by those who argue on behalf of her, albeit with a slightly nefarious cast, as under this construction, her agency extends so far as to call into question the centrality of her identity as a niqab-wearer and to highlight her apparent willingness to willfully abandon her principles in certain scenarios. However, while N.S.’s agency is here emphasized in order to make the argument that she *can*, and indeed *has* removed her niqab, such an understanding erases the element of compulsion which, one would presume, strongly informed her and other niqab-wearing women’s “decision” to remove their face-veil when participating in civic functions. The argument that N.S. is capable of and has been willing to remove her niqab loses its potency when we appreciate that she made this choice in order to abide by the demands of the state. It is worth noting as well that in oral arguments before the Supreme Court, Butt mentions briefly that N.S. is employed as a bus driver.⁴⁸ It is reasonable to assume then that possessing a driver’s license is more than just the result of a choice made by N.S.; she *must* have a valid driver’s license, which must include a photograph exposing her face, in

⁴⁶ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Respondents at para. 4).

⁴⁷ *Ibid*, at para. 15

⁴⁸ *R. v. N.S.*, 2011 SCC No. 33989, (Transcript of Oral Arguments, at 27, line 4-5).

order to secure her ability to gain and keep employment. Once again, N.S.'s "choice" to remove her face-veil, under such circumstances, is a mitigated one.

For the Muslim Canadian Congress⁴⁹ (hereinafter, the "Congress"), there is marked doubt about N.S.'s Islamic identity as concomitant with her wearing of the niqab. They call into question N.S.'s religious sincerity, and frame the niqab as a practice that may in fact be non-religious. While it may perhaps contain significance on an individual or cultural level, the Congress argues that it is not in actuality a part of religious orthodoxy.⁵⁰ However, what is not in doubt for the Congress, is that "the covered female face is a reminder to the wearer that she is not free, and to the observer that she is a possession."⁵¹ They further note that N.S.'s niqab indicates that she exists in "self-selected segregation"⁵² (here they are drawing on the words of Justice Marrocco). Her identity as a niqab-wearer, a self-selected act of differentiation, is also what marks her as lacking in the ability to become a full member of society. The Congress further constructs N.S.'s niqab-wearing identity as dichotomous to the functioning of a free and democratic Canada; as such, it should be subject to certain limitations which "are

⁴⁹ The Muslim Canadian Congress, according to their mission statement, "is a grassroots organization that provides a voice to Muslims who are not represented by existing organizations; organizations that are either sectarian or ethnocentric, largely authoritarian, and influenced by a fear of modernity and an aversion to joy." See Muslim Canadian Congress, "Who We Are", accessed June 19, 2013, <http://www.muslimcanadiancongress.org/whoweare.html>

⁵⁰ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener Muslim Canadian Congress at para. 8).

⁵¹ *Ibid*, at para. 14.

⁵² *R. v. N.S.* 2009 O.J. 1766, at para. 141.

necessary to protect public safety, order, health or morals and the fundamental rights and freedoms of others.”⁵³

1.3 *The Crown*

The Crown is a particularly interesting actor, as they are present not only to represent the interests of the state and the public, but are also the actor which will ultimately try the case on N.S.’s behalf, if and when it moves on to the trial phase. They also have a vested interest going forward, in that there may be situations arising where niqab-wearing women could either be witnesses/complainants or defendants. Their arguments before the Supreme Court thus straddle the line between support for some aspects of N.S.’s claims, and taking into account future considerations where a niqab could present a functional disruption to their ability to try a case (not unlike the concerns of the accuseds and their interveners).

Nevertheless, the Crown states that they are aware and sensitive to the needs of sexual assault complainants, among which is the pressing concern to secure access to justice for these women, including those who wear the niqab.⁵⁴ In accordance with this, there is an acknowledgment that the nature of the allegations and N.S.’s vulnerability as an alleged victim are factors that ought to be considered in the efforts to determine this issue.⁵⁵ In specific reference to N.S.’s identity as a niqab-wearer, the Crown directly quote the following passage from the previous Court of Appeal decision:

⁵³ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener Muslim Canadian Congress at para. 21).

⁵⁴ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Respondent Crown at para. 56).

⁵⁵ *Ibid*, at para. 38.

“N.S. is a Muslim, a minority that many believe is unfairly maligned and stereotyped in contemporary Canada. A failure to give adequate consideration to N.S.’s religious beliefs would reflect and, to some extent, legitimize that negative stereotyping. Allowing her to wear a niqab could be seen as a recognition and acceptance of those minority beliefs and practices and, therefore, a reflection of the multi-cultural heritage of Canada.”⁵⁶

Note here that what for the SALCO was unacceptably “tentative” language referring to N.S.’s place in society (“*many believe*” she is maligned and stereotyped vs. “*she is*” maligned and stereotyped) for the Crown emerges as a context within which N.S.’s identities can be properly placed and known.

The Crown, again turning to the Court of Appeal, also cites this Courts finding that, as a witness in a sexual assault trial, N.S. faces the difficult task of recounting humiliating and painful memories from her childhood, while also facing the intimidating prospect of being subject to intense cross-examination which, presumably, would center on challenging her credibility and reliability. These difficulties are further intensified in this case because N.S. will be testifying against close family members.⁵⁷ For the Crown then, what compounds the difficulty of her circumstance is not necessarily or mainly the added burden of being a niqab-wearer, but rather the toll that comes with having to testify against family members accused of sexually assaulting her.

1.4 *Justices of the Supreme Court: Majority, Concurring, & Dissenting Decisions*

In the Supreme Court majority decision, there is little discussion of N.S.’s identit(ies). What mention is made, is drawn from N.S.’s own words. It is noted that “N.S. testifies that her religious belief required her to wear a niqab in public where men

⁵⁶ Ibid, at para. 37.

⁵⁷ Ibid, at para. 38.

(other than close family members) might see her.”⁵⁸ The majority opinion also, at one point, measures the risks that should be considered when reaching a decision, via reference to N.S specifically as a niqab-wearer; to that end, the Justices note that their judgement must take into account the broader societal harms that may occur if niqab-wearing women were to be discouraged from reporting crimes and from participation in the justice system.⁵⁹ Throughout the majority decision, there is also a tacit link made between N.S.’s legal claim and N.S. as a niqab-wearing Muslim woman and sexual assault victim/complainant. In other words, as was the case for previous actors, what seems to give her claim force and vigour is the fact that she is *also* a sexual assault complainant and it is within *this* combined context that sensitivity is required and a history of marginalization must be contended with. In this sense then, accommodative measures are not considered *only* or *solely* because she is a member of a religious minority, but also because of the nature of the alleged crimes themselves.⁶⁰ It is also worth noting that the majority decision contains no mention of N.S. as a racial or ethnic minority.

Through this legal actor, an interesting aspect arises about how the notion of sincerity functions in this case, and what impact this has on how we may come to know about N.S., in this instance, through *not* knowing her. The majority decision notes that the preliminary inquiry judge, in coming to a decision, erroneously focused on the

⁵⁸ It is interesting to note that the majority chooses this part of N.S.’s testimony to the preliminary inquiry, rather than other parts of her statement, like where she indicates that her niqab is “part of her” or that she is more comfortable wearing it.

⁵⁹ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 37.

⁶⁰ *Ibid*, at para. 37

“strength” and not the “sincerity” of N.S.’s religious beliefs.⁶¹ The standard test by which courts measure the validity of freedom of religion claims was set in the case of *Syndicat Northcrest v. Amselem*; this case set the precedent for the extent to which whether the religious belief in question was *sincerely held* was to be a central matter for consideration in passing judgement.⁶² From one perspective, the *Amselem* decision and the legal test which emerged from it resulted in a welcome “hands-off” approach to religion by the state, wherein religious beliefs are protected from state interference and scrutiny beyond a basic and cursory examination into their presence and/or substance. From another point of view, *Amselem* can be seen as being informed by an equally motivating factor, which is an understanding of religion that construes it as “epistemically opaque.”⁶³ In other words, there is a perception, discernible within legal discourses, that religion and religious beliefs are inherently inscrutable, thus granting them a special kind of status because of their impenetrability.⁶⁴

Under this understanding, the notion of “sincerity”, as it is used in connection with N.S.’s identity as a niqab-wearing Muslim woman, functions insofar as it allows us

⁶¹ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at paras. 11-12.

⁶² The Court’s decision in that case stated that: [A]t the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the courts the (1) he or she has a practice of belief, *having a nexus with religion*, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual’s spiritual faith, *irrespective* of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she *is sincere* in his or her belief. Only then will freedom of religion be triggered. See *Syndicat Northcrest v. Amselem*, 2004 SCC 47, at para. 56.

⁶³ Bryan Thomas, “Public Reason and Canadian Constitutional Law”, (PhD diss., University of Toronto, 2008), 84.

⁶⁴ *Ibid*, 135.

to state that *we do not know* whether she is or is not sincere in her convictions; thus, we cannot know anything about this particular identity other than its inherent mysteriousness and perhaps, through certain lenses, its latent insincerity. It is also possible to see this strain of uncertainty and *not knowing* emerge again when, with regards to how future judges should go about measuring the potential deleterious effects of an order of removal, the majority states that “it is difficult to measure the value of adherence to religious conviction, or the injury caused by being required to depart from it.”⁶⁵

What is also striking is that while many things seemingly remain unknown to the Court about the substance of N.S.’s religious beliefs, which, by extension, raises question about the validity of her freedom of religion claim, the majority decision makes clear that we are able to know beyond even a shadow of a doubt *about* the rights attendant to the identity of the defendants, as well as about the potential infringement of these rights by the presence of the niqab. As defendants, their right to a “fair trial is a fundamental pillar without which the edifice of the rule of law could crumble. [T]his is of critical importance not only to the individual on trial, but to public confidence in the justice system.”⁶⁶

Justices Lebel and Rothstein, in their concurring decision, offer another construction of N.S.’s identities. To begin with, they display no doubt about N.S.’s sincerity with regards to her religious convictions.⁶⁷ In fact, there is no opaqueness to be found in this matter, nor is there an inability to ascertain just what N.S.’s identity as a niqab-wearer means. Under their understanding, N.S. is a representation of “the rapid

⁶⁵ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 36.

⁶⁶ *Ibid*, at para. 38.

⁶⁷ *Ibid*, at para. 65.

evolution of contemporary Canadian society and the growing presence of new cultures, religions, traditions and social practices.”⁶⁸ The value of this evolution must, however, be weighed against “the roots of our contemporary democracy.”⁶⁹ With this framing, the minority justices invoke a binary perspective with regards to, on the one hand, new identities with their attendant new traditions and cultures, and on the other, the foundations and roots of Canadian society, evoking a dichotomous understanding of N.S. and of her identities in relation to Canadianness.

Justices Rothstein and Lebel, in their concurring decision, also draw on a previous Supreme Court decision wherein Justice Abella underscored that while the right to have differences is constitutionally protected, this fact does not translate into an understanding of these differences as hegemonic. In other words, there are some differences which are simply not compatible with fundamental Canadian values, and limits on the expressions of such differences are therefore not arbitrary nor unfair.⁷⁰ In relying on these statements by Justice Abella, Rothstein and Lebel frame N.S. as being incompatible with, as other than, and as standing in opposition to *fundamental* Canadian values, a position which also forms the basis of their finding that there should be an unequivocal rule *against* allowing the niqab in courtrooms. Perhaps as an extension of this line of thinking, Justices Rothstein and Lebel do not go into any discussion of N.S. as a sexual assault complainant.

⁶⁸ Ibid, at para. 59.

⁶⁹ Ibid, at para. 72.

⁷⁰ See *Bruker v. Marcovitz*, 2007 SCC 54, at paras. 1-2, as cited in *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 70.

The dissent of Justice Abella centres on N.S. as a religious minority making a freedom of religion claim. While Abella also acknowledges that an order of removal would also contain serious implications for sexual assault complainants, in that some women would “be forced to choose between laying a complaint and wearing a niqab”⁷¹, and that a victim of sexual assault could be “further inhibited by being asked to choose between their religious rights and their right to seek justice”⁷², it is the danger of “hanging a sign over the courtroom door saying ‘religious minorities not welcome’”⁷³ that seems to animate her decision to dissent in favour of a bright line rule in favour of allowing the niqab, except where properly ascertaining identification would be a matter of concern.

What bears some consideration is Justice Abella’s comparison of N.S.’s identity as a niqab-wearing Muslim woman to a disability or compromised physical state. This comparison is drawn in the context of discussing the limited probative value of demeanour evidence (which will be discussed in more detail in Chapter IV) and with the intent of stating that N.S. should not be treated any differently from those who are accommodated because of physical limitations. Abella argues that courts have accepted evidence from witnesses where there has been no access to demeanour. She notes that witnesses “may have physical or medical limitations that affect a judge’s or lawyers’ ability to assess demeanour”⁷⁴, and that the *Criminal Code* contains provisions for collecting transcripts of evidence for those witnesses “who [are] unable to attend the trial

⁷¹ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para 95.

⁷² *Ibid*, at para 93.

⁷³ *Ibid*, at para 93.

⁷⁴ Abella, J., *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726

because of a disability”.⁷⁵ In addition, drawing on political philosopher Martha Nussbaum, Justice Abella states that “as noted by Nussbaum, religious requirements are experienced as “obligatory and non-optional”, that is, as not providing a genuine choice to the religious believer.”⁷⁶ These comparisons contain interesting, evocative implications for notions of N.S.’s agency; on one hand, wearing the niqab is linked (however loosely) to physical limitations which are beyond the control of the sufferer, while on the other, her religious obligations are likewise experienced as outside of her choosing and/or control.

II. Analysis

2.1 *On Victimhood*

It is important here to note that in analyzing the discourse produced by N.S.’s lawyer and her interveners, I do not wish to convey that I am overly critical of their constructions, nor that I necessarily disagree with much of their findings. Indeed, “to present an individual in her community and, further, to describe that community as the disadvantaged, the disempowered, [and] the marginalized is to pose a fundamental challenge to legal discourse”, which is prone to ignoring the reality of the daily lives of those who fall into these categories.⁷⁷ With this being said, as Martha Minow acknowledges, critiquing any aspect of rhetoric related to victimization or oppression is a tricky endeavour, with the very real possibility of misunderstanding the objectives of

⁷⁵ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 104.

⁷⁶ Martha Nussbaum, *Liberty of Conscience: In Defence of America’s Tradition of Religious Equality* (New York: Basic Books, 2008), 117, 167, as cited in *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para 93.

⁷⁷ Sherene H. Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms*, (Toronto: University of Toronto Press, 1998), 37.

such criticisms.⁷⁸ It is my intention that in analyzing the victim discourse produced by legal actors, I can uncover what kind of knowledge is produced about N.S. in the process. I want to understand how and what kind of a picture of N.S. emerges, what elements work to inform this depiction, and how these impact on the framing of her agency, or lack thereof.

The best of intentions on the part of counsel and interveners for N.S. may not always result in optimal effects; “in seeing ourselves as good human rights activists engaging in crucial issues of social justice, we can sometimes repeat imperial civilizing move(s), and in so doing fail to see how we oppress others;”⁷⁹ moreover, problematic “distinctions [can] underpin deceptively ordinary and outwardly compassionate process[es]”.⁸⁰ Therefore, as a general practice, questioning the tactics of even those you agree with is a necessary strategy, as often those “seeking solutions to justice have not often stopped to question their authority to interpret culture, history and contemporary reality.”⁸¹ A post-colonial lens also demands that we not lose sight of the possibility that N.S.’s marginalization and oppression can be refracted through such Orientalist lenses, even at the hands of advocates for her cause.⁸²

⁷⁸ Minow further states that “attacking victim rhetoric has been a favorite activity of some people who seem much less sympathetic to the charges of oppression than I mean to be; yet uncritical acceptance of victim rhetoric can derail political efforts to challenge oppression”. This debate reflects a particular dilemma posed by contemporary victim talk. It creates a self-fulfilling prophecy, on the one hand, by suggesting that victims are powerless. Yet on the other hand, rejecting victim talk may lead to blaming powerless people for their own powerlessness. See Martha Minow, “Surviving Victim Talk”, *UCLA Law Review* 40 (1993): 1413, 1420.

⁷⁹ Razack, *Looking White People in the Eye*, 18.

⁸⁰ *Ibid*, 89.

⁸¹ *Ibid*, 79.

⁸² *Ibid*, 92-3.

Marc Gidley notes that “members of the dominant group — no matter how ‘intimate’ their sense of involvement with the people concerned, no matter how deep their proposed interest in the subject — will represent *nothing but* the assumption of their own kind. [T]here will be a tendency ‘to dichotomize into we-they contrasts and to essentialize the resultant other.’”⁸³ The binary mode of representation which frames civilized, liberated Western woman as juxtaposed against pre-modern, oppressed Third World woman has been actively reproduced by both feminist and non-feminist scholars.⁸⁴ Recall that throughout the discourse produced by counsel and interveners for N.S., there is a distinct characterization of N.S. as suffering from various kinds of oppression — not, in these constructions, because she belongs to a faith tradition or cultural group that is inherently oppressive, but because her extreme difference marks her as subject to marginalization and subjugation by what is assumed to be dominant society. Through what is deemed “a preoccupation with scripts of inferiority”⁸⁵, N.S. thus becomes an “acted upon being”. Such a framing leaves little room for appreciating N.S.’s legal claim and choice of religious expression not as inextricably linked to her perceived victimization and lack of agency but rather, perhaps, as powerful acts of resistance.⁸⁶ It also does not easily allow for N.S. to assert and affirm her agency with regards to her ability to freely choose and demand the right to wear her niqab.

⁸³ Mick Gidley, “Representing Others: An Introduction”, in *Representing Others: White Views of Indigenous Peoples*, ed. Mick Gidley, (Exeter: University of Exeter Press, 1992), 1, 2-3, as cited in Margaret E. Montoya, “Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse”, *Michigan Journal of Race & Law* 5, no 3 (2000): 878.

⁸⁴ Razack, *Looking White People in the Eye*, 6.

⁸⁵ *Ibid*, 6.

⁸⁶ *Ibid*, 20

It should also be noted that N.S.'s identities are in fact constructed and represented by dominant groups.⁸⁷ This applies even in the case of community-based advocates such as SALCO and CAIR; though they are imbued with a sense of authoritativeness by virtue of the segment of the population they are “authorized” to speak for, they may still, as an extension of this authority, frame their understandings via reference to majority intra-group viewpoints. This results not only in the elision of differences within that group, but also calls into question the extent to which the intersectional lens CAIR specifically purports to use actually works to highlight complexity, rather than to flatten experiences. As has been noted, N.S. is a minority *within* a minority, and as such may speak with a voice that cannot be easily found amidst the general consensus of that community. Failure to appreciate this may lead to an inability to recognize and represent faithfully the particular nature of her subjectivity, as well as the “complex ways [she may] construct meaning.”⁸⁸

In the focus on oppression and marginalization as being the linchpin of her multiple identities, what also occurs is a perception of N.S.'s multi-dimensionality as being coextensive with her suffering. In other words, she only becomes multilayered and three-dimensional, and therefore more understandable, through the multiple layers of suffering she is said to experience. This “sets up a subject who is thoroughly disempowered and helpless [and which] either erases diversity or constructs diversities as aggravating experiences of oppression; whereas, in reality, the aspects of a woman’s life which differ from [such an] essentialized concept may serve to alleviate oppression.”⁸⁹

⁸⁷ Ibid, 52.

⁸⁸ Ibid, 46.

⁸⁹ Ratna Kapur, “The Tragedy of Victimization Rhetoric: Resurrecting the Native Subject

The characterization of N.S. as victimized and disempowered also works to “recreate the imperialist move that views subject[s] as different and civilizationally backward”.⁹⁰ It further “leaves her not yet a whole or developed person; instead, she resembles a minor needing assistance, and help”.⁹¹ In this way, her subjectivity is both fleshed out by her experiences of victimization and marginalization, while, simultaneously, she is also diminished by these experiences. By framing and coming to know her identities almost exclusively via reference to oppression and marginalization, N.S. becomes known through what Minow calls a “cramped identity.”⁹² What then has difficulty coming to the fore is the possibility that N.S. may “struggle for, and [have] claims to, rights in her multiple capacities”⁹³, and as connected to her multiple identities. However, the discourse produced by some legal actors results in N.S.’s master identity becoming one of victimization, which, through its very language, “invites people to treat victimhood as the primary source of identity”.⁹⁴ Any more three-dimensional or nuanced understanding of N.S. is precluded by the reductive nature of this victim identity, and we come to know her tautologically – she is oppressed and marginalized because she is oppressed and marginalized. Moreover, any sense of agency or choice that she may display works to countermand her status as a victim, and is thus de-emphasized by her counsel and interveners, in favour of concentrating on those identity-related aspects which deny or displace her ability to have agency and/or choice.

in *International/Postcolonial Feminist Legal Politics*”, *Harvard Human Rights Law Journal* 15 (2002):10.

⁹⁰ Ibid, 18

⁹¹ Ibid, 19.

⁹² Martha Minow, “Surviving Victim Talk”, *UCLA Law Review* 40 (1993):1432.

⁹³ Kapur, “The Tragedy of Victimization Rhetoric”, 32.

⁹⁴ Minow, “Surviving Victim Talk”, 1433.

To be sure, attention to socio-political contexts which give rise to marginalization and oppression may indeed be a most pressing concern for legal actors and for the purpose of both the acknowledgement of such difficulties and for working towards their alleviation. To that end, I do not argue that socio-political context is *not* important nor relevant, or that there are *not* pressing problems of marginalization and exclusion facing certain minority groups. I do not mean to imply that N.S., or other niqab-wearing Muslim woman, do not face very real barriers, or experience marginalization and oppression. However, what I am concerned with is how attention must also be paid to how this way of speaking about N.S. create and sustain ways of knowing her, as efforts at “cultural translation [are] inevitably enmeshed in conditions of power.”⁹⁵ Therefore, it is vital to recognize and call “into question the knowledge and being of both the teller and listener.”⁹⁶ With this in mind, we may find that while oppression and marginalization might be “an element of [N.S.’s] world, [they are] not its metonym and certainly not its totality.”⁹⁷

A practical effect of these ways of knowing N.S. is that it also leads to the Courts emerging as paternal protectors and emancipators of veiled Muslim women, as through their rulings, they are thought to be able to redress the marginalization they face. What is ironic however is that, in the N.S. case, it is only *within* the courts that she is potentially

⁹⁵ Talal Asad, “The Concept of Cultural Translation in British Social Anthropology”, in *Writing Culture: the Poetics and Politics of Ethnography*, eds. James Clifford and George E. Marcus, (Berkeley: University of California Press 1986), 163, as cited in Razack, *Looking White People in the Eye*, 79.

⁹⁶ Razack, *Looking White People in the Eye*, 52.

⁹⁷ Janet Halley, “Rape in Berlin: Reconsidering the Criminalization of Rape in the International Law of Armed Conflict”, *Melbourne Journal of International Law* 78, no. 9 (2008): 100 .

prevented from fully exercising her freedom of religion rights (leaving the situation in Quebec aside for a moment). What occurs then is a strange construction wherein the Courts function as both oppressors and as virtuous saviours, as both spaces of censure and of potential emancipation. Indeed, depending on the perspective, whether the Supreme Court acts to accommodate N.S. by allowing her to wear the niqab, or forces her to be “free of it”, they occupy a saviour position, while N.S., in both scenarios, remains in need of saving and divested of agency. Looking towards the Courts to operate as emancipators may also diminish the force of N.S.’s legal claim to exercise her freedom of religion rights, and work to “preserve the pattern of relationships in which some people enjoy power and position from which to consider — as a gift or act of benevolence — the needs of others.”⁹⁸

Speaking about victim rhetoric occurs on difficult and uncertain territory. While “focusing on victimization undermines capacity for choice and action, focusing on capacity for choice and action may minimize real facts of victimization. The passive and helpless connotations of victimization lie at the heart of this dilemma.”⁹⁹ Despite this thorniness, I contend that it is important to examine the impacts of what has largely been left unquestioned: the extent to which “the continuing discourse of abject victimhood essentializes the representation of Muslim women.”¹⁰⁰

⁹⁸ Martha Minow, *Making all the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press 1990), as cited in Razack, *Looking White People in the Eye*, 138.

⁹⁹ Minow, “Surviving Victim Talk”, 1427.

¹⁰⁰ Jasmin Zine, “Muslim Women and Politics of Representation, *The American Journal of Islamic Social Sciences* 19, no.4 (2002): 2.

2.2 *On Silence and Absence*

As previously noted, some legal actors remain markedly silent on issues related to N.S.'s identities, or avoid mention of them completely. It is difficult to theorize about silence, without falling into supposition and conjecture. Silence is also, by its very nature, ambiguous.¹⁰¹ It is sometimes difficult to judge when silence indicates something or when it indicates nothing. There is also the obvious, surface assessment that interveners and lawyers for the defendants do not speak about certain issues because doing so would not help their case or their position. However, silence, like any other form of discourse, can also work to encode a way of speaking about something, by either *not* speaking about it, or by using a singular language which is bound by a controlled and limited set of meanings. To that end, rather than accepting discourse produced by legal actors on their surface and as representative of “the sum total of statements on a particular statement”, we must examine “discursive structures as much for what they exclude as for what they determine.”¹⁰² Indeed, the tendency towards silence, especially with regards to issues of race or social marginalization¹⁰³, is a symptom of legal culture, wherein actors “participate in and reproduce a legal hierarchy that depends of silence and silencing”.¹⁰⁴ Legal discourse itself also works to elide issues related to race (and class) in a consistent and systematic manner.¹⁰⁵

¹⁰¹ Margaret E. Montoya, “Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse, *Michigan Journal of Race & Law* 5, no. 3 (2000): 855.

¹⁰² Sara Mills, *Discourse: The New Critical Idiom*, (New York: Routledge, 1997), 121.

¹⁰³ Montoya, “Silence and Silencing”, 856.

¹⁰⁴ *Ibid*, 853.

¹⁰⁵ Kimberlé Williams Crenshaw, “Foreword: Toward a Race-Conscious Pedagogy in Legal Education”, *National Black Law Journal* 11 (1989): 1-14, as cited in Montoya, “Silence and Silencing”, 893.

The discursive mechanisms of silence and silencing tactics may also work to sustain existing racial arrangements.¹⁰⁶ By maintaining silence on N.S.'s identi(ties), legal actors participate in the maintaining of the dominant group's worldview, wherein race is rarely mentioned because it does not matter in any significant way, having no real impact on their day-to-day realities.¹⁰⁷ Silence can thus *become* an act of silencing, wherein the latter can be used as a tool of subordination¹⁰⁸ and for maintaining the borders of knowledge and power.¹⁰⁹ Silence and silencing "have hegemonic effect(s), deluding us into thinking that race, gender, sexual orientation, and other characteristics of identity do not have to be mentioned because they do not matter; their alleged transparency proves their irrelevance."¹¹⁰

It should also be noted that, interestingly enough, while counsel and interveners for N.S. *do* take care to make mention of her as a member of a racial/ethno-racial minority, no actor ever expands on exactly what this identity *is*. Of course, with the inclusion of the South-Asian Legal Clinic of Ontario as an intervener, it is reasonable to surmise that N.S. is connected in some way to this ethnic or cultural community. However, this is never established as fact, nor is it specified or expounded upon. N.S.'s racial identity presents both as an unspoken assumption, and as a concrete fact that is intimately linked to her experiences of marginalization. The question that may be raised here is, what is the significance of *knowing* her race? In answer, I contend that *knowing*

¹⁰⁶ Montoya, "Silence and Silencing", 854.

¹⁰⁷ Ibid, 892.

¹⁰⁸ Razack, *Looking White People in the Eye*, 10, as cited in Montoya, "Silence and Silencing", 873.

¹⁰⁹ Montoya, "Silence and Silencing", 850

¹¹⁰ Ibid, 856

or asserting fact in this area may lend itself to avoiding the conflation of experiences of different ethno-racial groups and even national groups, while also allowing for N.S. to express a more multifaceted subjectivity, and to, in the process, become less abstract and more embodied and concrete. Silence on this issue, which results in the elision of conceivably important aspects of N.S.'s identity, also raises the spectre of an underlying assumption that her religious identity is in some way continuous with a specific, albeit unspecified, ethno-racial categorization. Such an identity does not need naming precisely because it is assumed that it is already obvious and known. Without making too much of a suppositional leap, I argue that it is worth considering whether this occurs because of a tendency to view Islamic/Muslim identity as monolithic and totalizing, and as, in and of itself, representative enough of concrete "otherness" so as not to require bolstering by other, less evocative forms of "otherness". In other words, once one is understood as a certain kind of "other", other facets of identity become more easily subsumed under this master identity. This is precisely the set of conditions that gives rise to the need for an intersectional understanding of identity, which would take into account its interconnected, layered multiplicities and how they coalesce and work in tangent to create and inform the lived experiences of people. While some legal actors state their intention to employ such a lens, by conflating N.S.'s religious identity with her ethno-religious identity, they may have the effect of doing just the opposite.

Chapter III: The Niqab – Functionalist and Symbolic Interpretations

Introduction

As mentioned in Chapter I, many of the arguments against allowing N.S to wear her face-veil while testifying centred on its supposed detrimental impact on the functioning and procedures of the court, as well as on the ability of defence counsel to adequately cross-examine her and ensure the fair trial rights of their clients. Examining the discourse produced legal actors relating to N.S.'s physical face-veil will allow for an analysis of the ways in which these players contradictorily frame the niqab as either a tool of enhanced visibility for a marginalized group, as an integral part of N.S.'s "being", as resulting in her figurative and literal erasure or invisibility, and/or as a symbol of ultimate difference. In this chapter, I first describe what each category of legal actor has to say about her niqab and how they negotiate its implications. I then analyze these discourses in order to highlight and critique how these ways of knowing about her face-veil construct N.S. as both coextensive with her niqab (she is her niqab and her niqab is her) and rendered invisible (figuratively and literally) and essentially different by it.

I. The Actors

1.1 *N.S.'s Attorneys & Interveners*

N.S.'s attorney David Butt begins his framing of the niqab by acknowledging that "a niqab is many things — lightning rod included — to many people in the complicated religious and social debates that surround and define the garment, its symbolism and those who wear it."¹ However, Butt emphasizes that with regards to the processes of the

¹ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Applicant at para. 69).

courtroom, the niqab is not an impediment, but in fact is benign,² as would be the collar of a priest, a yarmulke, or a turban.³ Just as these latter forms of religious garb do not irreparably impair the functioning of a courtroom, Butt argues that the niqab does not impede the full answer and defence rights of the defendants.⁴ He further normalizes the niqab by stressing that, as an innocuous form of religious dress, it should be accommodated “without question.”⁵ Butt also constructs N.S.’s niqab as providing her with both physical and spiritual comfort in the face of the trauma she must suffer as a witness in her own sexual assault case (it should be noted that N.S. herself never uses terms such as “trauma” or “traumatic” to describe this experience).⁶ If she were made to remove her niqab, trauma would arise not only from the burden of being such a witness, but also as a result of being made to testify unveiled. The potential for such an ordeal would raise the risk of barring access to the courts for niqab-wearing women, as the trauma of removal would not only prevent them from wanting to seek redress, but also impact upon their very *ability* to do so.⁷ Butt quotes from Natasha Bakht, who similarly argues that an order of removal, taken in conjunction with the already burdensome task of testifying in such a case, could potentially result in trauma, enough so that the quality of evidence given would be negatively impacted.⁸

Significantly, in Butt’s estimation, the niqab is not equated with N.S.’s physical invisibility, nor with an inability on the part of others to see (or hear) N.S. Butt lists, for

² Ibid, at para. 69.

³ Ibid, at para. 41.

⁴ Ibid, at para. 22.

⁵ Ibid, at para. 2.

⁶ Ibid, para. 1.

⁷ Ibid, at para. 63.

⁸ Ibid, at para. 63.

the benefit of Court, all of the physical aspects of N.S. which remain available and which could operate as bodily markers of veracity: “eye contact is unaffected by a niqab, body language is unaffected by the niqab, voice tone and inflexion is unaffected, [and] the cadence of speech is unaffected.”⁹ As proof of this argument, Butt points out that the preliminary inquiry judge had the opportunity to speak to and question N.S. while she was wearing her niqab, and that at no point did he indicate that the garment presented a significant difficulty in communication and/or the fact-finding process.¹⁰

However, recalling his earlier characterization of N.S.’s identity, Butt also characterizes the niqab as an elephant in the room — he concedes the “fact” that the niqab is controversial and gives rise to negative stereotyping and associations. He cites Bakht’s findings that the niqab is viewed by many as confrontational and offensive to national values and ways of living, and as an ostentatious rejection of Western norms.¹¹ The niqab as a benign garment seems to recede in the face of visceral reactions which occur when faced with “jarring aesthetic difference”. Nevertheless, Butt argues that this “mere aesthetic displeasure”, based as it is on a pejorative understanding of the niqab and the values which underlie it, cannot be allowed to drive the question of whether the niqab functionally compromises courtroom procedure.¹²

⁹ Ibid, at para. 37.

¹⁰ Ibid, at para. 39.

¹¹ Natasha Bakht, “Veiled Objections: Facing Public Opposition to the Niqab”, in *Reasonable Accommodation: Managing Religious Diversity*, ed. Lori Beaman, (Vancouver: UBC Press, 2012), 85, as cited in *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Applicant, at para. 55).

¹² *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Applicant at paras. 60-61).

Butt also constructs the niqab as being intimately connected to N.S.'s being and to her human dignity. He again draws on research by Bakht which links the niqab to being an extension of and a "critical factor" of N.S.'s "being".¹³ Under such circumstances, forcing its removal or denying access to the fundamental legal right to freedom of religion would amount to an attack on the physical integrity of veiled Muslim women.¹⁴ The niqab as "intimate" and "integral" is further underscored by equating an order of removal with an order for N.S. to "partially disrobe"¹⁵, indicating that to remove her niqab would be to expose her and to lay her bare before the court. Butt further argues that "forcing a woman to choose between taking off her veil to feel exposed, humiliated and profaned, or walking away from redress in our criminal courts, is a terrible burden to place upon her."¹⁶ In this context, N.S. is thus profaned without an intimate part of her being (her niqab), a consequence made all the more potent when considered in the context of a sexual assault trial. Following Butt's arguments, because N.S. is exposed and humiliated if made to remove her niqab, she may also, in a sense, be rendered less visible, as her access to the justice system would be greatly diminished if she were forced to abide by such burdensome limitations. In the context of this case then, what it means to be both clothed and unclothed take on different meanings; while, of course, N.S. would remain clothed and, conceivably, more covered than the average citizen when testifying

¹³ Natasha Bakht, "Objection Your Honour! Accommodating Niqab-Wearing Women in Courtrooms", in *Legal Practice and Cultural Diversity*, ed. Ralph Grillo et. al., (Surrey: Ashgate Publishing Ltd 2009), 4, as cited in *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Applicant at para. 56).

¹⁴ Bakht, "Objection Your Honour!", 116- 7, as cited in *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Applicant at 56).

¹⁵ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Applicant at para. 71).

¹⁶ *Ibid*, at para. 64.

even without her face-veil, stripping her of her niqab would be an act that would render her figuratively naked and exposed, in a manner that is particularly and unfairly burdensome to her, especially as a sexual assault complaint. Conversely, remaining veiled in this context allows her to retain her dignity, integrity, and her sense of “being”, as well as allow her to provide testimony without being impacted by the trauma associated with an order of removal.

Butt also draws a distinction between the niqab as a functional impediment (i.e. it may *literally* and *practically* impact on the ability to access physical cues) and as an ideological symbol that can be seen aesthetically jarring or confrontational. He concedes that:

[h]umans derive great meaning from their visual environment. Therefore, we can have strong visceral reactions to garments we perceive as jarring departures from a comfortable visual environment where exposed faces are the norm: in other words, a niqab is to such person aesthetically displeasing, or even aesthetically offensive. And that visceral taking of offence for aesthetic reason can be dangerously amplified by thoughtlessly attaching to a niqab some pejorative symbolic meaning unintended by the wearer herself.¹⁷

One would assume here, that given Butt’s previous focus on the niqab as being akin to an “elephant in the room”, there is also the possibility that it could be perceived as such because it is construed as ideologically threatening and/or confrontational to the norms of the courtroom and the society it represents. However, for Butt, while the niqab is the ostensible reason for both N.S.’s marginalization and lack of access to avenues of justice, allowing her to wear it would be a key element to ameliorating the effects of this marginalization and lack of access. The niqab is thus constructed both as an obstacle to and as a potential symbol of a more expansive concept of accommodation.

¹⁷ Ibid, at para. 59.

While neither LEAF nor the Barbra Schlifer Clinic equate the niqab with erasing visibility, they do equate it with *shielding* or *protecting* N.S. from the defendants. Similarly to Butt, the niqab is constructed as a piece of intimate apparel¹⁸, while also as being expressly bound up in her identity as a sexual assault victim; as such, any finding by the court must be informed by an understanding of the burdensome demands the legal system has historically placed on women in sexual assault cases.¹⁹ In keeping with this, LEAF characterizes an order of removal as “stripping” a sexual assault complainant/witness of “deeply personal clothing.”²⁰ In the context of a sexual assault trial, an order of removal would also be unavoidably gendered, not only because only Muslim women wear the veil²¹, but also because it would come at the behest of the male accuseds. In this way, “the order may be experienced as an act of male violence, a public undressing and nakedness, thus implicating the Canadian justice system in a very particular form of humiliation of Muslim women.”²² A parallel is thus drawn between the removal of the niqab and an act of gendered violence which exposes and degrades,

¹⁸ LEAF uses N.S.’s own words from the preliminary inquiry (the veil “is a part of me”) to underscore its centrality to her bodily integrity and the violence that would be done if she were made to remove her it. See *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Women’s Legal Education and Action Fund at para 23).

¹⁹ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Women’s Legal Education and Action Fund at para. 2). The Barbra Schlifer Clinic also notes that in academic literature pertaining to this topic, testimony is often described as a “second rape”. See *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Barbra Schlifer Commemorative Clinic at para. 23-24).

²⁰ *Ibid.*, at para. 7.

²¹ *Ibid.*, at para. 23.

²² *Ibid.*, at para. 26. The Clinic likewise that argues an order of removal would be traumatic and tantamount to a re-victimization of N.S. See *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Barbra Schlifer Commemorative Clinic at para. 37).

and which is aimed specifically at Muslim women.²³ Both LEAF and the Clinic also emphasize that the removal of the niqab would negatively impact N.S.'s ability to give testimony, given the trauma and serious "psychological stress"²⁴ that would inevitably arise from such an action. LEAF draws on the words of the Court of Appeal, wherein Justice Doherty stated that "without the niqab, N.S. would be testifying in an environment that was strange and uncomfortable for her. One could not expect her to be herself on the witness stand. A trier of fact could be misled by her demeanour."²⁵ Furthermore, the Clinic, like LEAF, argues that the disturbance arising from this would have the practical effect of eroding N.S.'s ability to either act "truthfully" (i.e. in an unmitigated manner) or to act at all, as "trauma could have significant consequences for a complainant's ability to give her evidence, and may cause her to choose not to give evidence at all."²⁶

N.S.'s interveners also frame the niqab as connected to a particular and specific religious community in the context of the current socio-political climate. To that end, LEAF argues that ordering the removal of an intimate garment worn only by Muslim

²³ In the context of a sexual assault trial, this is a particularly potent construction, as connotations of humiliation and degradation in one aspect (the removal of the veil) evoke similar experiences of sexual assault victims at the hands of their victimizers.

²⁴ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Barbra Schlifer Commemorative Clinic at para. 16).

²⁵ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Women's Legal Education and Action Fund at para. 12).

²⁶ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Barbra Schlifer Commemorative Clinic at para. 25). CAIR and the Canadian Civil Liberties Association also argue that the quality of evidence given during testimony would be negatively impacted by the anxiety and stress arising from being forced to testify without the niqab. See *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Canadian Council on American-Islamic Relations at para. 28) and *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Canadian Civil Liberties Association at para. 15).

women would carry with it potent implications, as Muslims are seen as “distrusted and marginalized” minority group in the West. Under these circumstances, compelling the niqab’s removal could be experienced as a reaffirming of the “superiority” of Western norms, and a coercive attempt to draw veiled women into the realm of “secular life”.²⁷

Other interveners for N.S., such as CAIR and SALCO, focus more concretely on the niqab as it relates to her (in)visibility. CAIR stresses that the niqab covers the face of wearers only below the eyes, which does not present an insurmountable or even substantial obstruction to triers of fact or to the rights of the accuseds. They note that because the niqab covers only part of the face, leaving N.S.’s “eyes, tone of voice, choice of words, logic of story, plausibility, posture and body language” to be assessed, her credibility can be adequately evaluated, and the rights of the defendants remain intact.²⁸ For SALCO, allowing N.S. to wear her niqab while testifying would actually work to *increase* her visibility, in the figurative sense, as it would allow for N.S.’s unmediated participation in the criminal justice system, and alleviate existing conditions of exclusion which impact niqab-wearing Muslim women.²⁹

While the Ontario Human Rights Commission has little to say about the niqab itself, other than further qualifying it as not covering N.S.’s *full* face³⁰, the Canadian Civil Liberties Association (CCLA), like the above interveners, similarly argues that the niqab

²⁷ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Women’s Legal Education and Action Fund at para. 26).

²⁸ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Canadian Council on American-Islamic Relations at para. 27).

²⁹ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener South Asian Legal Clinic of Ontario at para. 33).

³⁰ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Ontario Human Rights Association at para. 28).

does not erase those aspects of N.S.'s physical presence that would allow for her to both testify and to be rigorously cross-examined.³¹ In fact, they emphasize that fair trial interests, of which getting at the truth of the matter is a central concern, are not limited but are in fact promoted by the wearing of the niqab; doing so would allow those women who believe sincerely that it is their religious obligation to wear a face-veil the ability to participate in the judicial process.³² Here again, in a subversion of what is commonly assumed, it is N.S.'s *covered* face that has value in relation to its ability to affirm truth, while her *literal, physical* face actually recedes in probative value if she is forced to go unveiled.

1.2 Counsel & Interveners for the Accuseds

Counsel for the accuseds not only question the niqab as necessarily connected to religious beliefs, but also construe it as completely restricting access to all of N.S.'s face, thus rendering her *literally* invisible.³³ The niqab *hides* N.S., but not, as for LEAF, in a way that protects her from prying eyes; rather, this actor frames hiding as an act of concealment, which irreparably damages their clients' ability to make full answer and defence and to receive a fair trial.³⁴ More troubling than this framing, which gives rise to Orientalist depictions of duplicitous and untrustworthy Easterners, is the presumption which underlies it. Implicit in the accusation of concealment is an expectation on the part of this legal actor that there is a legitimate, unspoken right *to see*, or to gaze, and there is

³¹ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Canadian Civil Liberties Association at para. 13).

³² *Ibid.*, at para. 15.

³³ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Respondents, at para. 4).

³⁴ *Ibid.*, at para.15.

in fact never any indication that this “right” or the assumptions which inform it should be examined or contextualized. This assertion of such an unexamined right to know, through acts of revealing and gazing, brings us back to Edward Said, who, as noted in the first chapter, argued that in the hands of Orientalists, knowledge both emerges from and functions as a tool of domination.

The Criminal Lawyers’ Association also come to know the niqab as completely effacing N.S. They quote from previous Supreme Court decisions emphasizing the importance of judges and juries being able to see and hear the witnesses, thereby conflating the two senses and implying that without the former, the latter is impacted beyond repair.³⁵ In keeping with this finding, the Association asserts that the niqab prevents a wealth of information from being accessed, including “a witness’s facial cues, body language and gestures.”³⁶ The niqab is thought not only to distort and disguise, but also to “endanger [the] rights [of the defendants].”³⁷ They also call into question its status as a religious article, pointing out that “as N.S. stated, wearing the niqab is a matter of comfort and she has removed it other circumstances, such as to obtain a driver’s licence”.³⁸

The Muslim Canadian Congress begins its factum to the Court by describing the niqab as:

a controversial and polarizing garment, deceptively simple in its function and design. It is traditionally uniformly black and, save for a narrow slit for the eyes, it

³⁵ *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 799, as cited in *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener, Criminal Lawyers’ Association at para. 12, at. 5).

³⁶ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Criminal Lawyers’ Association at para. 12).

³⁷ *Ibid*, at para. 6.

³⁸ *Ibid*, at para. 26.

is meant to cover the wearer head-to-toe in a loose, oversized fashion. It is banned in some countries, culturally mandated in others. The entire purpose of the garment is to make women anonymous and shapeless — to conceal "the beauty of a woman", in the words of the Appellant, by making it impossible to observe her face, her demeanour, her expressions, and her emotions: one cannot be seduced by a non-descript woman. It is an article of clothing that can be worn for any number of reasons, ranging from the religious (as that term is understood for the purposes of section 2(a) *Charter* jurisprudence), to the cultural, to the political, to the familial.³⁹

Under this description, the niqab is inscribed with a number of familiar Orientalist tropes related to veiled Muslim women – the veil is connected to deceptiveness, is enforced on women, works to strip the wearer of her humanity by rendering her anonymous, is a result of misogynistic, retrograde conceptions of women as seductresses, and, in the final assessment, is not necessarily a religious garment at all.⁴⁰

For the Congress, the niqab is also defined as fundamentally opposed to the principles of gender equality, which is in turn integral to a “free and democratic society”.⁴¹ The niqab is “far removed from core *Charter* values”, and contains a double signification for wearers and for observers: for the latter, it signifies that she is not free, while for the former, it is a sign that N.S. is a possession. Under the framing of the niqab as antithetical to the values of a free and democratic society, the Congress “submits that

³⁹ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Muslim Canadian Congress at para.1).

⁴⁰ As an apparent expert on the niqab, the Congress draws on Steve Houchin, an American constitutional scholar, who helpfully ‘clarifies’ that the niqab may be worn “for the fulfillment of a religious obligation, cultural practice, or as a symbol of political conviction. Other Muslim women may veil simply to improve their family relations or to communicate certain messages to the outside world”. See Steve Houchin, “Confronting the Shadow: Is Forcing a Muslim Witness to Unveil in a Criminal Trial a Constitutional Right, or an Unreasonable Intrusion?”, *Pepperdine Law Review* 36, no. 3, (2009): 834, as cited in *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Muslim Canadian Congress at para. 12).

⁴¹ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Muslim Canadian Congress at para. 3).

the deleterious effects of infringing section 2(a) rights are lessened when the religious practice or belief is removed from the core values of a free and democratic society”.⁴² Beyond this negative symbolism, the niqab is also defined as literally rendering N.S. invisible, which also makes it impossible to *hear* her. As the Congress argues, “the open court principle embodies more than freedom of the press or simple physical access to the court room; rather, it is an expansive concept that includes the ability of the public to literally ‘see and hear the participants’ in a court case.”⁴³ The Congress also draws heavily on recent New Zealand case of *Police v. Razamjoo*, wherein witnesses who wore burqas were requesting the Court’s permission to keep them on while testifying.⁴⁴ In what is not an insignificant detail, it should be noted that a burqa, traditionally, covers the entire face, leaving a mesh screen for the eyes, as opposed to the niqab, which only covers the bottom half of a face. Not differentiating between the two is perhaps demonstrative of the fact that they see N.S.’s entire face as being rendered inaccessible and invisible by the niqab.⁴⁵ The Congress also quotes the following passage from the *Razamjoo* decision, referring to the burqa:

[t]he overall effect is that, apart from height and a very general (possibly misleading) sense of body bulk, none of the facial features or physical characteristics of the wearer are observable. [...] There was a strong sense of disembodiment, far greater than arises in receiving evidence by video link or the playing of an evidential videotape. It was all slightly unreal. The voice of the rogue computer in *2001 A Space Odyssey* quickly came to mind as an example of a voice conveying some sense of character but without an effective physical presence to fill

⁴²Ibid, at para. 23.

⁴³ Ibid, at para. 17.

⁴⁴ *Police v. Razamjoo*, [2005] D.C.R. 408

⁴⁵ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Respondents at para. 11). I am in no way arguing that the burqa, rather than the niqab, should be banned, because it makes the wearer *more* invisible. I am merely pointing out how eliding over differences between these two forms of dress is indicative of the myth of a monolithic Islam and of the manner in which veiled Muslim women are viewed.

out one's sense of a person. A telephone call from a complete stranger provides another example.⁴⁶

The niqab is thus a physical barrier which results in rendering her as unreal, as less than human - akin to a “rogue computer” — and as unknowable — like a “call from a complete stranger.” Under this construction, we are prevented from knowing anything substantive about N.S., as neither her physical attributes nor a sense of her personhood are accessible behind the veil.

While the actual content of the Congress’s factum is only around ten pages, the remainder of their 100-plus page document is striking for its connotations. Alongside a collection of domestic and international government reports about the niqab, and an academic article on the issue entitled “Confronting the Shadow”,⁴⁷ there is a selection of newspaper articles which recount acts of violence and criminality committed by veiled Muslim women.⁴⁸ The niqab is thus inscribed with a sense of danger and threat, both

⁴⁶ *Police v. Razamjoo*, [2005] D.C.R. 408, at paras. 1, 69, as cited in *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Muslim Canadian Congress at para. 4). In further reference to the Razamjoo case, the Congress further notes that “the court held that to do otherwise would undermine the basic values of New Zealand's free and democratic society because criminal justice must be ‘administered publicly and openly.’ The court was also concerned that if a woman's testimony were given less weight if she remained veiled this would create a ‘lesser class of witness’ which would ‘undermine the central concept of equality’ and ‘hearken the legal systems very different to our systems in which a person's sex, race or social position determines how much weight can be given to his—her evidence’”. See *Police v. Razamjoo*, [2005] D.C.R. 408, at paras. 71, 103.

⁴⁷ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Muslim Canadian Congress Appendix, 119). Houchin also states: “[t]he veil creates a shadow, and it threatens the very nature of our adversarial system. When we begin allowing certain exceptions to apply to our fundamental and deeply rooted values, the fabric of our country begins to unravel”. See Houchin, “Confronting the Shadow”, 876.

⁴⁸ Dina Aboul Hosn, "Dubai Police: Niqab an obstacle to tackling beggars: Women wear the veil (niqab) to conceal their identity, making it difficult for policemen mendicancy" *Gulf News*, July 12, 2011, and Mariam M. Al Serkal, "Veiled woman attacks and tries to rob man in Sharjah elevator: Police urge people not to enter lifts if they see strangers" *Gulf News*, July 12, 2011, as cited in *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726

symbolically (to the principles of a free and democratic society and open court), and literally (it provides a cover behind which criminality may be brewing).

The Congress further tries to diminish the religiosity of the veil by drawing on the findings of the Quebec Commission for Human Rights, which found that even the hijab could not be ascertained as worn entirely out of religious conviction.⁴⁹ In this vein, the Congress states that N.S. and other witnesses seeking to wear a niqab while testifying should be asked the following questions: “What is the purpose of her wearing the niqab? Does she wear a niqab for a religious reason? Is it a manifestation of a cultural practice? It is a political statement? Or is it something that her husband or father insists that she wear? If the practice is religiously motivated on a subjective level, does it admit to any exceptions?”⁵⁰ If any of these questions uncovers exceptions to the wearing of the niqab, or indicates its wearing for other than religious reasons, the Congress argues that the section 2 (a) rights of veiled women would not be engaged.⁵¹ Thus, while for the Defendant’s attorneys, credibility issues are linked to N.S.’s identity as sexual assault victim, for the Congress, the question of credibility rears its head when the niqab itself, as a physical and symbolic garment, is more closely examined.

1.3 *The Crown*

The Crown frames the niqab as a “new and challenging issue”, but they also assume that its sincerity as an article of religious clothing can be established, so long as

(Factum of the Intervener Muslim Canadian Congress Appendix, 35-36 and 56-58).

⁴⁹ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Muslim Canadian Congress at para. 8).

⁵⁰ *Ibid.*, at para. 9.

⁵¹ *Ibid.*, at para. 10.

any inquiry into it meets the broad tests outlined by *Amselem*.⁵² Interestingly, they note that in this particular case, a proper inquiry was not conducted into the exact nature of N.S.'s freedom of religion claim, as no evidence of her beliefs or how they may be reconciled with the defendant's rights was given, nor was she questioned adequately.⁵³ In this way, the exact substantive import of N.S.'s niqab remains shadowy, and there is an air of uncertainty with regards to precisely what category it falls into and how it can be navigated.

The Crown also relies on the Court of Appeal ruling to note that while the niqab *may* impede access to cross-examination, it also may *not*; the fact remains that we simply do not know enough to state definitively either way. While they do not go so far as to equate the niqab with a total loss of N.S.'s literal visibility, the Crown continues to vacillate in its understanding of the niqab. While it is noted that the Court of Appeal found that not all aspects of physical and facial demeanour are erased by the niqab, the Crown differs from this finding, stating that "the veil's ability to limit access may go beyond facial cues, depending on the circumstances of the case."⁵⁴ While the Crown draws on the same passages from the *Razamjoo* case the Congress did, which describe the burqa as resulting in a sense of disembodiment,⁵⁵ they resist making a final pronouncement in the N.S. case, as "the record in the case at bar is insufficient to determine the precise impact of the appellant's niqab."⁵⁶ The Crown also aligns with

⁵² *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Respondent Crown at paras. 21, 31).

⁵³ *Ibid*, at para. 32.

⁵⁴ *Ibid*, at para. 37

⁵⁵ *Police v. Razamjoo*, [2005] D.C.R. 408, as cited in *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Respondent Crown at para. 40).

⁵⁶ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Respondent Crown at

previous interveners in that “that the appellant may feel re-victimized if she is ordered to remove her niqab and testify before the men who she alleges sexually abused her”, although in their formulation, this presents less as fact and more as a possible scenario.⁵⁷ Finally, somewhat peculiarly, the Crown suggests that a possible measure of accommodation for niqab-wearers could involve “different styles or fabrics of niqab which may minimize the interference with the trier of fact’s ability to assess her demeanour”.⁵⁸ The exact functional effect of such an accommodation remains unclear, and it also implies that there is perhaps a certain representational image of the niqab which is at play here, and which may be possibly tempered by a less evocative and loaded version of it. Conversely, such a proposition may suggest that the Crown is less concerned with the potential multiple specificities of the niqab, or the different forms it could potentially take, than with its (dis)functionality within the courtroom.

1.4 *Justices of the Supreme Court: Majority, Concurring, & Dissent Decisions*

The majority justices, like the Crown, measure risks associated with the wearing of the niqab by referencing concerns put forth by both sides of the debate. The decision

para. 40). In keeping with this reluctance to affirm any particular way of knowing the niqab, the Crown describes risks associated with it as emerging from both sides of the debate. On one hand, to deem it as unbecoming to the courtroom process would be to risk stereotyping Muslims, as well as to jeopardize Canada’s multicultural traditions and access to justice for sexual assault victims. On the other, to grant the niqab an unequivocal presence in the witness box could potentially negatively impact the openness of the court process and its truth seeking function, as well as confidence in the administration of justice, and public accountability. See *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Respondent Crown at para. 40).

⁵⁷ *Ibid.*, at para. 56.

⁵⁸ *Ibid.*, at para. 47.

of the majority, however, indicates that the argument made by N.S.'s attorney and interveners that she would become more visible, literally and figuratively, if she were allowed to wear her niqab, is rejected. They imply that such an assertion "flies in the face of assumptions deeply embedded in common law criminal practice and the *Criminal Code*, as well as the accepted judicial view that seeing the face of a witness assists in credibility assessment and is important to a fair trial".⁵⁹ However, they do not go far as to completely frame the niqab as rendering the wearer invisible. Indeed, the majority displays some reluctance to make a pronouncement on just what the niqab does and does not do, functionally. While they at one point characterize it as "concealing" the face of the wearer⁶⁰, they, like the Crown, state that "[c]overing the face of a witness *may* impede cross-examination."⁶¹ However, Justice McLachlin emphasizes the strong connection between seeing the faces of witnesses and the conducting of a fair trial. While the ability to see a witness's face is not the sole, or even the most important, element of cross-examination, "its importance is too deeply rooted in our criminal justice system to be set aside absent compelling evidence."⁶² For the majority then, while there may be no concrete facts established with regards to the importance of face-to-face confrontation, its status as a norm⁶³, and as an "ancient and persistent connection to trial fairness"⁶⁴, and as measured against the presence of a garment which works to conceal, is enough to prevent deciding unequivocally in N.S.'s favour.

⁵⁹ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 48.

⁶⁰ *Ibid.*, at para. 43.

⁶¹ *Ibid.*, at para. 24-25, emphasis added.

⁶² *Ibid.*, at para. 27.

⁶³ *Ibid.*, at para. 23.

⁶⁴ *Ibid.*, at para. 31.

Interestingly, the majority seems to suggest that the effect of the niqab changes according to who it is being worn by. In other words, if it impedes on the ability to see the face of a central witness, it becomes problematic, whereas if the wearer's evidence is uncontested and the assessment of their credibility is not a central issue, it may not present the same difficulties, and a witness may be allowed to keep it on.⁶⁵ While, with these considerations, the majority seems to construct knowledge about the niqab in a functionalist manner, and are concerned with what physical limitations arise and the degree to which it impacts on trial fairness, rather than on framing the niqab as being an ideological affront to the norms of Canadian courtrooms, their construction gives rise to some troubling connotations. It could be implied that in the case of sexual assault complainants giving what everyone agrees to be centrally important testimony at trial, their importance would somehow translate into a requirement for them to be *more* visible, and to be *more* accessible. We are then lead to the distinctly problematic assertion that the law has more of a right or claim to gaze upon the bodies of sexual assault complainants/witnesses.

For Justices Rothstein and Lebel, the questions and concerns surrounding the niqab have less to do with its functional impact, and are centered more on upon its impact in relation to principles of criminal law and the Canadian Constitution.⁶⁶ The niqab is clearly defined by them as emblematic of a clash, both between the religious rights of victims of sexual assault and the rights of defendants, as well as between new, “challenging” traditions and established norms.⁶⁷ This clash “engages basic values of the

⁶⁵ Ibid, at para. 28-29.

⁶⁶ Ibid, at para. 58.

⁶⁷ Ibid, at para. 58. Rothstein and Lebel take issue with their belief that the Court of

Canadian criminal justice system”, and demands that we ask whether the wearing of the niqab is coextensive with not only the fair trial rights of the accused, but also with the principles, embedded in the Constitution, of neutrality and openness, made all the more important in the contemporary diversity that characterizes Canadian society.⁶⁸ For these justices, the answer to these questions is a clear no. Furthermore, their finding has nothing to do with the degree to which N.S.’s niqab is or is not a sincere expression of her religious faith; nor is this answer impacted by the possibility of trauma in testifying in a court in a sexual assault case (in relation to this latter point, they in fact focus on the trauma experienced by defendants in a criminal trial).⁶⁹

Rothstein and Lebel further argue that the niqab stands contrary to “common values that allow[] Canada to develop and live as a diverse society [and that] facilitate the interaction between all members of society.”⁷⁰ While s. 27 of the *Charter* is an indication of Canada’s “acceptance” that it is becoming more and more diverse, such a recognition of multiculturalism must occur within the context of the Constitution and its political and legal norms, and must remain grounded in the roots of our contemporary democratic society.⁷¹ They also identify the niqab as violating the fundamental Canadian value of an open court, which serves as a critical component of democratic states and the functioning

Appeal had little to say about this confrontation, and note that “it did not clearly decide whether wearing a niqab is compatible with the nature of a public adversarial trial in the courts of Canada and with the principles that govern such a trial under the *Canadian Charter of Rights and Freedoms*, the criminal law and the common law.” See *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 59.

⁶⁸ *Ibid.*, at para. 60.

⁶⁹ *Ibid.*, at para. 65.

⁷⁰ *Ibid.*, at para. 71.

⁷¹ *Ibid.*, at para. 72.

of the rule of law.⁷² The niqab negates the idea of public openness – here openness is not defined merely as access, but seems to mean, literally, the ability to *gaze* upon, in this case, the face of a veiled witness. With the niqab, the entitlement “of the public to know or learn about what goes on before them” is done away with. This definition of publicness, as opposed to the covertness which is implied by a face-veil, is defined as “the very soul of justice” and the “security of securities”, and is integral to integrity of the courts and the functioning of justice.⁷³ Within this definition then, given the above emphasis on the role of the “gaze”, publicness denotes a right to not only access the faces of citizens, but also the ability to objectify – to understand the face as a thing made external and concrete, a vessel for the conveying of truth. Finally, the niqab is also seen as cutting off communication in the context of a trial process, itself described as an act of communication with the larger public which allows all citizens to see the workings of justice.⁷⁴ Rothstein and Lebel concede that while communication may sometimes be difficult in some cases, such as where litigants with physical limitations may require accommodation, the niqab works to restrict, rather than facilitate, communication. Furthermore, it “shields” witnesses from interacting meaningfully with other legal parties.⁷⁵

In Justice Abella’s dissent, the niqab is qualified as not covering N.S.’s *entire* face,⁷⁶ and it also not seen as resulting in her total erasure. Like Butt and interveners for

⁷² Ibid, at para. 74

⁷³ *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, 1996 3 S.C.R. 480, at para. 22, as cited in *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 75.

⁷⁴ Ibid, at para. 76.

⁷⁵ Ibid, at para. 77.

⁷⁶ Ibid, at para. 80.

N.S., Abella lists the various aspects of demeanour still accessible to triers of fact, most significant of which would be the substance of her answers. Given this, Abella argues that N.S. would still be available for thorough cross-examination.⁷⁷

However, Justice Abella does not diminish the import of accessing the faces of witnesses during trials; nor does she pretend to suppose that access to N.S.'s face would not be greatly impacted by the wearing of the niqab. To that end, she “concede[s] without reservation that seeing more of a witness’ facial expressions is better than seeing less.”⁷⁸ Nevertheless, she argues that this desire is merely a matter of habitation and idealism⁷⁹, and that these attachments are not enough to override the need to allow for a full accommodation of the niqab, as an extension of its religious nature and the rights attached thereof.⁸⁰ She also, like Butt, normalizes the niqab, by placing it in the same category as physical impediments historically accommodate by the court system (such as aural, visual, or oral limitations).⁸¹ In her estimation then, there is no compelling reason why N.S.'s niqab should be understood as requiring a lesser extension of accommodative measures. Indeed, harm is more apt to be found in the likelihood that such an order

⁷⁷ Ibid, at para. 106.

⁷⁸ Ibid, at para. 82.

⁷⁹ Justice Abella states that even though, “historically and ideally, we *expect* to see a witness’ face when he or she is testifying, [this] is different from concluding that unless the entire package is available for scrutiny, a witness’s credibility cannot adequately be weighed.” Furthermore, while “witnesses in common law criminal courts are expected to testify with their faces visible to counsel and the trier of fact, it does not follow that if they are unable to do so, they cannot testify”. See *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 91-92.

⁸⁰ Ibid, at para. 82. Justice Abella does, however, make a distinction where there is an issue of identity – where the “witness’s face is central to the issues at trial, rather than merely being a part of the assessment of demeanour”, an order of removal may in fact be occasioned. This is the only exception, however. See *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 83.

⁸¹ Ibid, at para. 82.

would prevent niqab-wearing women from being willing to seek redress from the criminal justice system, as well as in the substantial interference⁸² with freedom of religion rights. Niqab-wearing women may decline to bring charges for offences committed against them, refuse to testify in trials (which would, conceivably, open them up to the possibility of legal sanctions), or, in cases where they are the accused, be unwilling (or unable) to testify in their own defence.⁸³ For Abella, these risks demand far more consideration than do concerns with the implications of not being able to see the entire face of witnesses.⁸⁴

Justice Abella also pays no heed to the question of whether N.S. truly wears the niqab as an extension of sincere religious belief. She recalls that “[t]his Court has adopted a low threshold when it comes to establishing sincerity of belief [and] inquiries into sincerity are to be “as limited as possible”, intended “only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice”. N.S. thus more than meets the sincerity threshold, and Abella underscores her point by noting the highly improbably proposition that a witness would wear the niqab because of insincere reasons, or to benefit themselves while testifying.⁸⁵

⁸² Ibid, at para. 84.

⁸³ Ibid, at para. 94.

⁸⁴ Ibid, at paras. 108-109.

⁸⁵ Ibid, at paras. 87-88.

II Analysis

2.1 *On Visibility and Effacement*

In the above discourses of legal actors about N.S.'s niqab, it is possible to see several distinct ways of knowing that emerge, which both subvert and affirm existing discursive frameworks. From N.S.'s attorney and interveners, we come to know the niqab not as a symbol of repression or segregation, or even as presenting a marked physical impediment. It is emphasized that while certain (ultimately unimportant) physical aspects of N.S. may be limited, with her niqab she presents as a more authentic, concrete, and accessible version of herself. If the notion of "visibility" can reasonably be attached to an increased potential for access and participation, under this construction, and if allowed to wear her niqab, N.S.'s visibility actually *increases*. In contrast, and in a complete upending of what is commonly attributed to the effects of a face-veil, if N.S. were to be made to remove her niqab, her figurative visibility, insofar as it is connected to her ability to come before the courts as a whole person, *decreases*, and she experiences trauma associated with this. In this sense then, without her niqab, we would be unable to get an accurate representation of who N.S. is – in this scenario, exposing N.S.'s face has the effect of making it more difficult to know anything about her. In sum, this position implies that without her niqab, N.S. not only suffers serious trauma, but also becomes less discernible, while with it, she becomes more embodied and knowable. While, conceivably, it is possible that the removal of her niqab, after years of wearing it, would impact her ability to be "herself" while testifying, what is interesting about this position is the emphasis it places on her niqab as an integral extension of her physical body and

her “self”, so much so that, in its absence, there would be a marked effect that would display itself physically.

For those legal actors who construe the niqab as erasing N.S. both literally and figuratively, and as preventing meaningful communication, the operating assumption seems to be based on norms related to the value of the face. As Ning Yu states, “a very common metonymy, richly manifested in language, is *the face stands for the person*. The bodily basis for this metonymy is that the face, with eyes, nose and mouth on its front and ears to its sides, is the most distinctive part of a person.”⁸⁶ The face is also thus strongly related to markers of identity, and in this framing, stands as the locus point of both social and physical interaction.⁸⁷ This norm is reflected in the very substance of language, as “in English, the word *face* is very often used in idioms indicating human interaction, especially confrontation, [which] shows that the face is the focus of interpersonal interaction and relationship.”⁸⁸

However, the focus on the importance of the face, and on the niqab as literally erasing N.S. and preventing all access to her as a physical and social being, may also be deeply rooted in what Razack calls “the colonial encounter”, wherein “the physicality of the encounter between powerful and powerless groups” is hinged upon the centrality of the notion of visibility in such encounters, both in terms of who is and is not seen, as well

⁸⁶ Ning Yu, “What Does Our Face Mean to Us?”, *Pragmatics & Cognition* 9, no.1 (2001):2.

⁸⁷ *Ibid*, 1.

⁸⁸ *Ibid*, 22. As an example of such findings, an op-ed article in the *New York Times*, defined the face-veil as preventing social interaction. It is asked how one can “establish a relationship with a person who, by hiding a smile or a glance – those universal signs of our common humanity – refuses to exist in the eyes of others?” See Jean-Francois Cope, “Tearing Away the Veil”, *New York Times*, May 05, 2012, (accessed March 07, 2013), http://www.nytimes.com/2010/05/05/opinion/05cope.html?_r=0

as who does the seeing and who is the object of seeing.⁸⁹ The representational practices of dominant groups are indeed given heft by the very action of seeing, as “he whose imperial eyes passively look out [also] posses[es].”⁹⁰ Razack further notes that there is an epistemic violence which is connected to this possessive form of vision, as it determines who is seen and not seen, as well as how they are seen.⁹¹ These “looking relations serve to establish and sustain hierarchies and relations of power between social and cultural ‘Others’”.⁹²

Katherine Bullock argues that “in current Western discourse, the veil, presented as a symbol of oppression, is a product of ‘the metaphysics of modernity’. This is a metaphysics that teaches individuals to view the world from the outside, as it were, and to understand meaning through looking.”⁹³ Bullock traces the historical relationship between the seeing eyes of colonizers and veiled Muslim women. She argues that:

Europeans had the confident knowledge of being at the apex of civilization, but this conviction could be destabilized upon their arrival in the Middle East, especially in the case of those who were used to and expected, the exhibition effect of detached, objective viewing. How could one be superior to, or establish authority over, creatures that could not be known since they could not be seen or grasped as a picture. What could not be seen or grasped as a spectacle could not be controlled.⁹⁴

In this context, the veil represented an inversion of such power relations, as it frustrated the viewer from accessing the object of their gaze,⁹⁵ with the understanding that the act of

⁸⁹ Sherene H. Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms*, (Toronto: University of Toronto Press, 1998), 11.

⁹⁰ *Ibid*, 15.

⁹¹ *Ibid*, 16.

⁹² Jasmin Zine, “Muslim Women and Politics of Representation, *The American Journal of Islamic Social Sciences* 19, no.4 (2002): 9.

⁹³ Katherine Bullock, “The Gaze and Colonial Plans for the Unveiling of Muslim Women”, *Studies in Contemporary Islam* 2, no.2 (2000): 1.

⁹⁴ *Ibid*, 6.

⁹⁵ Zine, “Muslim Women and the Politics of Representation”, 9-10.

seeing was also an act of possession.⁹⁶ The ability to *see* is also closely linked to Orientalist-type knowledge, “itself conceived of in terms of the gaze.”⁹⁷ As Said states, “the Orientalist scholar’s task was to make visible, for the Western audience, the ‘inscrutable Orient’”.⁹⁸ In this sense, for the Orientalist, knowledge [is] ‘essentially the *making visible* of material’”.⁹⁹ The veil as a gaze inhibitor interrupts the ability to construct meaning and establish dominance. In this context, donning the niqab can actually be understood as an act of resistance to the act of domination inherent to the Orientalist gaze, as well as to the set of norms which dictate how the “other” can come to be “known” by hegemonic forces. While the face-veil is an essential marker of otherness and of the Orient, it forestalls any ability to know more about who or what lies behind it: it is both known and unknowable, both revealing and concealing. Most importantly, its revelatory aspects work only to highlight its inherent mysteriousness.

It is possible to frame certain legal actors conflation of the niqab with N.S.’s invisibility and erasure of personhood as being “based on the same dynamic of the relationship between the veil and the gaze that first manifested itself in the colonial era.”¹⁰⁰ If she is allowed to remain veiled, N.S. becomes unavailable for visual penetration and for knowledge to be brought to bear on her. What knowledge does then remain from this inability to “see” N.S. is also largely based on a framing of the niqab as oppressive and/or in opposition to the readily identifiable and established foundations of

⁹⁶ Ibid, 11.

⁹⁷ Bullock, “The Gaze and Colonial Plans for the Unveiling of Muslim Women”, 4.

⁹⁸ Edward Said, *Orientalism*, (Middlesex: Penguin Press, 1978), 140, as cited in Bullock, “The Gaze and Colonial Plans for the Unveiling of Muslim Women”, 4.

⁹⁹ Bullock, “The Gaze and Colonial Plans for the Unveiling of Muslim Women”, 4.

¹⁰⁰ Ibid, 2.

Canadian society. Moreover, implicit in the argument that she, as a witness, must be laid bare before the courts, is the assumption that the state has an entitlement to gaze upon its subjects, at its behest. This “right” can be more easily asserted on the bodies of veiled Muslim women, given how she is framed as and becomes known through her unknowability.

Chapter IV: Demeanour Evidence and National Imaginaries

Introduction

While, on the surface, it appears that when speaking about the concept of demeanour and its attendant meanings and implications, legal actors are engaged in debates about the functional implications (or lack thereof) of the niqab for the purposes of cross-examination, witness assessment, and the fair trial rights of the accuseds, a closer analysis uncovers other, productive elements at play. In this chapter, I look at how the various legal actors construct and negotiate their particular concepts of “demeanour” and/or “demeanour evidence”. To clarify, demeanour may be taken to refer both to how a person behaves in relation to others, as well as a person’s physical, outward, appearance. These elements may be taken as a whole, or independently. I survey the conflicting manner in which forms of knowledge about demeanour and demeanour evidence are used by each legal actor, what is accepted by each as authoritative evidence on the issue, and the implications these different kinds of knowledge carry for conceptions of the veiled Muslim woman. In the process, I show that what emerges is the manner in which the symbolic capital assigned to demeanour evidence, as a norm and tradition, creates knowledge not only about N.S. and her relation to Canadianness, but also about Canadianness itself. I also show how the underlying anxieties and modes of knowing which inform the valorization of specific values and virtues related to demeanour tell us not only about how these traits become articulated, but also about where N.S. and her niqab stand in relation to these emblems of nationhood.

I. The Actors

1.1 *N.S.'s Attorney & Interveners*

When it comes to the issue of demeanour, the arguments made by N.S. attorney David Butt and supporting interveners do not differ greatly in terms of their core components. They argue that demeanour is not a reliable indicator of anything that is of probative value, and rely on academic research in order to underscore its fallibility. These actors also argue that if any value *were* to be ascribed to it, demeanour would be found to be more than simply the “face”. Moreover, access to demeanour is not so impaired by the niqab as to infringe substantially on fair trial rights. In particular, a few of these legal actors emphasize how the specific circumstances of this case render demeanour particularly useless, as a result of the traumatic effect an order of removal would have on her testimony and demeanour. Finally, they emphasize that it is mere convention, and not the infallible value of demeanour, which drives our insistence on relying upon it.

Butt argues that relying on demeanour and demeanour assessment, as both a concept and a legal tool of inquiry, is erroneous and dangerous; and he draws on academic research to underscore his points.¹ These resources tell us that there is little of value to be gleaned from observing a person’s demeanour, that facial cues cannot be

¹ Case law is also used to support his arguments. Butt cites previous findings by the Court of Appeal for Ontario which highlighted the subjective nature of demeanour assessments. Similarly, he demonstrates how the legal tradition itself has called into question the worth of demeanour evidence and assessments, and cites model jury instructions from the Canadian Judicial Council which caution against using them to make judgements. See *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Applicant at para. 30 and 36) and Canadian Judicial Council, Model Jury Instructions in Criminal Matters, Instruction 4.11, “Assessing Evidence”, accessed May 12, 2013, http://www.courts.ns.ca/General/resource_docs/jury_instr_model_apriI04.pdf

reliably linked to credibility², and that demeanour itself, as an indicator of anything of probative value, is a faulty concept. These studies, which emphasize the lack of connection between being able to detect lying by relying simply on demeanour,³ even when there are no obstructions to seeing all aspects of a witness⁴, allow Butt to assert that there is unanimity of academic opinion, backed by scientific research, with regards to the unhelpfulness of facial cues.⁵ As he notes, such an unequivocal repudiation by the academic community should be recognized by the Courts, lest they suffer “the disrespect of the intellectually discerning.”⁶

The Canadian Civil Liberties Association (CCLA) and CAIR also draw on research that emphasizes the unreliability of demeanour evidence. The experts they rely on argue that there are in actuality no concrete physical signs, to be read in the face or elsewhere on a person’s body, of lying or deception,⁷ while, historically, “appellate courts throughout Canada have recognized that demeanour evidence, particularly on its own, is an inherently unreliable predictor of credibility.”⁸ Such inaccuracy should be enough to

² *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Applicant at para. 22).

³ Natasha Bakht, “Objection Your Honour! Accommodating Niqab-Wearing Women in Courtrooms”, in *Legal Practice and Cultural Diversity*, ed. Ralph Grillo et. al., (Surrey: Ashgate Publishing, 2009), as cited in *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Applicant at para. 2).

⁴ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Applicant at para. 24).

⁵ *Ibid.*, at para. 25. The Ontario Human Rights Commission also finds that, “there is now widespread acceptance that little emphasis should be placed on a witness’s demeanour in assessing credibility”. See *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Ontario Human Rights Commission at para. 41).

⁶ *Ibid.*, at para. 3.

⁷ Marcus Stone, “Instant Lie Detection? Demeanour and Credibility in Criminal Trials”, *Criminal Law Review* 821, (1991): 829, as cited in *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Canadian Civil Liberties Association at para. 23).

⁸ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Canadian Civil Liberties Association at para. 20). See also *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Ontario Human Rights Commission at para. 42).

displace the value of demeanour assessments, and show them as “weak, faulty, and insignificant little practice[s].”⁹

Several of the interveners for N.S. also find that, despite its inherent limitations, if demeanour were to be considered as containing valuable information, it should more accurately be thought of as including *all* of the various aspects of self-expression that may be manifested by a person. These other aspects remain, despite the niqab, and are available for triers of fact to gauge and observe.¹⁰ In fact, N.S.’s demeanour is still available to be assessed; she retains her ability to make eye contact and her body language is still available, as is her voice tone and cadence. Moreover, “subconscious” movements remain, such as nodding, shrugging, or shaking.¹¹ In reality, the only aspect that a niqab *may* be found to impact – facial cues – is the same feature that has been dismissed by research as faulty and as not conducive to ascertaining the truth of a matter, as the consensus that facial cues are an unreliable tool for indicating accuracy indicates.¹² To rely on facial cues is thus to rely on a “shamefully imprecise tool.”¹³ Such is the faulty nature of demeanour evidence that Butt argues, “covering some of these facial cues

⁹ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Applicant at para. 39).

¹⁰ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Canadian Civil Liberties Association at para. 24) and *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener Council on American-Islamic Relations at para. 27).

¹¹ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Applicant at para. 37). See also *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Canadian Civil Liberties Association at para. 24) and *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Council on American-Islamic Relations at para. 27).

¹² *Ibid.*, at para. 37.

¹³ *Ibid.*, at para. 33.

with a veil takes away nothing of value and *may even help* by eliminating misleading information.”¹⁴

Moreover, LEAF and the CCLA both argue that in the past, courts have not found that the right to full answer and defence is infringed upon when other factors, such as physical limitations, impact upon demeanour.¹⁵ LEAF states that “[n]o one would suggest that witnesses whose facial expressions are limited, whether due to facial paralysis, muscle limitations, severe burns or other reasons, should be excluded or their evidence accorded less weight.”¹⁶ They also note that Courts allow testimony from witnesses who are not observable at all, as when they allow testimony by telephone in some cases.¹⁷

Demeanour is also framed by some legal actors as especially problematic because of the specific context of the case, both as sexual assault trial and as a case involving a member of a distinct minority group. In other words, as a result of the main underlying presumption of demeanour — that “nonverbal cues have fixed meanings” — demeanour, as an idea or a concept, is in reality hinged upon “artificiality” and “cultural contingency”¹⁸, the latter of which would be a problem in a case involving a witness who does not share in common the dominant cultures of the triers of fact.¹⁹ LEAF similarly

¹⁴ *Ibid*, at para. 67, emphasis added.

¹⁵ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Canadian Civil Liberties Association at para. 18).

¹⁶ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener Women’s Legal Education and Action Fund at para. 11).

¹⁷ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Canadian Civil Liberties Association at para. 18).

¹⁸ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Applicant at para. 27).

¹⁹ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Women’s Legal Education and Action Fund at para.15).

indicates that, while there is indeed a lack of evidence to prove demeanour is probatively relevant²⁰, when we narrow our scope to the context of sexual assault trials, its true problematic nature can be fully appreciated. In this context, demeanour evidence is rendered both useless and dangerous, given the historically prejudicial role it has played, where the outward appearances and physical responses of complainants have been given undue attention motivated by sexist, racist, and classist stereotypes.²¹ For LEAF, the expectation that the credibility of “central witnesses” (as complainants often are in sexual assault cases) should be subject to heightened scrutiny, and that their demeanour is somehow more indicative of and relevant to the truth of their complaint, is also problematic.²² Given this, and anticipating that forcing a witness to unveil in this context will cause significant anxiety and discomfort that would also negatively impact facial expressions, LEAF argues there is no value to be found in demeanour evidence.²³ Finally, as the CCLA notes, demeanour evidence further loses its value as the trauma arising from an order of removal forcing a witness to go against her religious beliefs²⁴ would muddy the waters: is N.S. upset or uncomfortable because she is avoiding a question, or because she is unveiled before the court? A trier of fact would not be able to determine where and when demeanour is relevant to credibility, or when it is representative of discomfort and trauma. N.S.’s demeanour is thus especially unreliable,

²⁰ Ibid, at para. 17.

²¹ Ibid, at para. 15.

²² Ibid, at para.16.

²³ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Canadian Civil Liberties Association at paras. 12 and 25) See also *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Applicant at para. 42).

²⁴ Ibid, at para. 25.

even more so than would the demeanour of other witnesses in less contentious circumstances.

Legal actors that advocate for N.S. also emphasize that the law's reliance on demeanour operates merely as a myth and a tradition, rather than as any kind of axiom indicating irrefutable truth.²⁵ Clinging to myths about demeanour and about our ability to read meaning into faces²⁶ results in law and legal culture unquestioningly accepting that access to demeanour not only has probative value, but is a fundamental and necessary condition for conducting a fair trial. These myths are characterized by oft-repeated, yet demonstrably unreliable, adages, such as "avoiding eye contact means dishonesty", or the idea that women who suffer from sexual assault will act in distinct ways when reporting or testifying about an offence. The shaky edifice upon which demeanour is built is exemplified by the former being often a matter of cultural difference, while the latter has been soundly discredited as being indicative of the credibility of victims of sexual assault.²⁷ The fact that demeanour evidence is a mere tradition within our legal culture is also reflected by case law, which upon inspection indicates that there is marked trepidation when it comes to committing consistently to this practice.²⁸ Such arbitrariness severely undercuts any potential value there is to be found in demeanour.

²⁵ While little else is stated about this issue by the Barbra Schlifer Clinic, they also argue that demeanour is not axiomatic to the assessment of credibility or effective cross-examination. See *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Barbra Schlifer Commemorative Clinic at para. 13).

²⁶ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Applicant at para. 3).

²⁷ *Ibid.*, at para. 27.

²⁸ *Ibid.*, at para. 34.

For Butt, “it is hard to be more dismissive of demeanour assessments than to label them arbitrary.”²⁹

Nevertheless, there remains in the view of the legal tradition a sense of confidence about the importance of demeanour evidence and our ability to read important cues and clues from the face; this is not only a troublesome habit, but also contains the risk of contributing to miscarriages of justice.³⁰ However, if we recognize “unequivocal peer-reviewed research, common sense, and the unscientific and dangerously over-confident way demeanour is actually used in the courtroom”³¹ we are able to come to terms with its problematic nature and to eschew its use. Furthermore, allowing demeanour assessment to stand as an unimpeachable part of the trial process would mean that the Court would become complicit in the stultification of law, where legal traditions carry more weight simply by virtue of them *being* traditions, and are insulated from being critically re-evaluated in light of new insights and pressing concerns for accommodation. As Butt states, “after Galileo it is a truism that when tradition and knowledge diverge, knowledge must prevail.”³² In knowing the relative uselessness of demeanour evidence, and given the specific context of this case, we should be able to avoid giving demeanour assessments undue weight. Conversely, if we were to avoid these advancements in knowledge, equality and religious freedom rights will suffer negative impact, as will sexual assault complainants/witnesses.³³

²⁹ Ibid, at para. 35.

³⁰ Ibid, at para. 29.

³¹ Ibid, at para. 32.

³² Ibid, at. para. 46.

³³ Ibid, at. para. 46-47.

CAIR also takes aim at the entrenched nature demeanour has in legal tradition, noting that these customs are very rarely subject to critique, nor is any attempt made to consult outside experts on the issue. So while these norms may indeed be connected to foundational legal principles, the continued and uncritical acceptance of them resists uncovering how they may equally be connected to the cultural or gender norms of dominant groups.³⁴ Such norms, as demeanour is assumed to be, can be shown to be culturally contingent, rather than objectively true.³⁵ For CAIR, shifting our perspective on demeanour, from seeing it as an unquestioned tradition containing inherent value, to understanding its questionable foundations and contingent nature, would be an exercise concomitant with our supposed commitment to multiculturalism, equality, and access to justice considerations.³⁶ In this sense, while wanting access to all facets of demeanour may be a preference rooted in habit, this does not mean that it need become a requirement.³⁷ CAIR's framing of the demeanour issue results in understanding demeanour as a problematic tradition, rooted in suspect and retrograde modes of knowing which are tradition-based.

The manner in which these legal actors constitute knowledge about demeanour evidence tells us not only about its lack of inherent value, but also about its relative worth (or lack thereof) within our current socio-political climate and the specific context of this case. As Butt notes, "justice and demeanour are not joined at the hip. Justice and demeanour really have at best only a casual, non-committed relationship of convenience.

³⁴ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Council on American-Islamic Relations at para. 32).

³⁵ *Ibid*, at para. 33.

³⁶ *Ibid*, at para. 33.

³⁷ *Ibid*, at para. 41.

Demeanour is important, except when it's not.”³⁸ For supporters of N.S., their framing of the worth of demeanour and demeanour evidence is informed by the hierarchical juxtaposition of two forms of knowing: on the one hand are legal traditions and norms, while on the other, is expert knowledge based in academic study and scientific research. The latter must supplant the former, both in recognition of the limitations of what amounts to little more than un-interrogated cultural norms, and as a measure of accommodation for those would present a challenge to such norms.

1.2 *Counsel & Interveners for Accuseds, & Crown*³⁹

Supporters of the accuseds position demeanour as fundamental to the ability of fact-finders to cross-examine witnesses, and they eschew any kind of knowledge that would indicate otherwise, relying instead on their own experts to rebut such claims. Demeanour itself is defined mainly and most importantly as to be found in the face, rather than in any combination of other forms of expression. Knowledge about demeanour is also constructed as containing an intuitive quality to it that is central to human interaction and which itself is knowable mainly through its indefinability. Finally, demeanour is known as inextricably woven into the fabric of Canadian legal tradition, while the notion of displacing this norm is constructed as entering unfamiliar territory with unknown dangers.

³⁸ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Applicant at para. 40)

³⁹ In this section, I add the Crown to this category of actors, as their arguments related to demeanour do not differ substantively from, and in fact echo, many of the positions taken up by legal actors in this same category.

In the factum provided to the Court by the accuseds' counsel, the court is warned against finding in favour of the arguments made by N.S.'s supporters, as this would result in an insurmountable impediment to cross-examination and thus fair trial rights. The Criminal Lawyers' Association frames demeanour as fundamental to the process of cross-examination, and thus to fair trial rights,⁴⁰ as does the Congress, which argues that the import of evaluating witness demeanour has historically been recognized as fundamental to credibility assessment, and to hinder this ability has been included among "traditional hearsay dangers."⁴¹

In response to Butt's assertions, both the Crown and the Criminal Lawyers' Association argue that his reliance on a single, unpublished research report cannot serve as an adequate grounding for a legitimate argument against demeanour.⁴² It is important to note here that it seems a mischaracterization of the arguments put forth by Butt to charge that only one unpublished paper was used to make his claim. In fact, Butt cites a survey of relevant academic literature on the worth of demeanour evidence as conducted by Natasha Bakht in her article on the accommodation of niqab-wearing women in Canadian courtrooms.⁴³

⁴⁰ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Criminal Lawyers' Association at para. 2-3)

⁴¹ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Muslim Canadian Congress at para. 24)

⁴² *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Respondent Crown at para. 36) and *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener Criminal Lawyers' Association at para. 3)

⁴³ See Natasha Bakht, "Objection, Your Honour! Accommodating Niqab-Wearing Women in Courtrooms", in *Cultural Diversity and Law*, ed. R. Grillo et al., (London: Ashgate Publishing, 2008), 9

Regardless, the knowledge presented by N.S. and her supporters is framed as being both uncorroborated and unproven. The Crown also argues that because the evidence offered by N.S. about demeanour “has not been tendered as expert evidence, [it can] only provide the social context in which the utility of demeanour evidence should be assessed.”⁴⁴ Expertise then, for the Crown, is to be determined in the legal arena, where evidence can be examined according to its internal practices. However, they too draw on other academic research which indicates that we simply do not know enough about the value of demeanour evidence to lie detection and assessments; as such, research which is critical of these tools cannot be allowed to supplant its centrality in the legal process.⁴⁵ Similarly, the Criminal Lawyers’ Association notes that other scientific studies exist that argue for the value of demeanour evidence.⁴⁶ Interestingly, little detail is given about this research, besides mentioning its existence and an array of article titles. The Association also differentiates between the kind of knowledge that is accepted in academia and the

⁴⁴ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Respondent Crown at para. 36).

⁴⁵ Max Minzner, “Detecting Lies Using Demeanour, Bias, and Context”, *Cardozo Law Review* 29, (2008): 2578, as cited in *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Respondent Crown at para. 36)

⁴⁶ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Criminal Lawyers’ Association at para. 20). The Association cites the following articles: P. Ekman, M.G. Frank, M. O’Sullivan, “A Few Can Catch a Liar”, *Psychological Science* 10, no. 3 (1999), R. E. Riggio, J. Tucker, K. Widaman, “Verbal and Nonverbal Cues as Mediators of Deception Ability”, *Journal of Nonverbal Behaviour* 11, no. 3 (1987), A. Vrij et al., “Detecting Deceit via Analysis of Verbal and Nonverbal Behaviour”, *Journal of Nonverbal Behaviour* 24, no. 4 (2000) and “Rapid Judgements in Assessing Verbal and Non-Verbal Cues: Their Potential for Deception Researchers and Lie Detection”, *Applied Cognitive Psychology* 18 (2004), S. Porter and L. ten Brinke, “Reading between the Lies: Identifying Concealed and Falsified Emotions in Universal Facial Expressions”, *Psychological Science* 19, no. 5 (2008): 508-514, B. M. DePaulo et. al., “Cues to Deception”, *Psychological Bulletin* 129, no. 1 (2003), and M.G. Frank and T.H. Feeley, “To Catch a Liar: Challenges for Research in Lie Detection Training”, *Journal of Applied Communication Research* 31, no. 1 (2003).

kind of knowledge that has a place in the courtroom. Whereas, in such research, “subjects generally attempt to determine deception in a vacuum⁴⁷”, knowledge in the courtroom is achieved via accessing a variety and combination of both analytical and intuitive tools that allow for triers of fact to find truth.

In these statements, several fascinating elements emerge. For one, the credibility of an academic paper is measured not only by the standards internal to the practice (for example, being peer-reviewed), but also by whether it has been subject to examination by legal counsel, who are normally not “experts” on subjects found in academic research (hence their reliance on such experts in the first place). In addition, by arguing that research on credibility should itself be subjected to an external standard of credibility, the ability to ascertain credibility is achieved differently in different domains. There is thus a “hierarchy of credibility”⁴⁸ which emerges, wherein knowledge in one domain (the academic/scientific), is not of the same caliber as knowledge in another (the legal), and where some forms of knowing are dismissed entirely as offering a legally adequate form of truth. Moreover, in constructing this hierarchy, these legal actors frame tradition-based knowledge as trumping all other forms.

Whereas for LEAF, the specific circumstances of the N.S. case call the value of demeanour into question, for the Criminal Lawyers’ Association, these same circumstances gives rise to the opposite argument. *Because*, as a sexual assault complainant, N.S. is a central witness, allowing her to testify with a face veil would have

⁴⁷ Ibid, at para. 21).

⁴⁸ I borrow this term from Anne Stoler, found in her article “In Cold Blood”: Hierarchies of Credibility and the Politics of Colonial Narratives”, *Representations* 37, Special Issue: Imperial Fantasies and Postcolonial Histories, (1992):151-89.

an even more significant impact on the accused's rights to full answer and defence, as her evidence and credibility are central to the case. N.S.'s testimony is the only evidence in the case, therefore access to her — all of her — is deemed even more important.⁴⁹ The Crown also acknowledges that context plays a role in deciding the worth of demeanour; they note that the Court of Appeal was to differentiate between the worth of demeanour evidence generally, and its worth during cross-examination which may be impeded by the presence of a niqab.⁵⁰ This means that “the highly individualistic nature of credibility determinations necessitates an approach to demeanour evidence which is tailored to the facts and circumstances of the particular case.”⁵¹

Demeanour is also inextricably linked to both the physical face and the body as a whole, both of which are equally negatively impacted by the niqab. With reference to the former, “facial cues may assist the trier of fact in determining whether a witness is being truthful, [and] also can be critical to counsel's ability to carry out an effective cross-examination.”⁵² The face is emphasized as not only containing valuable hints about whether or not a person is lying, but also is framed as crucial to understanding and interpretation.⁵³ These physical responses, such as grinning when confronted with an inconsistency, are integral to allowing triers of fact to exercise proper cross-

⁴⁹ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Criminal Lawyers' Association at para. 25). This argument again raises the spectre of arguing that access to the bodies of sexual assault complainants/witnesses is vitally important, just by nature of their legal status.

⁵⁰ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Respondent Crown at para. 35).

⁵¹ *Ibid.*, at para. 38.

⁵² *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Criminal Lawyers' Association at para. 4).

⁵³ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Respondent at para. 6).

examination.⁵⁴ Furthermore, the face is representative of the norm of the public, adversarial model, which centers on face-to-face confrontation and the cross-examination which flows from such an interaction.⁵⁵ While the Association admits that stereotypes and cultural norms can influence our ideas of what a guilty person looks like, this unfortunate and difficult to avoid side effect does not take away from the “fact” that *both* the face and body language (both of which are rendered invisible by the niqab), give us valuable information about witnesses.⁵⁶ Similarly, the Crown takes the position that the niqab hinders not only demeanour evidence stemming from the face, but also that which may go beyond; the glances, movements, hesitations, surprise, etc., which are all broadly a part of the visible and audible forms of expression revealed by witnesses, both consciously and subconsciously, are likewise diminished and rendered less comprehensible by the niqab.⁵⁷

For these legal actors, while demeanour may practically center on the face, at a deeper level, its meaning and function go beyond that. The Association describes demeanour evidence as containing intangible and intuitive qualities. They quote from a Supreme Court case:

[C]ertain doubts, although reasonable, are simply incapable of articulation. It may be that the juror is unable to point to the precise aspect of the witness’s demeanour which was found to be suspicious, and as a result cannot articulate either to himself or others exactly why the witness should not be believed. A juror should not be

⁵⁴ *Ibid*, at para. 6.

⁵⁵ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Respondent Crown at para. 38).

⁵⁶ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Criminal Lawyers’ Association at para. 7).

⁵⁷ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Respondent Crown at para. 40).

made to feel that the overall, perhaps intangible, effect of a witness's demeanour cannot be taken into consideration in the assessment of credibility.⁵⁸

Other cases are used to demonstrate that the assessment of credibility, hinged as it is on demeanour, is not an exact science; as such, it is difficult for triers of fact “to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various version of events.”⁵⁹ The Association, quoting from the *Razamjoo* case, note that cross-examination is “partly instinctive. Tiny signals, often in the form of, or involving, facial expressions, are received and acted upon almost, sometimes completely, unconsciously by the cross-examiner.”⁶⁰ The implications that are presumably to be found in demeanour are something you therefore grasp and/or know when you see. The common-sense instinct which serves to apprehend and interpret demeanour, while impossible to explain, simply *is* – it is an extension of the human capacity to communicate, as well as a tool of knowing and interpretation, and it needs little validation or explanation beyond that. This also gives rise to the creation of what Mariana Valverde calls “hybrid knowledge”⁶¹, which occurs as a result of the melding of expert and non-expert knowledge. This fusion, in turn, works to achieve a kind of closure around the idea and value of demeanour

⁵⁸ *R. v. Lifchus*, 1997 3 SCR 320, at para. 29, as cited in *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Intervener Criminal Lawyers' Association at para. 5).

⁵⁹ *R. v. Gagnon*, [2006] 1 S.C., as cited in *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Criminal Lawyers' Association at para. 5)

⁶⁰ *Police v. Razamjoo*, [2005] D.C.R. 408, at paras. 80-18, as cited in *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Criminal Lawyers' Association at para. 12). See also *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Muslim Canadian Congress at para. 30) and Factum of the Respondent Crown at para. 35.

⁶¹ Mariana Valverde, *Law's Dream of a Common Knowledge*, (New Jersey: Princeton University Press, 2003), 2.

evidence. In other words, combining reliance on their own expert (academic/scientific research) and non-expert (demeanour as intuitive and instinctual) knowledge allows legal actors such as the Association to construct demeanour as a form of knowing which is both objectively valuable and is a settled matter,⁶² and while not demonstrably knowable, intuitively apprehensible. This multi-layered combination of knowledge results in demeanour evidence appearing impervious to meaningful challenge. Simon Cole, in his exploration of expert knowledge as it relates to fingerprint evidence, notes that while this kind of closure is not uncommon in the scientific community, closure in the legal arena is, and should be, subject to critical re-examination.⁶³ However, where the idea of demeanour evidence is critically examined by the accuseds' supporters, any lacking is found not to be in its conceptualization or in the method with which it is evaluated; rather, its limitations are to be found in its absence – in other words, it recedes in value when, as is the case with *N.S.*, access to demeanour is diminished or negatively impacted.

Supporters of the accuseds, as well as the Crown, also frame access to demeanour evidence as vital to the legal tradition and to Canadian society as a whole because of its symbolic underpinnings and implications.⁶⁴ The Association chooses to focus in particular detail on the dangers associated with the Court departing from hundreds of years of Canadian legal tradition because of “limited and one-sided scientific evidence.”⁶⁵ Demeanour evidence is a fundamental part of *our* legal culture and the way *we* know

⁶²Simon Cole, “Witnessing Identification: Latent Fingerprinting Evidence and Expert Knowledge”, *Social Studies of Science* 28, no.5-6 (1998): 688.

⁶³*Ibid*, 689.

⁶⁴*R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Muslim Canadian Congress at para. 23).

⁶⁵*R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Criminal Lawyers' Association at para. 20).

witnesses, and is a core assumption of the Canadian common law tradition.⁶⁶ Here we see that whereas assumptions rooted in the value of demeanour gave rise to problematic arbitrariness for N.S. and her supporters, for these actors, assumptions are representative of the kind of certainty that comes from that which is known to be self-evidently true and of value. Likewise, the Crown, while acknowledging that “observations of demeanour have received diminished emphasis from the courts,”⁶⁷ argues that it is nevertheless an entrenched part of the Canadian legal process.⁶⁸ The Crown further emphasizes that the Supreme Court “has repeatedly, clearly, and recently affirmed the relevance of demeanour as an essential component of credibility assessments.”⁶⁹ At a deep-rooted level, then, because access to and the assessment of demeanour is what fortifies central aspects of the legal system, it cannot be cast aside so easily.⁷⁰ (As the Congress argues, “changes to the common law must be slow and incremental”).⁷¹ Counsel for the accuseds also stress the long-standing tradition of relying on demeanour evidence by referencing a case from 1947 which emphasizes its worth.⁷² To undercut such a tradition would be to “jettison the centuries-old assumption of our legal system”⁷³ and would have far-reaching effects on the justice system:

landmark decisions of this Court would be entirely undermined. The assumption that demeanour assessment has value is so deeply rooted in our legal traditions that there is a heavy onus on the Appellant when she asks this Court to abruptly discard

⁶⁶ *Ibid.*, at para. 5.

⁶⁷ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Respondent Crown at para. 11).

⁶⁸ *Ibid.*, at para. 8.

⁶⁹ *Ibid.*, at para. 36.

⁷⁰ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Respondent at para. 6).

⁷¹ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Muslim Canadian Congress at para. 9).

⁷² *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, (Factum of the Respondent at para. 7).

⁷³ *Ibid.*, at para. 1.

it. Such a revolutionary change in the foundations of our legal system should not rest on the meager scientific citations, untested by cross-examination, provided by the Appellant.⁷⁴

Indeed, it is precisely the embedded nature of demeanour within our legal system that not only makes it impossible to excise, but also which gives it its worth.⁷⁵ Finding otherwise is described variously by these legal actors as redefining core legal principles, changing Canadian law tumultuously⁷⁶, and as an abrupt and radical challenge to settled jurisprudence⁷⁷ which would carry dangerous and misleading implications.⁷⁸ The Congress quotes from a Supreme Court of Canada case wherein the importance of seeing and hearing the demeanour of witnesses is underscored:

[A]n appellate court which has neither seen nor heard the witnesses and as such is unable to assess their movements, glances, hesitations, trembling, blushing, surprise, or bravado, is not in a position to substitute its opinion for that of the trial judge, who has the difficult task of separating the wheat from the chaff and looking into the hearts and minds of witnesses in an attempt to discover the truth.⁷⁹

In these arguments, demeanour becomes known both as a form of evidence in and of itself, and, in the process, generates knowledge about the value and worth of demeanour evidence as a legal tool. At each level, the worthiness of demeanour evidence is backed by forms of knowing which are themselves readily identifiable and commonly used - as scientific fact, as legal imperative, and as accepted norm and tradition. Conversely, the

⁷⁴ Ibid, at para. 8.

⁷⁵ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Respondent Crown at para. 39)

⁷⁶ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Criminal Lawyers' Association at para. 6).

⁷⁷ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Muslim Canadian Congress at para. 23).

⁷⁸ Ibid, at para. 9.

⁷⁹ *Dickason v. University of Alberta*, 1991 2 S.C.R. 1103, as cited in *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (Factum of the Intervener Muslim Canadian Congress at para. 29).

actual method for translating this evidence into truth remains inscrutable and undefinable, operating as a function of intuition and outside of the boundaries of objective verification.

1.3 *Justices of the Supreme Court: Majority, Concurring, & Dissenting Decisions*

Justice McLachlin, writing for the majority, rejects the evidence offered by N.S. and supporting interveners about the unreliability of demeanour and demeanour evidence. According to the majority decision, there has been no expert evidence presented, by either side, that settles the extent to which seeing a witness's faces is central to effective cross-examination and credibility assessments.⁸⁰ They note that while each side argues for and against the worth of demeanour evidence, these arguments remain more rhetorical than factual.⁸¹

However, in many ways, the majority decision seems to accept the arguments centering on the legal tradition of demeanour evidence on offer from counsel for the accuseds and their supporters, and much of what these actors argue as proof of their positions is echoed by Justice McLachlin. For example, she cites the fact that previous decisions of the court have affirmed the common law assumption of the importance of seeing the faces of witnesses when testifying, especially during the practice of cross-examination, which is itself a process described as integral to the functioning of a fair trial. Justice McLachlin concedes that while the ability to see the faces of witnesses,

⁸⁰ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 17. Like legal actors arguing on behalf of the accuseds, Justice MacLachlin also emphasizes that the only evidence provided to the court was a four-page, unpublished review article which calls into question the ability to detect lies merely from facial cues, and that no expert witness was provided to undergo cross-examination related to this matter.

⁸¹ *Ibid*, at para. 20.

although not the only or even necessarily the most important part of cross-examination, cannot be set aside lightly, without compelling evidence to the contrary.⁸² The majority also aligns with the argument that seeing the faces of witnesses is inextricably linked to publicity and openness; to allow veiled witnesses the unequivocal right to testify wearing the niqab would “offer[] no protection for the accused’s fair trial interest and maintaining public confidence in the administration of justice.”⁸³ While the majority accepts the argument made by Butt and supporters that demeanour is not contained just in the face, and that non-verbal communication displayed elsewhere on the body may give triers of fact insights which would assist in getting at the truth of a matter,⁸⁴ Justice McLachlin notes that even these aspects may no longer be available when the niqab is worn.

Demeanour, to be found both in the face and in the body of witnesses, is constructed as being highly instructive, as demonstrated by the *Razamjoo* judgement, which is cited in detail by the majority decision:

There are types of situations in which the demeanour of a witness undergoes a quite dramatic change in the course of his evidence. The look which says “I hoped not to be asked that question”, sometimes even a look of downright hatred at counsel by a witness who obviously senses he is getting trapped, can be expressive. So too can abrupt changes in mode of speaking, facial expression or body language. The witness who moves from expressing himself calmly to an excited gabble; the witness who from speaking clearly with good eye contact becomes hesitant and starts looking at his feet; the witness who at a particular point becomes flustered and sweaty, all provide example of circumstances which, despite cultural and language barriers, at least in part by his facial expression, a message touching credibility.⁸⁵

⁸² Ibid, at para. 21.

⁸³ Ibid, at para. 48.

⁸⁴ Ibid, at para. 24. The majority decision also notes that because the *Criminal Code* requires that judges take into account the prejudices that may arise, for either party, when using these testimonial aids, only works underscore the centrality of seeing the faces of witnesses. See *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 23.

⁸⁵ *Police v. Razamjoo*, [2005] D.C.R. 408, at para. 78, as cited in *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 26.

Interestingly, as other legal actors also argued, for the majority, demeanour takes on an especially important role in the context of sexual assault trials. However, this is not because, as Butt and supporters argued, demeanour evidence is a particularly flawed legal tool given the way it has been unfairly wielded against sexual assault complainants. Rather, Justice McLachlin states that where the evidence the witness provides is not contested, and therefore not an issue for cross-examination or credibility, a witness *may* be able to keep her face-veil on. Conceivably, in a sexual assault trial, this would rarely be the case, indicating that these trials would very seldom provide the circumstances necessary for an assault victim to keep her veil on while testifying. There is a connection then, between the type of evidence being provided by N.S. and other sexual assault complainants and the specific manner in which her demeanour evidence will be interpreted and understood by the trier of fact within the courtroom. Her role as such a witness demands a wider, more expansive understanding of demeanour and a greater reliance upon it, while access to her face is deemed even more vital to the very functioning of the trial process.⁸⁶

Although the above arguments of the majority are tempered throughout by the concession that the niqab *may* negatively impact demeanour evidence and thus the fair trial rights of defendants, what is not a matter of speculation is the fact that demeanour evidence as a concept both a general rule and a norm.⁸⁷ Demeanour assessments and evidence are axiomatic to the legal traditions and court process of Canadian common law. The “ancient and persisting connection the law has postulated between seeing a witness’s

⁸⁶ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 28.

⁸⁷ *Ibid*, at para. 21.

face and trial fairness”, is too deeply rooted in our legal system to ignore or set aside, or to find that a veiled witness has an unequivocal right to remain so while testifying.⁸⁸ To argue or find otherwise would fly in the face of deeply embedded assumptions of law.⁸⁹ While the majority notes that it is not inconceivable that assumptions may, over time, be shown to be baseless or informed by prejudice, or become displaced by new innovations and knowledge, there is nothing contained in the evidence presented to the Court that would support this decision.⁹⁰ Furthermore, to find, as Butt argued, that belief in the worth of demeanour evidence, which has been foundational to our legal tradition and practiced for centuries, are mere myths, would be a radical step that should not be undertaken by the Court.⁹¹

In their concurring decision, Justices Rothstein and Lebel have little to say directly about demeanour evidence, besides finding that N.S. and her supporters have failed to show that this evidence, especially when it consists of facial cues, are not a critical part of trial process and full answer and defence rights of the accused.⁹² For Rothstein and Lebel, their arguments centre on the notion that trials are, at the core, acts of communication, both between legal actors and between the legal system and the public at large.⁹³ They stress that the Canadian justice and trial system is based on the adversarial model, which is characterized in large part by the interactive exchanges which occur between triers of fact and witnesses.⁹⁴ These acts of communication and the

⁸⁸ Ibid, at paras. 27 and 31.

⁸⁹ Ibid, at para. 48.

⁹⁰ Ibid, at para. 22.

⁹¹ Ibid, at para. 49.

⁹² Ibid, at para. 64.

⁹³ Ibid, at para. 76, 77.

⁹⁴ Ibid, at para. 67.

openness they demand and facilitate are elements that underpin the maintenance of an independent and public justice system ruled by law. While there may be exceptions to this openness, they remain just that – concessions to general principles that cannot be made into norms. A finding from a previous Supreme Court case is shown to prove that:

[T]he importance of ensuring that justice be done openly has not only survived; it has now become ‘one of the hallmarks of a democratic society’. The open court principle, seen as ‘the very soul of justice’ and the ‘security of securities’, acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law. Openness [is] held to be the rule, covertness the exception, thereby fostering public confidence in the integrity of the court system and the understanding of the administration of justice.⁹⁵

In rejecting any argument that suggests demeanour evidence is anything other than fundamental to the trial process, and in connecting this process to acts of communication and interaction, as well as with publicity and openness, Rothstein and Lebel affirm demeanour not only as a norm and tradition, but as being under threat of diminishment by that which would encourages covertness, intelligibility, and forestalls interaction - namely, the niqab.

In her dissent, Justice Abella “concede[s] without reservation that seeing more of a witness’ facial expressions is better than seeing less.”⁹⁶ However, she refuses to go so far as to accept that seeing less of a witness’s demeanour is so crippling to the ability to assess credibility or cross-examine that it would justify infringing on the freedom of religion rights of N.S., or on her right to bear witness against her alleged assaulters.⁹⁷ Moreover, she finds that concessions to the norm of uncovered faces in the courtroom, where demeanour may be impaired by physical limitations, happen often and are almost

⁹⁵ *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, 1996 3 S.C.R. 480, at para. 22, as cited in *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 68.

⁹⁶ *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 82.

⁹⁷ *Ibid*, at para. 82.

always allowed to stand by the courts.⁹⁸ In these circumstances, diminished access to demeanour evidence is construed neither as impossible obstacle nor as impracticable,⁹⁹ and the fair trial rights of accuseds have not been found to be insurmountably impacted.

Justice Abella characterizes demeanour as being a package of traits: it is to be found in the face, body language, and voice, among other physical aspects. She notes that the niqab may only result in a partial obstacle to demeanour evidence, while other, equally important credibility cues remain, such as eye contact and expression, body language and gestures. Abella aligns with the arguments made by Butt and supporting interveners, and finds that a niqab presents only a partial interference to what amounts to an imprecise and faulty tool of credibility assessment.¹⁰⁰ Moreover, demeanour can be gleaned from verbal testimony, “including the tone and inflection of her voice, the cadence of her speech, or, most significantly, the substance of the answers she gives.”¹⁰¹ Abella also emphasizes that triers of fact, when assessing credibility, regularly look at other indicators besides facial cues.¹⁰² As counsel for N.S. and supporting interveners argued, Abella points out that courts have found that demeanour evidence has limitations when it comes to credibility assessments, and that there is considerable doubt as to an individual’s ability to accurately judge truth merely from observing demeanour.¹⁰³

⁹⁸ Ibid, at paras. 82, 97.

⁹⁹ Ibid, at paras. 102, 103.

¹⁰⁰ Ibid, at para. 108.

¹⁰¹ Ibid, at para. 106.

¹⁰² Ibid, at para. 98. Justice Abella cites from the British Columbia Court of Appeal, which noted that “demeanour ‘is but one of the elements that enter into the credibility of a witness’, with other factors including the witness’ opportunity for knowledge, powers of observation, judgement, memory and ability to describe clearly what he or she has seen and heard”. See *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 99.

¹⁰³ Ibid, at para. 99 and 100.

While ideally, having access to all of these facets makes things easier and is an expected part of the trial process, this expectation cannot be extended to an argument that unless *all* possible elements of demeanour are available, credibility cannot be ascertained and cross-examination cannot proceed.¹⁰⁴ She finds that “a general expectation is not the same as a general rule, and there is no need to enshrine a historical practice into requirement.”¹⁰⁵ For Justice Abella then, the history and tradition associated with demeanour evidence is just that: habitual practice that, given the possibility of pressing considerations and perhaps new advancements in knowledge, should not be allowed to stand unquestioned. Indeed, what is a more important tradition is to be found in the Canadian judicial history which has actively recognized the evolutionary nature of justice processes, and constantly engage in the reconciliation of legal tradition with new realities; as she states, “while history assists in understanding the past, it need not necessarily command the future”.¹⁰⁶ Given this, and the faulty nature of demeanour evidence, Abella is left wondering why, where the fundamental right of religion forestalls full access to demeanour, we insist upon relying on it.¹⁰⁷

II Analysis

2.1 *On National Subjects and Natural Strangers*

In tracing the strands of competing arguments about the role and value of demeanour evidence, what may become somewhat lost is how this relates directly to the

¹⁰⁴ Ibid, at para. 91.

¹⁰⁵ Ibid, at para. 92.

¹⁰⁶ Ibid, at para. 92.

¹⁰⁷ Ibid, at para. 108.

construction of knowledge about N.S. How then can we use what has been learned about this topic to show how and what kind of knowledge the various legal actors produce about N.S. individually and veiled Muslim women generally? I attempt to do so by reading N.S., as person and a subject, back into the discourses produced by these legal actors. While I look for and find her between the lines of these discussions, doing so will hopefully not be seen as an attempt to mine meaning from places where there is little to be found. I contend that knowledge about N.S. can in fact be found throughout the arguments of the legal actors, and about how she is constituted and de-constituted as a national subject, and measured in relation to the boundaries of our national community, which are both imagined and contain tangible qualities. I focus on the symbolic implications of demeanour characterizations, and where N.S. stands in relation to that which is constructed as norm and tradition, as well as fundamental to Canadian society, law, and human communication itself. Additionally, while understanding, in this scenario, is achieved by inserting N.S. back into the conversation, such a tactic may also work as an act of resistance against the powerful implications and consequences of silence that were articulated in the previous chapter.

In the “community of imagination”¹⁰⁸ which is the modern nation-state, the outsider is cast as and plays the role of trope. They are framed as a “figure of concern”, a stranger who desires what insiders already have.¹⁰⁹ Strangers and outsiders are further

¹⁰⁸ Sunera Thobani, *Exalted Subjects: Studies in the Making of Race and Nation in Canada*, (Toronto: University of Toronto Press, 2007), 5. Thobani draws on Benedict Anderson’s argument that nations are imagined communities. See Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, (London: Verso, 1983).

¹⁰⁹ *Ibid*, 4.

constructed as being absent of the qualities and values which are commonly understood to characterize the nation. Their apparent lacking in these qualities provokes anxiety and hostility, as they are “suspected of embodying the potential for the very negation of nationality.”¹¹⁰ National subjects imagine themselves as vulnerable to the dangers posed by these interlopers, who are characterized as making irrational claims on the nation. There is a mutually constitutive relationship that is at play here as well. As argued previously, the binary constructions which inform Western ontology also work to constructs “selves” in relation to “others”. These “others” are defined *by* their exclusion, while insiders are likewise shaped as such relationally to these strangers. “Strangers” also play a central role in how the borders, both imagined and real, of national community are constructed and known. The stranger is both familiar and strange, “both within and without field[s] of knowledge.”¹¹¹ Over and through the bodies of strangers, the nation is invented and sustained:

The role of difference in allowing or even establishing a national imaginary presupposes the proximity of those who are already recognisable as strangers as well as the permanence of their presence. The strangers become incorporated into the ‘we’ of the nation, at the same time as that ‘we’ emerges as the one who has to live with it (cultural diversity) and by implication with ‘them’.¹¹²

Narrations which frame and celebrate the national subject “as a particular kind of human being [and] a member of a particular kind of community” also function to mark them as “ontologically and existentially distinct from the strangers to this community.”¹¹³ A process of exaltation is vital to the constitution of these national subjects (and, by

¹¹⁰ Ibid, 4.

¹¹¹ Sara Ahmed, *Strange Encounters: Embodied Others in Post-Coloniality*, (London: Routledge, 2000), 57.

¹¹² Ibid, 95.

¹¹³ Thobani, *Exalted Subjects*, 5

extension, their ‘others’). Exaltations of national qualities and values work to imbue characteristics associated with belonging to the nation with an important form of capital¹¹⁴, while those who fail to embody or adhere to these lofty characteristics are seen as aberrations. They exist either “marked for perpetual estrangement or conditional inclusion as supplicants.”¹¹⁵

The process of exaltation also works to naturalize qualities associated with the national community, so that they become known as intrinsic to and reflective of the community. These qualities are not just abstract – they are “concretized and harnessed within a moral economy as very qualities and characteristics. In this, the technique of power naturalizes itself and appears as guileless, unexceptionally and ordinarily reflecting.”¹¹⁶ Understanding the process of exaltation allows us to better understand the lofty place afforded demeanour, demeanour evidence, and the faces of both people in general and witness specifically in the discourses of legal actors. We may also come to know, in turn, how this creates knowledge about N.S. By framing these elements as natural to human interaction, as coextensive with democratic principles of openness and transparency, and as foundational to the legal tradition, the niqab and its wearers represent all that is opposite. Exalting certain traits over others also allows us to recognize those who can be said to possess the same constitutive qualities, and to expel and exclude those who do not.¹¹⁷ In this way, the “excluded [o]ther becomes the nation’s ‘double’”, a double that, because of its oppositional identity, must be guarded against.¹¹⁸

¹¹⁴ Ibid, 5.

¹¹⁵ Ibid, 6.

¹¹⁶ Ibid, 9.

¹¹⁷ Ibid, 11.

¹¹⁸ Ibid, 20

The niqab and its wearer become known as belonging to a realm outside of the boundaries of national community, as covert where we are open, and as resulting in erasure in a domain that relies upon interactive expressions in order to known truth and credibility. In this juxtaposition, we are not only able to identify those who stand outside of national community, but also to delineate, valorize, and preserve those attributes which are thought to make “us” a coherent community.¹¹⁹

Moreover, the boundaries around nationhood are discursive. In other words, the nation does not exist merely as a physical entity, but rather is a result of the production and construction of places of belonging. To understand the nation as both physically and imaginatively real allows us to also understand “how the invention of the nation as a bounded space requires the production of a *national identity* which can be *claimed* by the individual”. In this way, the production of the nation importantly involves a conception of what it is *to be* a nationality or a part of a national community.¹²⁰ Recall that in the arguments set forth by those legal actors who argue against N.S.’s position on demeanour, great emphasis is placed on the juxtaposition of uncertain and uncorroborated evidence and knowledge against that which is known as a Canadian norm, fundamental principle, and tradition. In the process, there is a contest between the nature of credibility and authoritative knowledge. “Good” knowledge becomes pitted against “bad” knowledge, “good” witnesses are defined against “bad” witnesses, and uncovered faces are known as conveying truth instinctually, while covered faces forestall this ability. In each case, the “good” is associated with nationhood, while the “bad” is rejected as non-

¹¹⁹ Ibid, 20

¹²⁰ Ibid, 98.

compatible. N.S.'s refusal to allow access to the most important facet of her demeanour is framed as contrary to Canadian values, while it also prevents her from expressing those qualities which, themselves, are foundational to the constitution of her as a Canadian subject. Importantly, the qualities related to and emerging from the concept of demeanour require little to no scientific or expert knowledge to buttress it. They are known are natural, needing little explanation, and should not be subjected to unfounded critical re-examination. Moreover, the interaction that emerges from access to demeanour, operates as an extension of basic human communication, and what takes place during cross-examination is described as barely articulable; it is largely intuitive, stemming from a place that is known and recognized by those who engage in this process. Strangers then, as existing somewhere outside of the boundaries of the nation, would naturally be excluded from this intuitive process, marked as they are by difference, and, in the case of N.S. and her niqab, as forestalling access to knowledge and understanding.

Shot through all of the talk of norms and traditions is also the lurking danger that allowing the expectation of access to full demeanour to be upended would be dangerous and risky; it would change things “tumultuously”, and represent a threat to a principle that is foundational to the Canadian legal order. In this way, veiled Muslim women cease to be what Razack calls “imperilled”, but are now “imperilling.”¹²¹ What emerges from the discussion of demeanour is the negative agency of N.S.; in other words, she is granted capabilities to act in ways that actively threaten foundational principles and values of “our” Canadian societies, all the while remaining inscrutable and a stranger to “our”

¹²¹Thobani, *Exalted Subjects*, 237.

norms. Indeed, she is more than a stranger — in veiling herself, N.S. not only removes herself from community, but she also refuses to be known in a way that is *offensive* to the traditions of both the legal and greater community. It is not only N.S. that remains as such, as the evidence she offers against the value of demeanour evidence is constructed and rejected as strange, so that even her ways of knowing are abnormal, and unable to be tested or corroborated.

These findings can be juxtaposed against how Butt, interveners for N.S., and Justice Abella confront the underlying tension of “strangeness” that is to be found in the case. For these legal actors, N.S., her niqab, and her claims related to demeanour are framed as not only reasonable, but as relatable to aspects already to be found in the Canadian legal tradition. Relying on their own research and expertise, they find that the niqab has no discernable impact on demeanour, which itself amounts to little more than habitual practice, while it is emphasized that we regularly make concessions for other circumstances which may impact on the assessment of demeanour. N.S. is thus not strange at all, but asserts a claim which is already to be found within and supported by our legal tradition, while her niqab does not prevent others from knowing her or assessing her credibility. In addition, the vision of Canadian identity that becomes constructed in this discourse centers around advocating for a revising of tradition and the knowledge claims which underlie it, in favour of a more modern, evidence-based approach to understanding and allowing the niqab. Interestingly, accepting the niqab because science dictates that there is in no functional worth to demeanour assessments does little to address underlying issues these legal actors previously raised as informing dominant opinions of the niqab; namely, pejorative and discriminatory understandings of the face-

veil and the women who wear them. In advocating for scientific knowledge as the key to “accepting” the niqab, these still present social barriers are problematically presupposed to be alleviated.

For those legal actors who frame demeanour and demeanour evidence as intrinsically related to Canadianness, N.S. acts a foil for the articulation of this sense of nationality. Through excluding both her and the evidence she offers as proof of her legal claim, legal actors such as the Criminal Lawyers’ Association and the justices of the majority and concurring decisions are able to expound on and exalt not only what is to be included within the bounds of our national community, but also that which can be accepted as legitimate knowledge and evidence. In remaining inscrutable and inaccessible, N.S. offends the nationalistic sensibilities of these legal actors, while Canadian identity itself is framed as being bound in and to tradition.¹²² Moreover, we know, through rejecting N.S. and placing her somewhere outside the boundaries of our national community, more about what it means to belong to this national community. N.S. is thus imagined as a stranger, outside of the bounds of the imagined national community, imbued as it is with qualities that are both constitutive of and reflected in national subjects. The rejection of the evidence on offer from N.S. related to demeanour also occurs because this knowledge is framed as strange: even her ways of knowing are abnormal, uncorroborated, and untestable. Moreover, the exaltation of the value of

¹²² It is ironic to note that legal actors, in extolling tradition over science, seem to align themselves, ideologically at least, more closely with values assumed to be held by N.S. as a religious adherent. Conversely, supporters for N.S., despite her freedom of religion claim being informed by what seems to be a strongly traditionalist form of faith, rely on “forward-thinking” (i.e. scientific) knowledge to advance their arguments. In this way, one form of tradition is wielded as a weapon against another form of tradition, while innovation is wielded by an apparent traditionalist (N.S.) as a tool for their emancipation.

“transparency” becomes, in this context, translated into an accompanying right to gaze – to have the power to not only see strangers but to also deem them as such.

Conclusion

The East is full of secrets and because she is full of secrets she is full of entrancing surprises. Many fine things there are upon the surface [but] its essential charms is of more subtle quality. [Suddenly] the East sweeps aside her curtains, flashes a facet of jewels into your dazzled eyes, and disappears again with a mocking little laugh at your bewilderment; then for a moment it seems to you that you are looking her in the face but while you are wondering whether she be angel or devil, she is gone.¹

Gertrude Bell, *Persian Pictures*

Six years after first attempting to testify in a Toronto courtroom while wearing her niqab, and soon after the Supreme Court of Canada rendered a somewhat lukewarm decision that neither found for her unequivocal right to do so, nor for a concrete rule against the face-veil, N.S. returned to offer testimony on the issue before the judge who originally found that she must remove it. As per the ruling of the Supreme Court, Judge Weisman must now abide by a four-part test to determine whether the niqab should be allowed to be worn while witnesses are testifying. The four questions the majority decision of the Supreme Court found that justices must consider are: 1) whether there is a sincere belief in the religious claim, 2) whether wearing the face-veil will present a substantial risk to the fairness of the trial, 3) whether there are any other reasonable accommodations, and 4) if there are not, do the salutary effects of an order of removal outweigh the deleterious effects of such an order?² In what is perhaps an indication of the extent to which this test will indeed prove workable, Judge Weisman offered by way

¹ Gertrude Bell, *Persian Pictures*, (London: Ernest Benn Limited, 1894), 34-35.

² Laura Lynch, "First test of Supreme Court's new face-veil rules imminent", CBC News, (accessed June 24 2013), <http://www.cbc.ca/news/canada/story/2013/04/18/lynch-niqab-sex-abuse-case.html>.

of accommodation the option for N.S. to testify before closed circuit T.V.³ without her face-veil, thereby achieving, albeit it in a circuitous route, what N.S. has been fighting to avoid — the baring of her face while giving testimony, in contravention of her religious beliefs and in violation of her freedom of religion rights. While technology is seen to offer a potential solution to the problem, whereby a T.V. screen operates as a proxy for a veil, making a distinction between witnessing this act in person as opposed to observing it on camera seems to not only miss the point of N.S.’s claim, but also raise serious doubts as to whether the discourse surrounding the case has actually resulted in any inroads with regards to informing Canadian courts of the substance of N.S.’s beliefs and the reasoning behind her claim. It is perhaps then not a surprise that on April 24, 2013, Judge Weisman, after applying the test put forth by the Supreme Court, found that N.S. must remove her niqab if she is to testify as a witness in her sexual assault trial. This ruling is expected to be appealed by N.S.’s lawyers.⁴

While the second round of the preliminary hearing allowed counsel for N.S. and the accuseds to make much of the same arguments they did before the Supreme Court, and N.S. herself repeated her original objections to baring her face, more information *about* her has also emerged. In a recent CBC news article, N.S. is quoted as clarifying to the court that “Islam is not a religion of extremism”, and that she has removed her veil when she suffered from morning sickness or allergies, as well as for passport and driver’s license pictures and police, although she clarifies that she did so in the latter cases only

³ Ibid.

⁴ “Toronto court rules woman must remove niqab to testify”, CBC News, (accessed June 24 2013), <http://www.cbc.ca/news/canada/toronto/story/2013/04/24/toronto-supreme-court-niqab-face-veil.html>.

because she did not have a choice. N.S. also explains more about her beliefs, requiring the Judge to at one point ask her to spell a term for his edification. Moreover, we learn from her attorney, David Butt, that she is a “straight-up gal”.⁵

This short online article, providing more glimpses into N.S. as a person than are to be found in the reams of legal documents stemming from the case, also notes that present at the hearing, for the benefit of the accuseds, was a Hindi-language interpreter.⁶ Interestingly, while it is N.S. who has become known and defined by some legal actors through her innate difference, she is not the one who requires assistance with the English language — indeed, her testimony seems to suggest that she is fluent. There is a sense of irony that while counsel and interveners for the accused advocate for the protection of Canadian norms and traditions, it is their clients that require the efforts of a translator, while N.S., the one who is accused of “tumultuously” challenging these traditions, seems quite at home. Perhaps, however, language skills are not enough to overcome the visual and symbolic impact of the niqab. The article also makes note of the fact that while N.S. came to court in a “niqab and a black floor-length cloak”, one of the accuseds wore “a Muslim skull cap”, while the other wore a “black leather jacket”.⁷ The focus on the clothing of the players in this case highlights not only the ongoing preoccupation with physical appearance in the case, but also raises the question as to why it is felt necessary to juxtapose the clothing of N.S. and her alleged assaulters. While, conceivably, as N.S.’s attire is central to this case, focusing on it is understandable, is there any inherent value in knowing that one of the defendants wore a leather jacket? Does a leather jacket

⁵ Lynch, “First test of Supreme Court’s new face-veil rules imminent”.

⁶ Ibid.

⁷ Ibid.

make someone less or more relatable and/or knowable? If N.S. were to, instead of a “cloak”, likewise don a leather jacket, would she be known differently? Would she fall somewhere else on the continuum of “traditionally Canadian” to “radically different and challenging”?

Answering these questions requires looking more closely at the forms of knowing which sustain such categorizations. Discourses on veiled Muslim women operate around certain tropes and modes of knowing, which operate both to construct the identity of veiled Muslim women and to assign them a position in relation to ideas surrounding “normal” and “abnormal”, or “tolerable” and “intolerable” religiousness and differentness. These forms of knowing, as on display in this case, allowed for N.S. to become a malleable object onto which these complex, intersecting, and contradictory sentiments are projected and played out; in the process, she both becomes and is knowable. Indeed, for both N.S.’s “friends” (i.e. her counsel and supporting interveners) and “foes” (i.e. counsel for the accused and their supporting interveners), discursive attempts to come to grips with, for example, her multiple identities, operated more so as catalysts for actors to re-affirm largely negative ways of knowing veiled Muslim women, which worked to obscure a deeper appreciation of N.S.’s subjectivity and agency. That is not to say, however, that these ways of knowing N.S. are neat or even coherent. As demonstrated, she is at once a confluence of aspects (Muslim, sexual assault victim, veiled woman) and an overarching identity (a “super victim”). She is both divested of agency and granted degrees of agency, to the extent that each characterization helpfully buttresses the arguments of legal actors. She is rendered both highly visible and invisible by her face-veil. She is at once a public body, available for others to gaze upon, even if

only to affirm her innate difference, and a private, obscure entity, cloaked as she is behind the niqab and her refusal to become accessible. Moreover, she is constituted and known through all of the talk and the multitude of voices present in the case, as much as she is in the gaps and silences which run throughout. Indeed, the voided spaces left by some legal actors are in fact packed with knowledge about N.S.; silence, in this case, indicates the power to assume certain things about her which did not require naming. Returning to the recent CBC article which indicated the presence of a Hindi-language interpreter, there is the question of whether it would have made any kind of difference to the case, of our understanding of it and the issues which underlie it, if such information as the specifics of her ethnicity had been specified and known from the outset? In the analysis that I have used in this thesis, this tidbit of knowledge is important largely because of the underlying meanings that may be abstracted from its absence; its emergence only after the case also highlights the ways in which N.S. is known and unknown by legal actors during the course of the Supreme Court proceedings, which parts of her are considered to relevant or irrelevant, and what was assumed or left unstated about her.

I contend that analyzing the maneuvers of legal actors involved in the N.S. case, and how they navigate and construct knowledge about N.S. is vital to understanding how and on what terms law works to create and sustain (and, to a lesser degree, disrupt) knowledge about veiled Muslim women. My analysis of the case hopefully allows for a greater understanding of the processes and impacts of this knowledge construction, and also hints towards a future wherein Canadian law can more ably grapple with issues related to religious freedom, especially for those who are constructed as existing

somewhere outside or hovering just around the boundaries of national community. In the case of niqab-wearing women, and indeed for any minority seeking to assert a legal claim, what would perhaps benefit the courts and legal actors is to cease viewing these kinds of claim-makers largely through a prism of deep difference which demands investigation and explanation, or a perceived extension of boundaries, whether of rights and freedoms, toleration, or visions of nationhood. While knowing N.S. not *merely* or *solely* as a niqab-wearing woman, or as figure subsumed under the weight of pre-existing and constructive forms of knowledge about her faith, her apparent difference(s), and the validity of her legal claim, may have had little impact on the final outcome of her case, it could operate as a much-needed move forward in our understanding of “others”, as well as work to unearth the implications of the kinds of knowledge we assume already to have.

The question that still lingers in the N.S. case is, what do we expect to see in her face? If, like the “East” in Bell’s quote, N.S. were to sweep aside her face veil, what exactly do we expect to find? Do we hope to find anything of value in her face – truth, credibility, or perhaps the answer to secrets - or do we merely desire the *ability* to see, to look, to gaze upon that which is hidden from us? Is there value even in this all too human desire, or is it, in this context, merely an expression of dominance, of the assertion of force and knowledge over that which resists both? In refusing to unveil her face, N.S. does more than make a freedom of religion claim. She forces us to confront unquestioned values and norms, to re-examine our hegemonic forms of knowing, and to allow for the possibility that what lies beneath her niqab, whether “angel” or “devil”, is less important than what drives our desires to reveal her.

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