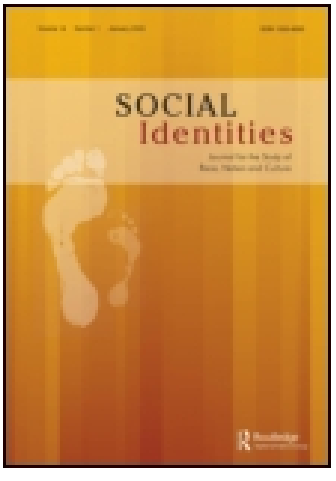

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Headscarf and burqa controversies at the crossroad of politics, society and law

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INTRODUCTION

Headscarf and burqa controversies at the crossroad of politics, society and law

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In recent years, discourses around the Islamic 'burqa'[1] have proliferated in Western Europe and in Canada. France and Belgium have been the epicentres of significant 'burqa' political storms, which have resulted in the passing of laws that prohibit full-face veiling in all public spaces. Other countries have witnessed similar debates, with the Netherlands coming close to adopting a law banning the burqa (Associated Press, 2012) and some Spanish municipal 'burqa bans' being struck down by Spain's Supreme Court in the name of freedom of religion (Di Leonardo, 2013). Canada has seen similar developments. While the Supreme Court rendered a decision giving great importance to the religious freedom to wear the niqab in the case of *R. v. N.S.*,[2] other Canadian debates echo the European anxieties over the Islamic veil. The government of the province of Quebec has put forward Bill 94,[3] which is designed to set guidelines for public officials who receive accommodation requests. Article 6 of the Bill specifically states that public servants and persons receiving services should follow the 'general practice' of 'showing their face'. While a change in government prevented the Bill from becoming law, persisting rumours at the time of sending this introduction to print hinted at a more radical prohibition of the wearing of religious symbols by employees of the Quebec public service, in the form of a legislative 'Charter of Quebec Values' (Canadian Press, 2013).

On the one hand, these recent discussions illustrate the reinvigoration of a secularist rhetoric that posits the Western modern 'invention' of face-to-face interaction as a universal indicium of civilization, excluding and stigmatizing those who derogate from these cultural constructs.[4] In this context, we have seen the emergence of several political alliances between feminists, neo-conservatives and secularists, all engaging in forms of 'governance feminism'[5] which place gender equality at the centre of a fictitious Western historiography opposed to barbaric 'invented traditions' (Hobsbawm & Ranger, 1992) of the Muslim world. On the other hand, the most common strategy of opponents to the banning of the veil has been to frame their arguments in the rhetoric of freedom of religion and constitutional (civil rights) law. Thus, a Muslim woman is currently contesting the French burqa ban before the European Court of Human Rights, relying heavily on freedom of religion.[6] In the wake of the adoption of the burqa ban in Belgium, Human Rights Watch (2010) adopted a similar position, arguing that the ban violated freedom of religion, thought and conscience, as well as the right to personal autonomy. Quebec's Bill 94 was criticized by the Canadian Civil Liberties Association (CCLA,

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2010) mainly on the basis of freedom of religion, freedom of expression and equality rights. In the Canadian case of *R. v. N.S.*, the appellant Muslim woman focused her argument mainly on freedom of religion.[7] Scholars have also embraced this intellectual framework. Many of us, myself included, have at one point or another mobilized concepts of constitutional law, and particularly freedom of religion, to discredit the burqa bans (Bakht, 2012; Fournier & See, 2012; Leckey, 2010).[8] This reliance on constitutional law to seek justice can be analysed as 'left legalism', defined by Janet Halley and Wendy Brown as endeavours 'in which the left [seeks] to mobilize the implicit promise of the liberal state that it will attempt to make justice happen by means of law' (Brown & Halley, 2002, p. 9). In the context of the burqa bans, the core of left engagement with legalism is the project of giving voice and agency to Muslim women through freedom of religion and its core idea of defending freely chosen beliefs. Moreover, this project is often combined with some form of political 'multiculturalism' that justifies robust conceptions of religious accommodationism (Ryder, 2008).

Scholars featured in this special issue aim to interrogate discourses brandished by *both* sides of the debate (repressive secularism and identitarian multiculturalism) to understand their hidden assumptions, internal contradictions, conceptual instabilities and constitutive effects. This endeavour is guided by a Foucaultian insight that discourses must be analysed as political *events* and not as mere neutral signifiers (Foucault, 1981). It draws inspiration from scholarly methodologies that aim to understand the cartography of (legal) discourse, i.e. how the latter maps and frames knowledge in politically charged categories, indeed binaries (Johnson, 1981; Santos, 2007). In this endeavour, queer theory provided great theoretical inspiration and pushed us to view those contradictions and binaries not as 'self-corrosive' or weakening the various political projects related to the burqa bans, but rather as enabling 'competitions for the material and rhetorical leverage required to set the terms of, and to profit in some ways from, the operations of such an incoherence of definition' (Sedgwick, 1990, p. 11). Accordingly, much attention was paid by our contributors to the political implications (the 'public texture', as put by Valérie Amiraux in the conclusion to this special issue) of legal discourses on burqa bans. Moreover, queer insights allowed us to develop substantive critiques of identity politics and led us to the conclusion that the ideas of difference and authenticity can unduly 'reduce power to a formalism of membership' (Warner, 1993, p. xix) and impoverish our political gaze. Judith Butler's argument that 'the anticipation of an authoritative disclosure of meaning is the means by which that authority is attributed and installed' (1999, p. xiv) inspired us to think more critically about the way in which discourses around the burqa bans, beyond the obvious function of sealing the fate of the garment, perform the more fundamental task of framing what it means to *be* (a Muslim, a woman, and even a non-Muslim) in a given polity.

Participants to this interdisciplinary project exchanged ideas and insights in various forums. On 17 and 18 May 2012, Professor Valérie Amiraux and I convened a workshop entitled '"Illegal" Covering: Comparative Perspectives on Legal and Social Discourses on Religious Diversity' at the International Institute for the Sociology of Law in Oñati, Spain.[9] Lori G. Beaman and Richard T. Ford gave the keynote addresses, and Robert Leckey, Anna Korteweg and Valerie Behiery delivered their talks before scholars from Belgium, Canada, France, Spain, the UK and the United States. Such an interdisciplinary setting allowed us to explore each other's fields and scholarly languages, from law (Richard T. Ford and Robert Leckey) and sociology (Anna Korteweg) to art history (Valerie Behiery) and religious studies (Lori G. Beaman). The workshop gave us all an

opportunity to read our respective insights together, to see how we could better envision the stakes of law, identity and power revealed by the burqa bans.

In this special issue, Richard T. Ford, a prime legal scholar and commentator of US race and discrimination matters, performs a critical *tour de force* against left legalism's unintended effects and conceptual incongruities by shifting his gaze to the old continent, France in particular. The results of his analysis are startling. On a theoretical level, Ford mobilizes Michel Foucault's concept of pervasive power relations to map the processes which shape the act of veiling in the West. In his account, powerful members of the Muslim community do structure the meaning of the veil, as do myriads of other relational and political processes, which are not reducible to choice and sincere beliefs. Moreover, the Muslim subject is not merely repressed by the burqa ban, but wholly *constituted* by it in many unexpected ways. Ford here advances a critique of the foundations of European and pre-realist American private law, relying on economist Ronald Coase's 'joint costs' analysis rather than the 'victim-and-perpetrator' model of legal reasoning. The implications of this line of inquiry are powerful: the question of whether a Muslim woman is the 'victim' of infringement on religious freedom becomes a loaded, complex distributive question rather than a clear case of fighting state repression of autonomous cultural subjectivity. Following Ford's decentralized approach, not all accommodation claims regarding the burqa should necessarily be successful. The answer will depend upon a normative policy choice in each context. This inquiry allows us to open up our analytical gaze to myriads of political objectives, economic goals and social considerations that were hidden from view by the vision of the rights bearing Muslim woman as a victim. Civic culture-building, social cohesion and women's emancipation thus cease to be portrayed as mere rhetoric to bully Muslims and are evaluated as full-fledged policy objectives, as is the fight against social exclusion and bigotry, in which Ford is deeply engaged. This does not imply that the ban will further all or even most of these objectives. However, it allows for that possibility, as Ford so intelligently argues. Finally, Ford's proposed way forward decentres the Muslim subjectivity to call for the 'integration of disadvantaged and socially isolated groups, regardless of whether that requires the accommodation or the suppression of the distinctive practices of minority groups' (this volume).

Lori G. Beaman, a renowned scholar of gender and religion and the director of the *Religion and Diversity Project* at the University of Ottawa,[10] was the other keynote speaker. In her contribution, Beaman brilliantly decentres traditional invocations of the Muslim subject by insisting that we connect the dots between Western women's struggles and agency and the situation of veiled Muslim women. Her deconstruction of the sameness/difference binary, which still structures feminist thought on the veil, led us to considerably enrich our thinking on the gendered nature of the burqa bans. Beaman thus refuses the secularists' idea that while non-veiled women are 'free' and 'equal', Muslim women exercise no agency and are wholly oppressed by religion (part of what she calls 'difference thinking'). Beaman also refutes another mode of difference thinking, which leads to cultural relativism and the refusal of any cutting across the 'woman' category. Moreover, she criticizes the radical feminist ideas of sameness and false consciousness, according to which the burqa issue is simply a matter of universal women's oppression. In opposition to these perspectives, Beaman develops an inspiring proposition for a feminist jurisprudence based on a contextual quest for *similarities* between various categories of women. In Beaman's capable hands, it is not only the sameness/difference binary which falls apart, but also the coercion/consent binary, as she develops a

conception of agency rooted in 'relationships which are directly bound up in [women's] decision-making' (this volume). In so doing, Beaman opens the door to rethinking traditional feminist accounts of power, which often rested on a rigid opposition between coercion and freedom. In this, she echoes Richard T. Ford's contribution. This dense theoretical exploration culminates in an inspiring call for 'a focus on similarities between categories that renders more fluid the boundaries between the categories themselves' (Beaman, this volume).

Robert Leckey, a legal scholar whose work on constitutional law and queer theory has been awarded the International Academy of Comparative Law's Canada Prize, offers a path-breaking application of the classic queer analyses of Eve Sedgwick, Judith Butler and Janet Halley to the question of the burqa bans. Leckey elaborates a sophisticated exploration of legislative debates surrounding a particular form of legal regulation of the burqa, Quebec's Bill 94, to shed light on its constitutive effects. Just like Richard T. Ford, Leckey starts with the Foucaultian idea, canonical to queer theory, that regulation does not merely repress identity and subjectivity but produces it. Leckey innovates by focusing this analytical gaze on the intricacies of state discourse, mapping the latter's fluid manifestations. The resulting picture regroups in one highly agile text the 'occasions on which the minority and the so-called majority redefine and reconstitute themselves reciprocally' (Leckey, this volume), i.e. where the Quebec nation is constituted as secular, while the minority is constituted as wholly religious. Leckey also devotes much space to the discourse's slipping between views of religious identity as knowable and unknowable. The veil's signification is thus simultaneously held by Quebec politicians to be reducible to one thing (women's oppression) and to signify many things (political activism, cultural affirmation, etc.). Interestingly, Leckey notes that the conventional strategy of claiming that the burqa has multiple significations undermines the claim to freedom of religion, which is based on the notion that the veil means only one thing: religious piety. Discourses in favour of the bans thus reveal a significant contradiction in identity politics. Leckey ends by moving beyond queer theory to map some of the considerations underlining Quebec's curtailment of face covering. His rich analysis reveals that much of the discourse around Bill 94 is not best understood as 'majority-minority' interactions, but as dynamics of 'community-affirming impulses' that go beyond simple conceptions of Muslim subjectivity repressed or controlled by the state.

Anna Korteweg, a Dutch-born sociologist who has conducted substantial fieldwork and interviews in European Muslim communities and whose book (*The Headscarf Debate: Conflicts of Belonging in National Narratives*, co-authored with Gökce Yurdakul) is forthcoming with Stanford University Press, brings her unique gaze to our special issue. Korteweg presents here a case study of the Dutch debates on the headscarf, which is directly related to discussions on the burqa bans. The peculiar proposal of the Dutch far right – a tax on the wearing of headscarves instead of an outright *ban* – allows us to better conceive the distributive stakes of state laws regulating the veil/headscarf. In this case, there is no absolute prohibition, only the idea that the headscarf produces social costs ('pollution', according to the far right) that must be compensated. This case study, in the hands of Anna Korteweg, becomes a way to measure the distributive stakes of the law by chronicling the various political reactions of differently endowed stakeholders, be they groups or individuals, from the Muslim communities and beyond. Korteweg significantly enriched our discussions with insights from the field and empirical data. For instance, her interviews reveal that because of the debates around the proposal of the 'headrag tax', the headscarf 'is increasingly not a religious symbol but a sign of protest'

(Korteweg, this volume). Relying on her fieldwork, Korteweg further notes that 'making the headscarf taxable would not remove it from the public sphere but attach a new layer of meaning to the cloth, [which would be] worn by the truly devout or the truly rejectionist' (this volume). Korteweg's rich case-study thus allows us to see that, far from merely repressing Muslim subjectivity, the 'headrag tax' proposals and burqa bans (and the reactions they provoke) should be understood as constituting new forms of power/knowledge across the social body.

Finally, Valerie Behiery addresses in her piece the aesthetic genealogy of the Islamic veil, offering yet another way to measure its social stakes beyond geopolitics, philosophical disagreement and even social practices of exclusion. Instead, Behiery insists that we conceptualize the veil as imbricated in 'the more intimate and complex [tensions] among form, image, culture and self' (this volume). She traces the origins of the dominant Western scopic regime, in which vision (to see and be seen) is central, to the fact of marking Christ as the observable, earthly image of God. Behiery argues that the Christian West's foundational ocularcentrism and visual anthropomorphism has led to secularism and an 'individual-centred society based on human rights' (this volume). By contrast with this Western visual trope, Behiery describes the dominant Islamic regime, which focuses on aurality, 'because text – the Qur'an – and not a sacred prophetic body, forms its paradigmatic mystery and core'. Here, image and visibility do not have the same importance for subject formation as in Western culture. Having described at length these two semiotic systems, Behiery gives us brilliant hints at their possible imbrications in political contestation. Interestingly, far from reinforcing either the idea of a consistent secular model that could be imposed on Muslims or that of a coherent Islamic (visual) culture that could be brandished in the name of identity politics, Behiery's contribution highlights the slippery and unstable nature of the political implications of the scopic regimes. Using the example of the 2011 World Press Photo of the Year, which shows a burqa-wearing woman caring for an injured young man, Behiery analyses the acclaim generated by the picture in the West despite its shunning of subject-formation through facial visibility. Behiery argues that the photo was celebrated in part because of its resonance with another central Western visual trope: that of Mary mourning Jesus, as notably represented in Michelangelo's *Pietà*. Such an artistic artefact, Behiery argues, was sufficient to create a partial and unstable cultural junction. Thus, rather than coherent antagonistic visual tropes, Western and Islamic regimes are complex amalgams of contradictory impulses that can meet to produce convergence as well as divergence in the *eros* of the politics of vision. Behiery closes her paper by suggesting that the two scopic regimes can further intersect, seeing as they both rest on the 'co-existence and co-dependence of the seen and the unseen' (this volume). There may thus be many conflicting political desires to explore in the overlapping visual regimes of 'Islam' and 'the West', and Behiery's paper offers a path-breaking introduction to such an interdisciplinary project.

Contributors to this special issue, while they analyse both state justifications for the bans and left legalist responses, share a particular concern with the latter. Indeed, we are animated by Wendy Brown and Janet Halley's insight that 'legalism has regulatory capacities which have been particularly dangerous for left projects because they remain so unstudied, so unavowed' (Brown & Halley, 2002, p. 11). This also aligns with Jeannie Suk's warning against 'how the characteristic logic, ideology, rhetoric, and momentum of a law reform project can become conventional wisdom and then be extended without reflection on their meaning' (Suk, 2009, p. 13). These concerns made a study of left

legalism particularly pressing for many participants. In this introduction, I attempt to read together the interdisciplinary contributions to this special issue to map the conceptual instabilities, blind spots and political/theoretical costs associated with the freedom of religion legal strategy espoused by many actors opposing the ban. Specifically, I touch upon two discursive binaries that lie at the core of left legalism's conceptual apparatus and that are interrogated by the contributors: the *state intervention/non-intervention* binary, which allows religious claims to revolve around a sphere of individual autonomy and freedom to be preserved through the neutral language of law, and the *coercion/consent* binary, which gives the private sphere of identity its content by recasting wildly contradictory forms of power/knowledge as mere 'choice' and 'freedom'. I focus my discussion on this twofold discursive structure, outlining the mystification it produces and the political stakes it hides from view. I end by assessing the political effects of uncritically using the discourse of constitutional left legalism and propose a more promising approach to left engagement with the burqa bans.

State intervention/non-intervention

Constitutional arguments against the ban (whether rooted in freedom of religion, gender equality, the right to privacy, or other doctrines) all rest on and are obsessed with state action: the suffering of veiled Muslim women, we are told, comes from this *specific* legislation (state intervention) and the goal is admittedly to repeal the law to re-enter a space of (state) non-intervention. It is no surprise that both the European Convention of Human Rights (ECHR) and the Canadian Charter of Rights and Freedoms apply almost exclusively to rights violations by the state (whether through legislation or government action).[11] Furthermore, as a general rule, respect for human rights does not require positive actions on the part of the state; rather, it requires abstention and respect for the prerogatives of individuals, which are deemed to exist autonomously outside the political state. Such a focus on the state by activists and scholars can be misleading. In fact, before the adoption of the burqa bans, the wearing of the veil was already regulated by myriad legal norms, from university/hospital/state agency policies and labour collective agreements to municipal bylaws regulating face covering in the context of carnivals and public festivities.[12] When we add up all these decentralized rules prohibiting/restricting/regulating the veil in the absence of a ban, the idea of non-intervention is less convincing. Furthermore, for a century now, legal theorists influenced by American legal realism have considered that purported non-intervention by the state often entails indirect forms of intervention. What may be perceived as legislative silences are actually decisions to leave the regulation of a given practice to the rules of private law and non-state normativity in the private sphere. For instance, as revealed by Anna Korteweg's multifaceted fieldwork, even in the absence of a ban, the choice to wear the burqa or not while looking for an apartment to rent will be made according to pressures and norms mutually imposed by the parties themselves (not wearing the burqa for an apartment visit, finding a landlord who does not discriminate on the basis of the burqa, choosing a Muslim-majority neighbourhood, etc.). As argued by Lori G. Beaman and Richard T. Ford, the absence of prohibition does not leave women 'free' to wear the burqa; it simply means that the latter's regulation will remain 'hidden' in the sphere of (landlord-tenant or neighbour) private interaction, which in turn is regulated by the background rules of tort and contract/housing law.[13]

The on-going discussion of the intervention/non-intervention binary can be tied to the ideas of French philosopher Louis Althusser. According to Althusser's 'performative' conception of ideology, individuals are never autonomously defining themselves as subjects. They have no 'pure' (religious) identity, because the veil acquires meaning only in relation to other persons and institutions. In their everyday life, Muslim women are always interacting with state and private 'ideological apparatuses' (Althusser, 1997), for instance by wearing the veil in defiance of the ban or of their landlord's decision, in response to puzzled looks (or insults, compliments, accustomed responses) from the neighbours and family members, etc. This conception contradicts the liberal rationale of religion as pure identity situated outside the state and directly ties in to the critique of the intervention/non-intervention binary: when the state chooses to confine itself to the role of neutral arbiter, it is actually leaving private ideological apparatuses interact with and regulate individuals. Thus, (religious) subjects are never outside interpellation. This is not to say that they have no autonomy. As put by Judith Butler, interpellation by exterior norms 'does not produce the subject as its necessary effect, nor is the subject fully free to disregard the norm that inaugurates its reflexivity; one invariably struggles with conditions of one's own life that one could not have chosen' (Butler, 2005, p. 19). Muslim women participate actively in shaping their subjectivity in the constrained reality of social relations. However, the only way their religion/identity can mean anything at all is through these social interactions, an idea which also goes to the heart of both Lori G. Beaman's theory of agency and Valerie Behiery's exploration of the conflicting cultural visions of the veil. So, the criticism of the ban as undue intervention in the private affairs of Muslim women is misleading, as it does not account for the subject formation from which identity originates, a point that also informs Valérie Amiraux's concluding remarks. This leads me to the next binary, that of coercion/consent.

Coercion/consent

The legal doctrine of freedom of religion rests on the idea of freely chosen beliefs. While there are certain differences in the legal tests applicable in different judicial arenas, in particular as to the extent to which 'objective' conformity with official religious dogma is relevant,[14] in every jurisdiction the emphasis is on inner conscience and the fact of not being coerced by the state into relinquishing freely chosen practices.[15] Freedom of religion constitutional claims thus present as a sincere belief the wearing of the veil in particular circumstances, i.e. most often in public, outside of the restricted family circle. Moreover, they do so by mobilizing a legal institution deeply grounded in the idea of uncoerced spirituality and consent. This outlook is problematic in its political implications. Why do we assume that (all?) Western Muslim women 'sincerely' believe in the necessity of wearing the veil in those particular circumstances, or 'freely' choose to do so? Could it be that Muslim women do not have complete consent or coercion but, rather, that they (like all women, in fact) behave according to a continuum between those two opposites? This touches upon the feminist debates on women's agency, which this special issue revisits. As Lori G. Beaman so rightfully insists, the burqa ban issue forces us to reconsider conventional feminist accounts of agency, which are trapped in the all-or-nothing mode of sameness/difference, coercion/consent binary thinking. In so doing, we can draw significant insight from the Critical Legal Studies (CLS) literature on power and agency.

In a Western context, analyses like Duncan Kennedy's 'Sexy Dressing' (1993) reveal the *strategic*, instead of merely ('free' or 'coerced') *expressive* use of dressing such as high heels and sexy clothes. Kennedy examines two positions on the link between sexy dressing and rape in the US. First, he analyses the liberal patriarchal position, which sees in sexy dressing the free acceptance of a contractual obligation to perform extra-marital sexual intercourse, on penalty of sexual assault ('she asked for it'). Second, Kennedy notes that radical feminists often oppose to this twisted narrative of sexy dressing as contractual freedom a theory of total male power, arguing that men systematically force women to respond to their socially constructed desires on penalty of rape, violence and/or daily stereotyping. Kennedy complicates *both* these narratives by putting forward a Foucaultian model of sexy dressing as a semiotic instrument in which pleasure is symbiotically associated with power. Kennedy attempts to understand the multiple stakes of differently situated women in the regulation of sexy dressing, finding that these interests rarely converge into the 'abolition' of sexy dressing, however tied to rape the latter may be. Instead, any modification of the sexy dressing 'regime' will bring about a reshuffling of the cards for various groups of men and women who manipulate the variables of the patriarchal regime to produce power, resistance and pleasure all at once (Kennedy, 1993, p. 1358). Kennedy teaches us that Western women may have many complex reasons for adopting conventional patriarchal symbols, and this behaviour cannot be reduced to false consciousness. Neither are these 'freely' chosen preferences. They are strategic choices made in always-already constrained relational environments, and their costs and benefits vary according to the circumstances.[16] Duncan Kennedy's thinking on feminine sexy dressing can apply *mutatis mutandis* to the Islamic veil, as both forms of dressing can be analysed as strategic mediums of interpersonal relations rather than unilateral instruments of submission (the burqa ban secularist claim) or 'free' expression (the freedom of religion claim). This vision of (constrained) female agency can perhaps be what Lori G. Beaman argues we must uncover.

When we apply the 'Sexy Dressing' CLS approach to the veil, we quickly start to move away from the idea of the garment as freely chosen. Focusing on power relations instead allows us to comprehend how the 'knowledge' (in the Foucaultian sense of individual subjectivity) behind the veil is produced, as Richard T. Ford and Robert Leckey insist we must do. If the 'modern soul' is the 'effect and instrument of a political anatomy' (Foucault, 1979, p. 30), how is the Islamic soul (or gaze) formed? A few ideas come to mind, though this 'genealogy' requires thought and research. For instance, why is the veil mostly worn in public, outside the family residence (Bodman, 1998, p. 4; Mernissi, 1975, pp. 142–143)? This practice is certainly shaped by socio-legal processes revolving around the Muslim family. Here, Janet Halley and Kerry Rittich's (2010) (legal) analysis of the genealogy/*invention* of family law as a distinct and autonomous domain, i.e. a *field* in part born from colonial law-making processes, may be relevant. Perhaps the peculiar way of framing the wearing of the veil as a ritual required only outside the family circle stems in part from the shaping (both by colonizers and indigenous nationalist elites) of the Muslim subject as part of an essential tradition embodied by the Muslim family (e.g. Halley & Rittich, 2010; Hamoudi, 2010, p. 307).

Thus, the particular circumstances in which the veil is worn may have been determined not by sincere beliefs or 'choice', but by complex processes of creation of knowledge. Following Lama Abu-Odeh (2010), we can view the veil as a powerful instrument to regulate women's performance of gender, especially with regards to the 'honourable' nature of their public behaviour. As demonstrated by Abu-Odeh, this

regulation of gender performance is often manipulated by various groups of stakeholders from the Muslim community/polity itself (Islamists vs. post-independence secular nationalists in the Third World context, for example). The result is a shifting terrain of prohibitions and permissions, which often involves the veil and comes to define what it is to be a Muslim woman in a given milieu. For instance, a strategic wearing of the veil might make desegregated public spaces in Arab countries acceptable to the religious establishment (Abu-Odeh, 2010, p. 950). Inversely, as Abu-Odeh remarked elsewhere, women may actively use the garment as a tool to change the nature of their interactions in the 'public sphere' (Abu-Odeh, 1993, p. 29). This instrument may allow them to brandish religious piety against male assertiveness and intrusion, thereby securing the approval of bystanders in refusing public male harassment. Valerie Behiery, in her contribution to this special issue, provides valuable insight into the (contested) cultural significations of the veil that might influence the playing out of these social processes of meaning attribution.

Anthropologist Lila Abu-Lughod's classic fieldwork among Egyptian Bedouin communities echoes this sort of dynamic analysis of the micro-level relationships that determine the signification of the veil. For instance, she analyses the habit of veiling before certain categories of men and not others as stemming from practices of caste and social hierarchy, irrespective of individual and autonomous 'belief'. That is why the Bedouin women she studied were more likely to veil before men of higher social status than before their husbands' dependents, clients or males of lower social status (Abu-Lughod, 1986, p. 162). These examples, which mostly pertain to non-Western societies, nevertheless have much to teach us on how to study the functions of veiling in the specific context of the Western Muslim gaze. In all these accounts, the veil emerges as a multifaceted instrument of power that cannot be reduced to mere religious belief, as forcefully argued by many contributors to this special issue. In fact, the contributors invite us to ask complex questions: who are the stakeholders involved in the shaping of the 'Western' practices of veiling? What are the power relations that structure and inform this creation of knowledge which is subsequently re-inscribed as sincere 'choice'? Asking these questions disqualifies the ideas of 'freedom' and 'sincere belief' which permeate the discourse of left legalism and sets the stage for innovative genealogical research projects.

A critique of left legalism

One possible conclusion from these discussions is that we should be wary of the ways in which left legalism (whether European or North American) structures our thinking. Constitutional legalism functions in rigid binaries which do not account for the complexities of daily life in the Muslim West. These binaries serve to cast the (Muslim) subject as autonomously existing *outside* power, by inventing freely adopted cultural practices (the coercion/consent binary), spheres of imagined immunity from state intervention to preserve the so-called choices (the intervention/non-intervention binary) and, finally, a sphere of doctrinal purity, i.e. law, which can be relied on to mediate and resolve the conflicts over the boundaries of the zones of unconstrained identities. This special issue reminds us of the following: if we think a ban on veiling is a bad idea, it should not be because of the existence of abstract 'freedoms' independent from politics, neither because of sincere beliefs or choice, nor because the state should leave Muslim women alone (it never does, as many of our contributors argue). The ban is a bad idea, we could say, because it would *probably* reinforce racism and make *most* Muslim women more dependent on the patriarchal sectors of their communities by further estranging

them from the public sphere. But even then, this special issue pushes us to explore the issue further before we can have a clear opinion on these hard normative questions.

Rather than merely attacking the binaries of legalism as 'false', perhaps the way forward is to focus on the effects of using this discourse. What does it prevent us from seeing? What are the effects on the act of veiling itself and on Muslim women's subjectivities? For instance, as suggested by Richard T. Ford and Robert Leckey, could it be that we are intensifying the burqa as a pious manifestation of Muslim faith and Muslim identity? Could it be that insisting on the burqa as a free, sincere exercise of freedom in the private sphere, instead of a complex instrument of power and knowledge, makes it *more* religious than it really is? Are we, through our constitutional doctrines, producing *more burqas*? As Karl Marx wrote in his sophisticated piece 'On the Jewish question', because of the secular, liberal conception of religion as private and apolitical, 'religion not only continues to exist but is *fresh* and *vigorous*' (Marx, 1978, p. 29) in secular societies. Maybe the burqa will be called upon to become an important symbol of religiosity for many Muslims who did not identify with it at first.

The binaries of constitutional law can perhaps also be analysed, following Wendy Brown, in part as manifestations of a Nietzschean *ressentiment*, the 'reworking of [suffering] into a negative form' (1995, p. 70) by the subordinated Muslim woman subject who confronts her socio-political injury with liberalism's paradoxical invocation of equality and liberty. Rather than blame herself for her subordination, as suggested by liberalism's formal equality, the Muslim woman casts the cause of the injury outside herself and her identity and holds it to be autonomous and marginalized by outside forces (the coercion/consent binary). As a consequence, the creation of power/knowledge outlined in this special issue is occulted, laid to rest by politicized identity's 'impulse to inscribe in law and in other political registers its historical and present pain rather than conjure an imagined future for power to make itself' (Brown, 1995, p. 66).

Another effect of portraying the ban as undue state intrusion in the faith of members of the 'Muslim minority' may be to hide from view the ways in which a ban on veiling will shift power relations in the Muslim communities, for instance by emboldening certain actors that oppose bigotry, empowering 'radicals' over 'moderates', adding relational value to the veil as a sign of defiance, etc. In this regard, the case of Rachid Nekkaz, the French Muslim businessman who is offering to pay all the fines imposed for wearing the burqa 'in whatever country in the world', is fascinating. This man went to Brussels in 2011 to pay the fines imposed on some women under the Belgian burqa ban (France 24, 2011). If he continues to do so, this will essentially neutralize the effects of the law for most women involved. However, it will certainly also shift the dynamics of power within the Muslim community in important ways for him and others who pay the fines. He has already been accused by some NGOs of exploiting this issue for his own political and economic gain inside the community (France 24, 2011). Likewise, the 'headrag tax' debates described by Korteweg demonstrate how laws often function not as absolute prohibitions met with pious resistance, but as distributive mechanisms met with divergent reactions from stakeholders negotiating their identity in the shadow of the law.[17] This exemplifies how burqa bans will have myriad unequal effects on differently situated women and stakeholders, depending on the (perceived) costs and benefits of every decision. What are the alliances being formed around this issue among groups, religious authorities and economic players?[18] These crucial issues are put out of sight by the constitutional vision of the autonomous Muslim subject.

The idea of religious freedom might also hide from view parts of the lived reality of Muslim women. It might prevent us from thinking beyond the idea of freedom, to understand the complex relationship Muslim women may have with the veil, as they navigate through community, family and personal relationships, which are inevitably ridden with power relations, as Lori G. Beaman and Richard T. Ford both remind us. Moreover, it might prevent us from systematically tracing the origins (and implications) of these power relations in the sensuality and *eros* of cultural regimes of vision, following Valerie Behiery. Only once we analyse these power relations can we decide whether banning the burqa is a good or bad idea or, said differently, whether it produces positive or negative outcomes. For instance, let's say we have a sample of 100 Muslim women. Can the ban possibly allow 10 women to leave unhappy and abusive relationships (their conservative husbands simply cannot accept to remain married to an unveiled woman)? Can it allow 10 others finally to remove the burqa by brandishing the religious rule according to which Muslims must respect the secular laws of their country of residence? Will it alienate some 40 others from the public sphere and make them worse off than before the ban? Conversely, could it raise the identity stakes of the burqa and allow some 10 other women to gain added credibility in their community by wearing the burqa, or even the hijab, as a sign of defiance of perceived Western 'repression' and bigotry? Could it allow some 10 women to negotiate a compromise with their husbands, to wear the headscarf instead of the burqa and thus feel less contempt on the streets? On a more 'personal' (but no less important) level, will it render the burqa more attractive, sexier for some 10 women who might be tempted to wear it to court the more religious members of the community? Or, inversely, will it make the veil less pious and more political, alienating some 10 burqa-wearing women from the moderate mainstream of Muslim communities, which does not value militant identity politics? Will the strategy of opposing to the ban a claim of united religious piety advance all (or even most) of these differentially situated women's interests? One can doubt it, as many of the fictitious interests just identified directly contradict each other. In any event, in the sphere of intimate power/knowledge, constitutional legalism will probably impede the power struggles left multiculturalists care about by hiding them from view.

There may be costs to employing the conceptual tools of left legalism, and we should at least acknowledge them if we are to engage in constitutional strategies on the burqa ban issue. This study will not only provide a more lucid view of the discursive practices of left multiculturalist lawyers; it may also provide us with new legal and political strategies. We could opt, as cleverly proposed by Amr Shalakany in reference to Janet Halley's work, to 'take a break' from the post-colonial theory which has so readily allied itself to left legalism and multiculturalism (Shalakany, 2007). We could substitute this with a string of pragmatic theoretical insights that might include feminism, Marxism, deconstruction, queer theory and some forms of post-colonialism. Indeed, the idea is not to dismiss post-colonialism and/or left legalism as always useless. Rather, their contradictions and conceptual instabilities may, as with any given discourse, prove to be useful 'tactical elements or blocks operating in the field of force relations' (Foucault, 1978, pp. 101–102). Our contributors remind us, however, that this assessment should not rely on a reductionist conception of the 'Muslim minority' as a monolith oppressed by the 'West', but on a contextual, dynamic conception of power relations between various groups and sub-groups that cut across the 'Muslim' category. This special issue thus approaches the burqa bans by piecing together different theoretical and disciplinary insights which might provide a momentary 'break' from multiculturalism and left

legalism. Perhaps this 'break' can allow us to heed Halley's call to 'tak[e] into account as many interests, constituencies, and uncertainties as we can acknowledge' (2006, p. 9), an idea which goes to the heart of all the contributions to this special issue. So the question becomes, not *whether* to use a given legal discourse, but *when* to do so and, most of all, *in whose interests* at a given moment.

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Notes

1. In this Introduction, I use for brevity's sake the word 'burqa' to refer to the various face-covering Islamic veils such as the niqab, the burqa and the chador, in accordance with frequent uses of the term in media and political debates.
2. *R. v. N.S.*, [2012] 3 S.C.R. 726. The Supreme Court purported to balance the religious freedom of N.S., a Muslim woman contesting an order that she remove her niqab to testify as the complainant in a sexual assault case, against the right of the accused to make full answer and defence. In doing so, the majority insisted on the importance of credibility and character evidence and concluded that women may be ordered to remove their niqab in certain circumstances. However, the Court refused to forbid veiled testimony categorically, stressing the importance of freedom of religion in the Canadian constitutional order.
3. Bill 94, *An Act to establish guidelines governing accommodation requests within the Administration and certain institutions*, 1st Session, 39th Legislature, Quebec, 2012 ('Bill 94').
4. Robert Leckey and Valerie Behiery's contributions to this special issue intelligently evidence this idea's rootedness in Christian theology and Western modernity.
5. I borrow this expression from Halley, Kotiswaran, Shamir and Thomas (2006).
6. Case *S.A.S. v. France* (43835/11) Muslim woman wearing niqab forbidden to cover her face in areas open to public and banned from public facilities: communicated (2012, February 22), *European Court of Human Rights News*. Retrieved from http://echrnews.wordpress.com/2012/02/22/sas/. The woman also argues that the ban from public facilities, the refusal of services and the potential exposure to fines are degrading treatments and are thus discriminatory.
7. See *R. v. N.S.*, *supra* note 2.
8. Other dear colleagues, while not advancing freedom of religion claims *per se*, made some arguments centring on the 'subjectivity', 'choice' or 'agency' of Muslim women, which are directly concerned by the critique I am elaborating here (Laborde, 2010; Malik, 2008).
9. This workshop was organized with the generous financial support of Valérie Amiraux's Canada Research Chair for the Study of Religious Pluralism and Ethnicity and my own University of Ottawa Research Chair in Legal Pluralism and Comparative Law.
10. The *Religion and Diversity Project* is a collective research grant of $2.5 million awarded by the Social Sciences and Humanities Research Council of Canada (SSHRC) to 36 Canadian scholars (see http://www.religionanddiversity.ca/).
11. On the European Convention of Human Rights, see Knox (2008, p. 4). On the Canadian Charter of Rights of Freedoms, see the Supreme Court case *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.
12. Such bylaws were enforced against burqa-wearing Muslim women in Belgium prior to the adoption of the burqa ban (Mathieu & de Hert, 2011).
13. Legal realist Wesley Hohfeld made this a key point of his analyses (1917), as did Robert Lee Hale (1923).
14. In Canada, freedom of religion claims rest on the notion of individual subjectivity and sincere beliefs, irrespective of objective conformity to widely accepted religious dogma. See *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at para. 46; *R. v. N.S., supra* note 2 at paras. 12–13

and 51. It would appear that the European Court of Human Rights (ECHR) case law does not disregard objective conformity to recognized religious practices. Indeed, some observers write that protection under the ECHR does not 'necessarily' extend to cases where 'a person attempts to adapt his conduct to his moral obligations in ordinary life, but his behaviour does not strictly consist in religious teaching or directly correspond to specific ceremonial practices' (Martínez-Torrón, 2012, p. 370). Interestingly, Martínez-Torrón reports that the United Nations human rights corpus is closer to the Canadian 'subjective' approach than that of the ECHR (2012, p. 369).

15. Even under the less 'subjective' test of the ECHR, the focus is on protecting individuals from 'being obliged to act by the State in a way that runs counter to one's inner beliefs' (Evans, 1997, p. 294).
16. For a similar perspective on Muslim and Jewish women's interactions with religious family law, see Fournier (2012).
17. This expression is borrowed from Mnookin and Kornhauser (1979).
18. For a brilliant analysis of sex work regulation in India along the lines of what I am suggesting here, see Kotiswaran (2011). For another illustration of such a 'left law and economics' approach, this time in the context of US low-income housing markets, see Duncan Kennedy (2002).

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