

The right to testify while dressed as Darth Vader

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Suppose I sit to give testimony in court wearing a Darth Vader costume. May the judge require me to remove my costume, or at least my face mask?

According to the Supreme Court of Canada decision rendered last Thursday (20 December 2012), no, the judge may not, not unless she has made four different difficult determinations (“Justice and the niqab,” December 20, 2012).

First, she has to determine whether I'm sincere in my reasons for dressing as Darth Vader. What my reasons are is not to the point, just whether I'm sincere about them.

If she determines that I am not sincere, she may require me to remove my costume. Otherwise, she has to determine whether the case is about a matter serious enough to warrant forcing me, against my sincere wishes, to remove my costume. (Apparently she may not simply consult the defendant whether it is.) Suppose she determines that the court is indeed meeting today on a matter of importance. Now she has to determine whether my testifying dressed as Darth Vader introduces a significant risk of unfairness into the trial. (Apparently just a little unfairness would be okay.)

I'm sincere about my clothing, but the trial is about something important and my testifying in costume will likely introduce a real element of unfairness into the proceedings. So now may the judge require me to show my face as I testify? No, not yet. Finally, before ordering me to compromise my sincere wishes, the judge must determine that her order will not inhibit other sincere mask-wearers from reporting or testifying about alleged crimes.

Some critics of this decision have complained about the high degree of arbitrariness it will introduce into court proceedings. It will frequently happen that judges with the same evidence will make different determinations, for a judge's determination will depend not only on that evidence but on what the judge cares about.

These critics might be right, unless judges regularly take court proceedings or fairness to be important, in which case all masks will be ordered off, or judges are concerned to appear sensitive to our multicultural reality, in which case no mask will be ordered off.

That its arbitrariness isn't my criticism of the decision should be clear from my supposing myself to be wearing a Darth Vader costume, rather than a niqab. That the Supreme Court decision was about the niqab rather than any old dark costume indicates that religion was a factor here. My complaint, rather, is that the decision is a blow against both secularity and civil liberties.

It is a blow against secularity, for it privileges religious belief and commitment. Now I might, of course, claim that I wear a Darth Vader costume to trials for religious reasons, thereby

requiring the judge to charge up her sincerity metre. But I'm an atheist. Okay, then, I wear it for creedal reasons. No, as I said, I'm an atheist—I go in for neither religion nor stuff that might as well be religion.

I have my reasons for testifying in Darth Vader garb, and if someone's religious reasons for testifying in similar garb are good enough, then my non-religious reasons are good enough as well, or at least that is how it would be in a secular society.

How is it that a reason of religion gets a pass where other reasons don't? How, for instance, is it better to mutilate a child's penis for reasons of religion than for equally ungrounded reasons of health? How is it right for us to tolerate unfairness out of concern for religion but not out of concern for other things that matter to people?

The problem, of course, is the deference to religion built into our Charter and our culture generally. For us secularists, the decision is disappointing, for it reinforces religious privilege.

My second claim, that the decision is a blow against civil liberties, might seem paradoxical, for freedom of religion is itself a civil liberty. It is, but so, too, are freedom of dress and freedom of self-presentation. The decision infringes these civil liberties, for it renders the rest of us (insincere Muslim women, non-Muslims) unfree to testify while wearing a niqab.

Ironically, respect for freedom of dress and presentation would do just as well for sincere Muslim women as deference to religion will, and without them having to be scanned for sincerity.

The first part of the civil libertarian's position, again, is this: either anyone may, for whatever reason under the sun, wear a niqab or Darth Vader costume while testifying or nobody may. That's just plain equality as a function of state impartiality. The second part of the civil libertarian's position is that no one may wear a niqab or Darth Vader costume if doing so threatens to compromise justice in even the slightest.

An objection to the idea that sometimes fairness may be compromised in service to other values, religious requirement, say, is that the mute and the paralysed often give evidence at trials, and, sometimes to the detriment of the defence, they can reveal no more by tone or expression than people behind masks can. The objection fails because the analogy is false. A person behind a mask isn't like a person with a face paralysis but like a person pretending to be paralysed.

What it comes down to, for a civil libertarian, is whether seeing a person's face while they give evidence really does promote fairness. If it doesn't, then no one should be required to surrender freedom of dress in order to testify. (I suspect most of us have our doubts that it makes any difference.)

The one significant objection to leaving witnesses free to cover their faces when it makes no difference to fairness is the openness and publicity objection, voiced by Mr Justice Louis LeBel. That people present themselves to other people openly, with their faces unobstructed, is, though, a social ideal best attained socially, and not through regulation. That I respect your freedom to dress as you will does not imply that I will not criticise your anti-social fashion choices or refrain from attempting to argue you out of them. On the contrary.