Sexual Assault in Canada

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23.
What's in a Face? Demeanour Evidence in the Sexual Assault Context

Natasha Bakht

Natasha Bakht's chapter examines another manifestation of law's understanding of sexual assault — the need to test the credibility of complainants — this time expressed by a claim that Muslim women must remove their niqabs so that their “demeanour” can be scrutinized. Many authors in this collection have explored this constant in sexual assault: from the moment of reporting to police through to the criminal trial, women's accounts are disbelieved and filtered by police “unfounding” rates that are simply not comparable for other crimes, as explained by Teresa DuBois in Chapter Nine, and by other forms of “credibility-testing,” such as the Sexual Assault Evidence Kit discussed by Jane Doe in Chapter Sixteen. Natasha’s analysis joins with that pursued by Maria Campbell, Tracey Lindberg, and Priscilla Campeau in Chapter Five by exploring the role of racism and colonialism in marginalizing and stigmatizing complainants. She argues here that the demand that Muslim women “take off their clothes” in order to testify to their experience of sexual assault amounts to cultural and religious discrimination and to yet another form of “whacking the complainant” by defence lawyers.

Women’s bodies are too often the sites of cultural conflicts. In the context of sexual violence, the criminal law has forced women to fit into rigid characterizations of the ideal rape victim. This ideal rape victim has been described not only as morally and sexually virtuous (read white), but also as cautious, unprovocative, and consistent.1 Classist and sexist stereotypes pervade the law’s understanding of victims of sexual violence.2 Racialized women and Aboriginal women are similarly caught between a rock and a hard place3 as they negotiate their positions in a

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world that conveniently erases colonial and racial aggression in its attempt to combat sexual violence. More recently, the body of a religious woman, a Muslim complainant in a sexual assault trial, has become the site of cultural conflict. This time the conflict is between the legal and judicial culture that upholds the necessity of relying on demeanour evidence in a courtroom versus the religious and cultural beliefs of a devout Muslim woman who wears a niqab. Underlying this more obvious conflict is the repugnance many people, including feminists, feel when they encounter a Muslim woman who covers her face.

Sexual assault is an area of law that has been fraught with misogyny and racism. While efforts to reverse this trend have been enormous, real, practical, on the ground change has been slow. My interest is in ensuring that women’s equality is furthered, that women from minority groups in particular are not in the unhelpful position of having to choose between their cultural or religious beliefs and other fundamental rights. I hope to contribute to the literature on gender-justice in the sexual assault context by relying on an intersectional analysis that examines religion and culture. In doing so, I discuss the needs of a small minority of women. Though the numbers of niqab-wearing women may be few in Canada, adequately addressing their plight in this context is just and will ameliorate the workings of the judicial system for all women.

Objections to women who wear the niqab publicly are not uncommon in Canada or other parts of the Western world. In another work,

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5 The niqab is the full-face veil worn by some Muslim women through which only the eyes are visible. A variety of reasons have been given by women for why they wear the niqab. A common theological motivation is that Islam requires modesty, in dress particularly as between women and men who are able to marry.
7 The success of the 2009 conference, “Sexual Assault Law, Practice and Activism in a Post-Jane Doe Era” held at the University of Ottawa and the numerous participants who submitted abstracts, presented papers, and attended the various sessions is an example of the tremendous feminist work being done in this area.
8 Ayelet Shachar has referred to this dilemma faced by minority women as the ultimatum of having to choose between your rights or your culture. Ayelet Shachar, “The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority” (2000) 35 Harv CR-CLL Rev 385 at 388.
9 Culture is typically used by a racialized or Aboriginal accused in combination with a traditional criminal law defence. The use of culture in the service of victims of sexual violence is less common but perhaps even more important in its intersectional dimension.
I have canvassed a variety of these objections, including that the niqab is a security threat, it prevents Muslim integration, it causes problems with identification, and it oppresses women. These and other justifications for banning the niqab rarely consider the views or lived realities of Muslim women, often distort the public interest element of the controversy, evade legal obligations to accommodate minority communities, further marginalize an already targeted and besieged religious group, and reveal more about the ignorance and biases of the objectors than the “otherness” of Muslim women.

There have been several highly publicized instances of niqab-wearing women finding themselves in a courtroom, whether as advocate, plaintiff, witness or most recently a complainant in a sexual assault trial. In Toronto, a Muslim woman complainant made a request to wear her niqab while giving testimony in a preliminary inquiry in which she alleged that two accuseds sexually assaulted her over a period of several years. The accuseds’ lawyers objected to the complainant wearing her niqab on the basis that it interfered with their clients’ right...

10 For a critical examination of these and other objections that people hold of the niqab, see Bakht, “Veiled Objections” supra note 6.
12 Muhammad v Enterprise Rent-a-Car, No 06-41896-GC (Mich 31st Dist Ct, 11 October 2006).
13 Police v Razamjoo, [2005] DCR 408 (DCNZ) at para 99. For a critical analysis of opposition to the niqab in courtroom settings as well as an examination of accommodations that ought to be available to niqab-wearing women in their potentially multiple roles as lawyer, witness, jury member, judge, or accused, see Natasha Bakht, “Objection, Your Honour! Accommodating the Niqab in Courtrooms” in Ralph Grillo et al, eds, Legal Practice and Cultural Diversity (Surrey: Ashgate Publishing, 2009) 115.
14 R v MS and MS (16 October 2008), Toronto (Ont Ct J) [MS].
15 R v NS, [2009] OJ No 1766 (Ont Sup Ct J). In this case, at least one of the accused is related to the complainant whose desire not to remove her niqab while testifying is to avoid showing her face to men whom she could potentially marry. NS’s relation to the accused is not significant to her plea to wear the niqab in court because she would also wish to avoid showing her face to the male judge, male lawyers, and the men seated in the public courtroom. The Court of Appeal for Ontario recently rendered its decision in NS stating that where an accused’s right to a fair trial and a witness’s right to exercise her religious beliefs are both raised, reconciling these competing interests must be determined factually on a case-by-case basis (R v NS, 2010 ONCA 670 at para 97). The court recognized the unreliability of demeanour evidence generally as well as in the specific context of sexual assault, noting that “[a]justing the [court] process to ameliorate the hardships faced by a complainant like NS promotes gender equality”: ibid at para 80.
to make full answer and defence,\textsuperscript{16} including the right to disclosure upon a preliminary inquiry. They argued that in order to cross-examine the complainant effectively, they needed to be able to see her face to gage her reactions to their questions.

Disagreeing with this premise, this paper will argue that the prosecution and adjudication of sexual assault must be more inclusive of the needs of Muslim women who cover their faces. It will be argued that reliance on demeanour evidence in a sexual assault trial must be limited. Just as other feminist reforms have demonstrated the importance of taking into account more than simply the accused’s rights in a sexual assault trial, I will argue that a Muslim woman’s equality rights and religious freedom are equally deserving of serious consideration in this context.

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\textbf{WOMEN’S EXPERIENCES WITH THE JUDICIAL SYSTEM IN THE CONTEXT OF SEXUAL ASSAULT}
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It has already been amply documented that sexual assault is most often perpetrated by men on women.\textsuperscript{17} Sexual assault for the most part goes unreported and the prosecution and conviction rates for sexual assault are among the lowest for all violent crimes. As noted by Justice L’Heureux-Dubé in her dissent in \textit{R v Seaboyer}:

There are a number of reasons why women may not report their victimization: fear of reprisal, fear of a continuation of their trauma at the hands of the police and the criminal justice system, fear of a perceived loss of status and a lack of desire to report due to the typical effects of sexual assault such as depression, self-blame or loss of self-esteem.\textsuperscript{18}

Courtrooms have not been safe spaces for women who have told their stories of sexual violence. Prior to 1981, women who were raped by their husbands had no legal recourse since marital rape was not an offence

\textsuperscript{16} The accused has a traditional right to face his/her accuser, though \textit{R v Levogiannis} (1990), 1 OR 3d 351 (CA) stands for the proposition that this is not a basic tenet of the legal system. While normally the accused has the right to be in the sight of witnesses who testify against him, an order under s 486(2.1) of the \textit{Criminal Code}, permitting the twelve-year-old complainant to testify behind a screen so that he would not have to see the accused, was held to be constitutional.

\textsuperscript{17} See, for example, \textit{R v Seaboyer}, [1991] 2 SCR 577 at para 137, L’Heureux-Dubé J dissenting in part.

\textsuperscript{18} \textit{Ibid} at para 139.
in the *Criminal Code*. The adversarial nature of our criminal justice system has often made women complainants feel as though they were on trial for their non-criminal behaviour. Overtly sexist and racist remarks by police, judges, and over-zealous defence lawyers who use questionable tactics to embarrass, violate, and denigrate the complainant’s character, as well as the regular use of irrelevant information to prejudice the jury were, and many would argue still are, commonplace in our judicial system. Justice L’Heureux-Dubé has referred to the biases at play when women are sexually assaulted as rape mythologies. In other words, women’s descriptions of their rapes are measured against false typecasts of who she should be, who her attacker should be, and how injured she must be in order for it to be believed that she was, in fact, raped.

Historically, the legal system as a whole has not served sexual assault complainants well. However, feminist legal scholars and activists have insisted upon statutory and court-interpreted reforms to rules of evidence and procedures to accord with complainants’ privacy and equality rights. These reforms include the abolition of the doctrine of recent complaint, and the corroboration rules, both of which perpetuated

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


22 Certain defence lawyers have promoted the following tactic in defending those charged with sexual assault: “You have to go in there as defence counsel and whack the complainant hard at the preliminary. You have to do your research; do your preparation; put together your contradictions; get all the medical evidence; get the Children’s Aid Society Records … and you’ve got to attack the complainant with all you’ve got so that he or she will say I’m not coming back in front of 12 good citizens to repeat this bullshit story that I’ve just told the judge.” Cristin Schmitz, “‘Whack’ Sex Assault Complainant at Preliminary Inquiry” *Lawyers Weekly* (29 May 1988) 22.

23 *Seaboyer, supra* note 17 at para 140.

24 *Ibid*.

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

26 Section 274 of the *Criminal Code* states that in sexual assault offences “no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration”: *ibid* at s 274.
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distrust of women's veracity in sexual assault cases. The reforms extend to limitations on questions about the complainants' prior sexual conduct and strict restrictions around access to complainants' therapeutic records. This fairer and more sensitive approach to the prosecution of sexual assault has also resulted in accommodations in the form of giving independent status to a complainant to apply for an order directing that her identity and any information that could disclose her identity not be published. Moreover, closed circuit television testimony and testimonial screens for complainants who are minors, for whom testifying before the accused is overly traumatic, have been implemented.

Ongoing reforms to the criminal justice system such as those aforementioned are necessary to make the harrowing experiences of reporting sexual assault and testifying against accuseds in such trials more bearable and just. The increasing diversity of Canadian society means that such reforms must be tailored to meet the specific needs, interests, and characteristics of varying complainants. Religious women, for example, who are sometimes identified by outward symbols of their faith, must feel that the Canadian justice system is inclusive of their concerns. For niqab-wearing Muslim women, an accommodation of their rights will involve a re-evaluation of the use of demeanour evidence in courtrooms.

27 Code, supra note 19 at ss 276(1), 276(2)(c). These sections were upheld by the Supreme Court of Canada in R v Darrach, [2000] 2 SCR 443.
28 Code, supra note 19 at ss 278.1–278.91. These provisions were constitutionally upheld in R v Mills, [1999] 3 SCR 668. Lise Gotell has argued that despite the Code reforms, women's access to privacy rights as it pertains to confidential records and the "the systemic nature and complexities of sexual violence have been actively resisted in legal decision-making" in "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" (2002) 40 Osgoode Hall LJ 251 at 292–93.
30 Section 715.1(1) of the Criminal Code permits a video recording of victims or witnesses under the age of eighteen at the time of the offence as admissible evidence if certain conditions are met. Section 486.2(1) permits a witness under eighteen or a witness who has a mental or physical disability to testify outside the courtroom or behind a screen or other device that would allow the witness not to see the accused: Code, supra note 19 at ss 715.1(1) and 486.2(1).
The Use and Misuse of Demeanour Evidence

The reliance on demeanour evidence in courtrooms generally is increasingly discredited in the legal literature. However, judges and juries are nonetheless still permitted in law to assess the credibility of witnesses and the accused based on demeanour evidence. Triers of fact are permitted to evaluate the trustworthiness of a person in court based on his/her appearance, attitude, behaviour, and/or disposition. Although much case law exists to support this contention in Canada, there is also a growing body of case law and social science literature that warns against excessive use of demeanour evidence because of its inherent unreliability.

I have argued elsewhere that the use of demeanour evidence to assess the credibility of witnesses in a courtroom is dangerous because “no one can do better than chance at spotting liars simply by demeanour.” The fact of the matter is that it is nearly impossible to know whether perspiration on a witness’s brow is the nervous result of telling a falsehood, the anxiety of being on the stand for the first time, or any combination of other factors. Judging demeanour is particularly challenging for judges and juries who are not familiar with the witnesses. They may not have had the opportunity to observe the witness for a very long period of time; they must assess a witness in a fairly artificial environment without having a sense of how she/he normally reacts to stress.

Some social science research suggests that the facial expressions of people who are attempting to deceive differ from those exhibited when the person is telling the truth. Elizabeth Levan reports that: “A series of studies by Albert Mehrabian indicated that the facial expressions of individuals attempting to deceive were more pleasant and often ac-

31 See, for example, R v White, [1947] SCR 268. See also Bakht, “Objection Your Honour,” supra note 13 at 118.
32 Justice O’Halloran noted in Faryna v Chorny: “[t]he law does not clothe the trial judge with a divine insight into the hearts and minds of witnesses,” [1952] 2 DLR 354 at 357 (BCCA). See also R v Levert (2001), 159 CCC (3d) 71 at 81 (Ont CA), and R v Norman (1993), 26 CR (4th) 256 at para 47 (Ont CA).
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accompanied by smiles more often than truthful communicators.”35 This data has been both corroborated and contradicted in other studies.36 Even if one were to start from the premise that facial expressions indicate dishonesty, research shows that little confidence should be placed in people’s ability to perceive these expressions, whether they are police officers, college students, customs officials, or judges.37

For most people, the ability to perceive or decipher the truth of a statement from the demeanour of the communicating person is questionable. Yet there appears to be a disconnect between what one thinks one is able to perceive and what one actually does. It is very common for individuals to believe that they can determine when they are being lied to.38 This overconfidence was expressed by one lawyer who argued:

My cross-examination is determined by my assessment of the demeanour of the witness. I may be pursuing a certain line of questioning for the witness. Having an opportunity to see their demeanour I might conclude I believe the witness is being sincere on this point and am I really going to get anywhere with this line of questioning. No, I do not think so. I am going to move on to somewhere else. On the other hand observing the witness’s demeanour I might conclude the witness is prevaricating, the witness is not being forthright and I might want to explore that area further.39

Judges and lawyers are not taught how to read facial expressions for truth or deceit. This is not a recognized area of their legal training. Lawyers — such as the one previously mentioned who claim to have extraordinary powers of observation — simply use and trust their gut instincts. The data on lie detection suggests that these lawyers, though they may believe otherwise, are no better than the average person in detecting accurately and consistently the “micro-expressions” ex-

36 Ibid.
38 Ibid at 283.
39 NS, supra note 15 at para 110.
hibited by individuals when lying.40 Aaron Williams notes that “[i]f a fact finder’s ability to ascertain deceit through non-verbal communication is slightly greater than fifty percent, how compelling is the court’s interest in requiring a witness to remove her veil, especially when the only non-verbal cues inhibited by the niqab are facial expressions?”41

Although the legal system presumes that judges and juries are knowledgeable about human nature, Justice Wilson in R v Lavallee42 reminds us that this is not always the case. In Lavallee, the Supreme Court of Canada held that the use of expert evidence to assist in explaining the psychological impact of battering on wives and common law partners was relevant and necessary in a case where a battered woman killed her partner one night by shooting him in the back of the head as he left the room. A psychiatrist’s assessment was used in support of Lavallee’s defence of self-defence.43 As Justice Wilson explained, the average person may think they are experts on human nature, but by virtue of popular mythology embedded in our society and unassisted by expert evidence, they may be lead to erroneous conclusions about battered women.44 Thus, what may appear “obvious,” that if a battered woman does not leave her batterer, then she must enjoy the violence, is in fact demonstrably untrue.

Similarly, it has been documented that in racial profiling cases, perfectly innocuous behaviour is often interpreted as suspicious simply because it was viewed through stereotypical lenses.45 Observations of people, whether they appear guilty or innocent, necessarily depend on highly subjective impressions.46 On the question of race, some social

40 Ekman in Williams, supra note 35 at 285.
41 Williams, supra note 35 at 288. Feminist activist Jane Doe of the infamous case, Jane Doe v Toronto (Metropolitan) Commissioners of Police, [1998] OJ No 2681 (Ct J (Gen Div)), sarcastically retorted in response to the insistence that demeanour is a useful tool in prosecuting sexual assault that what one needs in order to truly assess the credibility of women complainants is to have them testify naked. How else, she asked, can we ensure that they are not lying?
43 The psychiatrist explained Lavallee’s ongoing terror and her inability to escape the relationship despite the violence and the continuing pattern of abuse that put her life in danger, and he testified that, in his opinion, the shooting was a final desperate act of a woman who sincerely believed that she would be killed that night (Lavallee, ibid at para 9).
44 Ibid at paras 31–34.
46 R v Levert (2001), 159 CCC (3d) 71 at 81 (Ont CA).
science research has suggested that jurors may be less capable of reading the demeanour of witnesses of a different race.47 Given that our society struggles with systemic racism and sexism, among other oppressions, the fact that certain people appear less trustworthy than others should make us cautious in our reliance on demeanour evidence.

The concern with an overconfident use of demeanour evidence in the sexual assault context is that people will depend on what Justice L’Heureux-Dubé has called “myths and stereotypes”48 about the appropriate way in which women ought to react to sexual assault, penalizing those who do not fit into such rigid characterizations. For example, women who appear nervous may create the impression of untruthfulness; if a woman fails to show emotion, this may be read as a lack of sincerity; if she is extremely upset, she may be seen as exaggerating. Reliance on demeanour evidence will disadvantage complainants whose attitude and disposition does not accord with fixed conceptions of the appropriate reactions to sexual violence. The use of demeanour evidence in sexual assault cases is essentially a license to use (sometimes unarticulated) racist and sexist notions about women as a way to defeat their narratives and dismiss their allegations as untrue. The legitimate fear is that lawyers and judges may perpetuate the standard of the “ideal rape victim” that few victims of sexual assault will be able to achieve.

Although judges may not state the reasons for their findings of credibility based on demeanour, this simply makes their power less accountable and more dangerous. Just as women are likely to be disadvantaged by demeanour evidence, the quiet hegemony of white supremacy and patriarchy will protect some men’s accounts such that his appearance, attitude, and disposition work in his favour: “He doesn’t look like a rapist; he’s too well dressed, well mannered or intelligent.”49 What then is in a face? I would suggest that an undue focus on women’s demeanour risks reliance on tremendously misleading evidence.

Judicial education and academic research on the unreliability of demeanour evidence has prompted judges to caution themselves about the effects of demeanour evidence and to “strenuously resist allowing demeanour to factor into an assessment of credibility.”50 Similarly, the

48 Seaboyer, supra note 17 at paras 125, 141, 157.
49 Online: <http://www.barrettandfarahany.com/sub/sexual-assault-bias.jsp>.
50 Gloria Epstein, “What Factors Affect the Credibility of a Witness” (2002) 21 Advocates’ Soc J 10 at 12. See also R v AW, [2004] OJ No 5506 at paras 44 (Sup Ct), 68 where the judge stated: “In the videotaped statement the Complainant spoke in a soft mono-
Canadian Judicial Council’s approved model jury instruction on demeanour is permeated with cautions about the unreliability of demeanour evidence:

What is the witness’s manner when he or she testifies? Do not jump to conclusions, however, based entirely on how a witness testifies. Looks can be deceiving. Giving evidence in a trial is not a common experience. People react and appear differently. Witnesses come from different backgrounds. They have different abilities, values and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or even the most important factor in your decision.51

It is possible, of course, that demeanour evidence can be used in favour of sexual assault complainants. Indeed, several such instances can be found in the case law.52 The scope of this paper does not allow a comprehensive analysis of whether demeanour evidence has been used favourably for the complainant and, if so, what the characteristics of these complainants are. Despite a preliminary search of sexual assault cases in Ontario that indicates that judges may use demeanour evidence fa-

tone voice without any indication of emotion. In giving her evidence in Court her demeanour was much the same… I think it goes too far to suggest in this case that, because the Complainant did not exhibit a stereotypical emotional response, it is incumbent on the Crown to adduce expert evidence. Common sense and experience demonstrate that individuals respond differently to traumatic events and that is why demeanour evidence must be carefully and cautiously considered … “ [emphasis added].


52 See, for example, R v AI, [2003] OJ No 3347 at paras 44, 52 (QL) (Sup Ct) where the judge stated: “I was impressed with both Ms KD and Ms JD. I find that they have tried to be truthful and fair in their testimony. Both appear to have been profoundly affected by adverse incidents of a sexual nature in their youth. They cried often in giving their testimony. They were each under obvious stress. They did not exaggerate in their claims and did their best to recollect as best they could. They are honest and credible witnesses who sincerely believe the allegations they make against Mr AI. They have no apparent motive to make false charges against Mr AI. They certainly believe in what they testified happened to them in their contact as young girls with Mr AI… As I have said already, I find both complainants and Mrs LD to be very straightforward and credible witnesses. The demeanour of each complainant was convincing. In my view, each did her best to answer questions truthfully and to relate events as best she could remember. I believe each is trying to be truthful and fair in respect of her allegations in her testimony against Mr AI. It is understandable that each complainant is emotional about the situation. The complainants cried often in the course of their testimony.” The accused in this case was nonetheless acquitted.
vourably as it pertains to complainants, I remain unconvinced that demeanour evidence is a reliable source of probative information. In particular, I worry that the most marginalized women — those who experience intersecting inequalities by virtue of race, Aboriginality, physical or mental disability, age, or socio-economic status — may not appear sufficiently credible.

Some research has indicated that non-verbal communication, such as body language and, specifically, “self-touching” and hand gestures, are better indicators of untruthfulness than facial expressions. Because the face is the main focus of attention during conversation, the deceiver will be more aware of the face as a source of deception cues and thus more likely to disguise their facial expressions, leaving other bodily activity uncontrolled. Evaluating body movements and more prolonged gestures may prove easier to decipher than the rapid microexpressions of a face. Yet, one's ability to dependably recognize these bodily cues without any sort of training is still doubtful. However, the implication for niqab-wearing women is important because other forms of non-verbal communication like gestures, body movement, and variations in voice remain perceivable despite the niqab.

THE IMPACT OF A NIQAB PROHIBITION ON MUSLIM WOMEN
In 2006, a niqab-wearing Muslim woman found herself in court. Ginnah Muhammad brought suit in Michigan against Enterprise Rent-A-Car. She was seeking relief for $2,750 in assessed damages to a rental

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53 A preliminary search of the Quick Law Criminal Law Case database with Ontario as the jurisdiction and using the search string “("sexual assault" or rape) and ((complainant or victim) /s facial)” yielded 332 cases. Of these, there were eighty-eight examples of the use of demeanour evidence. In sixty-seven cases, the judges’ assessment of demeanour was favourable to the complainant (even if a reasonable doubt was found and the accused was acquitted). In sixteen cases, the judges’ assessment of demeanour was not favourable to the complainant. In the remainder of the cases, the use of demeanour evidence was unclear or equivocal.
54 Williams, supra note 35 at 288.
55 Ibid.
56 In determining credibility, judges and juries are on firmer ground if they go beyond demeanour and seek support for their findings of credibility from the entire trial record such as an examination of all of the elements and probabilities existing in the case. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what has been seen and heard, as well as other factors, combine to produce what is called credibility. See Egya N Sangmuah, “After B(RH): Continuing Need to Give Adequate Reasons for Findings of Credibility” (1994) 29 CR (4th) 135.
car that she claimed was caused by thieves. Rather than discussing her claim, Judge Paul Paruk gave her the stark choice of removing the niqab or having her case dismissed. Judge Paruk reasoned: “I can't see your face and I can't tell whether you're telling me the truth and I can't see certain things about your demeanor and temperament that I need to see in a court of law.” Setting aside the problematic overconfidence that Judge Paruk displayed in his ability to “see the truth,” of particular note is the striking language with which Ginnah Muhammad couched her refusal to remove the niqab. She said: “I wish to respect my religion and so I will not take off my clothes.”

Most women would agree that one should not have to remove one’s clothing in order to testify in court. Claire McCusker has argued: “The dissonance was definitional: those who drafted the rules governing Paruk’s courtroom would never have thought to consider a face-covering ‘clothes’ in the same sense that a skirt and blouse are ‘clothes,’ while to Muhammad this was a natural use of the word and the concept.”

Ginnah Muhammad’s small claims dispute was eventually dismissed because she refused to remove her clothes. As I have argued elsewhere, there are very few instances that would make it necessary to see a woman’s face in the courtroom. Opposition to the niqab in a courtroom, no matter the type of case at issue, must be able to definitely respond to the question, “What is the significance of seeing this woman’s face to the judicial/legal task at hand?” In a sexual assault trial, more than per-

57 Muhammad, supra note 12.
58 Transcript of Record at 4, Muhammad, ibid. “Rejecting an American Civil Liberties Union Argument that the Revised Michigan Rule of Evidence 611 Should Contain an Exception for Religious Dress, the court voted 5–2 to approve a standard that gives the courtroom judge the power to require witnesses to remove head or facial coverings.” See Martha Neil, “Courtroom Judge Has Power to Ban Muslim Veil, Top Michigan Court Decides” (17 June 2009) ABA J, online: <http://abajournal.com/news/courtroom_judge_has_power_to_ban_muslim_veil_top_mich_court_decides/>. Clearly, Judge Paruk would have disagreed with Justice O’Halloran who noted in Faryna that “[t]he law does not clothe the trial judge with a divine insight into the hearts and minds of witnesses” (Faryna, supra note 32 at 357).
60 Muhammad, transcript, supra note 58 at 6.
61 McCusker, supra note 60 at 396.
62 Bakht, “Objection, Your Honour,” supra note 13 at 118. In situations where the identity of the niqab-wearing woman must be verified, women court staff can simply validate a woman’s identity by asking her to remove the veil privately for the purposes of comparing a piece of photo identification with her face (ibid at 129). Moreover, it should be noted that it is not uncommon for judges to take evidence without being able to
haps in any other courtroom situation, the effect of forcing a woman to remove her niqab will be to literally strip her publicly and in front of her alleged perpetrators. Courtrooms already require women to relive their horrifying experiences of rape and sexual abuse, reproducing the powerlessness they experienced during the rape. Having to confront this situation without one's usual clothing is both perverse and grossly insensitive.

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

Many of the feminist reforms surrounding the prosecution of sexual assault have been for the purpose of increasing the reporting of such violent crimes. The impact of not reporting sexual assault is ongoing victimization. As put by Justice L’Heureux-Dubé in Seaboyer:

Whether or not a particular woman has been sexually assaulted, the high rate of assault works to shape the daily life of all women. The fact is that many, if not most women, live in fear of victimization. The fear can become such a constant companion that its effect remains largely unnoticed and
Some studies have demonstrated that women who have been sexually assaulted withdraw in some form from social life in order to prevent being further harmed. Even where such restrictions of their behaviour are moderate, it can negatively affect the individual’s sense of personal autonomy and diminish the quality of her life.

In *R v NS*, the complainant testified that the niqab is “a part of me.” Muslim women who are asked to choose between being faithful to their religious beliefs or “opting out” of providing testimony in a sexual assault trial may well make the choice in favour of religion. The result of that supposed “choice” will be severe and negative damage to her sense of self-worth and acceptance in Canadian society. Muslims are already a globally targeted community since the events of September 11th, 2001. In addition to the general concern that Muslims will avoid participation in democratic processes where they consistently feel marginalized by the state, the cultural insensitivity of not recognizing religious practices that offer comfort, security, and stability to women will send the specific message that niqab-wearing women should not report their sexual assaults as justice will not be done for them.

**LEGAL ARGUMENTS TO ACCOMMODATE THE INTERSECTIONAL RIGHTS OF NIQAB-WEARING COMPLAINANTS**

There are several legal approaches that can be taken to ensure that niqab-wearing complainants are permitted to testify in court while wearing their niqabs. I will address these various legal avenues; however, the crux of the issue is that the integrity of the criminal justice process lies in recognizing that a fair trial protected under the *Canadian Charter of Rights and Freedoms* is a right enjoyed not only by the accused, but also the complainant and the public, who have a right to the proper adminis-

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65 Seaboyer, supra note 17 at para 150.
66 Ibid.
67 Ibid at paras 150–52.
68 NS, supra note 15 at para 29.
69 Sherene Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008). See also Bakht, supra note 6.
tration of justice. The proper administration of justice requires consideration of the competing interests at stake in the criminal justice process, such as the intersecting equality rights and religious freedom of the complainant and the public’s interest in the effective prosecution of criminal charges through criminal processes that are sensitive to the needs of victims and witnesses.

Such a contextual argument is by no means novel. In 1999, the Women’s Legal Education and Action Fund [LEAF]71 successfully argued in R v Mills,72 a case about the constitutionality of provisions in the Criminal Code that limited the production of women’s personal records for the defence in sexual offence proceedings, that “[i]t is not only the accused but also the complainant and the public at large who are entitled to the equal benefit of a fair and just trial process.”73 The Supreme Court of Canada held in Mills that a complainant’s rights to privacy, security of the person, and equality are to be analyzed as equal to the rights of an accused person.74 LEAF argued that courts must be precluded from drawing inferences about what is relevant in a criminal trial on the basis of discriminatory or stereotypical reasoning. Thus, assessments of relevance must be made through an equality prism wherein the Charter value of equality informs how relevance is determined.75 Respecting women’s rights to equality during a sexual assault trial would encourage victims to report sexual offences and to testify in sexual offence trials; it would centrally engage the public interest in the pursuit of justice on behalf of all members of society.76

The defence argument in a sexual assault case is that the right to a fair trial as protected by ss 7 and 11(d) of the Charter includes the right to make full answer and defence. In other words, in order to be fully prepared to meet the charges against the accused, the defence would argue that they must be able to see the complainant’s face in order to follow her expressions as she answers questions under cross-examination. Counsel for the accused in NS argued that they could not adequately

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71 LEAF is a national charitable organization that works toward ensuring that the law guarantees substantive equality for all women in Canada. Since its inception in 1985, LEAF has intervened in over 150 cases and assisted in establishing landmark legal victories for women on a wide range of issues. In 1999, LEAF intervened at the Supreme Court of Canada in Mills, online: <http://www.leaf.ca/>.

72 Supra note 28.

73 Mills, ibid (Factum of the Intervener LEAF at para 45).

74 Mills, supra note 28 at paras 21, 61, 90.

75 LEAF Factum, supra note 73 at paras 35, 38.

76 Ibid at paras 50, 51.
represent their clients because being unable to follow the complainant’s expressions hampered their ability to gauge in which direction to take their line of questioning. They felt that their right to full answer and defence would be circumscribed by an inability to cross-examine the complainant without her veil. As LEAF argued in Mills:

> An accused’s right to a fair trial is not a right to perfect justice according to his determination of what this would involve, but fundamentally fair justice taking into account the rights of others involved in the process … The right to a fair trial does not mean that an accused person is entitled to everything that might possibly be helpful to his defence. (emphasis added)

Indeed, the fair trial rights of the accused do not “trump” the rights of the complainant. As the Supreme Court of Canada held in Dagenais v Canadian Broadcasting Corporation, “When the protected rights of two individuals come into conflict … Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.” Just as the court held in Mills that a complainant’s rights to privacy, security of the person, and equality are to be analyzed as equal to the rights of an accused person, a complainant’s rights to sex equality and religious freedom must likewise be accorded equal status with the accused’s right to make full answer and defence.

A niqab-wearing complainant’s interests in a sexual assault trial will engage the intersecting rights of equality and freedom of religion. The religious aspect of such a claim is perhaps obvious. The niqab-wearing complainant would argue that her desire to wear the niqab while testifying is a practice that has a nexus with religion, Islam in particular, and that she sincerely believes that she must wear the niqab publicly in order to conduct herself according to her faith. Most Charter claims

77 R v MS and MS, supra note 14 (Factum of the Applicant at para 12).
78 LEAF Factum, supra note 73 at paras 46–47. Given the unsubstantiated value in the need to see a witness's face in order to properly assess credibility, the interference with the right to make full answer and defence may, in fact, be minimal. Consequently, there may be no need for the court to engage in a reconciliation of two rights. “In Amselem … the Court refused to pit freedom of religion against the right to peaceful enjoyment and free disposition of property, because the impact on the latter was considered ‘at best, minimal.’ Logically, where there is not an apparent infringement of more than one fundamental right, no reconciliation is necessary at the initial stage”: Multani v Commission Scolaire Marguerite-Bourgeoys, [2006] 1 SCR 256 at para 28.
80 An individual advancing an issue premised upon freedom of religion must show that (1) he or she has a practice or belief, having a nexus with religion, which calls for par-
of freedom of religion that are sincere are successful at the s 2(a) stage because the test articulated by the Supreme Court of Canada is fairly broad and subjective:

[F]reedom of religion consists of the freedom to undertake practices and harbour beliefs having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her 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.81

The balancing of freedom of religion against other public interests is typically done at the stage of s 1 of the Charter, the justificatory analysis. However, to understand the niqab-wearing complainant’s issue as merely one of religious freedom is to misinterpret what is at stake in such a case. The gendered aspect of this issue lies in the fact that this is a case of sexual assault allegedly committed by two men upon a woman.82 The context of this offence cannot be forgotten: a majority of the sexual assaults in Canada are committed by men on women.83 Moreover, the religious requirement of wearing the niqab is a specific article of faith exclusive to women.84 While the Islamic requirement of modesty is interpreted differently by Muslims globally, no interpretation requires men to cover their faces by wearing a niqab.

The case in question involves the religious and gendered practice of wearing a niqab in court. Thus, the denial of the right to testify in a sexual assault trial while wearing the niqab will not only impact the

81 Ibid at para 46.
82 NS, supra note 15 at paras 3–6.
83 Seaboyer, supra note 17.
84 Three recent religious accommodation cases to have reached the Supreme Court of Canada have all involved male applicants and religious practices uniformly shared by men and women of the particular faith. See Amselem, supra note 80 where Orthodox Jewish residents of a Montreal condominium sincerely believed it was necessary to build a succah or religious hut on their balconies during the festival of Succot. In Multani, supra note 78, a Sikh youth sincerely believed he was required by his faith to carry a kirpan or religious dagger at all times, including to school. In Alberta v Hutterian Brethren of Wilson Colony, [2009] 2 SCR 567, members of a Christian religious group sincerely believed that voluntarily having their photograph taken for a driver’s license violated the Bible’s second commandment against idolatry.
complainant’s religious beliefs, but will also significantly hamper her sex equality rights under the Charter. Testifying in a sexual assault trial is a stressful experience that provokes much anxiety for complainants. The public and adversarial process makes for an extremely difficult place to answer questions about sensitive and highly traumatic incidents. Prohibitions on wearing the niqab while giving testimony will only discourage Muslim women, who regularly dress in such a fashion, from reporting sexual assaults. Thus the historic under-reporting of the crime of sexual assault that Parliament has attempted to combat through other legislation\(^85\) will simply be undermined for this group of women.

An intersectional analysis offers a more nuanced approach to rights litigation and is more likely to reflect the multiple and complex affiliations of people’s lives. The concept of intersectionality, first coined by theorist Kimberlé Crenshaw, emphasizes that subordination may manifest itself in multiple ways in the lives of some people.\(^86\) Racialized women, for example, frequently experience racism and sexism in the same course of events. Intersectionality insists that the multiple identities and corresponding consequences for such people are not ignored. For religious women, such an approach is particularly significant since their plight is often the result of multiple forms of oppression. In NS, the complainant referred to the niqab as “a part of me.”\(^87\) Indeed, religious women should be able to use legal instruments such as the Charter to reflect both their religious and gender identities.

It is possible that a niqab-wearing complainant could make an intersecting claim of discrimination on the bases of sex and religion using s 15 of the Charter. Although in Law v Canada (Minister of Employment and Immigration), it was held that it “is open to a s 15(1) claimant to articulate a discrimination claim on the basis of more than one ground,”\(^88\) few courts have recognized intersectionality in their section 15(1) jurisprudence.\(^89\) Alternatively, an intersectional argument can be made us-

\(^{85}\) Seaboyer, supra note 17 at para 253.
\(^{87}\) NS, supra note 15 at para 29.
\(^{88}\) Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at para 37.
\(^{89}\) Beverley Baines notes that two provincial appellate courts have tried to reconcile section 15(1) with the litigants’ real life experiences of intersectional discrimination. Beverley Baines, “Section 28 and the Canadian Charter of Rights and Freedoms: A Purposive Interpretation” (2005) 17 CJWL 45 at 65. See Dartmouth/Halifax County Regional Housing Authority v Sparks, [1993] NS No 97 (CA); and Falkiner v Ontario
ing s 2(a) of the *Charter* combined with s 28. Kerri Froc has argued that section 28 of the *Charter* may provide a conceptual tool that recognizes and redresses an integrative approach to *Charter* litigation. She states that the aim of section 28 should be to ensure that the multidimensional oppression experienced by women as whole persons is given due recognition with respect to all applicable *Charter* rights. Finally, section 27 of the *Charter* may offer something new in the way of an intersectional approach. Combined with another *Charter* right, s 27 is a reminder to interpret a law of general application in such a way as to enhance the cultural diversity and pluralism of Canadian society. Ideally, a truly multicultural interpretation of section 27 would take into account women’s understanding of their cultures. Thus, women could articulate an infringement of rights that occurs simultaneously and that together are distinctive from each alone. Such an analysis will acknowledge the significance of wearing the niqab to the identity of the complainant, as well as the subjective experience of its forced removal as a form of public nakedness and violation, which is particularly problematic in a sexual assault trial.

**CONCLUSION**

In this paper, I have argued that actors in the criminal justice system must consider the intersecting needs of niqab-wearing complainants in sexual assault trials. Women who cover their faces for religious reasons in everyday life should not have to remove their veils in courtrooms regardless of the type of case at issue. But in the context of a sexual assault trial, it is particularly crucial to accommodate niqab-wearing

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90 Section 28 provides that: “Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons”: *Charter*, supra note 70.


92 Section 27 of the *Charter* reads: “This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians”: *Charter*, supra note 70.


94 For a more fulsome discussion of how section 27 can be interpreted intersectionally, see *ibid*.
women because the experience of testifying in court about such sensitive and distressing matters puts women in a highly vulnerable situation. Over the years, court processes and rules of evidence in criminal law have changed to recognize the law’s discriminating impact on complainants of sexual assault. Knowing that court processes are receptive to all women’s circumstances will encourage more women, including niqab-wearing women, to report sexual violence. The accommodation of religious women in such a context is necessary because it is just — not because Canadian law makers are doing a favour to certain Muslim women. Indeed, the majority of evidence indicates that the use of demeanour evidence, such as the expression on a witness’s face to evaluate credibility, is dangerous and unreliable. Niqab-wearing women should not have to remove their clothing in court in order to perpetuate the misapprehension that this will further the fair trial rights of the accused. An intersectional approach to rights litigation that acknowledges both the sex equality and religious freedom dimensions of this issue is most likely to reveal the full nature of the claims at stake. As LEAF argued in O’Connor, court processes must be “subjected to continuous critical scrutiny to ensure that they evolve congruently with advancing knowledge and insight into the unique plight of complainants.”

95 R v MS and MS, Applicant’s Factum, supra note 77 at para 34.