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Gendering Islamophobia to better understand immigration laws

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ABSTRACT

This paper examines two recent developments in immigration law in Western liberal democracies: security exclusions and forced marriage provisions. It aims to consider how both of these settings are influenced by a pernicious Islamophobia and by gender. And, of course, by the intersection that creates a gendered version of Islamophobia. The overarching aim of the work is to consider whether and how human rights arguments are likely to be effective in immigration law. The work proceeds by developing the ideas of ‘unknowability’ and ‘unintelligibility’ as two ways to describe how Western law responds to Islam, and in so doing, contributes to Islamophobia.

KEYWORDS

Law; Islamophobia; security; forced marriage; gender

As a legal scholar and migrant advocate, I am keenly interested in human rights – when they work and when they fail. In migration law, rights arguments fail frequently. I remain hopeful that if we can understand this failure better, we can mitigate against it, somehow. My challenge here is to puzzle out the role that human rights arguments have had in confronting the pernicious Islamophobia which is one of the key markers of the contemporary politics of immigration.

This paper evaluates the success of human rights arguments in confronting Islamophobia in immigration law. Taking two examples where there have been significant legal developments since the beginning of the twenty-first century, the paper shows a marked contrast between legal responses to security issues on the one hand and to forced marriage on the other. Looking closely at these two instances, we find that human rights discourses lack nuance and create pressures tending towards ‘all-or-nothing’ legal results. One of the important distinctions between the two settings is that the security arena is almost entirely about men, and the forced marriage setting is mostly about women. Figuring out how and why gender matters is an important starting point for my analysis.

The insights that emerge from considering these two settings are complicated. Human rights function quite differently in each example and the complications are partially about gender, and partially about Islamophobia. I have analyzed the contrast by considering the security problem as one of knowledge and the forced marriage problem as one of intelligibility. At the root of both problems is a profound failure on the part of many non-Muslim

Western thinkers, policy makers, lawyers, and decision makers both to understand Islam in a nuanced way and to admit a lack of understanding. Having already announced my commitment to human rights and their inherent Westernized quasi-universalism, the challenge here is to develop a way of talking about cultural difference meaningfully, while simultaneously rejecting cultural relativism. The distinction between ‘knowability’ and ‘intelligibility’ is designed to set some guideposts within the realm of culture and to distinguish different reactions to cultural difference. Or, in other words, to breakdown some of the ‘othering’ practices that paralyze good analysis. Focusing on gendered settings exposes how Islamophobia becomes normalised in Western legal decision making.

I begin the paper by discussing Islamophobia and how knowability and intelligibility help us to chart a path, before turning to my two exemplar cases, and finally attempting to draw some conclusions. This paper began life as a chapter in a book about contemporary immigration politics (Dauvergne 2016). In this iteration, I am focusing on the questions that were left unanswered in that earlier writing. My conclusion is that the West’s Islamophobia is gendered in ways that significantly torque human rights arguments. This conclusion can inform our use of human rights arguments, if we are able to honestly embrace it. If we push it farther, it can tell us something about the encounters between Islam and ‘The West’.

My focus in this paper is on immigration law and its regulation of entry and expulsion, rather than on other legal frameworks that regulate belonging and presence (Dauvergne 2005; Geddes and Scholten 2016). In this setting, the state acting as a regulator emerges inevitably as an un-nuanced trope. As I am examining Western liberal democracies, the idea of a Western perspective is, in a short piece, a flat trope. This is, of course, as problematic as Islamophobia itself, but the immigration law setting grants all power to the admitting state, including the power to leave its premises unexamined. One of the consequences of focusing on the law in a short paper is that it leaves this flat trope unexplored. This is one aspect of the deep inequality that Owen theorises (2019).

Islamophobia in contemporary immigration politics

Islamophobia is not new to Western cultures. Contemporary Islamophobia’s antecedents can be traced as far back as the Crusades, to a time when Western culture was emergent. Islamic culture and religious tradition was part of the backdrop against which it became possible to understand Western civilisation as a coherent entity (Rana 2007; Allen 2010; Safeer Awan 2010). This lineage is important. Understanding its long-term contours makes it possible to see both how and why the terrorist attacks of 11 September 2001 mark a turning point. The terrorist attacks of 2001 unleashed a fear of Islamic fundamentalism in Western societies (Ramirez, Hoopes, and Quinlan 2003; Morey and Yaquin 2011; Elver 2012). This fear has freed Western politics from grappling with cultural relativism and opened up a rhetorical space in which it seems permissible to prefer some cultures to others.

Despite the enduring character of Islamophobia, the decade following the 9/11 terror attacks brought an enormous cultural production of both anti-Islamic thought and inchoate fear, along with anxiety about both. Samuel Huntington’s *The Clash of Civilizations and the Remaking of World Order*, published in 1996, experienced a revival and was regarded as prescient. For Western populations, the War on Terror merged into the

wars in Iraq and Afghanistan, intertwined with the idea that this is about saving someone else as much as it is about saving ourselves. Films ranging from the award-winning *The Hurt Locker*, to the much-criticized *Saving Jessica Lynch* or the blockbuster *Body of Lies* contributed to the cultural production of Islam. Locations like Abu-Ghraib and Guantánamo Bay became firmly anchored in the minds of Western publics. Five years after 9/11, most educated citizens of the United States, Britain, or Australia probably knew more about conditions in these prisons than in the penitentiaries and immigration detention centres within their own states.

The early decades of the twenty-first century have seen Islamophobia returned to the centre of many Western cultures. Whether reviled as ignorant and racist, or embraced as ordinary and finally out-in-the-open, the relationship between Islam and the West has taken up a central space in many Western popular and political discourses. This trend is proving a defining feature of twenty-first century Western politics, which Donald Trump's presidency with his controversial immigration politics is sure to exacerbate. It is likely not since the Crusades themselves that Islam has occupied such a prominent position in the Western imagination.

Despite all of the attention to Islam, not nearly enough detailed and nuanced knowledge has followed. As a result, many citizens of so-called Western states are becoming acquainted not with Islamic cultures and the Muslim religious tradition, but with the caricatures of Islam produced within popular culture. Outside of the Muslim members of Western elites, too few educated non-Muslim Western citizens have any idea at all how to differentiate Islam from Islamic fundamentalism, even in a rudimentary way. This is a primary source of Islamophobia, a shape-shifting category that can be broadly understood as an irrational suspicion, hatred, or fear of Muslims akin to racism but with *sui generis* qualities.¹ Like all irrational fears, Islamophobia draws strongly on ignorance.

At this point, then, we bump up against the twinned problems of the unknown and the unintelligible. This is the juncture of what one does not know and what one cannot understand. Despite all of the attention to Islam over the past two decades, few non-Muslims in Europe or North America, for example, can name the most important Muslim sects, recount a basic history of the religion, tell you when Mohammad lived, or explain the now pervasive concept of 'radicalization'. This is a knowledge issue. The deeper and more truly 'cultural' issue is that there is much about Islamic cultures that is so different from stereotypical Western experiences that it does not make sense even to Western citizens who have crossed the knowledge threshold. True cultural difference is about just this: difference that does not submit itself to coherent analysis through the lens of the other. Both lack of knowledge and putative unintelligibility contribute to the elision between fear of fundamentalism and Islamophobia. Even when we know these two things are different, many in the West do not know nearly enough to draw a line between them.

Knowability and intelligibility mark two positions that recur in Western immigration law's responses to Muslim migrants. Focusing analysis on unknowability calls our attention to moments when legal decision makers move forward in the absence of knowledge. Focusing on unintelligibility is somewhat different as it draws attention to the moments when decision makers stop short of trying to make sense of something because that something is 'cultural'. Both unknowability and unintelligibility create gaps in understanding. In these gaps, Islamophobia flourishes.

The 9/11 terrorist attacks made it permissible, even logical and rational, to be afraid. A fear of religiously motivated terrorists is grounded in plenty of clear evidence that such people do exist, and will pursue violent aims at any and all costs to themselves. There has been a remarkable acceptance of full-body scanners, biometric passports, closed circuit monitoring of public spaces, and the packaging of gels and liquids into minute quantities in zip-lock bags for scrutiny at now endless airport security queues. The security turn, its critique, and its political normalisation relate directly to fear of Islamic fundamentalism and fuel the broader Islamophobia (Gibney 2019; Bigo and Tsoukala 2008; Roach 2011). While the new security measures have been employed liberally, it is no secret which people we most imagine will be put on the ‘no fly’ list. Recent research about racial profiling shows that this stereotype has not dissipated in the years since 9/11 (BC Civil Liberties 2010; Ontario Human Rights Commission 2017). The familiar processes of racism are being deployed in this setting with banal predictability (see also Owen 2019). The tiny grain of ‘rational’ fear, combined with the understanding that overreach is essential to the logic of security, leads to an acceptance of heightened scrutiny and a willingness to be more tolerant of racial-profiling practices than in years past (Bennett 2008; Schuck, Martin, and Glaser 2012).

The cultural production of Islamophobia and the welcoming of new security measures directly affect matters of immigration in Western liberal democracies. Immigration policy is always a matter of national aspirations and national self-image and thus an irrational fear linked to a group that can be defined largely as non-citizens thrives here. As with other aspects of this terrain, however, the immigration linkages are often light on facts. For example, the number of Muslim migrants to Western states is lower than many would expect (Pew 2011). I turn now to two recent immigration law settings where Islamophobia, growing in the spaces of unknowability and unintelligibility, looms large.

Indefinite detention, masculinity, security

The security turn in immigration politics of Western liberal democracies began in the 1980s and 1990s with the emergence of the so-called ‘asylum crisis’. In the security climate following 9/11, detention of suspected terrorists was the most high-profile use of immigration law in Western states. In the United Kingdom, Canada, and New Zealand, cases reached the highest courts seeking clarity about the limits of immigration law’s capacity to function in this manner. These rulings became the site for core statements about national identity, security, the limits of human rights, and the value of citizenship. In each case, the people detained were Muslim men. In the United States, the issue played out somewhat differently as the political parallel came in the form of the Guantanamo Bay-related cases, but it was still the case that ‘[i]mmigration policy rapidly became the most visible domestic tool in the war on terror’ (Johnson 2013 at 1401, citing Kerwin).² The rise of denationalisation that Gibney (2019) analyzes in this volume moved on a closely parallel track.

Immigration law became an important location for terrorism concerns for two reasons. The first is straightforward: following the September 11 attacks, Western concerns about terrorism were, rightly or wrongly, concerns about ‘elsewhere’ – the threat was outside, so closing borders was a conceivable response to it. The second and more consequential reason that immigration law became a focus of terrorism scrutiny is that immigration

detention is usually considered to be 'administrative' detention. This means that people can be detained under immigration law without being tried and convicted. Detaining people without using criminal law is an anathema to core rule of law values.

In the United Kingdom, Canada, and New Zealand, the story played out in broadly similar ways: the government used provisions of the immigration law to achieve effectively indefinite detention of Muslim men suspected of terrorist links and the result was a major confrontation in the courts. Once in the courts, the responses varied, in part because of differing level of respect for international human rights commitments.³ The issue in all cases is not discrimination on the face of the law but rather how and when government officials and judges choose to use particular facially neutral provisions (see also Chung 2019; Boucher 2019, who make similar points).

These cases are a telling instance in the story of immigration law and the fear of fundamental Islam. In Canada, the case at the Supreme Court level concerned three men, each of who were suspected of terrorist linkages or activities (it is impossible to know exactly what because of the secrecy provisions). The evidence supposedly met the threshold for them to be deported, but deportation was impossible because of the likelihood that their countries of nationality would torture them or put them to death if they returned. Instead, they were detained under the legal fiction that they were temporarily awaiting deportation. The British case was based on almost identical facts. In New Zealand, the facts were slightly different as Mr. Zaoui had been a political candidate in his native Algeria, and thus had a higher profile at the outset. The security concerns (again, we do not know exactly what) arose during his process of seeking refugee protection, and were equally mysteriously withdrawn five years later, allowing him to remain permanently in New Zealand. In each case, the legal battle was protracted. Not only did the cases reach the highest appellate court, but they returned to that pinnacle repeatedly.

The cases speak powerfully to the problem of the unknowable. This is evident on a surface level in the use of secret evidence provisions, deployed in all three countries. In each case the state asserted that some evidence needed to be kept from the public in the name of national security. In other words, that publics simply had to trust their governments to determine who was dangerous and who was not, based on information that would never see the light of day. The political presumption of those supporting these measures is that *if* the evidence were known, everyone would agree. In other words, that the basic tenets of securitisation that lead to the quick acceptance of the body scanner at the airport, would carry over to acceptance of indefinite detention as well.

The more profound deployment of the unknowable, however, is that which overlaps with both Islam and gender in these cases. Here the presumption is that some Muslim men are terrorists and it is impossible to discern which ones. Legal argument is a poor location in which to contest this construction and its intertwining of gender and security threat. The use of secret evidence obscures this further. In Canada, 30 of 31 security certificate detainees have been men. In place of detailed intelligence and diligent policing, a veneer of unknowability is asserted to placate public opinion. It is possible to unravel this presumption with evidence, argument, and time, but the hegemony of Islamophobia makes this unravelling difficult, and sometimes impossible. In these security cases, the unknown stands as a posture of wilful blindness. The answers to these questions (Who is a danger? How can we prove it?) are much more 'knowable' than immigration law requires. Immigration law needs less precision than criminal law and thus unknowability

flourishes here. In indefinite immigration detention, suspicions and secret evidence suffice. This bias towards substituting Islamophobia for knowledge fits precisely into the framework that indefinite immigration detention provides.

The fact that the detainees in these cases were all men is important. It ought not to be sheeted home to a masculine propensity to violence. At the very least, it feeds on and reinforces a stereotype of Muslim men. More significantly it tips over into what Miranda Fricker has called an 'epistemic injustice' that works within and alongside Western Islamophobia, and impairs Western capacity to understand security threats with more precision (Fricker 2007).

Finally, in these cases human rights arguments had some successes, but these were limited in significant ways. Not one of these cases relied successfully on the core texts of the international human rights regime. Both refugee law (which was successful in New Zealand) and the European Convention (which was partially successful in the United Kingdom) are specialised regimes, and thus they provide important indicators of when international human rights law will gain some traction: i.e. when a right is articulated as something 'less' than international and aimed at a group more specific than 'humans'. Most shocking perhaps was the Canadian case where constitutionally enshrined human rights proved no match for indefinite detention on the basis of secret evidence. The Supreme Court of Canada required some modifications to the law, but approved the general framework of indefinite detention for non-citizens suspected of terrorism on the basis of evidence that is kept secret. In the context of immigration securitisation human rights have become malleable to the politics of the day. Human rights have proven to yield to unknowability.

Forced marriage, women, and the limits of intelligibility

Security detention forces us to come to terms with the draconian power of immigration law, and to ask how far away from liberal commitments to personal liberty and privacy liberal democracies are willing to travel. The story of these cases, therefore, tells us something about fear, about liberal states' laws, and about human rights. But they do not require us to come to terms with the putative unintelligibility that is at the vexing core of Islamophobia. Instead, they can be explained by attention to what is knowable and what is not, and by wilful assertions of 'unknowability'. Shifting focus to examine how forced marriage has emerged as an immigration-linked concern in Western states, by contrast, moves the conversation directly into the terrain of this veneer of unintelligibility.

By 2014, most Western liberal democracies had expressed official concern about forced marriage. Forced marriage is illegal (because all marriage requires consent of both parties) and it is a human rights breach contravening no fewer than four binding international human rights treaties, as well as the Universal Declaration of Human Rights.⁴ The first frissons of public concern about forced marriage began in Europe in the 1990s. Two high-profile stories of young girls abducted and forced into marriages by their families made headlines in 1992 and 1997 respectively. In 1998, Rukhsana Naz was killed by her mother and brother in Britain after seeking to leave a marriage her family had forced upon her (Siddiqui 2005). European communities and states responded to these actions with new laws and policies, ranging from new immigration provisions raising the age at which a spouse could be sponsored and introducing

stricter scrutiny of marriage sponsorships in a variety of ways (Denmark, Norway), new criminal provisions (Norway, Germany, Belgium), and new civil laws (France, Britain). The most creative and extensive efforts were those in Britain where a 'Forced Marriage Unit' was established, initially within the Foreign and Commonwealth Office and now shared with the Home Office. The British trajectory was distinguished by strong involvement from grassroots feminist organisations, and a considered rejection of both immigration law reform and criminalisation options. Instead, innovative civil law reform included extending the reach of British law to provide for legal remedies for citizens and even permanent residents who are out of the country at the time that they are forced into marriage (Dauvergne and Millbank 2010). Britain later introduced criminal provisions targeting forced marriage in 2014, despite opposition from community and feminist advocates, as well as legal redundancy.⁵

Public concern about forced marriages was slower to develop in the paradigmatic settler states. Australia was the leader in this group, with the national government releasing a discussion paper on 'Forced and Servile Marriage' in 2010. Also in 2010, an Australian court intervened to prevent a family taking their daughter abroad to be forcibly married. In 2013, legislation criminalising forced marriage was passed.⁶ In New Zealand, a petition calling for legislative action was presented to Parliament in 2009. This led to hearings before a Parliamentary Committee and a significant data gathering exercise by NGOs. In 2011 the Government responded to the Committee report by saying that further legislation would not be helpful and that it would emphasise 'building relationships of trust with migrant and other groups' (Radhakrishnan 2012 at 7). In 2012 a private member's bill aimed at requiring court consent in order for minors to marry was introduced, but was still on the order paper in 2015 when the government was prorogued.⁷ Canada's Department of Justice commissioned a research paper on forced marriage in 2008 (Bendriss 2008). In 2010 the South Asian Legal Clinic of Ontario founded a network for NGOs in Canada dealing with forced marriage, and in 2013 the group published a survey of the incidence of forced marriage in Canada (Anis, Konanur, and Mattoo 2013). The Canadian government's first foray into this area was to publish advice for travellers on its foreign affairs webpage.⁸ In 2015, the government passed legislation (re-)criminalising forced marriage, with a title that left no question about how the new law fits under the Islamophobia umbrella: the 'Zero Tolerance for Barbaric Cultural Practices Act'.⁹ In the United States, where the issue of forced marriage has been politically and rhetorically overshadowed by the issue of child marriage abroad, comparatively less action has been taken. The Tahirih Justice Centre surveyed service agencies in 2011 and reported on the prevalence of forced marriage 'in Immigrant Communities in the United States' (Heiman and Smoot 2011).¹⁰

The trajectory of this concern about forced marriage is intertwined with immigration and with Islamophobia in intricate ways. While a minority of states have made immigration law reform part of the official response to forced marriage, immigration is intertwined with the narrative everywhere. This intertwining begins at the definitional stage, as analysts typically set out to demarcate a clear line between forced marriage and arranged marriage.¹¹ With some variation, these definitional efforts show arranged marriage as an accepted practice in some cultures where the marriage partners do ultimately consent to the union, while forced marriage is a breach of human rights in which there may be no consent at all, or where consent might be obtained by violence or coercion. This

distinction is instructive, and emphasises the extent to which *both* practices are foreign to the hegemonic unexamined Western model of marriage as a contract between two autonomous and romantically attracted individuals. The need for such care in the line drawing exercise demonstrates the foreign-ness of the terrain, and marks the place of the putative unintelligibility problem. In essence, the Western analytic posture is that arranged marriage is unintelligibly foreign but is acceptable because it is embedded in a non-Western culture. It is like saying ‘we do not understand this, but we do not need to do so.’ Forced marriage, however, is viewed as being a-cultural: it is rendered understandable by the assertion of a human rights standard. Once the practice crosses a human rights line, legal drafters and decision makers give up on the effort to understand its cultural roots, let alone how Western immigration laws torque those roots.

This is difficult terrain and risks tripping into cultural relativism. My argument is absolutely not that forced marriage ought to be respected because it is culturally grounded. There is no evidence of this. What I am interested in is how Western regulators use unintelligibility as a way to separate arranged and forced marriage. This is not to say that arranged marriage is in a literal sense unintelligible but rather to say that othering of cultural practices uses this device. My assertion is that because of the power of human rights in this setting we ignore the fact that forced marriage occurs in predominantly non-Western cultural settings, and especially as immigration disrupts those settings. Rather than do the difficult work of parsing these instances, the assertion that arranged marriage is cultural but forced marriage is not offers unintelligibility as a response.

The linkage between forced marriage and immigration is developed in several ways. The high-profile news cases have all involved communities within Western states with strong ties to ‘elsewhere’. The instructive cases in public education material often warn about young people who are taken to another country on the pretext of a vacation or a visit to relatives, only to find they are to be married while away, or about vulnerable young people who are forced into a marriage to facilitate an immigration sponsorship. The statistics portray a story of forced marriage linkages to communities with various markers of minority status in Western states (Yurdakul and Korteweg 2013).

The effort to separate forced marriage from arranged marriage is emphatic that these are not practices that exist on a continuum. Indeed, government and non-governmental organisations working on this project often emphasise that forced marriage happens everywhere and can happen to anyone, regardless of gender, sexual identity, race, religion, citizenship, or country of origin. The Ontario, Canada, group that completed Canada’s first survey of forced marriage by canvassing ‘service providers’ put it this way:

Men and women of all ages, from varied cultural religious and socio-economic backgrounds experience FM. ... FM victims come from varied backgrounds, communities, cultures, ages, religions, etc. (Anis, Konanur, and Mattoo 2013 at 4)

This presentation is strategic, emphasising that this is a problem that ‘we’ (Australians, Canadians, Americans, ...) must confront in ‘our’ own communities. Despite this strategy, data in every Western state producing it show that those forced into marriage are more frequently young Muslim women than any other group. In the United Kingdom, which has the most sophisticated governmental statistics, 80 percent of victims in 2016 were female, and approximately 57 percent of victims came from India, Pakistan, and Bangladesh, all with large Muslim populations.¹² The Ontario report found 92 percent women

among 219 cases, of whom 47 percent were Muslim (the next largest group was Hindu, followed by Sikh). The United States report also emphasised that ‘individuals facing forced marriage in the United States are from very diverse national, ethnic and religious backgrounds’; however, a majority were female and more than half were Muslim.¹³

There are advantages, disadvantages, and incredible complexities to ‘de-gendering’ the discourse surrounding a highly gendered harm. While the politics of inclusion is certainly vital, removing gender risks obscuring the vulnerability of being young and female and living within a newcomer community inside a prosperous Western state. Those complexities are multiplied by presenting the practice as both de-gendered and de-linked to immigration. This posture also prevents us from focusing on the uncomfortable spectre that immigration may itself increase the risk of forced marriage. There is persistent anecdotal evidence now arising in a wide range of Western states that forced marriage is sometimes used by families against young people who have ‘strayed’ too far from the traditional values of the ‘old country’ wherever it is, or, worse, who show evidence of ‘transgressive’ sexuality (the Forced Marriage Unit in the United Kingdom has gathered evidence that there are heightened risks of forced marriage for LGBT youth). This linkage with immigration is less straightforward than the immigration sponsorship connection, and therefore is thornier to unravel (see further Chung 2019).

Just like the security turn in immigration law, concerns about forced marriage did not begin with 9/11. Instead, there has been a sharp increase in interest, attention, and detection since that time, which has altered a trajectory that had commenced in Western Europe late in the twentieth century. In thinking through how we understand the question of forced marriage, we are confronted sharply with a standoff between unintelligibility and human rights. It unfolds as follows. A firm line is drawn between arranged marriage and forced marriage to render ‘culture’ intelligible via the tool of human rights. In other words, while some practices, or traditions, particularly those involving women and sexuality, may be foreign to Western law and law makers, once they cross over the line into human rights abuse, these decision makers are no longer concerned about the cultural anchors of such practices. This kind of analysis underpins the entire notion of human rights: that they are held in common by everyone, and the distinctions that make us particular and individual as human beings do not alter our entitlements. Human rights, therefore, offer a solution to the problem of putative unintelligibility. Once a practice can be understood as a human rights abuse, one can ignore the aspects of it that are hard to understand – it is firmly located and contained in a universe of liberal values and commitments.

Forced marriage is an easy case for the analysis of wilful unintelligibility. Fitting this analysis around laws banning Muslim women from wearing various forms of headscarves in a variety of settings are more complicated because it is not clear that such women are ‘oppressed’, even within their own ‘cultures’, by that practice. The headscarf controversy has now played out across Western (e.g. France), non-Western (e.g. Turkey), settler (e.g. Canada), and non-settler states (Wallach Scott 2007; Jones 2012; Piatti-Crocker and Tasch 2012). Its analytic challenge is profound and points directly to the problem of unintelligibility. The incomplete resolutions to this conflict are as varied as the form of the veil itself. It can be no coincidence that culture, unintelligibility, and women fit neatly together like a set of nested dolls. The forced marriage context ties these questions directly to immigration and its regulation.

There is nothing wrong, and much that is laudable, in the strong commitment to human rights values that the battle against forced marriage demonstrates. But it is interesting and important that this struggle has ramped up at this point in time. This timing is linked to the renewal of Islamophobia, and with it a freeing from the cultural relativism that plagued human rights debates in the last quarter of the twentieth century.

Whether or not a state chooses immigration law as a tool for combatting forced marriage, key immigration law provisions of all Western states are adaptable to this purpose. Law reform is not required to achieve this end; it can be pursued in legal and policy decision making via additional scrutiny of rules about marriage sponsorship, family reunification, and the like. More difficult to achieve would be deploying these tools in a 'neutral' way without attention to profiling markers such as race, religion, age, and country of origin (See Boucher 2019; Chung 2019; Ellermann 2019, for other examples of the neutral rule problem). Unlike redeploying immigration law for security purposes, it is much more politically palatable to use immigration law to protect human rights and thus it is more complicated to bring scrutiny to these usages of the law. The British engagement with forced marriage, which initially introduced 'crack-down' immigration measures, has managed to achieve remarkable subtlety in its approaches to forced marriage, with strong engagement with feminist, immigrant, and feminist immigrant communities. But even in Britain battling forced marriage has proven scarcely possible without reifying the 'us' and 'them' divide at the core of immigration law.¹⁴

In a sense, the battle against forced marriage fits directly into the fear of fundamentalist Islam. Like the security concern, concern about forced marriage can serve a justificatory purpose for public and political discourses. The fight against forced marriage can be read as a response to 'otherness' where law makers attempt to use legal tools (human rights) to identify within a sea of unintelligibility particular ideas that can be isolated, known, and sanctioned. This process is akin to what Korteweg describes as a shallow deployment of the idea of gender equality (2017). There is nothing to suggest that forced marriage is linked to fundamentalism, no reason to think that it is more likely to occur in more deeply religious communities or families. But law makers are on firm ground when they disdain it, and it adds to the construction of a cultural abyss. Thoughtful analysis of responses to forced marriage brings us face to face with the trope of unintelligibility. The 'how' of forced marriage becomes known through human rights work, but the 'why' of the practice is obscured by this same work. Considering something to be unintelligible because of culture makes it permissible not to understand it. This escape is a glimmer of the elision from a fear of fundamentalist Islam to a pervasive Islamophobia. Accepting that even human rights work can contribute to cultural production of Islamophobia is an important part of grappling with its persistence.

Lessons for human rights, gender & Islamophobia

The central challenge in drawing human rights lessons from gendering Islamophobia is to keep all of the complication and nuance in the analysis; to somehow avoid the simplification impulse that leads back to either cultural relativism or kneejerk responses. On the surface of these two examples we see that in the security context, which is highly masculinised, Western analysts quickly assume knowledge (i.e. 'we know some of these people

are dangerous') and human rights arguments have proven weak or inadequate. In the forced marriage context, which is highly feminised, human rights arguments are almost over-determinative, moving us very quickly to a response that all too often allows us to skip over the stage of deepening our understanding of how and why this practice arises and the uncomfortable overlaps with gender and culture. These two contexts are of course related to the stereotypes of men as aggressors and women as victims, which seem amplified by cultural difference. Paying attention to human rights in these settings allows us to get beyond this rudimentary starting point. I believe there are several lessons that can be drawn from comparing these settings.

The first lesson is that in addition to anything else it does, Islamophobia disempowers women. This point finds parallels in Sarah Song's argument that studies of multiculturalism and gender often overlook how gender norms are shaped by interactions between majority and minority cultures (2005). My claim is not as deep as Song's because Islamophobia makes depth unnecessary. This is not a conclusion about whether Islam itself empowers or disempowers women; it is instead a call to understand that the Western cultural production of Islam exacerbates gender inequality. The gender stereotyping of both of these immigration law examples serves as a further layer of obfuscation. It is important to work to unearth this, even as we work to prevent security threats and to protect vulnerable young women (and men). This means keeping all the complexity in the picture, and owning up to the fact that living in 'The West' is not in itself emancipatory for young Muslim women. It might be, of course, but it also exposes them to disempowering Islamophobia, to the villainization of their fathers and brothers and uncles, and to a threat of forced marriage that is fuelled in part by the legal forms of Western states' immigration laws.

The second lesson is that advocates for human rights must confront the shortcomings of these legal tools in order to resist provoking a response of simple withdrawal into a shell of the very cultural relativism that the human rights paradigm seeks to reject. This will be difficult. It is not inconsonant to say that we reject forced marriage and at the same time to admit that it is infused with culture. Much of the advocacy against forced marriage is working so diligently at *not* making cultural judgments that the role culture plays is washed out of the analysis. Taking culture out of the analysis makes it impossible to analyze how a fight against forced marriage contributes to Islamophobia. Transparency and thoughtful engagement would be much harder to achieve, but would generate more nuance. A nuanced analysis could, then, move beyond forced marriage and provide insights into other immigration contexts like that of securitisation.

The unintelligibility that renders true cultural difference 'other', creates a platform for the more mundane wilful lack of knowledge that is at the root of Islamophobia. Too often, non-Muslim Westerners render Islam understandable by reducing it to a Hollywood output. The binary reactions of the law (including human rights) are then much easier to apply once we have smoothed over the thing we do not know or cannot understand fully. The slide from a fear of fundamentalist terrorism into generalised Islamophobia substitutes unintelligibility for unknowability, failing to understand things that could be made knowable.

Finally, human rights are by definition both universalistic and Western. When the interests they protect fit comfortably within a stereotypically Western cultural frame, their appeal is amplified. This is what happens in the case of forced marriage. Human

rights form a powerful discourse in this setting because they sever the potentially unintelligible from its 'otherness' and assimilate it into a familiar framework. On the other hand, in the security setting, human rights arguments encounter more resistance. In that setting the rights arguments run straight into the fear itself. There is no question of unintelligibility: there is instead a presumption that we know what the risk is, and therefore must counter it. Our inability to know exactly what danger will arise and where and when becomes part of why we accept the weakening of human rights. In the instance of forced marriage, we ignore unintelligibility. In the security setting, we ignore what may be knowable and instead reify unknowability as a centrepiece of the analysis.

The final challenge is to consider what the immigration example can tell us about the relationship between Islam and the West, which is central to so much of contemporary immigration politics, whether played out nationally, locally, or globally. At present, this relationship is mediated through Islamophobia and the contemporary tendency to generate a Western cultural production of Islam. The contours of Islamophobia are complicated; it does not have the same effects, or the same results, or the same linkages with human rights in every instance. But it is pernicious. Working to understand the roles Islamophobia plays in varying instances is one step towards reducing its monolithic power. This is a starting point in moving both law making and discretionary legal decision making away from irrational phobia.

Notes

1. On the potential futility of defining Islamophobia, see Sayyid's thoughtful introduction to *Thinking Through Islamophobia: Global Perspectives* (2010). Allen's succinct discussion in 'Still a Challenge for Us All?' (2016) is also helpful.
2. In Australia, immigration detention used as a security tactic did not attract the same judicial scrutiny. One reason for this absence is that Australia's administrative detention regime for non-citizens was already by 2001 more rigid than any other detention regime in the world. In 2004, prior to the rulings in the other states, the Australian High Court approved indefinite detention for non-citizens *who were not terror risks* and who could not be deported: *Al-Kateb v Godwin*, [2004] HCA 37.
3. See *Zaoui v Attorney-General*, [2005] 1 NZLR 577 (CA); *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*; *X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, [2004] UKHL 56 [Belmarsh]; *Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 SCR 350. While both the New Zealand case and the British case relied heavily on international statements of human rights, the Canadian court kept its reasoning within the parameters of Canada's own constitutional *Charter of Rights and Freedoms*. The *Charter of Rights and Freedoms* has not been a strong source of protections for non-citizens in Canada and its interpretation has not kept pace with international developments in key areas. See, Dauvergne (2013).
4. *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) art 16(2); *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 23(3) (entered into force 23 March 1976); *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 7 November 1962, 521 UNTS 231 art 1 (entered into force 9 December 1964); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 art 10 (1) (entered into force 3 January 1976); *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 art 16 (entered into force 3 September 1981).

5. *Anti-social Behaviour, Crime and Policing Act (2014)* (UK), c 12. The United Kingdom had introduced legislation criminalizing forced marriage in 2006 but it was not passed.
6. *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Cth), amending *Criminal Code Act 1995* (Cth). See Australia, Attorney-General's Department, Criminal Justice Division, *Discussion Paper: Forced and Servile Marriage* (Barton, ACT: Attorney-General's Department, 2010); Simmons and Burn 2013.
7. New Zealand *Marriage (Court Consent to Marriage of Minors) Amendment Bill 2017* (Member's Bill – Joanne Hayes): Bills Digest No 2478, which passed its first reading on June 7, 2017.
8. Government of Canada (2015). The contents of this advice leave something to be desired, for example:

If you are forced to travel abroad, you may wish to provide the following information to someone you trust in Canada:

 - your contact information abroad
 - a photocopy of your passport photo page and birth certificate
 - a recent photograph of yourself
 - your itinerary (anticipated travel details, flight information, return date).
9. Bill S-7, *Zero Tolerance for Barbaric Cultural Practices Act*, 2nd Sess, 41st Parl, 2015 (second reading 23 March 2015).
10. Regarding the politics of child marriage vs forced marriage, see Millbank and Dauvergne 2011; also USAID 2014.
11. Here are some examples:
 1. The *SALCO Report*, *supra* note 15 at 4, which states:

Forced/non-consensual marriage is a form of domestic violence and a global human rights issue. FM is characterized by coercion, where individuals are forced to marry against their will, under duress and/or without full, free and informed consent from both parties. Men and women of all ages, from varied cultural religious and socio-economic backgrounds experience FM. FM and arranged marriage are often mistakenly conflated. While arranged marriage has full, free, and informed consent of both parties who are getting married, FM does not – Lack of consent is the critical distinguishing factor in a forced marriage.
 2. The *Tahirih Report*, *supra* note 18 at 2, which states:

An arranged marriage is not the same as a forced marriage. A forced marriage, in which an individual feels she has no ultimate right to choose her partner and/or no meaningful way to say no to the marriage, is distinguishable from an arranged marriage, in which the families of both parties (or religious leaders or others) take the lead but ultimately, the choice remains with the individual.
 3. The UK Forced Marriage Unit's (2014) at 1, which states:

There is a clear distinction between a forced marriage and an arranged marriage. In arranged marriages, the families of both spouses take a leading role in arranging the marriage, but the choice of whether or not to accept the arrangement still remains with the prospective spouses. However, in forced marriage, one or both spouses do not consent to the marriage but are coerced into it. Duress can include physical, psychological, financial, sexual and emotional pressure. In the cases of some vulnerable adults who lack the capacity to consent, coercion is not required for a marriage to be forced.
12. UK stats are available online: <www.gov.uk/forced-marriage>. The next countries on the list are also Muslim majority: Somalia, Afghanistan and Saudi Arabia each accounted for 1 percent or more of victims in 2016.
13. *Tahirih Report*. This study had even lower numbers than the Ontario study with a total of 150 individuals listed as having a religious affiliation (at footnote 15).

14. A compelling example of this is the idea that the British government, as part of its forced marriage work, will sometimes undertake ‘rescue missions’ overseas. The first of these to gain widespread attention involved a thirty-two-year-old Bangladeshi woman who had been living in the United Kingdom where she had studied medicine and was working as a trainee doctor. In August 2008, she was tricked by her family into returning to Bangladesh where they locked her up in order to force her into a marriage she had previously rejected. The High Court of England and Wales issued a protection order on her behalf, and with the assistance of diplomatic officials, she was eventually brought before a court, placed in police protection, and then returned to England. She was neither a British citizen nor a dual national. See Bowcott and Percival (2008); Walker (2008).

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