The Veiled Muslim Witness and the Accused's Right to a Fair Trial in Adversarial Legal Systems

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Then call them to our presence; face to face,
And frowning brow to brow, ourselves will hear
The accuser and the accused freely speak[1]

Abstract

In a number of recent cases across common-law jurisdictions, female Muslim witnesses have been denied their right to wear the *niqab* while testifying in court. Ultimately, in each of these cases, the right to a fair trial—and the perceived threat to that right—overrode the witness's express desire to veil. However, a fundamental fact not recognised in any of these judgments is that a Muslim woman's refusal to remove her veil has drastic implications for her access to courts in both the criminal and civil contexts, thereby implicating her ability to participate as a citizen. It raises the critical question whether such a state of affairs should be tolerated in a pluralistic society. This contribution investigates this question by analysing the right to confrontation from historical, epistemological and comparative perspectives, including its limitations. It then evaluates the rationales that the courts have advanced for holding that the veiled Muslim witness violates the accused's right to a fair trial, namely it deprives the court of the ability to observe the witness's demeanour, it infringes on the right to cross-examine the witness, and it defies the 'symbolic' value of confrontation.

INTRODUCTION

Imagine the following scenario: The prosecutor calls a key witness in a criminal trial. This witness is a Muslim woman who wears the *niqab*.[2] She is expected to appear in open court before the judge, assessors, counsel, the accused and the public. However, this witness believes that removing

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1 William Shakespeare, *Richard II* Act 1, Scene 1.

2 I use the term '*niqab*' and 'veil' to refer to 'a veil worn by some Muslim women in public, covering all of the face apart from the eyes.' See *OED Online* (OUP March 2018) <www.oed.com/view/Entry/245908> accessed 28 May 2018.

her veil is offensive to her dignity,[3] and an infringement of her fundamental freedom of religion.[4] The question that this contribution seeks to answer is: Should a Muslim witness be permitted to wear the *niqab* while giving evidence, or would her doing so violate the accused's right to a fair trial?

Both Muslim men and women are required to dress modestly, conforming to a general understanding of the Hadith and tradition, but only Muslim women engage in the practice of veiling.[5] In Islam, covering the body is known as *hijab*.[6] However, because wearing the headscarf is so prevalent among Muslim women, the word *hijab* has become synonymous with the headscarf itself.[7] There are various forms of the *hijab*, including the *niqab* (a veil that covers all of the face, except for the eyes),[8] and the most concealing Muslim veil, the *burqa* (which covers the entire face and body).[9] Veiling practices differ widely among Muslim cultures.[10]

Wearing the *niqab* is increasingly prevalent,[11] but contentious.[12] Supporters of this veiling practice cite to passages from both the Hadith and Qur'an to

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3 Section 1(a) of the Constitution of the Republic of South Africa of 1996 (hereinafter 'the Constitution') states the values on which the Republic of South Africa is founded. One of these core values is human dignity. Section 7(1) of the Constitution reiterates this value. Section 10 enshrines the right to human dignity as a fundamental right in the Bill of Rights, Chapter 2, of the Constitution.

4 Section 9 of the Constitution (the equality clause) provides that neither the State nor a person may unfairly discriminate against another based on certain grounds, *inter alia* that of religion. Section 15 of the Constitution protects the right to freedom of religion, belief and opinion as a fundamental right. Section 31 of the Constitution provides for rights in respect of cultural, religious and linguistic communities.

5 Human Rights Commission of New Zealand, *Muslim Women, Dress Codes and Human Rights: An Introduction to Some of the Issues* (2005) 2. The Hadith is a literary compilation and recording of the Prophet Muhammad's words and actions. SA Nigosian, *Islam: Its History, Teaching and Practices* (Indiana University Press 2004) 80.

6 Etymologically the word originated from the Arabic *hajaba*, meaning 'to veil or protect that which is private.' See *OED Online* (OUP March 2018) <www.oed.com/view/> accessed 18 June 2018.

7 According to the *Oxford English Dictionary*, in this context *hijab* refers to a 'head covering or veil worn in public by some Muslim women.' See *OED Online* (OUP March 2018) <www.oed.com/view/> accessed 18 June 2018.

8 See (n 2).

9 A veil that covers the whole body and face, save for a slit for the eyes. David Griffiths, 'Pluralism and the Law: New Zealand Accommodates the Burqa' (2006) 11 Otago LR 284.

10 Steven Houchin, 'Confronting the Shadow: Is Forcing a Muslim Witness to Unveil in a Criminal Trial a Constitutional Right, or an Unreasonable Intrusion' (2009) 36 Pepperdine LR 833.

11 In the 1970s, only one per cent of the Muslim population wore face veils; currently approximately one third of female Muslims engage in the practice. Amy-May Leach and others, 'Less is More? Detecting Lies in Veiled Witnesses' (2016) 40 Law & Human Behavior 401.

12 For example, in 2010 the French National Assembly passed a bill making it illegal to wear a full-face veil in public areas in France, with the bill receiving almost unanimous approval in the French Senate. Shortly thereafter, Belgium also moved to prohibit the *niqab.* Lori Chambers and Jen Roth, 'Prejudice Unveiled: The *Niqab* in Court' (2014) 29 Canadian J of L and Society 393.

argue that it is religiously mandated.[13] However, within the Muslim faith, there are also those who deny that wearing the *niqab* fulfills a religious obligation. They see the purpose of the *niqab* simply as the expression of a cultural practice or the symbol of political conviction.[14] Because of the complexity of the various views and arguments, the substance of the debate is beyond the scope of this article. I assume for present purposes, as I believe a South African court would do, that a woman's decision to wear the *niqab* is a religious practice. Once a female Muslim witness has expressed her belief sincerely and as religiously motivated, it would hardly behoove a court to venture into the quagmire of questioning the religious verity or the reasonableness of that belief. Our courts are not in the business of passing judgment on religion.

However, the permissibility of the *niqab* has been called into question by the courts, albeit on non-religious grounds. In a number of cases across common-law jurisdictions in the West, female Muslim witnesses have been denied their right to wear the *niqab* while testifying in court. For example, a judge in a United States small-claims court dismissed the plaintiff's complaint when she refused to remove her veil in order to testify (*Muhammad v Enterprise Rent-A-Car*).[15] In Canada, an alleged victim of childhood sexual assault was ordered to testify at a preliminary inquiry without the *niqab* (*R v NS*).[16] Two witnesses in New Zealand were required to remove their *burqas* while giving evidence before the judge, counsel and female court staff (*Police v Razamjoo*).[17] Most recently, a defendant who had been charged with witness intimidation was directed to remove the *niqab* while presenting evidence in a Crown Court in the United Kingdom (*The Queen v D(R)*).[18]

Ultimately, in each of these cases, the right to a fair trial—and the perceived threat to that right posed by allowing a witness to wear the *niqab* while testifying—overrode the witness's express desire to veil. However, a fundamental fact not recognised in any of these judgments is that a Muslim woman's refusal to remove her veil has drastic implications for her access to courts in both the criminal and civil contexts, thereby implicating her ability to participate as a citizen.[19] It raises the critical question whether such a state of affairs should be tolerated given the pluralistic composition of South African society.

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13 ibid.
14 Houchin (n 10) 834.
15 [2006] No 06-41896-GC (31st D Mich).
16 [2012] SCC 72.
17 [2005] DCR 408.
18 [2013] EW Misc 13 (CC).
19 Brian Murray, 'Confronting Religion: Veiled Muslim Witnesses and the Confrontation Clause' (2010) 85 Notre Dame LR 1732.

THE CASES

Muhammad v Enterprise Rent-A-Car

On a Wednesday morning in October 2006, at the small claims court in Hamtramck, Michigan, Paruk J called Ginnah Muhammad to testify in support of her claim against Enterprise Rent-A-Car.[20] Muhammad, an African American convert to Islam, wore the *niqab*, a garment that covered her entire face, except for a narrow slit revealing her eyes. Before she began, the judge asked her to remove her veil.[21] He explained that[22]

> [U]nless you take that off, I can't see your face and I can't tell whether you're telling me the truth or not and I can't see certain things about your demeanor and temperament that I need to see in a court of law.

Muhammad insisted that she could not remove the *niqab* before a male judge. She explained that as 'a practicing Muslim … this is my way of life.'[23] She said that she could remove the *niqab* before a female judge, but 'otherwise, I can't follow your order.'[24]

Paruk J assured her that he was the only judge available and that he 'meant no disrespect to [her] religion,' but said that he understood that the *niqab* was 'a custom thing,' not a religious obligation.[25] Muhammad insisted that for her, this was not the case; she wished 'to respect [her] religion' and thus could not remove the *niqab*: '[T]his is part of my clothes, so I can't remove my clothing when I'm in court.'[26]As a result, Paruk J dismissed the case, without prejudice, whereupon Ginnah Muhammad left the courtroom.[27] Muhammad essentially lost her day in court because of her desire to practice an aspect of her religion.[28]

R v NS

In *R v NS*,[29] a majority of the Supreme Court of Canada held that the wearing of the *niqab* by a witness (who was also the complainant in this prosecution for sexual assault) had the potential to violate the defendant's right to a fair

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20 Transcript of Small Claims Hearing *Muhammad v Enterprise Rent-A-Car*, No 06-41896 [Mich Dist Ct 11 October 2006] 3.
21 ibid.
22 ibid 4.
23 ibid.
24 ibid.
25 ibid 5.
26 ibid 6.
27 ibid.
28 Murray (n 19) 1728.
29 *R v NS* [2012] SCC 72.

trial.[30] In reaching the decision, similar to Shakespeare's *Richard II*, the Court placed emphasis on the defendant's ability to confront his accuser face-to-face. McLachlin CJ stated that the common law and prior judicial pronouncements have assumed that the ability to see a witness's face is an important feature of a fair trial.[31]

The Chief Justice made two epistemic claims in arriving at the conclusion that permitting a witness to testify whilst wearing the *niqab* would pose a risk to trial fairness.[32] The first was that covering the face of a witness may impede cross-examination, which is 'integral to the conduct of a fair trial and a meaningful application of the presumption of innocence.'[33] This was because non-verbal communication was thought to have the potential to provide the cross-examiner with invaluable insights that can assist in getting at the truth.

The second claim was that covering a witness's face might also impede the ability of fact-finder to assess the witness's credibility.[34] McLachlin CJ concluded that there exists a 'strong connection'[35] between the ability of the accused, counsel and the jury to see a witness's face and a fair trial.[36] Although the Chief Justice conceded that the ability to see a witness's face is not the only—or even the most important—feature of cross-examination or accurate credibility assessment, she nevertheless noted that 'its importance is too deeply rooted in our criminal justice system to be set aside absent compelling evidence.'[37]

Abella J's dissent judgment differs from the majority in the emphasis she placed on whether being able to observe a witness's face is in fact crucial to the assessment of credibility.[38] While it is true that there is a general *expectation* that a witness in a criminal trial will testify with her face visible, this is not akin to a general *rule*. Abella J pointed out that this paradigm is deviated from in other contexts without undermining trial fairness, such as

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30 According to McLachlin CJ, writing for the majority, the issue that the Court had to decide was when, if ever, a witness who wears the *niqab* for religious reasons would be required to remove it in order to give evidence. *NS* (n 22) para 7. Three sets of rights protected under the Charter of Rights and Freedoms were engaged by the facts of the case: NS's freedom of religion (s 2(a)), and the defendant's right to a fair trial (s 7), including the right to make full answer and defence (s 11(d)). See also Chambers (n 12) 382.

31 *NS* (n 22) para 20–21.

32 Karl Laird, 'Confronting Religion: Veiled Witnesses, the Right to a Fair Trial and the Supreme Court of Canada's Judgment in *R v N.S.*' (2014) 77 Modern LR 126.

33 *NS* (n 22) para 24.

34 *NS* (n 22) para 25.

35 *NS* (n 22) para 27.

36 Laird points out that Canadian law, similar to South African law, does permit children to testify via CCTV or from behind a screen, so that they cannot see the defendant. Laird (n 32) 126.

37 *NS* (n 22) para 27.

38 *NS* (n 22) paras 80–110.

when an interpreter is used, or when the witness has a medical condition that impedes the ability of the fact-finder to assess the witness's demeanour.[39]

Abella J also seemed much more skeptical than the majority about the strength of the relationship between trial fairness and the ability to assess demeanour. For reasons that will soon become clear, I believe that the dissenting judgment represents the most appropriate approach to the Muslim witness who wishes to testify while wearing the *niqab*. For now it is sufficient to point out that, in contrast to the majority, Abella J made explicit that confrontation is not a monolithic concept, but rather is comprised of various facets, including physical presence, the ability to cross-examine, knowledge of the witness's identity, and the ability to hear the witness testify. The reason confrontation has been added to the pantheon of rights is that it plays a role in ensuring that the defendant receives a fair trial. However, if one facet of confrontation is abrogated, in this instance facial visibility, Abella J's judgment demonstrates that this does not necessarily undermine the fairness of the trial.

McLachlin CJ asserted that a woman could be ordered to remove the *niqab* if 'permitting the witness to wear the *niqab* while testifying create[s] a serious risk to trial fairness' and no accommodation could be found.[40] Fundamentally, the chief justice held that, in this case at least, the accused's interests in a fair trial outweighed the religiously based concerns of the complainant, as well as her security of the person and equality rights.[41] By contrast, in balancing the interests of the victim and the accused, Abella J decided that 'the harm to a complainant of requiring her to remove her *niqab* while testifying will generally outweigh any harm to trial fairness.'[42]

Police v Razamjoo

In *Police v Razamjoo*,[43] two women wished to wear the *burqa*[44] while giving evidence for the prosecution in the District Court in Auckland.[45] The issue before Moore J was whether permitting witnesses in a criminal trial to wear the *burqa*[46] whilst testifying infringed the accused's right to a fair trial enshrined in the New Zealand Bill of Right Act ('BORA').

The accused argued that, if the women remained veiled, it would breach his right to a fair trial under section 25 of BORA. Specifically, counsel

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39 *NS* (n 22) para 102.
40 *NS* (n 22) para 9.
41 Chambers (n 12) 381, 384.
42 *NS* (n 22) para 86.
43 [2005] DCR 408.
44 See (n 9).
45 ibid.
46 Defined as 'a long loose garment covering the whole body from head to feet, worn in public by women in many Muslim countries.' *OED Online* (OUP March 2018) <http://www.oed.com/view/Entry/24980> accessed 29 May 2018. *Police v Razamjoo* [2005] DCR 408 para 106.

for the accused contended that to allow the witnesses to remain veiled would prevent the accused (and the fact-finder) from assessing facial demeanour during cross-examination,[47] and that the burqa was 'tantamount to camouflage.'[48]The two witnesses, for their part, relied on the following BORA protections: the right to freedom of thought, conscience and belief (s 13); the right to manifest their religion in practice and in public (ss 15 and 20); and the right to freedom from discrimination on the grounds of their belief (s 19).

Significantly, Moore J accepted that a fair trial may be possible even though the ability to observe the witness's demeanour is absent or significantly reduced. However, Moore J went on to state that[49]

> [A]uthorising the giving of evidence from beneath what is effectively a hood or mask would be such a major departure from accepted process and the values of a free and democratic society as to seriously risk bringing the Court into disrepute.

For this reason, Moore J determined that the two women would be required to remove the garment, but would be screened for the public and the accused. The judge and counsel (as well as female court staff) would be able to observe the witnesses' faces.[50]

Queen v D(R)

In *The Queen v D(R)*,[51] D was the accused, and the court crisply framed the question to be decided thus: '[T]o what extent [is] D entitled to wear the niqaab during proceedings against her in the Crown Court?'[52]

Interestingly, in the United Kingdom, direct guidance on the question of whether evidence from a witness who wears the *niqab* violates the right to confrontation, can be found in the *Judicial Studies Board Equal Treatment Bench Book* (the *Bench Book*).[53] Chapter 3.3 of the *Bench Book* states that, in relation to a woman who wishes to wear the *niqab* in the witness box, the question for the judge to determine is[54]

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47 Griffiths (n 9) 284–285. Parenthetically, it should be noted that New Zealand law, similar to South African law, does not recognise a common-law right to face-to-face confrontation. Griffiths (n 9) 285.

48 Houchin (n 10) 852.

49 *Razamjoo* (n 17) para 109.

50 ibid para 110; Griffiths (n 9) 284.

51 *D(R)* (n 18).

52 ibid para 6.

53 Judicial College, 'Equal Treatment Bench Book' (*Courts and Tribunals Judiciary*, February 2018) Chapter 3.3 <http://www.judiciary.gov.uk/publications/new-edition-of-the-equal-treatment-bench-book-launched/> accessed 29 May 2018.

54 ibid.

> [What] is required to enable a woman wearing a niqab to participate in the legal process, to facilitate her ability to give her best evidence to ensure, so far as practicable, a fair hearing for both sides? It should not automatically be assumed that any difficulty is created by a woman in court, in whatever capacity, who chooses to wear a niqab.

In conclusion, the Bench Book states that 'the best way of proceeding comes down to basic good judge craft.'[55]

However, it is on this point that Murphy J departed from the *Bench Book*. He stated that the issue of whether a defendant before the Crown Court may wear the *niqab* is not one of 'judge craft,' or even one for 'general guidance'—it is a question of law. And in this respect Murphy J found 'valuable assistance' in the judgment of the Supreme Court of Canada in *R v NS*,[56] because 'it comports with the long experience of judges and counsel in adversarial proceedings in England and Wales':

> [T]he ability to observe a witness's demeanour and deportment during the giving of evidence is important and, in my view, essential to assess accuracy and credibility.

Murphy J stated:[57]

> I am satisfied that the ability of the [fact-finder] to see and observe a witness remains of cardinal importance in almost all cases in the context of the adversarial trial.

The accused was thus prohibited from giving evidence whilst wearing the *niqab*.[58]

South African Law

Although the issue of the female Muslim witness desiring to give evidence while wearing the *niqab* does not seem to have arisen in South Africa, our courts have expressed themselves with regard to the right of confrontation in general, and with respect to masked witnesses specifically. In *S v Motlatla*, the court held:[59]

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55 As quoted in *D(R)* (n 18) para 10.

56 ibid para 13.

57 *D(R)* (n 18) para 34.

58 *D(R)* (n 18) para 86. The accused was allowed the wear the *niqab* during the trial when she was not giving evidence. She was also allowed to give evidence from behind a screen shielding her from public view, but not from the view of the judge, the jury, and counsel. *D(R)* (n 18) para 86.

59 [1975] 1 SA 814 (T) 815.

> There must be a confrontation in that [the accused] must see them as they depose against him so that he can observe [the witnesses'] demeanour, and they for their part must give their evidence in the face of a present accused.

Albeit not in a religious context, in *S v Nzama*[60] the court refused to allow a witness to give evidence while masked, because it was 'incomprehensible that an accused could properly exercise [the right to a fair trial] in relation to a witness whose face was completely unrecognisable to him.'[61]

THE 'RIGHT TO CONFRONTATION' IN THE ANGLO-AMERICAN TRADITION

These cases evince the atavistic adherence to a courtroom principle—'the right to confrontation'—that appears to exist in a zone that is above scrutiny. And, because 'the right to confrontation' is universally either explicitly, or impliedly deemed to be, part of the right to a fair trial, to understand the potential impact of the veiled Muslim witness on the accused's right to a fair trial, it is necessary, in the first instance, to parse the mystifying concept of 'confrontation.'

A Brief Historical Overview of the 'Right to Confrontation'

The accused's right to be confronted by the witnesses against her is widely agreed to be a fundamental element of a fair trial, much like the presumption of innocence. Lord Bingham described it as being[62]

> [A] long established principle of the common law that the defendant in a criminal trial should be confronted by his accusers.

Embodied within the psyche of the common law is a belief in the power and value of confrontation and the adversarial system, both inside and outside of the legal realm, for procuring the truth.[63]

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60 [1997] 1 SACR 542 (D). In *Nzama*, counsel for the state applied for an order that a state witness be permitted to testify in such disguise as would preclude the accused, the court or anyone else from being aware of what he looked like and of his identity.

61 ibid 543. See also *S v Mgengwana* [1964] 2 SA 149 (C).

62 Ian Dennis, 'The Right to Confront Witnesses: Meanings, Myths and Human Rights' (2010) Criminal LR 255.

63 Murray (n 19) 1750.

The ancient Hebrews believed that the accused was entitled to face an accuser directly,[64] so did the Romans. When Paul was condemned by the Priests and the Elders, the Roman governor, Festus, pronounced[65]

> it is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him.

This concept lay dormant, however, after the fall of the Roman Empire until the fifteenth century.[66] Once the irrational methods of medieval adjudication, such as trial by ordeal and by battle, withered away, Western legal systems adopted different approaches to giving evidence.[67] Continental systems tended to take evidence on written interrogatories—behind closed doors and out of the presence of the parties—for fear that witnesses would be coached or intimidated.[68] By contrast, beginning in the fifteenth century, numerous English judges and commentators—John Fortescue, Thomas Smith, Matthew Hale and William Blackstone among them—praised the open and confrontational style of the English criminal trial.[69]

In a celebrated sixteenth century description, Sir Thomas Smith spoke approvingly of the 'altercation' between accuser and accused.[70] A description of a typical trial of this era emphasises the significance of confrontation: 'The judge, after they be sworn, asketh first the party robbed if he know the prisoner, and *biddeth him to look upon him*.'[71] Then a dialogue similar to the following occurred between the accused and the accuser face-to-face:[72]

The party pursuyvant giveth good ensigns, *verbi gratia*, I know thee well enough; thou robbest me in such a place, thou beatedts me, thou tookest my horse from me, and my purse; thou hadst then such a coat, and such a man in thy company. The thief will say No, and so they stand a while in altercation.

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64 Deuteronomy 19:15–18. All references to scripture are to *Holy Bible* (King James).

65 Acts 25:16. The tradition of confrontation was prevalent in Roman law throughout the reaches of its empire. Roman law required that accusers be present in court, and reflected an accusatorial system analogous to that of modern day common law systems in the Anglo-American tradition. For example, the Roman emperor Trajan advised the governor of Bithynia that: '[A]nonymous accusations must not be admitted in evidence as against any one, as it is introducing a dangerous precedent, and out of accord with the spirit of our times.' Daniel Pollit, 'The Right of Confrontation: It's History and Modern Dress' (1959) Journal of Public Law 384.

66 Jaqueline Beckett, 'The True Value of the Confrontation Clause: A Study of Child Sex Abuse Trials' (1994) 82 Georgetown LJ 1609.

67 Richard Friedman, '"Face to Face": Rediscovering the Right to Confront Prosecution Witnesses' (2004) 8 The Intl J of Evidence and Proof 8.

68 ibid.

69 ibid.

70 ibid.

71 Beckett (n 66) 1609, quoting Sir Thomas Smith, *Commonwealth of England* (1908) 443, 511 [emphasis added].

72 ibid.

In the eighteenth century, Blackstone spoke of 'the confronting of adverse witnesses' as being among the advantages of 'the English way of giving testimony:[73]

> The open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer … [T]he persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness.

Thus, from the very rudiments of the Anglo-American juridical structure, confrontation played a crucial role in determining the fate of an accused.

The elevated status status of the right to confrontation is also reflected in much rhetoric. For example, with reference to the Confrontation Clause in the United States Constitution, Friedman states that[74]

> [I]t expresses a right that has a life of its own; giving the accused the right to confront the witnesses against him is a fundamental part of the way we do judicial business.

In the influential New Zealand case of *Hughes*,[75] Richardson J described the right to confrontation as 'basic to any civilised notion of a fair trial.'[76]

The Meaning of the 'Right to Confrontation'

Notwithstanding seeming agreement about the fundamental importance of confrontation, this right presents, in Ian Dennis's words, 'some puzzling features'.[77] Firstly, there is lack of agreement among courts and commentators in common law jurisdictions about what 'confrontation' actually means. The right to confrontation is generally considered to encompass all, or a subset, of the following 'bundle of rights': (i) the right to a public trial;

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73 William Blackstone, *Commentaries on the Laws of England Volume 3* (University of Chicago Press 1979) 373–374. See also Friedman (n 67) 8. It should be noted that the norm of confrontation was not always respected. The Royal courts in England, of which the Court of Star Chamber is the most notorious example, followed Continental procedures. In his notorious treason trial, Sir Walter Raleigh complained bitterly of the refusal of his prosecutors to produce his accuser, Lord Cobham, to repeat in court his assertion of Raleigh's treason that he had made in a confession under torture. Dennis (n 62) 261. However, most of these royal courts, being viewed as arms of an unlimited royal power, did not survive the upheavals of the seventeenth century. Friedman (n 67) 8–9.

74 Friedman (n 67) 1028.

75 *R v Hughes* [1986] 2 NZLR 129.

76 [1986] 2 NZLR 148.

77 Dennis (n 62) 256.

(ii) the right to 'face-to-face' confrontation; (iii) the right to cross-examine adverse witnesses; and (iv) the right to know the identity of one's accuser.'[78]

The term 'confrontation' is a convenient and evocative descriptor, but when examined more closely, there does not seem to be any common conception of what it describes.[79] For example, as discussed in more detail below, the American conception of 'confrontation' differs markedly from that found in the United Kingdom, Canada, New Zealand and South Africa with regard to the issue of 'face-to-face' confrontation.

Secondly, the right to confrontation differs from the presumption of innocence with regard to the varying accounts that are offered for the rationale of the former.[80] There is general agreement that the presumption of innocence is plainly founded on the values of individual liberty and reputation.[81] It is a statement about the political relationship between the individual and the state.[82]

Although the right to confrontation is an ancillary element of that political relationship,[83] confrontation is about more than simply the relationship between the state and the individual. It involves more complex relationships that take account of other values and interests.[84] Just as the accused may call upon the state to protect her interests in a fair trial, so, too, may witnesses and co-accused have claims against the state for protection of their interests. Their claims may well lead to tension and conflict with the claim of the accused. Thus, other than in the case of the presumption of innocence, these multiple and likely competing interests make developing a principled, justifying account of the right to confrontation and its exceptions a problematic exercise.[85]

The Right to Confrontation in the United States and South Africa

In the United States, the right of confrontation enjoys explicit constitutional status. The 'Confrontation Clause' in the Sixth Amendment to the United

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78 Dennis (n 62) 260–269.

79 ibid 256.

80 ibid 257.

81 See, for example, Paul Roberts, 'Taking the Burden of Proof Seriously' (1995) Criminal LR 784.

82 The state is obliged to overcome a presumption in favour of the individual's liberty and reputation by discharging a burden proving guilt beyond a reasonable doubt.

83 Arising from the state's obligation to prove its case by calling prosecution witnesses to testify against the accused.

84 Dennis (n 62) 257.

85 ibid 257.

States Constitution guarantees the accused in a criminal prosecution the constitutional right to 'be confronted by the witnesses against him.'[86]

Bobby Naudé concludes, without explanation, that an accused's constitutionally entrenched right to confrontation under the Sixth Amendment of the United States Constitution 'can be compared' to the accused's constitutional right to adduce and challenge evidence in South African law.[87] This position is untenable. In the United States, a veiled witness implicates two *explicit* constitutional guarantees of the accused. Firstly, and more broadly, she is entitled to a fair trial.[88] Secondly, and more specifically, she is *explicitly* guaranteed the opportunity to 'be confronted with' the individuals who will testify against him.[89] In *Coy v Iowa*,[90] using literal textual interpretation, Justice Scalia, writing for the majority, concluded that the 'irreducible literal meaning' of the Confrontation Clause guarantees the criminal defendant 'a right to meet face to face all those who appear to give evidence at trial.'[91]

This face-to-face confrontation is what Spencer and Flin have memorably described as the right to 'eyeball' the witness.[92] The idea is traceable in the common law to the sixteenth century 'altercation' form of trial described by Sir Thomas Smith.[93] It certainly forms part of the defendant's right to confrontation under the Sixth Amendment to the United States Constitution. In *Coy v Iowa*, the Supreme Court commented:[94]

> We have never doubted that the Confrontation Clause guarantees the defendant a face to face meeting with witnesses appearing before the trier of fact.

It is noteworthy that, in contrast to the United States Constitution, in the South African Bill of Rights (and also in Canada, New Zealand and the United Kingdom), although the accused normally has a right to be present

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86 Modern instruments of human rights, such as the European Convention on Human Rights tend not to use the term 'confrontation' when expounding upon the right to a fair trial. However, when considering the right of a criminal defendant under a 6(3)(d) to examine witnesses against him, the European Court of Human Rights has on occasion referred to the lack of 'confrontation' as a ground for finding that the trial had been unfair. See, for example, *Saidi v France* [1994] 17 EHRR 251 ECtHR para 44.

87 Bobby Naudé, 'Face-coverings, Demeanour Evidence and the Right to a Fair Trial: Lessons from the USA and Canada' (2013) XLVI (2) CILSA 168.

88 Sixth Amendment to the United States Constitution.

89 ibid.

90 [1988] 487 US 1012.

91 ibid 1021.

92 John Spencer and Rhona Flin, *The Evidence of Children: The Law and Psychology* (2 edn, Blackstone Press 1993) 79.

93 *De Republica Anglorum* (1583) cited in Dennis (n 62) 263.

94 *Coy v Iowa* [1988] 487 US 1019.

at her trial, there is no explicit right to confrontation.[95] Rather, it is presumed as being implicit in the right to a fair trial.[96] This is a significant difference between the American conception of confrontation and that of other Anglo-American legal systems.

In the South African context, specifically with reference to section 170A of the Criminal Procedure Act[97] (allowing for the evidence of a child witness to be given with the aid of an intermediary *via* closed-circuit television), Mitchell AJ in *S v Stefaans*[98] stated, as a general principle, that 'an accused *prima facie* has the right to confront his accusers and be confronted by them.'[99]As the general 'right to confrontation' is not explicitly enumerated as one of the fifteen separate rights that constitute the accused's right to a fair trial pursuant to section 35(3) of the Constitution, the assumption must be that it is *implied* within the right to a fair trial, and more specifically the 'right to adduce and challenge evidence.'[100]

As stated above, although there is not any agreement on what exactly the 'right to confrontation' means, there seems to be consensus across the common-law world that it is generally considered to encompass all, or a subset, of the following 'bundle of rights': (i) the right to a public trial; (ii) the right to 'face-to-face' confrontation; (iii) the right to cross-examine adverse witnesses; and (iv) the right to know the identity of one's accuser.'[101]

For the sake of thoroughness it should be noted that, in South Africa, (i) above (the right to a public trial) is specifically enumerated as one of the constituent rights of the right to a fair trial in section 35(3).[102]

It is further debatable whether the right to 'face-to-face' confrontation constitutes part of the South African 'right to confrontation.' What is indubitable is that, under the South African Constitution—similar to Canada, New Zealand and the United Kingdom—it is not an *express* constitutional guarantee as it is under the Sixth Amendment of the United States Constitution. However, I am prepared to accept, *arguendo*, that it is implied in the 'right to confrontation' in the South African context.

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95 Dennis (n 62) 263.
96 Laird (n 32) 125.
97 Act 51 of 1977.
98 [1999] 1 SACR 182 (C).
99 ibid para 187*h*–188*i*.
100 Section 35(3)(i) of the Constitution.
101 Dennis (n 62) 260–269.
102 Section 35(3)(c) of the Constitution, which refers to the right 'to a public trial before an ordinary court.'

Limitation of the Right to Confrontation

Sherman Clark has argued that certain facets of criminal procedure are 'socially and culturally situated.'[103] In the American context specifically, they:[104]

> [R]eveal and aspire to a certain form of courage and directness. If a label is helpful this might be described as the virtue of "egalitarian forthrightness." It is a Gary Cooper, John Wayne, "look them in the eye" ethic.

Certainly, the notion of face-to-face confrontation in the theatrical setting of a courtroom lends itself to images of Hollywood shoot-outs at high noon. The obvious objection is that the justifying principle for face-to-face confrontation may be acceptable for evenly-matched cowboys. In the United States, the Judeo-Christian ethic,[105] the literary tradition Americans teach their children,[106] their politics,[107] and their idioms[108] all demonstrate the value Americans place on face-to-face confrontation. Face-to-face confrontation is ingrained in American society as part of the social ethos.[109]

But this principle seems harsh and unrealistic when applied to most ordinary witnesses, particularly the vulnerable and intimidated.[110] For some jurisdictions—I would argue South Africa being one of these—face-to-face confrontation is untenable as a desirable ethical rule when applied, for example, to an abused child testifying against his alleged abuser, or an elderly citizen testifying against a member of an alleged gang of violent youths.[111] In *Levogiannis*, L'Heureux-Dube J in the Supreme Court of Canada approved of a comment in a New Zealand case that the right to

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103 Sherman Clark, '"Who do you Think you Are?" The Criminal Trial and Community Character' in A Duff and others (eds), *The Trial on Trial Volume 2* (Hart Publishing 2006) 83, 93.

104 ibid 86.

105 The Bible (n 58) explains that no man should be delivered up to die before the accusers met the accused face-to-face.

106 For example, Shakespeare wrote in *Richard II*: 'then call them to our presence; face-to-face, [a]nd frowning brow to brow, ourselves will hear [t]he accuser and the accused freely speak.' Shakespeare (n 1).

107 For example, President Eisenhower described face-to-face confrontation as part of the code of his home town of Abilene, Kansas. This code demanded that you must 'meet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry … In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow.' *Jay v Boyd* [1956] 351 US 345, 372–373 (Frankfurter J, dissenting, quoting press release of Eisenhower's remarks to B'nai B'rith Anti-Defamation League on 23 November 1953).

108 This concept of 'confrontation' persists in everyday language and idioms in the United States, such as 'look me in the eye and say that.' Beckett (n 66) 1631.

109 ibid.

110 Dennis (n 62) 265.

111 ibid 265.

confrontation was not a right to glower at and intimidate witnesses.[112] She added obiter that she agreed with the suggestion of the Attorney General for Manitoba, intervening, that the importance of confrontation in truth-seeking is a culturally-biased vision of human characteristics and should not be viewed as part of our fundamental principles of justice.[113]

A fundamental principle of political moral authority underpinning the criminal judicial process is that the accused, as a citizen of the state, should be treated with concern and respect for her liberty and dignity.[114] This is the principle of fair treatment, and it forms part of the accused's right to a fair trial. But this principle does not apply uniquely to the accused. It applies to all citizens of the state, particularly to other citizens involved in the proceeding against the accused, namely victims and witnesses. They also have a claim to fair treatment and interests that may be put at risk by the operation of the criminal judicial process.

The issues courts face when ordinary trial processes are altered, are not limited to witnesses wearing the *niqab*, but also occur with regard to child witnesses in sexual abuse cases, witnesses who fear for their safety, and witnesses who are administered anti-psychotic drugs.[115]

In the Anglo-American legal systems, the right to confrontation is subject to numerous limitations and exceptions. As Fawzia Cassim acknowledges, despite the rhetoric, in none of its various forms is the right to confrontation absolute.[116] It frequently loses the priority that might be suggested by its apparent status. Moreover, the pressure for modification of the right continues to increase[117]—it is a 'shrinking right.'[118]

For example, in most common-law jurisdictions there are numerous exceptions to the hearsay rule, many with a long lineage. In modern Anglo-American systems, there is a growing tendency for hearsay exceptions to be enlarged, as the common law is replaced by new statutory codes—the South African Law of Evidence Amendment Act[119] is one obvious example.

Moreover, in the event of a conflict between the protection of a vulnerable witness and the requirement of face-to-face confrontation, the latter must yield to the greater public interest in the protection of a witness. Many jurisdictions have introduced a range of special measures to ease the burden faced by vulnerable and intimidated witnesses giving evidence—

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112 *R v Levogiannis* [1993] 67 OAC 321 para 30.

113 ibid para 32.

114 Dennis (n 62) 260.

115 Aaron Williams, 'The Veiled Truth: Can the Credibility of Testimony Given by a *Niqab*-wearing Witness be Judged without the Assistance of Facial Expressions' (2008) 85 Univ of Detroit Mercy LR 290.

116 Chapter 9, 9.4 in Fawzia Cassim, 'The Right to Meaningful and Informed Participation in the Criminal Process,' (LLD thesis, University of South Africa 2003).

117 Dennis (n 62) 256.

118 ibid 256.

119 Act 45 of 1988

for example, section 170A of the South African Criminal Procedure Act[120] allows the evidence of a child witness to be given with the aid of an intermediary *via* closed-circuit television. In addition, section 171 of the Criminal Procedure Act provides for evidence on commission in such circumstances where a witness is 'unavailable,' and her attendance in court cannot be obtained. Orders for witnesses to give evidence anonymously may be issued in a number of jurisdictions.[121] The general trend across common-law jurisdictions is for the scope of these measures to expand.[122]

In *Razamjoo*, the Crown had made multiple references to judgments that indicated that a fair trial was not necessarily a *perfect* one from the accused's point of view.[123] This 'imperfection' was necessitated by the need to ensure fairness to the other people who had been drawn into the criminal justice process, which, in this case, meant the witnesses themselves. The Crown also invoked the broader community interests in seeing offenders efficiently brought to justice.[124]

The Crown cited to numerous other exceptions to open court testimony (such as in sexual abuse cases and gang violence trials) to show that, as there were many other instances of witnesses giving evidence in alternative modes, it could not be argued that there was a compelling need to require Muslim witnesses to unveil.[125] One particularly striking precedent was *R v Atkins*,[126] a Court of Appeal case in which witnesses to a gang-related murder testified from a remote location via closed circuit television. Neither the accused nor his counsel had any ability to assess either visual or verbal demeanour, as the faces and voices of the witnesses were distorted.[127]

The point is that all these measures curtail, in various ways, the scope of the right to confrontation. Its rich common-law heritage notwithstanding, any notion that the right to confrontation has 'some unique or permanent special strength' is a myth.[128]

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120 Act 51 of 1977.

121 In the United Kingdom such anonymity orders are now on a statutory basis. See, for examples, Coroners and Justice Act 2009.

122 Dennis (n 62) 256.

123 *Razamjoo* (n 17) para 43.

124 ibid.

125 ibid para 46.

126 [2000] 2 NZLR 46 (CA)

127 Griffiths (n 9) 296. In summary, the Crown requested the court to refrain from infringing the witness's religious freedom protection for two reasons. Firstly, that there could be no important objective achieved by an order to unveil, and the numerous exceptions in other types of trials indicated that this was not essential to creating a fair trial. Secondly, as shown by the scientific research, an order for the two women to unveil and so render their facial demeanour accessible to cross-examination, had no rational connection to the right of the accused under s 25 of BORA to 'examine' the witnesses against him. These two reasons, based on the proportionality test propounded by the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 183, came together to render any order to unveil an unreasonable interference with the witnesses' religious rights. Griffiths (n 9) 297.

128 Dennis (n 62) 257.

In sum, it is possible to draw at least four main conclusions from an examination of the Anglo-American 'right to confrontation': (i) it is not a single right possessive of some unique or special strength, despite the lavish praise heaped on it by judges and scholars—it is probably best understood as a bundle of rights; (ii) the strength of the various rights can differ quite markedly across jurisdictions; (iii) none of the rights is absolute and all are subject to significant limits and qualifications—eg, hearsay exceptions, special measures for vulnerable witnesses and anonymity orders; and (iv) most of the tendency of modern law is towards further attrition of the right.[129]

In the South African context, the 'right to confrontation,' although not expressly articulated, seems to be implied in the Constitutional right to a fair trial, specifically the right to adduce or challenge evidence. And, for present purposes, I am also prepared to assume that the South African 'right to confrontation' encompasses all of the following bundle of rights (although this might overstate the matter): (i) the right to a public trial; (ii) the right to 'face-to-face' confrontation; (iii) the right to cross-examine adverse witnesses; and (iv) the right to know the identity of one's accuser.

The next step is to consider which specific rights, among the 'bundle' of confrontation rights, would be implicated by a veiled Muslim witness. It is difficult to understand how allowing a Muslim witness to give evidence while veiled would violate rights (i) and (iv). It is beyond cavil that the veiled female witness neither infringes upon the accused's right to a public trial, nor does the fact that she wears the *niqab* violate the accused's right to know the identity of his accuser—the Muslim woman wears the *niqab* as part of her religious observance, not as a mask to conceal her identity.

Thus, the veiled Muslim witness might only *potentially* violate rights (ii) and (iii)—the right to 'face-to-face' confrontation and the right to cross-examine adverse witnesses. Even without examining the matter in any greater depth, this much is obvious: the fact that the Muslim woman is veiled does not *negate* the accused's right to confront her 'face-to-face,' or to cross-examine her. At most, the wearing of the *niqab* might only *limit* these rights of the accused—and minimally so. The accused, the fact-finder, and counsel can at all times observe the witness, including all of her demeanour cues with the exception of facial expressions. Also, the accused is not deprived of the opportunity to cross-examine the witness, only perhaps the opportunity to explore an avenue of cross-examination based upon the witness's facial expression in reaction to a question.

These mere limitations stand in sharp contrast to existing statutory abrogation of the right to confrontation—which *eliminate*, and not merely limit—the constituent confrontation rights of the accused. For example, section 170A of the Criminal Procedure Act eliminates the accused's rights to 'face-to-face' confrontation, and exceptions under section 3 of the Law of

[129] Dennis (n 62).

Evidence Amendment Act eliminates the accused's right to cross-examine the hearsay declarant.

The conclusion is therefore merited that the veiled Muslim witness only has the *potential* to impede—and to impede to a limited extent—but two of the 'bundle' of constituent rights of the general 'right to confrontation.' Based on this alone, it cannot be said—as Naudé is apparently prepared to accept—that the potential limited attenuation of two facets of confrontation necessarily undermines the accused's right to a fair trial.

Moreover, I emphasise the 'potential to limit,' because it has by no means been established to any degree of empirical certainty that a veiled Muslim witness does *in fact* impede either the accused's right to 'face-to-face' confrontation, or the right to cross-examine adverse witnesses. This is the primary question I examine below, because it is also the *primary* rationale that the courts have advanced in forcing Muslim witnesses to unveil. I also briefly analyse and critique the other rationales for holding that the veiled Muslim witness violates the accused's right to a fair trial, namely infringement of the right to cross-examine the witness and the 'symbolic' value of confrontation.

THE DEMEANOUR RATIONALE

The issue of the veiled Muslim witness that has confronted courts in the United States, Canada, New Zealand and the United Kingdom begs the following question: What is the role of facial expressions in determining credibility? Put differently: Is the ability to observe a witness's facial expressions so integral to that witness's evidence that the inability to observe facial expressions would leave the fact-finder unable to judge the truthfulness of the witness's statements?[130] The courts in *NS*, *D(R)* and *Muhammad* expressly answered this question in the affirmative.

Nearly all courts in the common-law world recognise the importance of a fact-finder's ability to observe the demeanour and facial expressions of the witness.[131] The Court of Appeals for the Seventh Circuit in the United States articulated the classic argument in favour of courts' reliance on so-called 'demeanour evidence' thus:[132]

> While this court's review is confined to the "cold pages" of an appellate transcript, the jury had the opportunity to observe the verbal and non-verbal behavior of the witness, including the subject's reactions and responses to the interrogatories, their facial expressions, attitudes, tone of voice, eye contact, posture and body movements.

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130 Williams (n 115) 281, 286.
131 ibid 277.
132 *Goodwin v MTD Products, Inc* [2000] 232 F3d 600, 606–607.

Proponents of the removal of religious attire that covers the face of Muslim witnesses argue that if the face—'the most expressive part of the body'[133]—cannot be observed and assessed because the witness wears a veil, fact-finders will not be able to determine the credibility of the witness.

This makes intuitive sense in the adversarial process; many observers question the ability of the fact-finder to determine credibility without seeing the witness's face.[134] In *Razamjoo*, with reference to the actual testimony at the hearing by one of the witnesses while wearing the *burqa*, Moore J commented that there had been a 'strong sense of disembodiment,' which he compared to the difficulty in gaining a sense of character from a phone call from a stranger, or, more colourfully, the 'voice of the rogue computer in *2001 A Space Odyssey*.'[135]

Murphy J in *Queen v D(R)* was 'firmly convinced' that the wearing of the *niqab* necessarily hinders that openness and communication.[136] He continued:[137]

> It is unfair to expect [a] juror to try to evaluate the evidence given by a person whom she cannot see, deprived of an essential tool for doing so: namely, being able to observe the demeanour of the witness, her reaction to being questioned; her reaction to other evidence as it is given.

Murphy J also pointed out that:[138]

> It is no accident that our appellate reports are replete with observations that the jury, or judge, "had the advantage of seeing as well as hearing the witness" … [T]he ability to observe a witness's demeanour and deportment during the giving of evidence … is a fundamental and necessary attribute of the adversarial trial, and if it is taken away, the ability of the jury to return a true verdict in accordance with the evidence is necessarily compromised.

In the South African context, Fawzia Cassim is of the opinion that section 35(5) of the Constitution requires a confrontation to take place in that an accused must be able to observe a witness at close hand. In this way, the accused can assess not only the content of the evidence, but also the witness's demeanour, facial expressions, body language and inflections of the voice.[139]

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133 Houchin (n 10) 864.

134 Adam Schwartzbaum, ,The "Niqab" in the Courtroom: Protecting Free Exercise of Religion in a Post-"Smith" World' (2011) 159 Univ Pennsylvania LR 1557.

135 *Razamjoo* (n 17) para 69.

136 *D(R)* (n 18) para 58.

137 ibid para 59.

138 ibid para 70.

139 See Cassim (n 116) ch 9, 9.1. All references to 'the Constitution' are to the Constitution of the Republic of South Africa, 1996.

Bobby Naudé likewise subscribes to the generally accepted fallacy, prevalent in legal systems across the common-law world, that 'a court's ability to observe the demeanour of a witness contributes to the reliable assessment of credibility.'[140]This leads Naudé to the conclusion that the accused's right to adduce and challenge evidence, which constitutes part of the overarching right to a fair trial, 'will dictate the continued importance of demeanour evidence in assessing the credibility of a witness.'[141] He continues:[142]

> Not only should the trier of fact in principle have access to all possible forms of demeanour evidence, but proper cross-examination could also be prevented if an accused cannot fully observe the reaction of a witness to a question.

Naudé acknowledges the 'doubtful evidential value' of demeanour evidence,[143] yet, inexplicably, he continues to insist that '[t]here is always the possibility that such evidence might influence the outcome of a case,'[144] and therefore:

The accused's right to adduce and challenge evidence that forms part of the broader right to a fair trial, requires that the trier of fact should, in principle, have access to all possible forms of demeanour evidence.

There can be no doubt that so-called 'demeanour evidence' *might* influence the outcome of a case. However, the pertinent question is: *Should* it?

The Empirical Evidence—The Value of 'Demeanour' Generally

Although the legal system has traditionally placed great weight on the fact-finder's ability to detect untruthfulness by observing a witness's facial expressions, the empirical evidence shows that this confidence is grossly misplaced.[145] In fact, with 'impressive consistency',[146] extensive testing of this legal precept—resulting in a substantial body of empirical evidence amassed in the course of seven decades of research—has repeatedly demonstrated the fundamental error of according any weight to demeanour evidence in making credibility determinations.[147] Ordinary people simply

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140 Naudé (n 87) 166. Naudé states that demeanour evidence 'can be the factor that tips the scale beyond a reasonable doubt. ibid 167.

141 ibid.

142 ibid.

143 ibid 168–170.

144 ibid 170.

145 Paul Ekman and Maureen O'Sullivan, 'Who can Catch a Liar?' (1991) 46 American Psychologist 914.

146 Olin Guy Wellborn III, 'Demeanour' (1991) 76 Cornell LR 1075.

147 Jeremy Blumenthal, 'A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanour Evidence in Assessing Witness Credibility' (1993) 72 Nebraska LR 1159.

cannot effectively use the demeanour of a witness in deciding whether to believe the witness or not.[148]

Experimental subjects correctly detected truth and deceit between forty-five per cent and fifty-eight per cent of the time.[149] It should be borne in mind that the task calls on them to make a binary judgment—either that the subjects are truthful or deceitful. Thus, even if a respondent had a visual, hearing or speech impairment, or simply guessed or tossed a coin, that respondent would have a statistical chance of being correct fifty per cent of the time. Statistically, then, most people perform barely better than they would if they simply tossed a coin in judging whether a speaker is being truthful or not.[150]

Specifically with regard to that aspect of demeanour implicated by wearing the *niqab*—facial expressions—empirical social science research has shown that detecting lies through communicators' facial expressions is stunningly ineffective.

All *perceived* indicators of deception are based on visual cues, particularly facial cues, while most of the *actual* indicators are auditory.[151] Humans are predominantly visual creatures.[152] The deception researcher Bella DePaulo refers to this as 'video primacy'[153]—the human tendency to focus almost exclusively on the face (eye contact and other changes in facial expressions), to the exclusion of all other channels of deception—body, speech patterns, tone of voice and content.[154] Unfortunately, because of facial predominance in both expression and interpretation, the face is exquisitely controllable for self-presentation purposes, and it thus hides or reveals the

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148 Jeremy Blumenthal, 'A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanour Evidence in Assessing Witness Credibility' (1993) 72 Nebraska LR 1159.

149 Miron Zuckerman, Bella de Paulo and Robert Rosenthal, 'Verbal and Nonverbal Communication of Deception' (1981) 14 Advances in Experimental Social Psychology 39–40.

150 The 'consensus view based on series of social science studies demonstrate[s] that the test subjects in laboratory experiments correctly determined when a person was lying only slightly more than half the time.' Max Minzner, 'Detecting Lies Using Demeanor, Bias and Context' (2008) 29 Cardozo LR 2558.

151 Chet Pager, 'Blind Justice, Colored Truths and the Veil of Ignorance' (2005) 41 Williamette LR 391.

152 Eighty per cent of information that the human brain receives is through the eyes. Paul Ekman, 'Lying and Nonverbal Behavior: Theoretical Issues and New Findings' (1988) 12 Journal of Nonverbal Behavior 175.

153 Bella de Paulo, 'Decoding Discrepant Nonverbal Cues' (1978) 36 Journal of Personality & Social Psychology 320.

154 In 1969, Paul Ekman and Wallace Friesen, pioneers in the field of deception research, proposed a channel theory of deception that in ensuing years has been widely validated and accepted. In essence, they theorised that a person communicated information through the face, body, speech patterns, tone of voice, and content. When a witness is lying, cues to her deception are inadvertently 'leaked' through one or more of these channels, despite her attempts to appear honest. The lying witness is one who 'is probably unable to control all channels simultaneously and who probably controls some better than others.' Paul Ekman and Wallace Friesen, 'Nonverbal Leakage and Clues to Deception' (1969) 32 Psychiatry 88.

most information.[155] This is why one person can lie while looking another straight in the eye and flashing a smile. In Charles Dickens's words:[156]

> I have known a vast quantity of nonsense talked about bad men not looking you in the face. Don't trust the conventional idea. Dishonesty will stare honesty out of countenance, any day of the week, if there is anything to be got by it.

Studies have confirmed that observers over-rely on visual cues to their own detriment. Visual information actually *diminishes* accuracy.[157] In one experiment, subjects who observed a suspect interview were fifty-eight per cent accurate in distinguishing between those suspects who were truthful and those who were deceitful, whereas those who only listened to the same interviews or simply reviewed a transcript were seventy-seven per cent accurate.[158] The authors of the study concluded that the visual cues from the interview (ie, facial expressions, gestures and mannerisms) served primarily as distractors, lowering the proportion of accurate judgments.[159]

People are in fact considerably better judges of truth and falsehood if they shut their eyes and listen, because the behavioural cues that most steadfastly betray deception are those that leak from the voice—paralinguistic cues, such as pauses, hesitations and changes in pitch.[160]

However, by far the best determinant of the truth of testimony is not a witness's demeanour (visual or auditory behavioural cues) at all, but the actual content of the testimony.[161] 'The surprising finding', Zuckerman and others concluded, 'is the power (ie, the accuracy) of the word, either written or spoken.'[162]Whereas 'facial cues seem to be faking cues,' which may hinder rather than assist in lie detection, 'success at deceiving and success

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155 Saul Kassin, 'Human Judges of Truth, Deception and Credibility: Confident but Erroneous' (2002) 23 Cardozo LR 810; Blumenthal (n 147) 1190.

156 Charles Dickens, *Hunted Down* (Peter Owen Publishers 1996) 176.

157 John Hocking, Edmund Kaminski, Joyce Baucher and Gerald Miller, 'Detecting Deceptive Communication from Verbal, Visual, and Paralinguistic Cues' (1979) 6 Human Communication Research 42–43; Zuckerman (n 149) 27. Psychologists, Littlepage and Pineault, concluded that 'facial shots of dishonest statements would evoke low accuracy but high confidence.' Glenn Littlepage and Martin Pineault, 'Detection of Deceptive Factual Statements from the Body and the Face' (1979) 5 Personality & Social Psychology Bulletin 328.

158 Norman Maier and James Thurber, 'Accuracy of Judgments of Deception when an Interview is Watched, Heard, and Read' (1968) 21 Personnel Psychology 23. In another study, observers exposed only to a witness's voice performed almost twice as well as those who were exposed to visual cues. Hocking (n 157) 43.

159 ibid Maier 23.

160 Kassin (n 155) 810.

161 Pager (n 151) 386. '[N]onverbal information was not useful to subjects in detecting deception, whereas verbal content did provide a basis for significantly better-than-chance judgments.' Wellborn (n 146) 1085.

162 Zuckerman (n 149) 27.

at detecting deceit are both mediated largely by adeptness at constructing and interpreting verbal nuances.'[163] Indeed, as Ho states:[164]

> What a witness says is likely to be a better indicator and to have a greater impact on our assessment of her truthfulness than how she looks, speaks or behaves in the witness box.

A group of social science researchers went even further and specifically examined the very notion embodied in the court decisions in the United States, the United Kingdom, New Zealand and Canada discussed above, namely that a fact-finder's ability to detect deception among witnesses is compromised by the *niqab*.[165]

As explained above, there is no empirical evidence in the lie-detection literature suggesting that a *niqab* should impair lie-detection because it conceals a portion of the wearer's face; rather, existing research suggests that the opposite is far more likely. The *niqab* should minimise the amount of information that is available to observers and prevent them from basing their lie-detection decisions on misleading facial cues (eg smiling).[166] The veiling of the witness might force observers to attend to sources of information that are more diagnostic of deception, such as verbal content.[167] By encouraging the use of verbal cues, *niqabs* could actually facilitate the detection of deception.

However, in most of the lie-detection studies, both liars and truth-tellers' faces were visible. Thus, Leach and others set out to specifically test the effects of religious garments on lie-detecting. The researchers conducted two studies, involving 423 students of diverse ethnic backgrounds at Canadian universities. Respondents, who were eye witnesses to a staged 'crime,' were interviewed about what they had seen, and the interviews were recorded. Each respondent either told the truth, or lied, and wore the *hijab*, the *niqab* or no face-covering at all. Subjects then watched the video interviews of the 'eye witnesses' and had to indicate whether each 'eye witness' was lying or telling the truth.[168]

Contrary to the assumptions underlying the court decisions discussed above, across the two studies veiling did not hamper the lie detection ability of fact-finders.[169] In fact, observers were more accurate at detecting deception in witnesses who wore the *niqab* or *hijab* than those who did

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163 Zuckerman (n 149).
164 HL Ho, *A Philosophy of Evidence Law Justice in the Search for Truth* (OUP 2008) 253.
165 Leach (n 11) 401–410.
166 Bella de Paulo and others, 'Cues to Deception' (2003) 129 Psychological Bulletin 74–118.
167 Aldert Vrij, *Detecting Lies and Deceit: Pitfalls and Opportunities* (2 edn, Wiley 2008) 102.
168 Leach (n 11) 403–407.
169 ibid 407.

not veil.[170] Distinguishing between liars and truth-tellers in the group that did not veil was no better than chance, replicating previous findings.[171] It was only when 'eye witnesses' wore veils (either the *niqab* or the *hijab*) that observers performed at above chance levels. Thus, veiling actually improved lie detection.[172]

The Leach study allows one to conclude that fact-finders can even *more* accurately assess the credibility of a woman wearing the *niqab*, because potentially misleading facial indicators are hidden from view.[173] Paruk J, who asked Gina Muhammad to remove her *niqab* so that he could judge her demeanour when she testified, is likely to have made a more accurate judgment of Ms Muhammad's demeanour had she worn the *niqab* than not.

THE CROSS-EXAMINATION RATIONALE

Section 35 of the Constitution,[174] as well as international human rights instruments,[175] state that, as part of the right to a fair trial, the accused has the right to *challenge* the evidence against her. Practically, this right entitles the accused to cross-examine witnesses against her as to their credibility and reliability.[176]

As it had been in Roman times, cross-examination through confrontation also became a significant component of the accusatorial criminal justice system.[177] The right to cross-examine is widely regarded as fundamental.[178] One does not have to subscribe to Wigmore's exaggerated rhetoric ('beyond any doubt the greatest legal engine ever invented for the discovery of truth')[179] to accept that it plays a major role in enabling the accused to present a full defence to the charges against her.

Those opposing female witnesses testifying while veiled also argue that the veil impedes cross-examination in that it prevents the trial lawyer from capitalising on an ability 'to assess a witness's expression and general demeanor.'[180] One of the strategies identified by trial lawyers in conducting an effective cross-examination is the ability to assess the witness's general

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170 Leach (n 11) 407.

171 Charles Bond and Bella de Paulo, 'Accuracy of Deception Judgments' (2006) 10 Personality and Social Psychology Review 214–234.

172 Leach (n 11) 407. Part of the reason for this is likely the result of subject observers basing their decisions on verbal cues, rather than nonverbal cues, when observing witnesses from the veiled groups.

173 Schwartzbaum (n 134) 1571.

174 Section 35(3)(i).

175 Article 6 of the European Convention on Human Rights and Art 14 of the International Covenant on Civil and Political Rights.

176 Dennis (n 62) 265.

177 Murray (n 19) 1753.

178 Dennis (n 62) 266.

179 John Henry Wigmore, *Evidence in Trials at Common Law Volume 5* (JH Chadbourne rev, Little, Brown 1974) para 1367.

180 Houchin (n 10) 861.

demeanour. The veil covers up those 'tiny signals' revealed in facial expression that indicate 'how the witness is performing.'[181]Thus, the ability of counsel for the accused to make 'heat of battle' decisions that guide cross-examination is impaired.[182] Of course, as even Wigmore realised, cross-examination may sometimes lead the fact-finder away from the truth rather than towards it.[183]

It should be borne in mind that the accused retains the ability to question the veiled Muslim witness extensively, thereby eliciting responses to questions, exposing inconsistent statements, and showing hesitation in responses.[184] Moreover, what has been said about the reliability of facial expressions in gauging truthfulness also applies to cross-examination. Observation of the witness is unnecessary to uncover doubt, hesitation, lack of confidence and even lies. If it is the cross-examiner's intention to exploit signs of nervousness or lack of confidence in the witness's demeanour, he would be well advised to focus on nonverbal cues other than facial expressions—this information is much more reliably discernible from verbal content.

Given that individuals find it extremely difficult to detect and correctly interpret 'tiny signals revealed in facial expressions,' and that facial expressions are, in the first instance, hardly ever dispositive of truthfulness and deceit, and might in fact be misleading, the empirical evidence from social science should spur reconsideration of the idea that the need for physical demeanour evidence to be able to cross-examine effectively is sufficient justification for forcing the witness to unveil.

THE SYMBOLIC VALUE OF CONFRONTATION RATIONALE

Friedman points out that, beyond its 'instrumental purpose' (which, as we have seen, the empirical social science has exposed as illusory), confrontation also serves a 'symbolic purpose.'[185] Even if confrontation has no impact on the quality of prosecution evidence, it would be important to protect, because as the United States Supreme Court stated in *Coy*[186] and *Craig*[187]:

> [T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as "essential to a fair trial in a criminal prosecution."

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181 Houchin (n 10).
182 ibid.
183 Friedman (n 67) 16.
184 Murray (n 19) 1748.
185 Friedman (n 67) 16.
186 *Coy v Iowa* [1988] 487 US 1012.
187 *Maryland v Craig* [1990] 497 US 836.

It is not only fairness to the accused that is at stake, but also the moral responsibility of witnesses and of society at large, for:[188]

Requiring confrontation is a way of reminding ourselves that we are, or at least want to see ourselves as, the kind of people who decline to countenance or abet what we are as the cowardly and ignoble practice of hidden accusation.

According to Friedman, the symbolic value of confrontation is enhanced by its historical legacy in common-law jurisdictions.[189] Indeed, even if confrontation served no other value at all, it would be important to honour the right that accused persons have had for many centuries governing how witnesses against them may give evidence.[190]

The argument has been made that having access to all of a witness's demeanour cues not only promotes fairness in fact, but also a *perception* of fairness, 'which is arguably equally significant.'[191] According to Naudé, other constitutional values (ie, in addition to the accused's right to a fair trial) 'shift the balance towards having full access to all possible forms of demeanour evidence.'[192] In this regard he contends that '[a] system of open and independent courts is an essential component of the rule of law and of a democratic state.'[193]

However, as argued extensively above, the so-called 'social ethos' of confrontation rests upon a fundamentally incorrect historical belief in the value of watching a witness's demeanour to determine credibility. Empirical social science has definitively shown that so-called 'demeanour evidence' is essentially worthless in aiding the court to judge the credibility of the witness. In light of this, can the legal system continue to justify the infringement of a veiled Muslim witness' fundamental freedom of religion to maintain a *perception* or *appearance* of fairness, when that perception or appearance bears no relation to reality?

Critics have conveniently sidestepped the overwhelming empirical evidence by stating that 'the perception of fairness is almost as important—if not as important—as fairness itself.[194] However, can it be justifiable for the legal system to continue to tout the importance of the *perception* of fairness if *actual* trial fairness is not diminished by the veiled Muslim witness? Is this not evidence of a legal system completely out of touch with reality?

The accused in *Razamjoo* made absolutely no rebuttal to the social science claim. Its most significant submission on the point of demeanour

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188 Sherman Clark, 'An Accuser-Obligation Approach to the Confrontation Clause' (2003) 81 Nebraska LR 1258.

189 Friedman (n 67) 17.

190 ibid.

191 Murray (n 19) 1752. The United States Supreme Court noted that the Confrontation Clause 'serves ends related both to appearances and to reality.' *Coy* (n 90) 1017.

192 Naudé (n 87) 182.

193 ibid 182–183.

194 Murray (n 19) 1755.

evidence was to invoke Lord Hewart's famous dictum that justice should not only be done, but should manifestly and undoubtedly be seen to be done.[195] One element of this was apparently the community's perception that open justice requires faces to be visible to all in court.[196] Thus, a criminal trial was seen as a 'public event,' in which the public were entitled to see and hear the proceedings.[197] Any departure from the normal courtroom procedures could see the courts lose the confidence of the public and bring them into 'disrepute.'[198]

Evidently, Moore J considered public expectations of what a trial entails to be a decisive consideration, and the ability of counsel and the fact-finder to be able to assess facial demeanour was one aspect of a trial that the public expected to see observed in practice.[199] Thus, Moore J invoked a non-instrumental rationale for prohibiting witnesses to wear face-coverings while giving evidence, by reference to a broader societal interest. I am not sure that this advances the argument. Surely our legal system should not abide procedures that serve only spectacle value, but that do not, in fact, further the interests of justice.

Moreover, there are at least equally strong, if not stronger, societal interests in favour of allowing veiled witnesses to give evidence. Like any religious believer entitled to protection under the Freedom of Religion clause (section 15 of the Constitution), the Muslim witness has a powerful claim that involves the legal protection of a religious practice that many Muslim women consider sacred.[200] She can claim that wearing the veil is an expression of her religious belief, and being forced to remove it to reveal her face would violate her free exercise because it would force her to choose between following the law and following the dictates of her religion.[201]

At the most basic level, unveiling implicates the psychological and physical well-being of the Muslim woman.[202] Religious expression cuts to the very core of human dignity (section 10 of the Constitution) and, as Muhammad stated, unveiling would lead to major shame and embarrassment.[203] There is extensive literature on the significance of the veil to demonstrate the psychological effect of having victims face their supposed abuser.[204] NS

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195 *Razamjoo* (n 17) para 77.
196 Griffiths (n 9) 297.
197 *Razamjoo* (n 17) para 93.
198 ibid para 109.
199 Griffiths (n 9) 298. In *D(R)* (n 18) para 56, it was held that the Courts rely on the process of adversarial trial in open court to uphold the rule of law, to provide a trial which is fair to all parties, and to allow the highest possible degree of openness and transparency.
200 Houchin (n 10) 854.
201 Murray (n 19) 1731.
202 ibid 1743.
203 Transcript of Small Claims Hearing *Muhammad v Enterprise Rent-A-Car*, No 06-41896 [Mich Dist Ct 11 October 2006] 4.
204 Murray (n 19) 1744.

described the niqab as 'part of me;' she asserted that is was essential to her 'modesty' and 'honour.'[205]

Forcing the witness to unveil has major implication for her welfare, and as Muhammad expressed, might cause severe emotional distress.[206] The event could be traumatising, especially considering that the believer may perceive the removal of her veil as an attack on both her religion and her dignity. This is because veiling 'may be for the fulfilment of a religious obligation, cultural practice, or as a symbol of political conviction.'[207]

As a result, the judgments discussed above placed Muslim women who wear the veil in the invidious position of having to choose between their religion and participation in the justice system. The key fact is that the Muslim woman's rights of access to the courts is impeded because her free exercise of religion is under assault. There is thus a combination of infringements of her freedom of religion and right to human dignity, on the one hand, *and* access to the courts, on the other. [208]

Abella J warned in dissent in *NS* that denying religious freedom in this case was 'like hanging a sign over the courtroom door saying "Religious minorities not welcome."'[209] Unlike the majority, Abella J explicitly noted that:[210]

> [A] judicial environment where victims are further inhibited by being asked to choose between their religious rights and their right to seek justice undermines the public perception of fairness not only of the trial, but of the justice system itself.

As the Canadian Council on American-Islamic Relations asserted in their *amicus* brief:[211]

> [T]he choice the appellant faces is between walking away from her religious convictions as a person of faith, and walking away from the pursuit of justice as a victim of alleged sexual assault. Her status as a woman is what connects this impossible choice.

The Council concluded that the result of the case will be a 'chilling … further marginalisation of this population of women.'[212]

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205 *R v NS* [2012] SCC 72 para 29.
206 Murray (n 19) 1741.
207 Houchin (n 10) 824.
208 Schwartzbaum (n 134) 1557.
209 *NS* (n 94) para 94.
210 ibid para 95.
211 As quoted in Chambers (n 12) 394–395.
212 ibid 395.

If veiled Muslim women are hesitant to report sexual assault because they fear that they will have to remove the *niqab* in court, their right to live free of violence is undermined. This is a situation that all people should find intolerable, whatever their religious beliefs and habits of dress.

CONCLUSION

This contribution has argued that the Anglo-American right to confrontation is not a single right possessive of some unique or special strength, despite the lavish praise heaped on it by judges and scholars. It is more accurately characterised as a bundle of related but separate rights. None is absolute and all are subject to significant limits and qualifications—eg, hearsay exceptions, special measures for vulnerable witnesses and anonymity orders. All these limitations and qualifications have the effect of curtailing confrontation rights, and the momentum in Anglo-American evidence systems seems to be towards expansion of these limitations and qualifications.[213]

The veiled Muslim witness has the *potential* to impede—and to impede to a limited extent—but two of the 'bundle' of constituent rights of the general 'right to confrontation': the right to 'face-to-face' confrontation and the right to cross-examine adverse witnesses. Based on this alone, it cannot be said that the *potential* limited attenuation of two facets of confrontation necessarily undermines the accused's right to a fair trial.

Moreover, I emphasised the 'potential to limit,' because the veiled Muslim witness does not *in fact* impede either the accused's right to 'face-to-face' confrontation, or the right to cross-examine adverse witnesses. Social psychology has engaged in empirical studies of the act of deception and its detection for well neigh seven decades. In these scientific studies, not only do subjects rarely perform much better than chance in distinguishing truth from falsehood, they believe that they are better lie detectors than they in fact are.[214] With remarkable consistency these studies have produced findings that run counter to both popular and jurisprudential attitudes about the methods for identifying a liar.[215] There is no correlation whatsoever between behavioural cues popularly perceived to be associated with lying and those that are in fact displayed during *actual* deception.

Forcing a Muslim witness to unveil reflects nothing more than the common overconfidence in humans' ability to detect untruthfulness.[216] As the empirical evidence demonstrates, wearing a veil *per se* does not in fact undermine judgments of a witness's credibility, because so-called 'demeanour evidence' is—contrary to historical belief—of absolutely no use. People are more prone to disguise their facial expressions when lying

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213 Dennis (n 62) 270.

214 George Fisher, 'The Jury's Rise as Lie Detector' (1997) 107 Yale LJ 707.

215 Bella de Paulo, Julie Stone and Daniel Lassiter, 'Deceiving and Detecting Deceit' in Barry Schlencker (ed), *The Self and Social Life* (Mc Graw-Hill 1985) 323; Zuckerman (n 149) 1.

216 Williams (n 115) 287.

and to leave their bodily activity uncontrolled.[217] Social science researchers have concluded that visual cues may actually 'promote faulty judgments and greatly disserve the truth-seeking process.'[218]It is not the face, but words (whether written or spoken), that provides the most reliable guide to credibility.

What is more, social science researchers have specifically examined the question whether wearing a *niqab actually* compromises a fact-finder's ability to detect deception. The researchers concluded that the veiled Muslim witness does not in fact impede either the accused's right to 'face-to-face' confrontation, or the right to cross-examine adverse witnesses. Actually, quite the contrary. Observers in the experiments were more accurate in detecting deception in witnesses who wore the *niqab* than in those without any face coverings. Veiling actually improved lie detection. Thus, the fact that the female Muslim witness is veiled has every potential to *enhance* the accused's right to challenge adverse evidence.

The conclusion is therefore warranted that the inability to observe the witness's face, out of all the aspects of the multifaceted right to confrontation, in fact does not pose *any* threat to the accused's right to a fair trial.[219] Given the ordinary person's proven inability to decipher the truth of another person's statements based upon that other person's demeanour, the *rationale* underlying a fact-finder forcing a Muslim witness to unveil becomes not only questionable, but more than that, it also becomes indefensible.[220]

If a fact-finder's ability to ascertain deceit through nonverbal communication is only marginally better than chance, how compelling is the court's interest in requiring a Muslim witness to remove her veil, especially when the only nonverbal cues inhibited by the *niqab* are facial expressions—the most unreliable nonverbal cues of all? Moreover, based on the overwhelming empirical evidence, can it be justifiable for the legal system to continue to tout the symbolic importance of 'confrontation'—the *perception* of fairness—if *actual* trial fairness is not diminished by the veiled Muslim witness?

In sharp contrast to the accused, the female Muslim witness who is forced to unveil suffers actual and severe infringement of her constitutional rights. Principally, the female Muslim witness has a powerful legal claim to the protection of a religious practice that many Muslim women consider sacred. Also, forcing a Muslim witness to unveil infringes upon her fundamental rights to human dignity and to privacy. As a result, Muslim women who

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217 Elizabeth LeVan, 'Nonverbal Communication in the Courtroom: Attorney Beware' (1984) 8 Law & Psychology Review 90.

218 Blumenthal (n 147) 1189; See also Wellborn (n 146) 1075 ('There is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments.')

219 Laird (n 32) 136.

220 Williams (n 115) 285.

wear the veil are in the invidious position of having to choose between their religion and human dignity, on the one hand, and participation in the justice system, on the other.

Thus, the conclusion becomes indubitable that, in the balance between the accused's right to a fair trial and the female Muslim witness's desire to give evidence while wearing the *niqab* as an expression of her religious practice, the latter's right to freely exercise her religion in the courtroom should triumph.