

The Veiled Threat in the Canadian Judicial System: Blurring the Neutrality of Secularism in the Supreme Court of Canada case N.S. v. Her Majesty the Queen, et. al.

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Since the Enlightenment, a discourse of secular justice has permeated the Western legal system through an idealized rhetoric of objectivity and ‘reasonable’ doubt.¹ Christian morality, Abrahamic law, and the medieval tradition of penance have, like many other values, been sequestered from their origins and relocated as the foundational ideas of modern legal codes, such as those in Canada and France.² This paper’s argument is predicated on the theory that this hidden discourse is foundational to the Canadian legal system and that such a discourse is most apparent when the system is adjudicating cases involving perspectives that conflict with its foundational, yet hidden, values. It is important to expose this discourse because a refusal to

acknowledge the presence of such values, within a system that purports to be neutral due to its secular identity, can cause clandestine and overt discrimination against ‘others’ who attempt to participate in it.³

This paper will explore one such conflict, which exposes the presence of the hidden discourse within the Canadian Supreme Court, in which an ‘other,’ in this case a practicing Muslim woman, challenged the court’s presumptions that originated from this discourse. This paper examines the rhetoric used in the Supreme Court of Canada case N.S. v. Her Majesty the Queen, et. al. and demonstrates how the judges’ conception of the veil, use of scientific terminology, references to tradition, and the court’s overall references to Christianity reflect an underlying discourse of values, originating from Christianity and the Enlightenment, which inform the judicial process in Canada.⁴ To analyze this rhetoric, the following scholarly frameworks are employed: the theory of orientalism, the theoretical process of ‘othering’, and Christianity’s relationship with secularism, all of which are present in the scholarship concerning the French banning of the veil.⁵ As there has been no scholarship published concerning the Canadian case in question, as it occurred so recently, those examining the French ban are

¹ The term Western refers to European and North American sentiments that have been generalized to include a focus on Christianity, secular governance, and enlightenment values. Using the term ‘Western’ is problematic because it draws on a ‘clash of civilization’ rhetoric, which has its origins in orientalist conceptions. The reason that this term is used in this paper is because there is a convention within the scholarship that if the persons or structures of the discussion understand themselves in relation to this term then its use is acceptable. The term enlightenment refers to the intellectual setting in Europe that emerged in about 1648 (the Peace of Westphalia), with the works of Kant and Newton, and continued until 1789 with the French Revolution. The value system left behind by this movement continues to affect out contemporary culture; its elements include: autonomy, empirical reason relating to the scientific method, nature as the source of society, melioristic optimism in the potential for society to eventually evolve into a perfect entity, progress, and toleration.

² The term secularism has its origins during the conclusion of the Thirty Years War (1618-1848) when it was used to refer to territories that were no longer controlled by ecclesiastical authorities. Berger defines secularism as “the process by which sectors of society and culture are removed from the domination of religious institutions and symbols.” The authority of religious institutions is perceived to have been replaced by science, which derives its authority from the use of the scientific method. Peter L. Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (Garden City, New York: Doubleday & Company, Inc., 1967), 107. A more thorough discussion of this term and the process that it refers to will occur later in the paper when I discuss secularization theory.

³ The term ‘other’ is used in the scholarly discourse to refer to those who do not or cannot align themselves with the prototypical person who is understood as “normal.” With regards to the Canadian legal system and its value-ridden history such a person would be a wealthy, educated, literate, free, white male of European descent. Any person whose identity diverges from this prototype can be identified as an ‘other’ and can experience the dismissal of their value due to their divergence from the description of a ‘normal’ person. For further information on othering see the works of contemporary scholars, such as Bell Hooks, who are re-examining the ideas of Edward Said.

⁴ The term judges refers to the nine judges, one chief and eight associate, who constitute the Supreme Court of Canada. The term ‘court’ is also used in this paper to refer to aspect of the case that arise from the Supreme Court of Canada’s institutional guidelines and not from the opinions of the judges presiding over this case. For example, when referring to the garb and setting of the court room the term ‘the court’ will be used to refer to the institution responsible for this but the facial movement and comments produced by the individuals in that court room are referred to through the use of the term ‘judges’.

⁵ The term veil is used in this paper to refer to any head covering that Muslim women use to comply with the Qur’anic encouragement for modest dress. There are a number of different types of head-coverings that have emerged from diverse cultural settings but in the Western media they are all referred to as ways to practice veiling. This homogenizing tone, which is based on an ignorance of non-European cultures, present in the term veil is useful in my paper because it reflects the understandings of many of the Canadian Supreme Court judges and the discourse of the court system they participate in.

essential for this discussion. However, there are some large discrepancies between the French and Canadian forms of secular governance, which Oliver Roy's work provides an overview of. Such discrepancies are essential for determining why France and Canada approached the legality of veiling in two opposing ways.

Structurally, this examination begins with a discussion of the place of the veil in Western ideology that makes reference to the issues of orientalism, othering, and secularization. Then it summarizes the controversial 2003 ban on wearing a veil in French public schools. The third section examines a Canadian Supreme Court case and is followed by a discussion of how the rhetoric employed by the members of this court demonstrate the existence of a hidden but value-laden discourse. This paper ends with an analysis of how the Supreme Court's response to the question of whether a Muslim woman can wear her niqab to testify is an example of how the boundaries between secularism and Christianity are blurred by the presence of this hidden discourse.

THEORETICAL BACKGROUND

Islam currently occupies a place of both fear and fascination within Western culture and because of this Muslims have become the prominent 'other' of the West in the twenty-first century.⁶ Chaudhary reflects this when he writes that "the veil occupies an almost obsessive position in the Western collective psyche and its imagery is evoked at any mention of the Middle East or Islam."⁷ This obsession can be explained using the discourses of orientalism and othering, which were popularized by Edward Said through his publication of *Orientalism* in 1979.⁸ He argues that the East is constructed as the opposite of everything the West

values about itself and that this process demonstrates how this term fails to accurately represent the people it is imposed onto, but rather, it demonstrates what values are of central importance to Western identity.⁹ Said applied this theory to Islam by exploring how Islam and the West are presented as static monoliths to encourage the perception that contemporary people live in a "cartoonlike world where Popeye and Bluto bash each other mercilessly, with one always more virtuous pugilist getting the upper hand over his adversary."¹⁰ Chaudhary uses this theory of orientalism to explain why "the veil is... understood to be inherently a sign and practice of gender inequality and religious extremism."¹¹ From this theoretical stance, the veil is a simulacrum representing Islamic or Eastern morality – or its absence – to a Western audience while remaining an unsatisfactory imitation of the complex religious and culture reality it represents. Such orientalist rhetoric materializes into a lens that those acculturated in the West subconsciously employ, where viewing a veiled woman transforms her into a threatening other.

The process of othering is also associated with Said. It refers to the creation of an image that represents the opposite of everything the creator values and therefore, reinforces the identity of its creator because it constructs a boundary for determining what is unacceptable. In Western culture the central other is from 'the East'. The veil's ability "to evoke an 'eastern mystique'" for whoever is wearing it is an example of the othering process; for mystery is constructed as the opposite of Western transparency and rationality.¹² The absence of

⁶ There is a long history of interactions between Islam and the West but for most of this history they were one kind of a larger homogenized group of orientals. Any argument that Muslims have always been the most prominent 'other' in the West does not easily be challenged by the discourse in WWII when Japanese soldiers were the orientals viewed as most distinct and dangerous to the West. Since the Oklahoma bombing and particularly since September 11, 2001 Muslims have become the prototypical 'other' in the Western popular discourse, particularly its media.

⁷ Ajay Singh Chaudhary, "The Simulacra of Morality: Islamic Veiling, Religious Politics and the Limits of Liberalism," *Dialectical Anthropology* 29 (2005): 352.

⁸ Edward Said, *Orientalism*, 25th ed. (New York: Vintage Books, 1979).

⁹ Ibid.

¹⁰ Edward W. Said, "The Clash of Ignorance," *The Nation*, October 4, 2001, October 22, 2001 edition, 1.

¹¹ Chaudhary, "The Simulacra of Morality," 357.

¹² Ibid., 352.

those two qualities in the veil is particularly important because they are what secular justice systems strive to achieve. Discussions of such binaries and their relationships to othering are drawn from Cloud's discussion of Western conceptions of the veil.¹³ She writes that those who support a 'clash of civilizations' rhetoric: "construct paradigmatic binary oppositions, encourage viewers to adopt a paternalistic stance toward Afghan women, and offer images of modernity, aligned with light, in contrast to the darkness of chaos and backwardness."¹⁴ The veil covers the face and prevents the light from accessing it; this makes it associated with secrecy and darkness. As these traits have little value in Western society, women who wear a veil are presented as doing so unwillingly because of the garment's negative connotations. This in turn associates the veil with patriarchy and sexism, practices that secular states attempt to distance themselves from. Kumar writes that "only Islam is singled out for its sexist practices in the mainstream media and public discourse, this is not a historical oversight but a systematic attempt to construct 'our' values and religion as being enlightened in contrast with 'theirs.'"¹⁵ Such dichotomizing rhetoric is characteristic of discourses of othering and orientalism.

Some of these values, such as transparency and light, have a history of being associated with a Christian world view and they remain relevant due to the complex relationship between secularization and the Christian context that it emerged from. The theories that address this process and its relationship to Christianity are engaged in intense debate. Some argue that secularization is a product of modernity because only developing countries

need religion, while others claim that religion is not disappearing but manifesting in a way that is problematic to measure.¹⁶ Oliver Roy aligns with the latter group and focuses on the difference between secular societies that have Catholic histories, like France and those that have Protestant ones, like Canada. He argues that those who were predominantly Catholic in their history experienced a harsh break with religion to prevent the Pope from influencing their governmental process. On the other hand Protestant nations experienced a more gradual movement away from religious authority affecting governments due the absence of such a rigid hierarchy in this denomination. Roy's work *Secularization and Islam* is important for this paper's examination of how Canada's response to the veil differs from France's.¹⁷

The veil, when understood through a lens of orientalism and othering, is not simply an article of clothing but becomes an iconic representation of what is not Western. If secular societies did not have histories and were not steeped in a hidden rhetoric that views Christianity as normative then this correlation between the veil and the eastern other would not be so concerning. This hidden discourse has outlasted Christendom and remains influential in 'secular' nation-states. So when something constructed as 'other', such as the veil, is present within a multicultural country, with a predominantly Christian history, the item becomes problematic because it can challenge national identities based on shared experience. Such identities are of central importance in the modern era, which causes the immigration of 'others' to illicit hostile responses "arising from the illusion of national purity" being threatened.¹⁸ The theories of

¹³ Emmanuel Lévinas is credited with first conceptualizing 'the other' in *The Infinite Other* (1972) but the idea was popularized in *Orientalism* (1978). Some prominent scholars who have expanded on his idea are Michel Foucault (1990), Simone de Beauvoir (1949), Judith Butler (1990), Bell Hooks (1999), and Jacques Derrida (1973-2004). Dana L. Cloud, "To Veil the Threat of Terror": Afghan Women and The Clash of Civilizations in the Imagery of the U.S. War on Terrorism," *Quarterly Journal of Speech* 90, no. 3 (August 2004): 285-306.

¹⁴ Ibid., 291.

¹⁵ Deepa Kumar, "Framing Islam: The Resurgence of Orientalism During the Bush II Era," *Journal of Communication Inquiry* 34, no. 3 (2010): 263.

¹⁶ Pippa Norris and Ronald F. Inglehart, *Sacred and Secular: Religion and Politics Worldwide* (Cambridge, UK: Cambridge University Press, 2004); Reginald Bibby, "Reginald Bibby: Study Predicting Religion's Demise Is Way off the Mark," *National Post*, March 28, 2011, sec. Holy Post, <http://life.nationalpost.com/2011/03/28/reginald-bibby-study-that-predicts-religions-demise-misses-most-important-point/>. The consensus between most scholars, which has yet to impact the popular realm, is that the aspects of Christianity, such as church attendance, hierarchical structures, and denominational adherence, which are missing from contemporary forms of religion, such as New Age, are declining because of their associations with modernism. Modernism is an intellectual movement that remains relevant but has largely fallen out of favour since the end of WWII when discourses of progress and the supreme value of science were deemed problematic due to the Holocaust and the atomic bombings of Japan.

¹⁷ Olivier Roy, *Secularism Confronts Islam*, trans. George Holoch, Translated from the 2005 French Edition (West Sussex: Columbia University Press, 2007).

¹⁸ Carol A. Stabile and Deepa Kumar, "Unveiling Imperialism: Media, Gender and the War on Afghanistan," *Media, Culture & Society* 27, no. 5 (2005): 762.

orientalism, othering, and secularization are essential for understanding how this concern about purity impacted the French ban.

THE FRENCH EXAMPLE

In December 2003 the French government enacted a prohibition against wearing a veil while attending public school. President Jacques Chirac defended this decision by arguing that “it is the neutrality of the public sphere which enables the harmonious existence... of different religions” and therefore, anything distinct to a particular faith is a hindrance to someone else’s religious freedom.¹⁹ He also argued that: “secularism guarantees freedom of conscience. It protects the freedom to believe or not to believe.”²⁰ Such boldly anti-Islamic policies, which use secularization to legitimize their presence, have since been implemented in Turkey and are being debated in Britain and Sweden.

The scholarship responding to this decision focuses on the use of the term “neutral” in President Chirac’s speech because it is informed by a specifically French notion of what secularization and appropriate religious practice entail. Chaudhary writes that Chirac’s “justification may be defensible only by a reference to specific French historical tradition and subjectivity, as opposed to the kind of liberal universalism and emancipatory project which the law seeks to promote according to its authors and proponents.”²¹ Furthermore, Roy argues that a conception of Christianity as normative is evident in Chirac’s discourse because he places more value on religious belief than on religious practice.²² Hence he claims that personal practice should be sacrificed to maintain the purity of the public

space, which allows for all forms of belief. The hidden discourse discussed earlier, which is informed by orientalism, othering and Christianity, is most evident when secular legal systems, identified as liberal and objective, enact verdicts that discriminate against others in order to protect aspects of their historically contingent self-identity. The problematic nature of conceptualizing Christianity as normative has been expanded on by Hancock who explains how such a hidden discourse is also challenged by spatial assumptions that the veil problematizes. The Western divide of public and private spheres is questioned by this practice, as the veil allows private space to become portable. Hancock writes that “the veil collapses spatial scales” and by doing so generates a political discourse that “seems to move effortlessly from the individual (female) body to global geopolitical tension.”²³ This later comment references orientalist politics where the West constructs itself as inherently better than the East.²⁴ Such value judgements make policies of immigration problematic because obtaining citizenship does not remove the cultural taint of an eastern origin. Kumar and Williamson have argued that this is related to how “it has now become a new orthodoxy to insist that cultural diversity is a threat to national cohesion.”²⁵ In countries like France, immigration threatens a ‘pure’ national identity which is being diluted by others who corrupt that purity and take advantage of the prosperity that ‘true’ French citizens have worked to create. Removing the religious freedoms of certain women is necessary because central aspects of the French identity, informed by a history of Christianity and orientalism, are perceived to be in danger.

There is a difference however, between countries like France and newer nations like Canada, which were populated primarily by Protestant immigrants.²⁶ An association between secularism and national identity is present to a lesser degree in these countries and instead, Canadian national

¹⁹ “Chirac on the Secular Society,” *BBC News*, December 18, 2003, sec. Europe, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/3330679.stm> as quoted in Chaudhary, “The Simulacra of Morality,” 354.

²⁰ Ibid.

²¹ Chaudhary, “The Simulacra of Morality,” 354.

²² Roy, *Secularism Confronts Islam*, xiii.

²³ Claire Hancock, “Spatialities of the Secular: Geographies of the Veil in France and Turkey,” *European Journal of Women’s Studies* 15, no. 3 (2008): 166.

²⁴ This is related to tensions between the USA and China, which arise from the enormous financial debt that the USA owes the Chinese government. Similar to this is the issue of the lack of natural resources that the USA currently possesses, which is arguably motivated that government’s continued military presence in the Middle East. These are both instances where ‘Eastern others’ have more power than the West and are therefore, considered a threat.

²⁵ Gholam Khiabany and Milly Williamson, “Veiled Bodies, Naked Racism: Culture, Politics and Race in the Sun,” *Race & Class* 50, no. 2 (2008): 73.

²⁶ In Canada, it can also be argued that only aboriginal peoples are the only non-immigrants.

identity is based on the stereotype of a liberal and non-judgemental people whose government encourages cultural diverse lifestyles. This identity may not align with actual immigration policies but it remains integral to the identities of many Canadian citizens and the government's self-identity. The contrast is clear between a French identity that understands diversity as a threat to its notion of self and a Canadian identity that identifies itself using a pride in multiculturalism. This theoretical background seeks to illuminate how the veil is constructed as a marker of an oriental other who threatens Western identity. Chaudhary summarizes the perspective that accompanies this knowledge; "the question with which we are concerned here is not necessarily one about veiling per se. Rather it is a question about public space... religion" and identity.²⁷

A CANADIAN CASE STUDY

This paper now applies such a background to an example from the Canadian justice system. The focus is upon the rhetoric used during this trial, which was available via webcast on the Supreme Court's website and present in the published judgments, which summarize the Supreme Court's final decision. This paper analyses the court and judge's: conception of the niqab, references to Christianity, concern over the appellant's religious sincerity, emphasis on scientific rationality over religious practice, and focus on a maintenance of 'tradition'.

On December 18th, 2012 the Supreme Court of Canada began its hearing of *R. vs. N.S.*, 2012 SCC 72. This case addressed the question: can a witness wear her niqab while testifying in court or if she must remove it so a defence attorney can see her entire face during cross-examination? The appellant in this case was a practicing Muslim woman who was fighting to wear her niqab during her testimony against her alleged rapist.²⁸ Her lawyer argued that the court's "presumption should

be in favour of inclusivity [and] for respect [of a person in an already] vulnerable position."²⁹ The court's main concern however, was that this case involved a confrontation between two charter rights: the right to freedom of "religion and the right to make full answer for defence," which is central to the right to a fair trial.³⁰ After eighteen days of consideration the court ruled that a witness is allowed to wear her niqab while testifying unless "the salutary effects of requiring her to remove the niqab outweigh the deleterious effects of doing so."³¹ The Supreme Court's judgments on this case include the statement that "the answer lies in a just and proportionate balance between freedom of religion and trial fairness, based on the particular case before the court."

Beginning this analysis is a discussion related to Islam's status as a foreign religion and the veil's place as an icon of the other. This analysis focuses on how the judges presiding over this case had a skewed and uniformed understanding of the niqab. One judge implied that they understood the niqab to be a cloth that covered all of the body, instead of just the face. Also, for the first half of the trial the judges repeatedly referred to the niqab as a "veil" or incorrectly pronounced the word, showing unfamiliarity with this garment. This practice reoccurred consistently until the appellant's lawyer had used the term enough that certain judges adapted. As a joke one of the judges even asked: "Do you wear half a veil?"³² This comment was intended to reveal the problems of finding a suitable balance between charter rights in this case but it has an underlying tone of disrespect towards Islamic practice. Such comments demonstrate an overall unfamiliarity with the Islamic faith, as well as a desire to hide or correct that reality. This desire to mask the judge's ignorance may be related to the association between Canadian identity and multiculturalism. As Canadians we should know about other cultures, not just tolerate them.

²⁷ Chaudhary, "The Simulacra of Morality," 353.

²⁸ Further details of this court case are not accessible to the public because of issues of confidentiality. What the public record does allow knowledge of however, is that the occupation of the appellant is that of a bus driver and that she is not well educated or financially stable.

²⁹ This document is a webcast that provides an unedited recording of the entire court proceedings. *N.S. v. Her Majesty the Queen, et Al.* (Ontario, Canada: Office of the Registrar of the Supreme Court of Canada (Law Branch), 2012), <http://www.scc-csc.gc.ca/case-dossier/cms-sgd/webcast-webdiffusion-eng.aspx?cas=33989>.

³⁰ Ibid.

³¹ David B. Butt, Michael Dineen, and Elise Nakelsky, Judgements for *N.S. v. Her Majesty the Queen, et al.* (Supreme Court of Canada 2013). Some of the extenuating circumstances proposed by the court are if the identity of the witness is in question or if the case is debating whether an assault was aggravated or not and the injuries in question are located on her face. Aggravated assaults have a much higher minimum jail time than non-aggravated assaults.

³² *N.S. v. Her Majesty the Queen, et al.*

This tone of unfamiliarity reveals that these Supreme Court judges were not frequently exposed to Islam and therefore, do not consider it 'normative religious practice.' Their Christian lens is particularly evident in the following quote, where it becomes clear how problematic such a lens can be for those whose religious practices are deemed abnormal. One of the judges asked: "Can the court enquire for why the niqab is being worn... Could it be worn for cultural reasons?"³³ Here a distinction is been made between culture and religion, a distinction that emerges from a history of Christian development, but which is not present in Islamic practice. Also present is the belief that "a young girl wearing a veil is necessarily manipulated, and the paradox is that we repress her the better to liberate her: since the veil is a sign of enslavement, a woman could not possibly chose it voluntarily."³⁴ Such an interpretation is problematic because not only is Islam assumed to be inherently sexist but the veil, "a single item of feminine clothing" is attached to so many global issues that the agency of the women wearing it is obscured.³⁵ The unfamiliarity that the Supreme Court judges had with the niqab and their assumption about religion and culture being completely distinct belief structures all point to the presence of a hidden discourse informed by Christianity as normative and Islam as other.

Aside from these hidden references there were also oblique rhetoric of Christianity throughout trial, which confirm its status as the prototypical religion in the Supreme Court's rhetoric. The best example of this occurred when the appellant's lawyer responded to the judges questions about the religious sincerity of his client. His responses employed Christian references when he attempted to clarify the implications of such comments. For example, he said that this hearing "cannot become an attack on religiosity... inevitably there will be human inconsistencies in practice. How many good Catholics do go to mass every week? I don't

know."³⁶ Here he used Christianity as an example because it is familiar to his audience and is considered normative by the hidden discourse that informs secular society, as Western states emerged from a context where the church that was separated from the state was a Christian one. This statement shows the judges that their questions were "sliding from enquiring into religious sincerity into constructing a barrier for access by challenging her religious sincerity."³⁷ Such a discussion about the level of religious sincerity involved in wearing the veil is very illustrative of the presence of enlightenment values, such as rationality, within the Canadian legal system.

The sincerity and strength of the appellant's faith was of further concern in another section of the trial where a debate ensued between the appellant's lawyer and one of the judges. The judge enquired about whether "the religious charter right has been validly asserted?" He was asking if it has been adequately assessed that the witness' desire to wear her niqab was resulting from her religious commitment. The judge pressed to have the appellant explain the Islamic precedent for wearing the niqab to him and the appellant's lawyer replied that "we cannot expect a theological dissertation of that doctrinally high level of sophistication" from his client because of her low level of education.³⁸ The judge then asked "is there other evidence" of her religious sincerity because "there has got to be a religious belief that the practice has at its nexus."³⁹ This last statement reveals that that the judge understands religious practice as emerging from belief and that the latter is of more importance. This understanding is informed by Protestantism, in which a personal relationship with God is based in belief and the practices supporting it are of lesser value.⁴⁰ Here more than anywhere else it is revealed that the prototype for conceptualizing religion in the Canadian justice system is Christianity. Such assumptions clearly illustrate the reality that "the

³³ Ibid.

³⁴ Roy, *Secularism Confronts Islam*, 31.

³⁵ Hancock, "Spatialities of the Secular," 169.

³⁶ "Webcast for Hearing on 2011-12-08."

³⁷ *N.S. v. Her Majesty the Queen, et Al.*

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Examples of this include the Protestant Church's adherence of only two sacraments instead of the seven that the Catholic Church observes as necessary for salvation. It is also evident in the Protestant belief that the preacher is not different from the rest of the community and does not have any miraculous powers.

idea of neutrality” in a secular society is not reflective of how such values are practically implemented.⁴¹

In this third section, the paper demonstrates that the enlightenment values of objectivity and rationality are assigned more value than those of emotionality and tradition in the Canadian justice system. As a reminder, such opposing values are culturally associated with the east through orientalism and othering. The hearing for this case included an abundance of terminology that made reference to such values. For instance, all parties used rhetoric such as: “analysis,” “consensus in the scientific community,” “thin factual foundation,” “systemic approach to this forensic process,” and “subjective enquiry and subjective analysis... factual circumstances.”⁴² This terminology emphasizes the employment of objectivity in the production of factual statements. There was a lack of concern about the appellant’s personal experience, instead the scholarship employed by her lawyer was questioned, particularly the factual validity of the appellant’s claim concerning demeanour assessment.⁴³

This preference for the enlightenment values over experiential ones is also evident in this exchange that occurred between the appellant’s lawyer and a judge. The appellant’s lawyer argued that “the life of the law has not been logic [instead] it has been experience” in order to encourage the judges to re-evaluate their attachment to the art of reading demeanour queues, which would potentially be challenged by the presence of a niqab. One of the judges replied with a mocking tone that “sometimes logic has its role (all the judges laugh), sometimes.”⁴⁴ Here there is a clear disdain for any form evidence other than the ‘logic’ produced by empirical evaluation. Such an approach is echoed in another judge’s response to the appellant’s suggestion: “I would think you would not find a single trial judge who would not say that the process of assessing demeanour is a scientific one.”⁴⁵ Objective logic is understood as paramount to the Canadian legal process and it is humorous that the appellant’s lawyer has questioned this

because it is clearly the reality in the eyes of the judges. The appellant lawyer’s focus on personal experience is disregarded by many of the judges because the legal system in a secular country is not supposed to be informed by particular cultural, personal, or religious elements. Clearly efforts to eradicate these influences have not succeeded however, given the residual oriental attitudes towards Islam, which are informed by Christianity’s place as the normative religion.

This focus on enlightenment values also informed the trial’s discussion of religious belief and scientific experimentation. Specifically, rhetoric concerning the irreconcilability of objectivity and religion is evident; examples of this include: “the question raises an important cultural divide,” “the countervailing issue of religion” vs. intuition, and “values that are oppositional.”⁴⁶ This rhetoric of division was exemplified by one trial judge who said that the court was “dealing with the rhetoric that they [the rights to religious toleration and a fair trial] can be balanced... [Can we really] reconcile these values? It’s impossible for me to do it.”⁴⁷ Such dichotomous rhetoric may not appear harmful in this particular instance but its presence is still concerning.

This concern is related Said’s concern that orientalist and othering discourses create monoliths, such as Islam and the West.⁴⁸ If these are presented using a dichotomy they can be understood as having nothing in common and therefore irreconcilable. The veil, as a motif of the Islamic faith, becomes a symbol of something that cannot exist in harmony with the West’s secular government. Secularization is associated with reason and objectivity while Islam is associated with religious belief and extreme traditionalism, which impede progress. Such orientalist views of the world are not reflective of the opinions and lives of the majority of Muslims but they do inform the views of the majority of those unfamiliar with Islam. If Christianity is normative then all other religious traditions are abnormal and should be discouraged because abnormal behaviour is

⁴¹ Chaudhary, “The Simulacra of Morality,” 353.

⁴² *N.S. v. Her Majesty the Queen, et al.*

⁴³ Demeanor assessment refers to the science of observing bodily and facial movements to determine if the person is speaking the truth or not. As such it is a skill important for cross-examination.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Edward W. Said, “The Clash of Ignorance,” *The Nation*, October 4, 2001, October 22, 2001 edition.

discursive and harmful to the larger social structures, such as national identity.

One example of such dichotomous language is associating the West with transparency and light, while Islam is associated with secrecy and darkness. This is reflected in the court's Judgements, which state that "the public must be able to see how the justice system works. Wearing a niqab in the courtroom does not facilitate acts of communication."⁴⁹ Here the Islamic practice of wearing the niqab is associated with isolation and is presented as a barrier to obtaining the truth. This is also referenced in the statement that "the constitutional values of openness and religious neutrality in contemporary democratic" Canada are being challenged by this Islamic practice.⁵⁰ In the Judgements this rhetoric outlines the minority opinion of the judges and is contrasted with the conclusion that forbidding the appellant to wear her niqab to testify would likely discourage her from using the Canadian legal system and inclusivity, as discussed before, is of central importance to Canadian national identity.

The last issue discussed in this paper is the use of the phrase 'traditional' with reference to Canadian legal practice, which continues to be challenged and re-evaluated by the immigration of people with different traditions. Staniševski writes that: "The conditions of uncertainty and high-consequence risks create existential anxieties that lead to feelings of endangerment of one's collective identity, soothing of which could demand even stronger attachment to long-established practices."⁵¹ This focus on tradition can manifest in that enacting of laws that do not support the inclusion of diverse immigrant communities and instead attempt to retain an imagined sense of purity.⁵² For instance, one of the judges said that this issue of wearing a niqab was "confronting an approach to trials which is time honoured, which is how do you assess the demeanour of the witness."⁵³ Another judge also said that "traditionally, the ability to look at the witness" was central to the

defence lawyer's process of cross-examination.⁵⁴ Here legal practice is presented as static and based on pre-established traditions that do not have a cultural background but instead arise from universal rationality. Again we see a tension between what is normative and the complex reality of Canadian identity. Being able to see the face of a witness when she is interviewed is normative so anything that prevents this from happening is abnormal and therefore, discursive.

This focus on tradition and preserving national purity is important to secular societies that attempt to declare their own cultural and history irrelevant to their current governments. The French example focuses on purifying the public sphere through a ban on a practice deemed discursive because of its oriental associations. Canadian identity is related to purity and valuing 'secular' practice but it is also associated with inclusivity. In this particular case inclusivity was valued more than a tradition where Christianity is normative. The court argued that the religious freedom of the witness needed to be respected because the "guarantee of a fair trial... [is] a right that applies to every Canadian citizen regardless of origins."⁵⁵ One intervener even argued that this inclusivity was particularly important in the case of those Canadians who are practicing Muslims because that community already "faces discrimination, social exclusion, and various barriers to the justice system because of their race and religion."⁵⁶ This emphasis on inclusivity is also stressed in the Judgements, which state that "the need to accommodate and balance sincerely held religious beliefs against other interests is deeply entrenched in Canadian law."⁵⁷ This last statement reflects the strong relationship between inclusivity and Canadian identity, which were manifested in this case through the enacting of a precedent that supports religious freedom and a multicultural nation that accepts rather than tolerates the diverse lifestyles of its citizens.

⁴⁹ Butt, Dineen, and Nakelsky, Judgements for N.S. v. Her Majesty the Queen, et al. (Supreme Court of Canada 2013).

⁵⁰ Ibid.

⁵¹ Dragan Staniševski, "Fear Thy Neighbor: Ontological Security and the Illusion of National Purity," *Administrative Theory & Praxis* 33, no. 1 (March 2011): 63.

⁵² This association between imagination and a community's identity is credited to Benedict R. O'G Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London; New York: Verso, 2006).

⁵³ N.S. v. Her Majesty the Queen, et al.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid. An intervener is someone who represents an organization that feels the outcome of this Supreme Court case is particularly relevant to them. The Intervener in this case was a lawyer who represented a clinic for sexually abused women.

⁵⁷ Butt, Dineen, and Nakelsky, Judgements for N.S. v. Her Majesty the Queen, et al. (Supreme Court of Canada 2013).

CONCLUSION

What emerges from Western discussions of the niqab or other veils “is an image of the conflict over the universalism of certain liberal principles,” such as objectivity, and the historical context of the nations whose laws manifest them.⁵⁸ Western or secular legal systems are perceived as not being informed by culture or a particular religious tradition, to ensure their neutrality. However, the discussion of the 2012 Supreme Court of Canada case demonstrates that neutrality is an illusion informed by enlightenment values, which cannot be separated from the context that they emerged from. Attempts to produce it only result in the camouflaging of a discourse, which reveals the context of ‘universal’ doctrines. Chaudhary writes that the values of “secularism and an over-arching narrative of historical progress (against the “archaic” and “backwards” alternatives), while remaining elusively undefined, are put forward as universal values and goals.”⁵⁹ In the West because of ideologies such as othering and orientalism, those values deemed backwards and archaic are projected onto others to maintain the West’s stance as progressive. The exemplary other, in this case, is the Islamic woman; she is the opposite of everything that the West values. Her veil is associated with opaqueness, darkness, deconstructing the private and public divide, religious extremism, terrorism, an eastern mystique, and irrational or unscientific thought.

These associations are not grounded in reality but are nonetheless apparent in situations where the maintenance of a pure national identity, based on a covert discourse, is threatened. Such a focus on purifying the public space of deviant behaviour is discussed by Roy, who argues that “the sacred status of the state and its legal order, in this view, are the transportation to the temporal realm of a transcendence defined by religion.”⁶⁰ This is because all Western states historically drew their legitimacy from Christianity; a power in the eighteenth century that began to be usurped. This act of usurpation was not a clean break however, and the social constructs through which Christianity derived its authority were not

destroyed; instead they were used by the state to legitimize its own power, and therefore, the boundaries between Christianity and secularism are not as neat as secular or religious authorities would prefer them to be.⁶¹ The long standing relationship between Christianity and the West has informed the emergence of the exemplary other, the Islamic woman garbed in her veil. This image is associated with everything that the West uses to define itself against, using a lens of orientalism. In France this relationship resulted in a government ban that prohibited Islamic women from wearing their veils in public schools. The ideologies and rhetoric that informed their decision are also

“The exemplary other, in this case, is the Islamic woman; she is the opposite of everything that the West values. Her veil is associated with opaqueness, darkness”

present in Canadian society but the difference is that in Canadian society the centrality of multiculturalism to national identity acted as a counter-balance.

Understanding the presence of this counter-balance is vital to explaining the eventual verdict that the Supreme Court of Canada judges came to in *N.S. v. Her Majesty the Queen, et al.* Their rhetoric included a skewed perception of what the niqab is, a preference for Christianity as the normative religion, a dichotomous view of science and religion, and a strong attachment to traditional practice. Despite all of this, a desire to encourage participation in the Canadian legal system through inclusive laws and practices produced a verdict that stressed inclusivity over tradition. The reason that I chose this case as the focus of my paper was because the verdict demonstrates how central identity is in the processes of othering, orientalism, and secularism. In the modern era national identity is paramount and in Western nation-states a secular legal system is where that identity is the mostly clearly evident. For, the origins of Canadian law are informed by Christianity and the enlightenment but must be applied to a diverse group of citizens whose own histories, experiences, and cultures may conflict with the ones that produced the Canadian legal system. What this case study reveals is that thankfully inclusivity is more central to Canadian identity than the many other values hidden that continue to manifest themselves within our country’s legal system.

⁵⁸ Chaudhary, “The Simulacra of Morality,” 353.

⁵⁹ Ibid., 357.

⁶⁰ Roy, *Secularism Confronts Islam*, 41.

⁶¹ This is reflected in Kantorowicz’s work that explored how monarchical notions about the divinely ordained head of state were co-opted by secular governments through the rhetoric of the ‘body politic’. Ernst H. Kantorowicz, *The King’s Two Bodies: A Study in Mediaeval Political Theology*, 7th edition (Princeton, New Jersey: Princeton University Press, 1997).