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## The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law

Lise Gotell

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## The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law

### Abstract

This article explores the current state of Canadian law on the production and disclosure of complainants' records to reflect upon the implications of the Canadian Charter of Rights and Freedoms for Canadian sexual assault law and jurisprudence. Some scholars assert that the Supreme Court's decision in *R. v. Mills*, upholding section 278 of the Criminal Code governing access to complainants' records, constitutes an erosion of accuseds' rights and an unjustified compromise of constitutional standards. By contrast, this article demonstrates that *R. v. Mills* is a highly contradictory decision that can be read as creating an interpretation of section 278 that privileges defendants' rights and undermines the protections that the legislative regime sought to erect. Emerging out of the tensions inscribed within *Mills*, recent decisions continue to privilege the legal rights of the accused and to reinforce a liberal legalistic construction of sexual violence. Privacy, posed as a "right" to contain narratives of sexualized violence within a bounded personal space, may provide but tenuous protection against vigorous pursuit of records by defence counsel. When complainants can be constructed as failing to enact the characteristics of ideal victimhood, their entitlement to privacy is discounted. Through a discursive analysis of the case law on access to complainants' records, the article contends that the mechanism of disclosure constitutes the central contemporary enactment of the hysterization of the rape victim.

### Keywords

Canada. Canadian Charter of Rights and Freedoms; Rape--Law and legislation; Disclosure of information--Law and legislation; Privacy, Right of; Canada

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# THE IDEAL VICTIM, THE HYSTERICAL COMPLAINANT, AND THE DISCLOSURE OF CONFIDENTIAL RECORDS: THE IMPLICATIONS OF THE *CHARTER* FOR SEXUAL ASSAULT LAW<sup>©</sup>

BY LISE GOTELL\*

This article explores the current state of Canadian law on the production and disclosure of complainants' records to reflect upon the implications of the *Canadian Charter of Rights and Freedoms* for Canadian sexual assault law and jurisprudence. Some scholars assert that the Supreme Court's decision in *R. v. Mills*, upholding section 278 of the *Criminal Code* governing access to complainants' records, constitutes an erosion of accuseds' rights and an unjustified compromise of constitutional standards. By contrast, this article demonstrates that *R. v. Mills* is a highly contradictory decision that can be read as creating an interpretation of section 278 that privileges defendants' rights and undermines the protections that the legislative regime sought to erect. Emerging out of the tensions inscribed within *Mills*, recent decisions continue to privilege the legal rights of the accused and to reinforce a liberal legalistic construction of sexual violence. Privacy, posed as a "right" to contain narratives of sexualized violence within a bounded personal space, may provide but tenuous protection against vigorous pursuit of records by defence counsel. When complainants can be constructed as failing to enact the characteristics of ideal victimhood, their entitlement to privacy is discounted. Through a discursive analysis of the case law on access to complainants' records, the article contends that the mechanism of disclosure constitutes the central contemporary enactment of the hysterization of the rape victim.

Cet article examine le droit canadien vis-à-vis la communication de dossiers dans les poursuites relatives à une infraction d'ordre sexuel et offre une réflexion sur les répercussions de la *Charte canadienne des droits et des libertés* sur la loi et la jurisprudence en matière d'agression sexuelle. Certains auteurs affirment que la ratio dans la décision *R. c. Mills* de la *Cour suprême du Canada* constitue une érosion des droits de l'accusé tout en compromettant de façon inacceptable les standards constitutionnels. Toutefois, l'auteure maintient que la décision *R. c. Mills* est contradictoire puisque l'article 278 peut diminuer les protections que le régime législatif tente d'offrir, tout en favorisant les défendeurs. En raison des tensions causées par *R. c. Mills*, les décisions plus récentes continuent à favoriser les droits de l'accusé et de renforcer une idéologie juridique libérale de la violence sexuelle. Le droit à la vie privée, sous guise d'un droit à renfermer la violence sexuelle dans un espace personnel délimité, n'offre qu'une protection aléatoire vis-à-vis des efforts vigoureux des avocats de défense qui tentent de se procurer les dossiers des appelants. Quand les appelants ne démontrent pas les caractéristiques typiques de la victimisation, leurs droits à la vie privée peuvent être injustement accordés peu de valeur. Par l'entremise d'une analyse explicative de la jurisprudence relative au droit d'accès aux dossier des appelants, cet article maintient que le mécanisme de communication de dossiers promouvoit le concept contemporain de la victime hystérique d'agression sexuelle.

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It is by eliciting confessions in the courtroom, then allowing certain things to count as reasonable and certain things to count as unjust, that law functions as a form of power/knowledge. But rape law only allows certain kinds of stories to count as rapes . . . . The legal process structures the violence of rape not only by retrospectively identifying certain acts as violent and others as "normal"; it also forces women to redefine what was "significant" about their experience in order to testify successfully, and often enhances the sense of violation and self-doubt begun by the physical rape.<sup>1</sup>

The very possibility that a sexual assault complainant's personal records could be disclosed to the accused creates a new vulnerability for all of those seeking legal redress for sexual violation. A complainant's story must meet high standards of consistency and coherence to resist new techniques of credibility probing used to seek access to confidential records. This article will explore the current state of Canadian law concerning production and disclosure in the context of sexual assault trials. This case

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<sup>1</sup> Laura Hengehold, "An Immodest Proposal: Foucault, Hysterization, and the 'Second Rape'" (1994) 9 *Hypatia* 88 at 95 [Hengehold, "Immodest"].

study will reflect upon the implications of the *Canadian Charter of Rights and Freedoms*<sup>2</sup> for Canadian sexual assault law and jurisprudence.

The quest for access to complainants' records is a key feature of post-*Charter* sexual assault law. In 1992, after the Supreme Court of Canada struck the rape shield law,<sup>3</sup> the federal government re-enacted restrictions on sexual history evidence—albeit in a weakened form—in accordance with the majority's insistence on scope for judicial discretion.<sup>4</sup> In *R. v. Darrach*,<sup>5</sup> these restrictions were upheld against a legal rights challenge. The 1992 reform also enacted a statutory definition of consent as voluntary agreement,<sup>6</sup> enumerated situations of forced submission that do not constitute consent,<sup>7</sup> limited the defence of mistaken belief in consent, as well as requiring that the accused take "reasonable steps" to ensure consent.<sup>8</sup> In *R. v. Ewanhuk*,<sup>9</sup> the Supreme Court elaborated on the

<sup>2</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

<sup>3</sup> *R. v. Seaboyer*, [1991] 2 S.C.R. 577.

<sup>4</sup> See *Criminal Code*, R.S.C. 1985, c. C-46, s. 276 [*Criminal Code*]. This section prohibits the admission of sexual history evidence solely for the purpose of showing that the complainant was more likely to have consented or is less worthy of belief. It also requires that the evidence must be relevant to an issue to be proved at trial and that it must have significant probative value that is not "outweighed by the danger of prejudice to the proper administration of justice." It further mandates that in determining relevance and probative value, the judge must consider such factors as: the accused's right to make full answer and defence; society's interest in the reporting of crime; the importance of eliminating any discriminatory belief or bias from the fact-finding process; the risk that the evidence will arouse the jury's sentiments of prejudice, sympathy or hostility; the possible prejudice to the complainant's privacy and dignity; and the right of all persons to personal security and to protection and benefit of the law.

<sup>5</sup> [2000] 2 S.C.R. 443. For a feminist commentary, see Janine Benedet, "Legal Rights in the Supreme Court of Canada in 2000: Seeing the 'Big Picture'" (2001) 14 Sup. Ct. L. Rev. 97.

<sup>6</sup> Consent is defined as "the voluntary agreement of the complainant to engage in the sexual activity in question": see *Criminal Code*, *supra* note 4, s. 273.1(1).

<sup>7</sup> *Criminal Code*, *supra* note 4, s. 273.1(2):

(2) Where no consent obtained - No consent is obtained, for the purposes of sections 271, 272 and 273, where

(a) the agreement is expressed by the words or conduct of a person other than the complainant;  
 (b) the complainant is incapable of consenting to the activity;  
 (c) the accused induces the complainant to engage in the activity by abusing a position of trust,

power or authority;

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity;

or

(e) the complainant, having consented to engage in sexual activity, expresses by words or conduct, a lack of agreement to continue to engage in the activity.

<sup>8</sup> *Criminal Code*, *supra* note 4, s. 273.2:

It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

meaning of consent, ruled against the defence of implied consent supported by the lower court, and emphasized that the “reasonable steps” analysis is a central part of the test for mistaken belief. These statutory provisions, as well as their recent interpretation by the Court, appear to indicate a new era in the constitutional interpretation of sexual assault: one in which there is greater respect for the dignity of complainants, as well as a much firmer judicial recognition of the feminist-inspired insistence that “no means no.” Nevertheless, as Susan Estrich has cogently argued, the ironic consequence of greater legal appreciation of culpability for sexual aggression has been a heightened focus by the defence on destroying the credibility of complainants:

Precisely because it is all but impossible these days to argue successfully that no means yes, or that men are privileged to have sex with crying women, or that even stupidity as to consent should serve as a defence, men charged with rape, and those who defend them, have few options but to argue the incredibility of the woman victim.<sup>10</sup>

Probing complainants’ private records for evidence of inconsistency in order to create the appearance of faulty memories and motives to lie has provided the key mechanism of attacking complainants in Canada since the 1990s. This tactic functions as a kind of end run around legislative barriers to sexual history evidence and statutory restrictions on the defence of mistaken belief.<sup>11</sup>

While the quest for access to records has assumed an elevated importance during the post-*Charter* era, it is also an area of sexual assault law that exemplifies some of the critical implications of a constitutional rights regime for dealing with the problem of sexualized coercion. These implications include the legal privileging of defendants’ rights, the erosion of protections for complainants, and the complex dance between the legislatures and the courts—set within a discursive context where rights claims obscure the complexities of sexualized violence. I will argue that

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- (a) the accused’s belief arose from the accused’s
    - (i) self-induced intoxication, or
    - (ii) recklessness or wilful blindness; or
  - (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

<sup>9</sup> [1999] 1 S.C.R. 330. See Renu Mandhane, “Efficiency or Autonomy?: Economic and Feminist Legal Theory in the Context of Sexual Assault” (2001) 2 U.T. Fac. L. Rev. 173.

<sup>10</sup> Susan Estrich, “Palm Beach Stories” (1992) 11 Law & Phil. 5 at 14.

<sup>11</sup> Karen Busby, “Discriminatory Uses of Personal Records in Sexual Violence Cases” (1997) 9 C.J.W.L. 148. See also Women’s Legal Education and Action Fund (LEAF) *Submissions to the Standing Committee on Justice and Legal Affairs Review of Bill C-46* (1997) at 11.

through an analysis of production and disclosure we can observe the enhanced sway of a liberal legalistic discourse of rape; one in which a social and political analysis of sexual violence is being displaced.

## I. ACCESS TO COMPLAINANTS' RECORDS: OVERVIEW AND ARGUMENTS

In 1999, the Supreme Court decided *R. v. Mills*,<sup>12</sup> a case that considered a constitutional challenge to the federal government's legislative scheme governing access to sexual assault complainants' confidential records. *Bill C-46*<sup>13</sup> sought to restrict access to private records and to ensure that the defendants' legal rights were balanced against the equality and privacy rights of complainants. Emerging out of a series of consultations with women's groups, anti-rape activists, and defence counsel, *Bill C-46* added section 278 to the *Criminal Code*. Section 278 made a number of rationales for disclosure insufficient and gave judges guidance on the kinds of factors to consider in applications, including complainants' equality rights and society's interest in reporting sexual assault. Welcomed by feminist law reformers and condemned by defence counsel, this legislation was intended to replace the common law test for disclosure established by the Supreme Court in 1995 with *R. v. O'Connor*.<sup>14</sup>

In upholding section 278 in its entirety, the *Mills* decision, with eight judges in the majority and one in dissent, could be viewed as a feminist legal victory. But the *Mills* decision is riddled with ambiguities, giving rise to a situation in which complainants remain vulnerable to disclosure, albeit in different ways than under the *O'Connor* regime. There has been a great deal of debate about the meaning of *Mills*, with many legal analysts suggesting that the decision erodes the accused's legal rights and compromises constitutional standards to the supremacy of parliament.<sup>15</sup> In part, this article engages with this debate. I argue that the decision itself is contradictory. On the one hand, *Mills* gestures to complainants' rights and establishes a threshold test for production that would seem to work against speculative defence requests. On the other hand, however, the decision can be read as creating an interpretation of section 278 that privileges

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<sup>12</sup> [1999] 3 S.C.R. 668 [*Mills*].

<sup>13</sup> *Bill C-46, An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, 2d Sess., 35<sup>th</sup> Parl. 1997 (assented to 25 April 1997), S.C. 1997, c. 30 [*Bill C-46*].

<sup>14</sup> [1995] 4 S.C.R. 411 [*O'Connor*].

<sup>15</sup> See Jamie Cameron, "Dialogue and Hierarchy in *Charter* Interpretation: A Comment on *R. v. Mills*" (2001) 38 *Alta. L. Rev.* 1051 at 1051.

defendants' rights and undermines the protections that the legislative regime sought to erect.<sup>16</sup>

The meaning of *Mills*, however, cannot be settled through an interrogation of the decision and an analysis of *Bill C-46*. A narrow doctrinal focus on Supreme Court decisions is a troubling feature of much *Charter* scholarship in the area of sexual assault law.<sup>17</sup> This article will attempt to go beyond the speculation that is often a feature of Supreme Court-centred approaches by examining how the *Mills* decision has influenced lower court interpretations. This is the context in which the disclosure regime is applied and given meaning. It is also where the consequences of *Mills*' ambiguous balancing of defendants' and complainants' rights has been given divergent interpretations, impacting in concrete ways on women and children who bring forward sexual assault complaints. The impact of the decision, in the end, depends on the strategies adopted by defence counsel in relation to the judicially elaborated test for access, the interpretations given to this test by trial and appellate judges, and the manner in which this area of law has worked to discursively construct the "good rape victim" in a new guise.

This article examines the post-*Mills* case law on access to complainants' records. In all, I have examined thirty-seven trial and appellate decisions concerning access to complainants' private records (see Appendix A). Upon comparison with complainants' experiences under the *O'Connor* test, recent case law suggests a reduced likelihood of production and disclosure, flowing from *Mills*' insistence on an evidentiary basis for defence assertions of the likely relevance of confidential records. Nevertheless, very often woven through the courts' refusals to grant access to complainants' records are narrow and highly individualistic analyses of the potential consequences of records disclosure. Focused almost myopically on privacy rights, this framing denies the structural and systemic nature of sexual violence, containing women's words about their experiences within a rigidly demarcated and depoliticized personal space. Decisions to intrude upon this personal space seem to hinge upon memory, upon assertions about the disordered and hysterical character of complainants, and upon the almost ubiquitous defence claim that women's and children's stories of assault have been suggested and manipulated. These decisions are grounded in and legitimized by a conception of fair trial

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<sup>16</sup> See Steve Coughlan, "Complainants' Records After *Mills*: Same As it Ever Was" (2000) 33 *Const. Rev. (5th)* 300. See also Lise Gotell, "Colonization Through Disclosure: Confidential Records, Sexual Assault Complainants and Canadian Law" (2001) 10 *Soc. & Leg. Stud.* 315.

<sup>17</sup> Karen Busby's study of the pre-*Mills* case law is an important exception. See Karen Busby, "Third Party Records Cases Since *R. v. O'Connor*" (2000) 27 *Man. L.J.* 355.



rights that gives wide scope for rigorous credibility testing of complainants. The post-*Charter* discourse of fair trial rights empowers new and multiple assertions about the inherently suspect claims of the sexual assault victim. The result is to depict the sexual assault complainant as the irrational, incredible, and hysterical other of the rational legal subject. This article demonstrates that complainants remain vulnerable to disclosure post-*Mills* and that the battle over confidential records remains a critical site of struggle in sexual assault law.

## II. LIBERAL LEGALISM AND SEXUAL ASSAULT

The predominant understanding of sexual violence is framed in the shadow of legal discourse, a discourse that derives its legitimation from its own self-privileging as the arbiter of “truth” and the simultaneous negation of oppositional discourses.<sup>18</sup> The legal discourse of rape is based upon rigid binaries: consent/coercion, rape/normal heterosex, rational/irrational, and guilty/innocent. Through this binary logic, rape is defined against “normal heterosex.” Women’s and children’s claims are often rendered incomprehensible and the dynamics of coercive sexuality are obscured. The Canadian experience of records disclosure reveals a critical mechanism by which claims of sexual coercion have been disqualified. Dissonant narratives have been subordinated to the “tyranny of the binary” through records disclosure.<sup>19</sup> In turn, the productive possibilities for creating heterogeneous “alternative” knowledges outside the straightjacket of liberal legalism are eclipsed as the trial becomes the central metaphor for acknowledging sexual violation.

This article explores the rape trial and the specific dynamics of records disclosure from a Foucauldian perspective, as a disciplinary matrix with constitutive effects. As Michel Foucault emphasized, the repressive and coercive functions of law need to be downplayed in favour of an analysis of law’s constructive functions as discipline, surveillance, and normalization.<sup>20</sup> This approach is one that highlights the discursive effects of sexual assault law—the criteria by which authoritative pronouncements are separated from “hysteria”—and, in this process, gendered subjectivities,

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<sup>18</sup> Carol Smart, *Feminism and the Power of Law* (New York: Routledge, 1989) at 11.

<sup>19</sup> This is Anne Edwards’ concept. See Anne Edwards, “Gender and Sexuality in the Social Construction of Rape and Consensual Sex: A Study of Process and Outcome in Six Recent Rape Trials” in Janet Holland & Lisa Adkins, eds., *Sex, Sensibility and the Gendered Body* (New York: St. Martin’s Press, 1996) at 178.

<sup>20</sup> Annie Bunting, “Feminism, Foucault, and Law as Power/Knowledge” (1992) 30 *Alta. L. Rev.* 829 at 838.

adequate rationality, and definitions of violence are created and reinforced.<sup>21</sup> It is not simply that the penetration of complainants' records is based upon rape myths; for example, the mendacious woman and the deluded complainant. It is instead that the mechanism of disclosure and the cases in this area of law actively work to demarcate the category of the "good rape victim," replete with scripted expectations about what she will and will not do, just as they work to construct the very meaning of sexual assault.

In many ways, the sexual assault trial represents a central act in what Judith Butler refers to as the performativity of gender.<sup>22</sup> Through it, we can observe the endless repetition of heteronormativity's key scripts: the assertion and reassertion of an active, uncontrollable male sexuality and a passive female sexuality; the incredibility of sexual coercion; and the construction of women (and children) as more emotional, less rational, and less reliable than men.<sup>23</sup> In contrast to the feminist insistence on the structural and systemic nature of sexual coercion, the liberal legalistic construction is premised on a conception of rape as a discrete and isolated incident—as a violent sexual incident and a matter of individual deviance. Constructed as a crime, the "reality" of rape (that is, whether or not a set of events can properly be called rape) can only be discerned through the rigorous application of legal method. Through a careful consideration of all "relevant" evidence and through an adversarial confrontation between the accused/defence attorney and the crown prosecutor, it is assumed that judges will be able to arrive at the "truth" of the matter at hand—a determination of the guilt or innocence of the accused beyond a reasonable doubt. This "truth" is empowered by the manner in which law is viewed as akin to Western science, capable of revealing reality through disciplined, "objective," and "impartial" consideration of legally relevant facts.

The rape trial, as the stage of this discursive play, takes the form of an abstracted exercise of logic unrelated to the context of sexual interactions and to the complainant's own account of her violation.<sup>24</sup> The courtroom scene and the language of law create the image of law as separating out the "truth" from the hysteria of the victim. Prosecutors and the defence act as custodians of this order and are resistant to any form of dialogue that attempts to make sense of the sexual violence that does not

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<sup>21</sup> Hengehold, "Immodest", *supra* note 1 at 88, 94.

<sup>22</sup> Judith Butler, *Bodies That Matter* (New York: Routledge, 1993) at 12-16.

<sup>23</sup> Carol Smart, *Law, Crime and Sexuality* (London: Sage Publications, 1995) at 84.

<sup>24</sup> T. Brettel Dawson, "Sexual Assault Law and the Past Sexual Conduct of the Primary Witness: The Construction of Relevance" (1986-1988) 2 C.J.W.L. 310 at 316.

fit legal models of guilt or innocence.<sup>25</sup> Kristin Bumiller contends that survivors' discourse exceeds legal discourse in important ways, reflecting a non-legal conception of rape that describes feelings of violation and is not bound to the nature of the act.<sup>26</sup> Sexual violation results in a painful disruption of bodily integrity and also subjectivity, producing ambiguities that need to be negotiated and articulated.<sup>27</sup> In law, however, a survivor is unable to speak from her own terrain: "the ambiguity and uncertainty in her accounts of violent sexual experiences are appropriated in a field of language that interprets these responses as self-doubt..."<sup>28</sup> The imperatives of proof beyond a reasonable doubt often demand more than a victim can provide, requiring perfect consistency in the telling.<sup>29</sup> Through constitutionally entrenched safeguards that ensure that individual citizens can only be held accountable for actions that fall within clearly demarcated parameters, legal discourse acts as a metaphorical sieve, straining out complexity and political and social content from the stories of survivors.<sup>30</sup> As Laura Hengehold contends, the rape trial contributes to the "hysterization" of women by producing complainants' confessions in order to demonstrate their lack of self-knowledge. According to Hengehold, the rape trial "reinforces a discursive formation in which women are made to appear less coherent than men from whom they are differentiated by their status as victims."<sup>31</sup> The rape trial gives sexual violence a public form, while at the same time inscribing it within a discourse in which women are forced to present an inadequate, hysterical subjectivity.

The mechanism of records disclosure is a central contemporary enactment of this process of hysterization. Estrich, writing in the American context and Wendy Larcombe, writing in the Australian context, both point to an escalation in the defence's use of women's counselling and other records that parallels the Canadian experience.<sup>32</sup> As in Canada, this defence

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<sup>25</sup> Kristin Bumiller, "Fallen Angels: The Representation of Violence Against Women in Legal Culture" (1990) 18 Int'l J. Soc. L. 125 at 138 [Bumiller, "Fallen"].

<sup>26</sup> Kristin Bumiller, "Rape As A Legal Symbol: An Essay on Sexual Violence and Racism" (1987-1988) 42 U. Miami L. Rev. 75 at 82.

<sup>27</sup> Laura Hengehold, "Remapping the Event: Institutional Discourses and the Trauma of Rape" (2000) 26 Signs 189 at 196 [Hengehold, "Remapping"].

<sup>28</sup> Bumiller, "Fallen", *supra* note 25 at 141.

<sup>29</sup> Estrich, *supra* note 10 at 27-28.

<sup>30</sup> Hengehold, "Remapping", *supra* note 27 at 197.

<sup>31</sup> Hengehold, "Immodest", *supra* note 1 at 89.

<sup>32</sup> Estrich, *supra* note 10 at 17. See also Wendy Larcombe, "The 'Ideal' Victim v. Successful Rape Complainants: Not What You Might Expect" (2002) 10 Fem. Legal Stud. 131 at 136-37.

tactic has coincided with the enactment of rape shield laws that close off the possibilities of discrediting a complainant through the traditional method of sexualizing her. As law invades the extra-legal settings where women and children have been able to express their experiences of sexualized violence, sexual assault complainants have to be prepared to endure an unprecedented level of scrutiny to secure a conviction.<sup>33</sup> In this process, boundaries of interiority are breached, re-enacting the violation of the physical rape with an assault on the complainants' subjective sense of self. As Larcombe insists, this mechanism provides a potent means for destabilizing and discrediting complainants' claims.<sup>34</sup> Like sexual history evidence, information gathered from records is used to create a distinction between the complainant and the "ideal victim." If once the ideal victim was characterized by her chastity and sexual morality, the new ideal victim is consistent, rational, self-disciplined, and blameless.<sup>35</sup> Evidence gained from records can discredit a complainant's story "by exposing and attaching adverse inferences to any inconsistency, any undesirable fact, even anything surprising or unexpected about her," and this is used to orchestrate a gap between the complainant's claims and the characteristics of the ideal rape victim.<sup>36</sup> Through a dissection of case law, we can observe the contours of this distinction—a distinction that emerges from and is legitimized by the *Charter* rights claims mounted by the defence.

### III. THE SHAPING OF *BILL C-46*

Access to confidential records was not framed as a constitutional rights claim until the early 1990s when defence counsel began to employ the *Charter's* fair trial guarantees<sup>37</sup> as an inviolable rationale for disclosure. In the Supreme Court's *O'Connor* decision,<sup>38</sup> with five judges in the majority and four in dissent, credence was lent to these claims; the decision established a test for production and disclosure that ushered in a period of

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<sup>33</sup> Larcombe, *ibid.* at 136.

<sup>34</sup> *Ibid.* at 137.

<sup>35</sup> *Ibid.* at 144.

<sup>36</sup> *Ibid.* at 137.

<sup>37</sup> The fair trial guarantees are found in sections 7 and 11(d) of the *Charter*, *supra* note 2. Section 7 reads, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Subsection 11(d) of the *Charter* reads, "Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

<sup>38</sup> See *O'Connor*, *supra* note 14.

wide open access to complainants' records. As many analysts have argued, this two-stage test rested on a presumption of the *de facto* relevance of third party records.<sup>39</sup> At the first stage, the defence must demonstrate the "likely relevance" defined as "a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify."<sup>40</sup> Here the Court cautioned that the accused's burden should not be "onerous"<sup>41</sup> and the decision expressly excluded any consideration of complainants' rights. If the records pass the first stage of production, they were to be released to the trial judge to determine whether they should be disclosed to the accused. It is only at this second stage, the majority argued, that the privacy interests of the complainant and the record holder are to be considered. The test was skewed in favour of production on the basis of the accused's right to make full answer and defence. The judge was to weigh the "salutary and deleterious effects ... and determine whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence."<sup>42</sup>

It is now becoming increasingly clear that under the *O'Connor* regime, the likely relevance test functioned as a virtual "open door" through which judges were invited into the realm of the complainants' personal records.<sup>43</sup> This invasion, in turn, was justified by and rooted in a conception of fair trial rights by which the accused was viewed as being constitutionally entitled to all exculpatory evidence. Of thirty-five disclosure applications made in this period, records were ruled likely relevant in twenty-four cases.<sup>44</sup> The very predictability of applications during the period between the *O'Connor* decision and *Bill C-46*, as well as the tendency for trial judges to release records to the accused (in 60 per cent<sup>45</sup> to 75 per

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<sup>39</sup> Bruce Feldthusen, "Access to the Private Therapeutic Records of Sexual Assault Complainants" (1996) 75 Can. Bar Rev. 537 at 551. See also Gotell, *supra* note 16 at 323.

<sup>40</sup> *O'Connor*, *supra* note 14 at 436.

<sup>41</sup> *Ibid.* at 437.

<sup>42</sup> *Ibid.* at 441-42.

<sup>43</sup> According to the Attorney General of Canada, the first stage of the *O'Connor* test became an "as of right" procedure in which it was presumed that records should be made available for *in camera* review. *Mills*, *supra* note 12 (Factum of the Attorney General of Canada).

<sup>44</sup> Busby, *supra* note 17 at 383. See also *Mills*, *supra* note 12 (Factum of the Appellant at para. 16).

<sup>45</sup> Busby found that in 67 per cent of cases that passed the threshold for production, records or portions thereof were released to the accused: see Busby, *ibid.* at 384.

cent<sup>46</sup> of cases during this period), confirms the enduring salience of rape myths and their power to influence those who have the authority to determine the legal “truth” of sexual assault. The effect of the *O'Connor* decision on the law’s processing of sexual violation claims was to radically shrink the category of who is rapable, just as it expanded the possibilities of demonstrating consent. Always regarded with suspicion, allegations of sexual assault became even more suspect as confidential information came to be used to attack the credibility of complainants. Women, particularly those most vulnerable to assault, were increasingly cast into the category of unrapable. Extensively documented women, including women with mental health histories, immigrant women, aboriginal women, childhood assault survivors, foster children, and women with disabilities were especially vulnerable to records applications.<sup>47</sup> The release of therapy or psychiatric files implies that female complainants are inherently unreliable and that the usual methods for testing credibility are insufficient in sexual assault trials. Significantly, it was counselling records that were most frequently sought when disclosure applications were made under *O'Connor*’s liberal regime of access.<sup>48</sup> There is strong evidence that, during this period, complainants were faced with an impossible choice—report and do not seek therapy or do not report.<sup>49</sup>

It is a mistake to view *Bill C-46* as simply a response to the *O'Connor* decision. Legislation that would seek to restrict the widespread use of confidential records in sexual assault trials had begun to take shape

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<sup>46</sup> A 1998 survey of clients of sexual assault centres reports that women’s confidential records were released in almost 75 per cent of cases in which they were requested. See Tina Hattem, *Survey of Sexual Assault Survivors: Report to Participants* (Ottawa: Department of Justice, 2000) at 13, online: Canadian Association of Sexual Assault Centres <<http://www.casac.ca/issues/survey.htm>>.

<sup>47</sup> Marilyn T. MacCrimmon & Christine Boyle, “Equality, Fairness And Relevance: Disclosure of Therapists Records in Sexual Assault Trials” in Marilyn T. MacCrimmon & Monique Ouellette, eds., *Filtering and Analyzing Evidence in an Age of Diversity* (Ottawa: Canadian Institute for the Administration of Justice, 1993) at 81.

<sup>48</sup> Hattem, *supra* note 46 at 12.

<sup>49</sup> The Hattem study revealed that concern over the possibility of record disclosure was a major reason for not reporting: “women said that they were unwilling to risk being re-victimized by ‘being put under a microscope during the trial’...”: *ibid.* at 10. The Attorney General of Canada, the Appellant, and several interveners in *Mills* also provided evidence for this claim in their submissions to the Supreme Court. *Supra* note 43 at para. 21; *Mills, supra* note 44 at paras.126-29; *Mills, supra* note 12 (Factum of the Canadian Mental Health Association and Factum of the LEAF). Finally, in a study undertaken by doctors working at the Sexual Assault Service at Vancouver General Hospital it is reported that the rate of police reporting declined steadily between 1993 and 1997. While the authors make no link between this decline and the escalation of successful disclosure requests, the coincidence is suggestive. See Margaret MacGregor *et al.*, “Why Don’t More Women Report Sexual Assault to the Police?” (2000) 162 *Can. Med. Assoc. J.* 659.

in the federal Department of Justice long before the release of the Supreme Court's decision. In a series of consultations beginning in 1994, crisis workers and anti-violence activists brought the issue to the attention of the federal government and elaborated on the significant negative implications this practice had on their ability to act as effective advocates of sexually assaulted women and children.<sup>50</sup> Activists cited countless examples of centers overrun by subpoenas for records (one center faced forty subpoenas) with legal fees eating up their restricted budgets and workers forced to spend their days in the halls of courthouses, rather than helping assaulted women.<sup>51</sup> Based on the claim that records applications always introduce rape myths into legal deliberations and, therefore, cannot be in the interests of justice, the position that was consistently put forward in these consultations was "no records, no time." Activists demanded that the government act immediately to address a crisis situation by legislating the irrelevance and statutory privilege of confidential records.

In *Mills*, the Supreme Court used the fact of consultations as support for the decision to uphold legislation that departed from the *O'Connor* regime, arguing that "it was open to Parliament to give what weight it saw fit to the evidence presented at the consultations."<sup>52</sup> Jamie Cameron, in her critique of the decision, argues that the mere presence of consultation should not be allowed to save a "clear" breach of the legal rights provisions of *Charter*.<sup>53</sup> But she grounds this argument in misrepresentation: Cameron constructs the consultation process that led to the introduction of *Bill C-46* as narrow, slanted in favour of anti-rape activists, and confined to the legislative process directly preceding the bill.<sup>54</sup> This picture of the federal government as somehow "captured" by feminist advocates quite simply ignores the record. In a sense, *Bill C-46* can be viewed as a governmental response to feminist lobbying. Yet once the federal Department of Justice had committed itself to addressing the issue, it undertook ten separate consultations over a fourteen-month period, that included crisis workers, anti-rape activists, crown attorneys, defence

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<sup>50</sup> Department of Justice, *Consultation: Access to Complainant's Records* (Summary of Consultations) (Ottawa: Department of Justice, 1996) at 1 [Department of Justice, "Access"]. This document provides a summary of all consultations that had taken place on access to confidential records.

<sup>51</sup> Department of Justice, *Consultation on Violence Against Women* (Ottawa: Department of Justice, 1995) at 51-69 [Department of Justice, "Violence"].

<sup>52</sup> *Mills*, *supra* note 12 at 745.

<sup>53</sup> *Supra* note 15 at 1061-62.

<sup>54</sup> *Ibid.*

lawyers, and academics.<sup>55</sup>

While Canadian feminist groups and service providers have been among the legislation's strongest defenders, it is crucial to recognize that any regime for disclosure represented a departure from the preferred instrument of statutory privilege. Moreover, the agenda of feminist and anti-rape groups in the consultations had extended far beyond criminal law reform and enhanced protections for complainants. During successive meetings, activists embraced a coherent and agreed-upon position to frame their demands; this position is articulated in the document *99 Federal Steps to End Violence Against Women*.<sup>56</sup> This agenda contested the narrow focus on the criminal justice system, framed sexualized coercion as a systemic problem rooted in gendered and racialized inequalities, and demanded state action on a number of fronts—including social policy, public education, and, crucially, the provision of a stable funding base for independent, women-controlled front line work. In reading the transcripts of these consultations, one is immediately struck by how cabinet ministers and their officials sought to channel this broad agenda into a much narrower emphasis on criminal law reform.<sup>57</sup> Moreover, initiatives in criminal law reform, and, in particular, the federal government's efforts to respond to the chaos surrounding defence requests for confidential records, were consistently framed as being strictly bound by what the legal rights provisions of the *Charter* could and could not allow. In this way, as predicted by critics such as Judy Fudge in the late 1980s, the politics and discourse of the *Charter* is not confined to the courts but invades the legislative forum. As she argued in an early analysis of the implications of the *Charter* for sexual violence, rather than focusing on how best to respond to the pervasive problem of sexualized coercion, political debate is increasingly cast in terms of competing constitutional rights. In this way, "inconvenient demands" can be swept away by invoking the *Charter*.<sup>58</sup>

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<sup>55</sup> Department of Justice, "Access", *supra* note 50 at 1-2.

<sup>56</sup> Canadian Association of Sexual Assault Centres, *99 Federal Steps to End to Violence Against Women* (Ontario: National Action Committee on the Status of Women, 1993), online: Canadian Association of Sexual Assault Centres Homepage <<http://www.casac.ca/99steps/99steps.htm>>.

<sup>57</sup> This was evident in the 1995 Violence Against Women consultation when Sheila Finestone, Minister for the Status of Women, stated that funding cuts to anti-violence work and social programs were the result of neo-liberal imperatives and the International Monetary Fund. Quickly following this comment, which was resisted and debated by activists who insisted that ending violence against women meant addressing women's equality, Department of Justice officials and cabinet ministers sought to return the discussion to safer ground, drafting legislation to address sexual assault complainants' records. See Department of Justice, "Violence", *supra* note 51 at 26.

<sup>58</sup> Judy Fudge, "The Effect of Entrenching a Bill of Rights upon Political Discourse: Feminist Demands and Sexual Violence in Canada" (1989) 17 *Int'l. J. Soc. L.* 445 at 459.



The introduction of *Bill C-46* was perfectly consistent with governmental efforts to address the complex problem of coercive sexuality and gender violence through the criminal justice system, while simultaneously avoiding concrete and empowering social policy responses. Over the past decade and a half, the Canadian women's movement has come to loggerheads with governments intent on dismantling the vestiges of the welfare state; yet legislative initiatives designed to combat violence against women have proliferated during this very same period.<sup>59</sup> In response to successive court decisions that have undermined protections for complainants in sexual assault trials, recent federal governments have undertaken a series of "progressive" sexual assault law reforms, of which *Bill C-46* is the most recent example. It may be tempting to interpret this exchange between courts and legislatures as the dance of "progressive" politics versus "regressive" liberal legalism or as Cameron does, as evidence of feminist political influence.<sup>60</sup> Yet, as I have emphasized elsewhere, while appreciating the laudable stated objectives of these criminal law reforms, it is at the same time crucially important to pay attention to their form and underlying thrust. Feminist claims regarding the structural and systemic character of sexual violence have been filtered through a discourse emphasizing criminal responsibility and retribution.<sup>61</sup>

It is clear that *Bill C-46* did represent a considered legislative effort to forestall the routine legal invasions of complainants' private records that had become common under the *O'Connor* regime. In this sense, the bill could be seen as a kind of prophylactic, seeking to reduce (but not eliminate) disclosure, through a mechanism that balanced the accused's legal rights against the complainant's equality and privacy rights and societal concerns. In a number of ways, the *Criminal Code* revisions resulting from this legislative reform significantly altered the common law regime established by the Supreme Court in *O'Connor*.

*Bill C-46* defined the scope of records subject to its strict procedures extremely broadly as "any form of record that contains personal information for which there is a reasonable expectation of privacy."<sup>62</sup> By

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<sup>59</sup> Lise Gotell, "A Critical Look at State Discourse on 'Violence against Women': Some Implications for Feminist Politics and Women's Citizenship" in Manon Tremblay & Caroline Andrew, eds., *Women and Political Representation in Canada* (Ottawa: University of Ottawa Press, 1998) at 39 [Gotell, "State Discourse"].

<sup>60</sup> Cameron, *supra* note 15 at 1063.

<sup>61</sup> Gotell, "State Discourse", *supra* note 59.

<sup>62</sup> *Criminal Code*, *supra* note 4. Section 278.1 lists protected records: "... without limiting the generality of the foregoing, medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing

requiring that applications be made only to the trial judge, *Bill C-46* sought to prevent disclosure requests from being used at the preliminary inquiry as a means of intimidating the complainant—the “whack the complainant strategy” that had been widely deployed by defence counsel in the late 1980s and early 1990s.<sup>63</sup> *Bill C-46* reflects the thrust of the minority’s decision in *O’Connor* by establishing a much more rigorous test for disclosure. At the first stage, a written application must specify how the record is not only likely relevant (defined expressly in relation to “an issue at trial or the competence of the witness to testify”) but also how production is “necessary in the interests of justice.”<sup>64</sup> Here, the legislation listed a number of assertions, which are, on their own, insufficient to meet the criteria of likely relevance. These include: the existence of the record; that the record may contain prior inconsistent statements; that the record may relate to the reliability of the witness because she has received therapy; that the record may reveal other allegations of sexual abuse; and that the record relates to sexual reputation.<sup>65</sup> In this way, the government sought to prevent speculative requests for disclosure or “fishing expeditions” based upon unsupported allegations.<sup>66</sup>

Crucial among the changes *Bill C-46* ushered in was the requirement that a wider set of concerns be weighed before records can be released to the trial judge; specifically, “the salutary and deleterious effects of the determination on the accused’s right to make full answer and defence and on the right to privacy and the equality of the complainant ... and any other person to whom the record relates.”<sup>67</sup> In contrast to the *O’Connor* decision’s privileging of the defendants’ rights, *Bill C-46* directed the trial judge to take into consideration seven factors prior to viewing the requested records. These include: the necessity for full answer and defence; the probative value of the record; the extent of the reasonable expectation of privacy; the influence of discriminatory myths; the rights of privacy; the integrity of the trial process; and society’s interest in the reporting of sexual

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personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.”

<sup>63</sup> *Ibid.*, ss. 278.2(1), 278.2(2).

<sup>64</sup> *Ibid.*, ss. 278.3(3), 278.5(1).

<sup>65</sup> *Ibid.*, s. 278.3(4).

<sup>66</sup> Heather J. Holmes, “An Analysis of Bill C-46: Production of Records in Sexual Offence Proceedings” (1997) 2 *Can. Crim. L. Rev.* 71 at 89.

<sup>67</sup> *Criminal Code*, *supra* note 4, s. 278.5(2).

offences and the obtaining of treatment by complainants.<sup>68</sup> If records pass this first stage, these same factors are to guide the judge in deciding whether the documents or edited portions are to be turned over to the accused.<sup>69</sup>

The objective of section 278 of the *Criminal Code* is to limit judicial discretion and to require that fair trial rights be considered in light of the devastating implications of disclosure for complainants. Yet the form of this legislation stands as a telling example of the way in which *Charter* rights discourse invades and overdetermines legislative reforms. It is not simply that fair trial rights and the presumed requirements of the *Charter* constrained the political response to disclosure, thereby foreclosing the possibility of legislating statutory privilege. It is also that section 278 inserts into every disclosure consideration the requirement of a kind of micro-constitutional adjudication. While the provisions do attempt to direct a legal consideration of the social consequences of disclosure (by recognizing the consequences of permitting access for reporting rates, by considering the objective of ensuring counselling for those who have experienced assault, and by accounting for the sway of rape myths), by and large the balancing equation sidesteps an evaluation of needs, harms, and interests, in favour of an abstract consideration of rights. The primary focus of the test for likely relevance and for disclosure is framed and limited by the consideration of fair trial rights of accused persons as well as the privacy and equality rights of complainants. And while most trial judges in sexual assault cases will be very familiar with how fair trial rights can be used to express the interests and needs of the accused, few judges have any experience in pouring the concerns of complainants into the containers of constitutional privacy and equality rights. The discourse of *Charter* rights and its reframing of social and political questions as rights contests becomes indelibly marked on sexual assault law as the quest for disclosure is constituted as, first and foremost, a battle of rights.

#### IV. THE MILLS DECISION

No sooner was section 278 passed, than it was constitutionally challenged as a violation of the fair trial guarantees of the *Charter* and

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<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*, s. 278.7.

struck down in at least two lower court decisions.<sup>70</sup> Because of the considerable state of uncertainty in the law, the Supreme Court agreed to hear an instant appeal of the Alberta Court of Queen's Bench decision in *R. v. Mills*.<sup>71</sup> The exchange between the courts and the legislature around sexual assault, such a marked feature of the post-*Charter* landscape, has nowhere had more moves and complexities than on the question of disclosure. In *Mills*, a legislative regime that can be seen as a reply, yet not a response, to the common law test established by *O'Connor*, is returned to the Supreme Court for constitutional adjudication. Some political analysts characterize the *Mills*<sup>72</sup> decision upholding section 278 as an indication of a new relationship of constitutional dialogue between the judiciary and Parliament.<sup>73</sup> In upholding section 278, the majority of the Supreme Court was harshly critical of the unsophisticated constitutional analysis undertaken in the lower court decision; simply because the legislative regime for disclosure crafted in *Bill C-46* departed from *O'Connor* does not inevitably lead to a finding of unconstitutionality. Instead, the majority emphasized that the courts "do not hold a monopoly on the protection and promotion of rights and freedoms" and that, in specifying constitutional standards, there may be a "range of permissible regimes."<sup>74</sup>

The *Mills* decision has been widely interpreted as a triumph for feminists and a defeat for defence counsel. Yet to argue that *Mills* simply "upheld" section 278 is to ignore its profound ambiguity. *Mills* neither supplanted the Court's decision in *O'Connor*, nor did it "uphold" the legislative regime that replaced the *O'Connor* standard. Instead, cloaked under the language of legislative deference and the recognition of complainants' interests in the disclosure battle, is an interpretation of section 278 that significantly erodes its meaning and intent.<sup>75</sup>

Each gesture in *Mills* towards the recognition of complainants' concerns is simultaneously pushed forward and pulled back. Crucially, the Court indicated a move away from its previous myopic focus on the accused versus the state dyad as the only relevant constitutional relationship in

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<sup>70</sup> Sections 278.1 to 278.9(1) of the *Criminal Code*, *supra* note 4 were struck down in: *R. v. B.J.M.*, [1997] A.J. No. 891 (Alta. Q.B.) (QL); *R. v. Mills*, [1997] A.J. No. 1036 (Alta. Q.B.) (QL); and *R. v. Boudreau*, [1998] O.J. No. 3526 (Ct. J. (Gen. Div.)) (QL). The sections were upheld in *R. v. Hurrie*, [1997] B.C.J. No. 2634 (B.C.S.C.) (QL) and *R. v. Regan*, [1998] N.S.J. No. 356 (N.S.S.C.) (QL).

<sup>71</sup> *Mills*, *ibid.*

<sup>72</sup> *Mills*, *supra* note 12.

<sup>73</sup> Janet L. Hiebert, *Charter Conflicts* (Montreal: McGill-Queen's University Press, 2002) at 116.

<sup>74</sup> *Mills*, *supra* note 12 at 712.

<sup>75</sup> See Coughlan, *supra* note 16.

sexual assault law. In *Mills*, the Court recognized that defendants' legal rights must not be allowed to distort the "truth-seeking" function of the trial process by employing discriminatory myths about rape victims—including the relatively new rape myth that seeking therapy is an indication of untrustworthiness.<sup>76</sup> In fact, this was the very first time that the Court invoked the sexual equality guarantees of the *Charter* in deciding a sexual assault case. As the majority acknowledged, in passing *Bill C-46*, "... Parliament ... sought to recognize the prevalence of sexual violence, ... to encourage the reporting of incidents of sexual violence, ... to recognize the impact of the production of personal information on the efficacy of treatment, and to reconcile fairness to complainants with the rights of the accused."<sup>77</sup>

Yet the majority's gestures to equality and to societal concerns are tempered by its framing of complainants' claims through a narrow conception of "privacy." As the ruling emphasized, the disclosure of confidential information in the context of sexual assault trials inevitably infringes on the privacy rights of the complainant, defined negatively here as the "interest in being left alone by the state."<sup>78</sup> Individuals have a right to control the "dissemination of confidential information."<sup>79</sup> As the majority acknowledged, in the particular context of therapeutic relationships, privacy is essential for trust and, where confidentiality is threatened, so too is the complainant's mental integrity and security of the person.<sup>80</sup> Underpinning this discussion, however, is a highly individualistic and atomistic understanding of complainants' concerns. These concerns are defined primarily in terms of the right to "own one's stories." This kind of analysis conceives the complainant as an isolated individual, not caught up in a web of power relationships that influence her ability to construct an authoritative version of events. In the majority's insistence that "every man [*sic*] has a right to keep his own sentiments,"<sup>81</sup> there is an implicit emphasis on containment and a refusal to acknowledge the creative, communicative, and productive importance of speaking about rape outside the context of the courtroom.

Perhaps more concretely important to complainants seeking

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<sup>76</sup> *Mills*, *supra* note 12 at 719, 727, 741.

<sup>77</sup> *Ibid.* at 712.

<sup>78</sup> *Ibid.* at 721-22.

<sup>79</sup> *Ibid.* at 722.

<sup>80</sup> *Ibid.* at 723-24.

<sup>81</sup> *Millar v. Taylor* (1769), 4 Burr. 2303 at 2379 (K.B.), cited in *ibid.* at 722.

protection of their records than judicial pronouncements about equality and privacy rights was the majority's interpretation of the meaning of subsection 278.3(4). Subsection 278.3(4) lists a number of myth-ridden assertions, which, on their own, are insufficient to meet the criteria of likely relevance. The Court argued that this provision does not prevent defence counsel from relying on any one of the listed assertions, but that in order to meet the test of likely relevance, mere assertion is insufficient. Instead, there must exist an evidentiary or informational foundation to support the records' likely relevance to a trial issue or to the competence of a witness to testify; there must be case specific evidence or information that goes beyond general assertion.<sup>82</sup> This insistence on an evidentiary foundation could provide a strong barrier to "fishing expeditions"—speculative requests for records production.

Yet, once again, this gesture in the direction of complainants is pulled back by the majority's virtual rewriting of the legislative regime. Steve Coughlan goes so far as to argue that "the Court did its best to interpret the legislation to conform to its earlier judgement in *O'Connor*."<sup>83</sup> As the majority emphasized, where legislation is open to several possible interpretations, it is incumbent upon the courts to interpret it in a constitutional manner.<sup>84</sup> This allowed the majority to massage the test for disclosure laid out in the legislation in such a way that fair trial rights once again assume a position of pre-eminence. The ruling repeatedly stressed that section 278 retains judicial discretion, positioning the final decision of likely relevance in the subjective hands of the trial judge: "[the test] does not supplant the ultimate discretion of the trial judge ... the trial judge is the ultimate arbiter in deciding whether the likely relevance threshold ... is met."<sup>85</sup> Even though subsection 278.5(2) codified a list of considerations to frame the analysis of likely relevance—in this way seeking to limit judicial discretion—the *Mills* majority transforms these criteria into a "checklist" of various factors which "may come into play during a judge's deliberation."<sup>86</sup> The considerations enumerated in the legislation include social concerns and objectives that extend beyond the framework of competing constitutional rights, such as the influence of "discriminatory myths," "society's interest in reporting," and ensuring that victims receive

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<sup>82</sup> *Mills*, *supra* note 12 at 741.

<sup>83</sup> Coughlan, *supra* note 16 at 301.

<sup>84</sup> *Mills*, *supra* note 12 at 690.

<sup>85</sup> *Ibid.* at 742.

<sup>86</sup> *Ibid.* at 749. See also Coughlan, *supra* note 16 at 306.

counselling. Through the majority's slight of hand, social considerations are effectively reconstructed as optional concerns that need not be used in reaching decisions on production and disclosure. And, in a move which arguably erodes the very thrust of section 278, the majority insists that where there is any doubt about the likely relevance of the records, the "interests of justice" require that the trial judge must "take the next step in viewing the documents."<sup>87</sup> In its insistence that "in borderline cases, the judge should err on the side of production," the *Mills* majority effectively redefines the purposive meaning of *Bill C-46*.<sup>88</sup> Indeed as Justice Binnie recently opined for the majority in *R. v. Shearing*,<sup>89</sup> "I cannot agree that *Mills* has shifted away from the primary emphasis on the rights of the accused because *Mills* itself affirms the primacy—in the last resort—of the requirement of a fair trial to avoid the wrongful conviction of the innocent."

It is clear that the *Mills* decision is, in the end, highly contradictory. For now, the final Supreme Court pronouncement on disclosure regimes appears to uphold legislation that differed from its own common law test but arguably returns the law to a position that is much closer to the Court's original position. The post-*Mills* landscape is highly conflictual, the site of an endless push and pull between the colonizing impetus of legal discourse and the protection of extra-legal discursive spaces where women can tell their stories out from under laws' shadow. The contradictions inherent in the *Mills* decision give birth to divergent, although linked, themes that mark the judicial consideration of confidential records since late 1999.

## V. CHARACTERISTICS OF THE POST-MILLS CASES ON ACCESS TO COMPLAINANTS' RECORDS

If one were to accept the conventional interpretation of *Mills* as a decision that erodes fair trial rights by upholding a strict legislative test for production and disclosure, one might expect that defence counsel would have altered their strategies accordingly to avoid the costs, complications, and risks involved in applications for records. There is, however, a very strong indication that records applications have remained a crucial weapon in defence counsels' arsenal for discrediting claims of sexual assault. It is not possible to determine through case analyses how frequent production and disclosure requests arise in the post-*Mills* context. Nevertheless, both before and after the release of the *Mills* decision, criminal lawyers and their

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<sup>87</sup> *Mills*, *supra* note 12 at 751-52.

<sup>88</sup> *Ibid.* at 748.

<sup>89</sup> (2002), 214 D.L.R. (4<sup>th</sup>) 215 (S.C.C.) [*Shearing*].

associations began to strategize on how to deploy the section 278 regime to their advantage. Prior to *Mills*, the Criminal Lawyers Association held a “study day” to advise their members on how to prepare and argue a section 278 application.<sup>90</sup> As Leslie Pringle counselled,

[A] successful application to produce third party records may be critical. In some cases, it has resulted in the Crown actually withdrawing the charges after a review of the records. In others, it has been the key to successful exposure of weaknesses in the complainants’ version of events. For the complainant, it may be the beginning of an embarrassing examination of intensely private and personal topics...<sup>91</sup>

Following the *Mills* decision, an article in the Criminal Lawyers Association newsletter emphasized the continued importance of records applications:

What is portrayed as an invasion of the complainant’s privacy is in reality an essential tool in the appropriate case to ensure that a person [*sic*] accused of a serious charge of sexual assault receive a fair trial. The importance of pursuing these types of applications, when appropriate, cannot be overstated ... . When applying for the production of third party records, defence counsel should be relentless in reminding the courts that “it can never be in the interests of justice for the accused to be denied the right to make full answer and defence” (quote from *Mills* majority).<sup>92</sup>

As this article highlights, *Mills* is a decision rife with tensions, some of which can be used to the advantage of defendants in their quests for records. It is for this reason that records applications remain a contested issue in the case law.

In order to dissect the meaning and implications of the *Mills* decision, I have analyzed thirty-seven post-*Mills* cases (twenty-five trial cases and twelve appellate cases) concerning access to confidential records (see Appendix A). All of these cases appear in the legal database Quicklaw and cover the period between the December 1999 release of the *Mills* decision until mid-2002. Most of these cases apply the ambiguous and contradictory principles enunciated by the Supreme Court to the facts of specific cases and most concern decisions about the likely relevance of

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<sup>90</sup> Carol Letman, *Section 278 Applications* (Materials prepared for Criminal Lawyers Association Annual Spring Education Programme) in *Practical Applications: A User-Friendly Guide to Motions in Criminal Proceedings* (Toronto: Ontario Criminal Lawyers Association, 1999); Leslie Pringle, *Third Party Record Applications* (Materials prepared for Criminal Lawyers Association Annual Spring Education Programme) in *Practical Applications: A User-Friendly Guide to Motions in Criminal Proceedings* (Toronto: Ontario Criminal Lawyers Association, 1999).

<sup>91</sup> *Ibid.*

<sup>92</sup> Steven Skurka & Elsa Renzella, “Defending a Sexual Assault Case: Third Party Record Production” (2000) 21 *For the Defence* 32 at 32.



records under section 278 (twenty-seven cases, see Appendix B). Other cases rule on what kinds of records should be incorporated within the scope of section 278 and, in particular, the meaning that should be given to the phrase “reasonable expectation of privacy.” My analysis also includes cases that do not directly engage the interpretation of section 278, but nonetheless raise crucial issues concerning access to the confidential records of complainants. For example, the court in *R. v. Shearing*<sup>93</sup> dismissed the application of section 278 to a diary that had fallen into the hands of the accused and ruled on the scope of cross-examination on this diary. *R. v. Stewart*,<sup>94</sup> a British Columbia Court of Appeal decision, considered a stay granted because the Crown suggested that some complainants would become suicidal should their records be released.

As Karen Busby notes in her analysis of pre-*Mills* disclosure cases, decisions that are found on Quicklaw are not representative and do not constitute an accurate sampling of the range of situations in which applications are made.<sup>95</sup> Yet these cases are the ones that will be cited in the future evolution of section 278, thereby providing an important indication of emerging legal trends. My central analytic focus is the manner in which the decisions interpret the *Mills* balancing equation, the meanings they attach to constitutional rights claims that are a feature of each disclosure consideration, and crucially, their discursive consequences. In particular, as I have suggested through the interrogation of these decisions, we can observe precise mechanisms for the disqualification of complainants, the increasing hegemony of a liberal legalistic and individualistic discourse of rape, and an emergent ideal construct: the new ideal rape victim.

In order to lay a foundation for this legal and discursive analysis, it is useful to provide an overview of the general characteristics of these cases.

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<sup>93</sup> *Shearing*, *supra* note 89.

<sup>94</sup> [2000] B.C.J. No. 1815 (B.C.C.A.) (QL) [*Stewart*].

<sup>95</sup> Busby, *supra* note 17 at 359.

### A. *The Gendered Character of the Cases*

The post-*Mills* cases reflect the inherently gendered nature of sexualized coercion; recent Canadian statistics show that while 98 per cent of sex offenders are men, 82 per cent of survivors are women and girls.<sup>96</sup> All (100 per cent) of the 37 accused individuals in these cases were male and most, except for 6 adolescents, were adult men. By contrast, of 118 complainants, there was not one case in which assault against an adult man was alleged: 105 (89 per cent) were women and girls and 11 (9 per cent) were male children or adolescents at the time of the alleged assaults. In 2 cases, the complainant's gender was not indicated.

### B. *Relationships Between the Accused and the Complainants*

Consistent with Busby's findings on the pre-*Mills* case law, all of the cases involved defendants who had personal or professional relationships with the complainants.<sup>97</sup> There is not one single case of stranger rape among the cases analyzed. In the twenty-seven cases, where it was possible to determine the nature of the relationship between the accused and complainant[s], six were fathers/stepfathers, six were other family members (including brothers, uncles, and brothers-in-law), five were family friends and other acquaintances, two were ex-common law spouses, one was a roommate in a children's home, and one was a fellow student. There were five defendants who had had professional relationships with the complainants, including: a religious leader, a doctor, a probation officer, a group home worker, and a therapist. In part, the existence of close relationships between the accused and complainants merely reflects the statistical likelihood (69 per cent) that complainants will know their attackers.<sup>98</sup> It also suggests, however, that defendants who know their accusers can rely on their own personal information to determine the existence and nature of records.

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<sup>96</sup> Statistics Canada, "Sex Offenders" (1999) 19 Juristat 1 at 1.

<sup>97</sup> Busby, *supra* note 17 at 361.

<sup>98</sup> Metropolitan Action Committee on Violence Against Women and Children, *Statistic Sheet: Sexual Assault* (Toronto: METRAC, 2001), online: METRAC <[http://www.metrac.org/new/stat\\_sex.htm](http://www.metrac.org/new/stat_sex.htm)>. This statistic is based on a study undertaken by the Ontario Women's Directorate. See Ontario Women's Directorate, *Facts and Statistics: Preventing Violence Against Women* (Toronto: OWD, 1995), online: OWD Homepage <<http://www.gov.on.ca/citizenship/owd/english/facts/preventing.htm>>.

### C. *Extensively Documented Complainants*

Previous research has suggested that those complainants who have been extensively documented are particularly vulnerable to records applications, including children in care, people with disabilities and mental health histories, aboriginal women, and women of colour.<sup>99</sup> It was not possible to analyze this prediction on the basis of the case law analysis because very little information is provided about the complainants. In three cases that involved complainants with developmental delays, defendants used their expansive records to suggest incompetency or faulty perception. The decisions were completely silent about the racial background of the complainants (in only one case was the race of the accused noted). While several defendants sought to paint their accusers as delusional or suffering from mental illness, these assertions were frequent and most often appeared to lack a concrete foundation. It would therefore risk misrepresentation to try to categorize the complainants on the basis of mental illness.

### D. *Prevalence of Applications in Cases Involving Assaults Against Minors and Historical Allegations*

While much about the complainants is obscured in the text of the decisions, it is clearly apparent that most are (or have been) vulnerable children, some of whom have been in care and many with child welfare records. Almost 90 per cent of the complaints at issue in the post-*Mills* cases were of sexual offences against adolescents or children; 78 per cent of the cases concern allegations of past assaults. This finding suggests that records applications may be a feature of cases where children and adolescents are complainants and where complainants allege past abuse. The frequency with which the disclosure case law deals with historic abuse claims and contemporary assault claims made by minors implies that these allegations are regarded with suspicion and are seen to require external corroboration.

### E. *Records Sought*

In most of the application cases, defendants sought multiple records. In one extremely sweeping application, medical and therapeutic records were sought from sixty-three complainants. Again echoing Busby's

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<sup>99</sup> See MacCrimmon & Boyle, *supra* note 47.

findings on the pre-*Mills* case law,<sup>100</sup> counselling and therapeutic records were the most commonly sought records (eighteen cases), followed by applications for child welfare records (twelve cases). Medical and hospital records were sought in nine cases and diaries in four cases. Other records at issue were: educational (four cases); correctional (one case); criminal injuries compensation claims (one case); and police investigative reports of unrelated allegations (one case).

## VI. POST-MILLS CASE LAW AND THE FINDING OF NOT LIKELY RELEVANT: PRIVACY AND THE LIBERAL LEGAL SUBJECT

What characterizes [rape's] eventfulness? ... Does it take place in alleys and bedrooms or in the courtroom, where rape becomes a matter of a woman's credibility and psychological coherence almost more than it concerns her body and its integrity?<sup>101</sup>

As Larcombe insists in her insightful analysis of the constructed distinction between the ideal rape victim and the everyday complainant, cases in which the complainant “wins” are just as problematic for feminist critics as the wholesale discrediting process that marks the rape trial.<sup>102</sup> Such cases not only function as symbolic public testimonies of law's claim to justice, they also act to affirm a specific and narrow understanding of sexualized violence—as unusual, as individualized, and as capable of being resolved and redressed through the criminal justice system. Such cases also work to construct the characteristics of the ideal victim, a symbolic and unreal construct, who serves as the measure of any real complainant's credibility. The post-*Mills* cases in which complainants' records are found not likely relevant are admittedly not “good” cases. We do not know the outcome of the cases—for example, whether a conviction was secured and what kinds of scrutiny and reality-testing a complainant had to endure to qualify for legal redress. In most of the cases I have analyzed, all that is available is a decision about whether the records pass the threshold test for production.<sup>103</sup> But this decision is nonetheless crucial, for it reveals the line

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<sup>100</sup> Busby, *supra* note 17 at 369-72.

<sup>101</sup> Hengehold, “Remapping”, *supra* note 27 at 192.

<sup>102</sup> Larcombe, *supra* note 32 at 132.

<sup>103</sup> Only five cases dealt with the question of disclosure to the accused. I have not dealt with these decisions specifically, but I have included them in my analysis of likely relevance. In one case, the record produced was not disclosed: see *R. v. W.P.N.*, [2000] N.W.T.J. No. 15 (S.C.) (QL) [*W.P.N.*]. In four cases, some or all records, or portions thereof were disclosed: see *R. v. Hammond*, [2002] O.J. No. 1596 (Ct. J. (Gen. Div.)) (QL) [*Hammond*] (decided on basis that there was not a “reasonable expectation

between law's colonization of extra-legal spaces where complainants have "told" their stories of sexualized violence and the "protection" of these spaces. Decisions on likely relevance also expose the terms on which this line is drawn and what kinds of stories and complainants will qualify for the tenuous protections of section 278. This line, as we will see, is unstable and marked by both the ambiguities of the *Mills* decision and its narrow construction of complainants' concerns as the entitlement to privacy rights. This, in turn, depends upon the success of the complainant's performance of the ideal victim.

The *Mills* majority's insistence on the necessity of an evidentiary or informational foundation to ground a finding of the likely relevance of records<sup>104</sup> has positively impacted on post-*Mills* case law. Indeed, it is largely because of this insistence that there is a reduced likelihood of production. As Busby's research revealed, almost 67 per cent of records applications passed *O'Connor's* relaxed threshold test for production to the judge.<sup>105</sup> Using Busby's criteria of "all or most" of the records produced, my analyses of post-*Mills* decisions reveals a lower likelihood of a finding of likely relevance. In 33 per cent of the decisions on likely relevance that I have analyzed, the courts ordered all or most of the records to be produced. Busby's study, however, fails to elaborate on how she has defined "all or most." If I add to my analysis the four cases in which some records (often important and multiple records) were ordered produced, then the rate of a finding of likely relevance rises to 48 per cent (see Appendix B for a list of decisions on likely relevance).

The *Mills* decision, emphasizing the necessity of judicial discretion, offers a set of contradictory rationales from which judges can pick and choose in justifying a decision of likely relevance. In cases in which records did not pass the threshold for production, judges relied heavily on the *Mills's* criteria of case-specific "evidence" that would raise an assertion of likely relevance from the level of the general to the specific. Quite frequently, under the *O'Connor* rules, records were produced on the basis of the simple claim that they *may have* contained statements about the alleged attack.<sup>106</sup> In those post-*Mills* decisions in which records were found not likely

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of privacy") (QL); *R. v. W.G.*, [2000] N.J. No.86 (Nfld. S.C. (T.D.)) (QL) [*W.G.*]; *R. v. L.P.M.*, [2000] O.J. No. 4076 (Sup. Ct.) (QL) [*L.P.M.*]; *R. v. W.C.*, [1999] M.J. No. 542 (Q.B.) (QL). There are far too few disclosure decisions to reach any conclusions about emerging legal trends, for example, on its frequency or on its judicial justifications.

<sup>104</sup> *Mills*, *supra* note 12 at 740-42.

<sup>105</sup> Busby, *supra* note 17 at 383.

<sup>106</sup> Gotell, "State Discourse", *supra* note 59 at 325-29.

relevant, judges argued that simple assertion, based on speculation and myth, is no longer sufficient to support an order for production.

Quickly following the *Mills* decision, some lower court judges began to apply section 278 in a way that, in the words of the defence bar, “created a high ... threshold as to the type of information required to meet the likely relevance test.”<sup>107</sup> For example, in *R. v. P.E.*,<sup>108</sup> the Ontario Court of Appeal agreed with the trial judge and found that the accused had not established that the records at issue were likely relevant. This was a case of historical sexual abuse in which a thirty-seven year old complainant alleged long term abuse by her stepfather ending when she was sixteen years old. The requested records related to therapy that this woman had undergone at the time she made a police report. The Court of Appeal found that submissions stressing the temporal connection between the counselling and the making of the complaint, and the simple fact that the charges were discussed amounted to nothing more than bare assertions that failed to provide an evidentiary foundation. A similar conclusion is reached in *R. v. Batte*,<sup>109</sup> another complex historical abuse case, widely cited as an authority on the application of the case-specific evidence criteria. *Batte* was an appeal case not decided under the *Mills* section 278 regime, but under the *O'Connor* regime because it was the one in place when the initial decision was rendered. Nonetheless, Justice Doherty argued, citing *Mills*, assertion is not enough to support production even under the common law test. Simply because “a complainant said something about a matter which could be the subject of cross-examination at trial, does not raise a reasonable possibility that the complainant’s statement will have some probative value in the assessment of her credibility.”<sup>110</sup> As he elaborates, “[An] accused must point to ‘case specific evidence or information’ to justify that assertion. *In my view, the accused must be able to point to something in the record ... that suggests that the records contain information that is not already available to the defence.*”<sup>111</sup>

The *Batte* requirement that something in the record must constitute new and otherwise unavailable information strengthens the threshold test for likely relevance. This criterion was used in several post-*Mills* cases to

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<sup>107</sup> Skurka & Renzella, *supra* note 92 at 35.

<sup>108</sup> [2000] O.J. No. 574 (C.A.) (QL) [*P.E.*].

<sup>109</sup> [2000] 49 O.R. (3d) 321 (C.A.) [*Batte*].

<sup>110</sup> *Ibid.* at 342.

<sup>111</sup> *Ibid.* at 341 [emphasis added].

deny production.<sup>112</sup> In *R. v. Sutherland*,<sup>113</sup> for example, a developmentally disabled woman was sexually assaulted by an acquaintance. A few days later, she spoke with a support worker at an organization that provides assistance in community living and the police were subsequently called. Despite the fact that this meeting may have precipitated a police report, the Ontario Court of Appeal, following the trial judge, refused to order production. The Court of Appeal noted that the complainant had made four largely consistent statements about the assault and that the support workers notes, which did not go into the details of the assault, would have produced no new information to the defence.<sup>114</sup>

These decisions are indeed important in shrouding records from speculative production requests. But it is also crucial to interrogate the discourse on which these positive decisions are based and, in particular, the manner in which they construct complainants' concerns in the battle over confidential records. Drawing on the *Mills* decision, these trial and appellate decisions define the protection of records as primarily and almost exclusively a matter of "privacy" and "privacy rights."<sup>115</sup> Here, the abstractions of *Charter*-rights discourse, in which complexities of systemic sexual violence and questions about the relative authority of claims of coercive sexuality are filtered through a constricted discourse of privacy, can be observed. The "right" to "be left alone by the state" and "to control the dissemination of personal information" overdetermines the judicial consideration of the harmful consequences of access to complainants' records. One significant example of the myopic legal focus on privacy is *R. v. R.C.*,<sup>116</sup> a case in which counselling records were sought in order to provide foundation for the claim that a "religious" complainant felt

<sup>112</sup> *R. v. D.M.* (2000), 37 C.R. (5<sup>th</sup>) 80 at 93 (Ont. Sup. Ct.) [*D.M.*]; *R. v. P.J.S.*, [2000] Y.J. No. 119 at para. 26 (S.C.) (QL) [*P.J.S.*]; *R. v. Sutherland* (2001), 156 C.C.C. (3d) 264 at 270 (N.S.C.A.) [*Sutherland*]; *R. v. D.W.L.* (2001), 194 N.S.R. (2d) 379 at 388 (C.A.) [*D.W.L.*]; *R. v. M.G.*, [2001] M.J. No. 61 at para. 19 (Prov. Ct.) (QL) [*M.G.*]; *R. v. Thompson*, [2001] O.J. No. 2900 at para. 6 (Sup. Ct.) (QL) [*Thompson*]; and *R. v. S.P.*, [2001] O.J. No. 2898 at para. 10 (Sup. Ct.) (QL).

<sup>113</sup> *Sutherland*, *ibid.*

<sup>114</sup> *Ibid.* at 271.

<sup>115</sup> The following cases cite no consideration but privacy: *R. v. Clifford* (2002), 58 O.R. (3d) 257 at 271-72 (C.A.) [*Clifford*]; *Thompson*, *supra* note 112 at para. 3; and *W.P.N.*, *supra* note 103 at para. 4. In some cases, other considerations such as equality or society's interest in reporting are simply listed, but never elaborated and the primary emphasis remains on "privacy" unconnected to any other concerns. See *D.W.L.*, *supra* note 112; *P.J.S.*, *supra* note 112 at paras. 8-9; and *M.G.*, *supra* note 112 at paras. 14-15. In only one case is their some recognition of equality, discriminatory myths, and reporting that is meaningfully connected with the privacy of confidential records: see *R. v. Tatchell* (2001), 207 Nfld. & P.E.I.R. 131 at 137 (Nfld. S.C. (T.D.)) [*Tatchell*].

<sup>116</sup> *Clifford*, *ibid.*

“shame” because of her sexual relationship with the accused and had therefore lied to protect her “reputation.” Ignoring the broader purposes of *Bill C-46*, the Ontario Court of Appeal defined the purpose of section 278 as being solely about the protection of privacy. As the Court states, “the point of the provisions is that the complainant has the right to be left alone in these highly personal areas unless the accused can meet the test set out by Parliament.”<sup>117</sup>

What is troubling about this narrow focus on privacy is that it encourages a kind of legal analysis that is both degendered and decontextualized. Privacy is constructed as an abstract good, apart from any consideration of the specific consequences of defence access to complainants’ records in the context of sexual assault trials. Janine Benedet, writing about the use of sexual history evidence, argues that this is wrong not because it constitutes an invasion of privacy, but instead because sexual assault evidence undermines sexual equality.<sup>118</sup> While it is not clear to me that even “equality rights” could provide a framework amenable to capturing the complexities of production and disclosure, at least equality discourse could permit a fuller analysis of the uses of confidential records and the assumptions that inform this strategy. Even though the legislative framework established by section 278 asks the courts to weigh the accused’s legal rights against the privacy *and equality* rights of complainants—considering factors such as “discriminatory myths,” society’s interest in reporting, and ensuring counselling for complainants—rarely are any concerns other than privacy (and fair trial rights) acknowledged. This narrow analysis is rooted directly in *Mills*’ emphasis on privacy and its construction of societal and equality concerns as secondary and subordinate considerations, which may or may not frame the determination of likely relevance. Of the fourteen cases in which records were found not likely relevant, only four cases even mentioned “equality”<sup>119</sup> and only three cases noted the goal of encouraging reporting of sexual offences.<sup>120</sup> Most often, these considerations are given no elaboration. In only one case could it be suggested that an equality analysis influenced the determination of not likely relevant. In *R. v. Tatchell*, a case in which residential school records were sought for a blind and developmentally delayed complainant, the court cautioned that the application may be based on “the discriminatory

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<sup>117</sup> *Ibid.* at 272.

<sup>118</sup> Benedet, *supra* note 5 at 107.

<sup>119</sup> *Tatchell*, *supra* note 115 at 137; *P.J.S.*, *supra* note 112 at paras. 8-9; and *M.G.*, *supra* note 112 at paras. 14-15.

<sup>120</sup> *Tatchell*, *ibid.*; *D.W.L.*, *supra* note 112 at 390; and *M. (D.)*, *supra* note 112 at 94.



belief that all persons with an intellectual disability ... are incapable of telling the truth” and suggested that the release of such records would discourage reporting by those with “intellectual disabilities.”<sup>121</sup>

Judicial resistance to considerations beyond privacy is even carried to the point of hostility in the *Stewart*<sup>122</sup> trial decision, a case involving sixty-four complainants claiming indecent assault and rape against a British Columbia doctor. At the records application stage, the Crown had raised the fear of suicide should the records of some complainants be released. The trial judge’s reaction was to stay all charges. In high rhetoric, he claimed that recognizing suicide as a potential consequence of records disclosure inevitably tainted his decision on the applications: “... if I do make a ruling in favour of the accused, you are saying to me, Well, you may have just killed her.”<sup>123</sup> Of course, there is no reason why health concerns should not be allowed to factor into a consideration of “the salutary and deleterious effects” of production and disclosure. While the stay decision was overturned on appeal, the *Stewart* decision stands as an extreme example of a pervasive judicial resistance to recognizing the complex and profoundly harmful consequences of records disclosure that extend well beyond controlling personal information. Through the legal emphasis on “privacy,” the obfuscation of the social context, and the power-ridden implications of access to records, the construction of sexualized violence as a discrete event that occurs between isolated individuals is both enforced and enacted.

The discourse of privacy provides unstable ground for the protection of complainants from invasive credibility probing. This is revealed by interrogating the underside of decisions in which records are found not likely relevant. Judges are often quite eloquent in their elaboration of factors which may have pushed an application over the threshold for production. It is through these elaborations that we can observe the construction of the ideal victim, whose characteristics mirror the liberal legal subject. To claim the protections of privacy rights, one must assume the standpoint of the rational liberal legal subject: one must articulate a straightforward and consistent account capable (often at an early stage in the trial process) of meeting the test of historical truth, and one must squeeze the ambiguities and complexities of coercive heterosex into the binary logic of the consent/coercion dichotomy. Complainants who are represented as failing to meet standards of consistency, rationality, and

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<sup>121</sup> *Tatchell, ibid.* at 132, 137.

<sup>122</sup> *Supra* note 94.

<sup>123</sup> *Ibid.* at para. 15.

psychological coherence risk losing the protections afforded by privacy rights.

Judicial comments about the kind of factors that might push records into the category of likely relevance mark these largely positive decisions. What joins these commentaries together is their emphasis on the threat of therapeutic and other forms of contamination and the spectre of false memories. In many decisions, judges were emphatic in their insistence that these were not situations involving questionable therapeutic practices or faulty memories.<sup>124</sup> In *P.E.*, for example, the judge held that “there was nothing to suggest that the complainant had recovered these memories of abuse or that the counselling had influenced her memory.”<sup>125</sup> Similarly, in *Batte*, the judge affirmed that, “... there was no evidence that the counselling process played any role in reviving, refreshing, or shaping the memory of [the complainant].”<sup>126</sup> The *M.A.S.* decision draws a line:

“There was no evidence that there were questions asked by the worker ... [that may have] tainted the complaint ... . What is frowned upon, of course, is any manipulation, psychological or otherwise, of a person to persuade him or her to lay charges ... . Here, there was no evidence to support a finding that illegal, improper, unethical or questionable practices or methods were employed.”<sup>127</sup>

These repeated denials of disorder, manipulation, and faulty memories serve as a warning about just how fragile the protections afforded by privacy may be. Complainants are always vulnerable to being constructed as troubled and delusional. In cases where records are either produced or released, complainants’ [in]ability to resist these presumptive constructions depends upon the success or failure of their performance as the ideal rape victim, a construct marked by the psychological coherence and the consistency of their claims. This performance remains a target for defence

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<sup>124</sup> See also *P.J.S.*, *supra* note 112 at paras 14-15: “the evidence, in fact, is that the complainant asserts that she remembers well what took place ... I do not find anywhere in the evidence which was presented ... that her memory is questionable. [There is no case specific evidence] supporting the assertion that the records would help a faulty memory or that the records would disclose acts which tended to impair or distort the perceived memory.” See also *W.P.N.*, *supra* note 103 at para. 14: “so it is not a situation where either the initial disclosure was made during therapy or that the complaint’s memory of the alleged abuse was somehow “recovered” during therapy.” See also *M.(D.)*, *supra* note 112 at para. 21: “there is no mental health profile of the complainant giving rise to concern about her capacity to observe record, recall and report any abuse experienced”: *R. v. E.A.N.*, [2000] B.C.J. No. 298 154 at 158 (C.A.) (QL): “in particular, [the complainant’s] therapy did not ever involve ... the restoration of memory” (quoting affidavit evidence of the therapist).

<sup>125</sup> *Supra* note 108 at 373.

<sup>126</sup> *Supra* note 109 at 340.

<sup>127</sup> *R. v. M.A.S.* (2001), 151 Man. R. (2d) 264 at 267 (Q.B.).

strategies aimed at challenging the clarity and distinctness of memories, suggesting that a complainant misremembers or misinterprets what she does remember.

## VII. POST-MILLS CASE LAW AND THE FINDING OF LIKELY RELEVANT: THE HYSTERIZATION OF THE RAPE COMPLAINANT

If some recent decisions rely on *Mills*' insistence on the lack of an evidentiary foundation in refusing production, others also rely on the opposing elements within the *Mills* decision to justify a finding of likely relevance. Even though the post-*Mills* case law as a whole indicates a reduced likelihood of successful applications, the interpretation of the test for access in decisions ordering production and sometimes disclosure is deeply troubling. It not only suggests avenues for manipulating the section 278 balancing equation to permit continued and invasive credibility probing, but also rests upon repetitive construction of complainants as hysterical and incoherent, thus disentitled to the privacy that can only shroud the rational legal subject.

In some cases, records are disclosed because they are found to fall outside the regime established by section 278. These cases are often based on a finding of a lack of a "reasonable expectation of privacy in the records," holding that since the records in question contain statements to authorities, there is an expectation that authorities will investigate and act and, therefore, the records fall outside the boundaries of expected privacy.<sup>128</sup> It has been confirmed, for example, that complainants have "no reasonable expectation of privacy" in criminal injury compensation claims because of the public nature of these proceedings.<sup>129</sup> In *K.A.G.*, letters to school officials describing allegations against a fellow student are also deemed to fall outside the expectation of privacy.<sup>130</sup> More troubling than the exclusion of records clearly related to the allegations at issue was the decision in *Hammond*,<sup>131</sup> where it was decided that police investigative reports about an unrelated complaint be disclosed to the accused. Here the judge ruled that the section 278 regime did not apply. Even though the police reports were from a completely separate incident, they were ordered

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<sup>128</sup> See *R. v. K.A.G.* (2001), 192 N.S.R. (2d) 5 at 7 (Fam. Ct.) [*K.A.G.*].

<sup>129</sup> *R. v. L.S.*, [2000] O.J. No. 3991 (Sup. Ct.) (QL).

<sup>130</sup> *K.A.G.*, *supra* note 128.

<sup>131</sup> *Hammond*, *supra* note 103.

released to the accused under the Crown's disclosure obligations.<sup>132</sup> That the accused sought to use these records based on an unsubstantiated claim that the records might establish a pattern of making false complaints is not subjected to any rigorous judicial analysis. As the judge concluded—drawing on *Mills*, though sidestepping section 278—“uncertainty should be resolved in favour of the accused.”<sup>133</sup>

The privileging of the accused's rights, the tenuous protections afforded by privacy, and the potential to avoid the legislative regime for the disclosure of confidential records are starkly illustrated in the recent Supreme Court decision in *Shearing*.<sup>134</sup> This case involved multiple allegations of historical sexual offences against the leader of a quasi-religious cult. *Shearing* is a complicated case, raising issues not only about the scope of section 278, but also about similar fact evidence and proper limits on cross-examination. Most relevant to this discussion was the question of whether the diary of one of the adult women complainants, who, as a child, had lived with the accused, was covered by the section 278 regime. This diary, kept for a brief period during the alleged offences, had been left behind by the complainant when she had moved out some twenty-two years before the trial. During the trial, the diary had fallen into the hands of the accused who sought to cross-examine the complainant on her failure to record the alleged abuse.

With seven judges in the majority and two in dissent, the Supreme Court curtly dismissed the applicability of section 278 to the diary. Rejecting the claim that the diary should be returned to the complainant so that the accused could make an application for disclosure, the majority argued colloquially that this “would seem ... to shut the barn door after the horse has escaped.”<sup>135</sup> The majority gives short shrift to the complainant's interests, arguing that because violation of her privacy rights had already occurred and because the diary was already in the possession of the defence, the proper question was not disclosure but admissibility.<sup>136</sup> On this question, the Court ruled that “the nature and scope of KWG's diary did not raise privacy or other concerns of such importance as to ‘substantially

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<sup>132</sup> *Ibid.* at paras. 13-16. These obligations were established in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, where the majority articulated a strong and expansive interpretation of accused's rights under section 7 of the *Charter*, *supra* note 2, and on this foundation broadened the Crown's obligation of disclosure to include all information relevant to the defence.

<sup>133</sup> *Hammond*, *ibid.* at para. 27.

<sup>134</sup> *Supra* note 89 (Justice L'Heureux-Dubé & Justice Gonthier dissenting on this issue at 259-71).

<sup>135</sup> *Ibid.* at 245.

<sup>136</sup> *Ibid.* at 249.

outweigh' the appellant's fair trial right to cross-examine on the diary ... ." (both the selected entries permitted by the trial judge and the absence of entries)<sup>137</sup> Here, even the slanted balancing of rights envisioned by *Mills* is avoided in a decision that arguably reinvents the doctrine of recent complaint.<sup>138</sup> Underlying the majority's analysis is the construction of a good rape victim, one who behaves in certain ways. If a complainant records her daily life in a diary, then it is expected that she will record incidents of abuse. A set of expectations about the appropriate and rational behaviour of ideal victims provides the unspoken backdrop to this decision, despite the majority's protestations to the contrary. Such "rational" behaviour, in turn, acts as a set of standards by which a real complainant's actions are measured and her failing engineered. In the end, what *Shearing* tells us is that it is not only what complainants have said and written about their assaults that can be opened to legal invasion, it is also what is not said and not written.

The repeated hysterization of complainants and the orchestration of a dissonance between real complainants and the ideal rape victim also informs cases where records are found to fall within the scope of section 278. These discursive moves are both shrouded and enabled by the *Mills* decision's privileging of defendants' rights. The *Mills*' majority's stress on the importance of judicial discretion,<sup>139</sup> its reframing of section 278's guidance on factors that should be considered as simply a checklist,<sup>140</sup> and its argument that fair trial rights must prevail in "uncertain" situations<sup>141</sup> are all widely cited in the cases where records have been ordered produced and sometimes disclosed to the accused. As Coughlan has suggested, the effect of *Mills* may be to resurrect *O'Connor*'s low threshold test for likely relevance under the rhetoric of judicial deference.<sup>142</sup> Indeed, the argument that *Mills* does not displace the pre-eminence of fair trial rights within sexual assault law receives strong support in this set of cases. Most often, the tone of these decisions is highly conclusory. Judges will often simply review the facts of the case, describe the records sought, summarize defence submissions, quote (most often without any interpretation) the provisions

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<sup>137</sup> *Ibid.* at 258.

<sup>138</sup> Justice L'Heureux-Dubé, for the dissent, argues that "the assumption that 'silence speaks volumes' is unfounded, and by itself cannot lead to the conclusion that no assault occurred," *ibid.* at 267.

<sup>139</sup> *Mills*, *supra* note 12 at 745, 747-49, 754.

<sup>140</sup> *Ibid.* at 749

<sup>141</sup> *Ibid.*

<sup>142</sup> Coughlan, *supra* note 16 at 306.

of section 278, and then, on the basis of a selective reading of the *Mills* decision, render a decision. Decisions to produce and sometimes disclose records are most frequently justified by referring to the *Mills* argument that, where there is any doubt, records should be produced in the interest of justice.<sup>143</sup> The reconstruction of the test for likely relevance to accord with *O'Connor's* exclusive emphasis on fair trial rights is succinctly put in *R. v. L.G.*: “production of these records to the trial Judge for his [sic] review is one of those borderline cases in which I should err on the side of ordering production.”<sup>144</sup>

When this interpretation of *Mills* is used, a finding of likely relevance is always already available. Privacy rights afford shaky grounds for resisting production when fair trial rights are conceived of as trumps and when defence counsel can construct complainants as disordered, delusional, and thus undeserving of privacy. In very few cases where records are found likely relevant is the complainant constructed as simply untruthful. In *R. v. D.P.F.*, social service records relating to an adolescent complainant were ordered produced based upon allegations that she had made two other “false” allegations of abuse.<sup>145</sup> There appeared to be little to support the suggestion that that these complaints had been “false,” and on the face of it, this was an unsupported “assertion” that would seem to fail the requirement of case-specific evidence. Similarly, in *R. v. Hudson*, multiple group home records of two adolescent girls were produced, based on claims by the defence that accusations against a group home worker had been fabricated in response to some unspecified disciplinary problem and to show that the girls had seen a movie that depicted a vaguely similar incident of abuse.<sup>146</sup> Underpinning both of these cases is the assumption that adolescent girls maliciously fabricate allegations and are inherently suggestible. Because the three complainants each had extensive child welfare, medical, and social service records, the cases also suggest the vulnerability of those documented in multiple public records to production applications. But cases in which records are produced on the basis of defence theories of fabrication and motive to lie are relatively infrequent

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<sup>143</sup> This passage from *Mills* is specifically quoted as the ultimate rationale for a finding of “likely relevance” in the following decisions: *Hammond*, *supra* note 103 at para. 23; *R. v. (D.P.F.)* (2001), 199 Nfld. & P.E.I.R. 224 at 237 (Nfld. S.C.(T.D.)) [*Fleming*]; *R. v. L.G.*, [2000] O.J. No. 5090 (Sup. Ct.) at para. 76 and 85 (QL) [*L.G.*]; and *R. v. C.S.* (2000), 195 Nfld. & P.E.I.R. 104 at 108 (Nfld. S.C.(T.D.)) [*C.S.*].

<sup>144</sup> *L.G.*, *ibid.* at para. 94.

<sup>145</sup> *Fleming*, *supra* note 143 at 236.

<sup>146</sup> [2001] O.J. No. 5456 paras. 53-62 (Sup. Ct.) (QL). The production order, however, excludes records of therapy and counselling.

among the cases that I have analyzed.

The hysterization of complainants is a far more resounding refrain in these cases, anchoring decisions to produce and to release records. All of these cases are extremely complex and each, on its own, could provide the basis for detailed study of the manner in which stories of sexual coercion are increasingly disqualified by destabilizing the psychological coherence of the complainant. Here, some general, albeit striking themes emerge. In five of the nine cases in which the production and sometimes disclosure of all or most records was ordered, the rationale was that the complainant[s] suffered from "false memory syndrome" (FMS).<sup>147</sup> (The rationale, where elaborated,<sup>148</sup> for production and disclosure in the other cases included: a finding of no reasonable expectation of privacy,<sup>149</sup> inconsistent statements,<sup>150</sup> and the ability of a developmentally disabled complainant to perceive and recall events.)<sup>151</sup> In this manner, a syndromized category, forged initially by parents claiming they had been "falsely" accused of abuse,<sup>152</sup> and without status as a recognized psychological disorder<sup>153</sup> gains legal legitimation within sexual assault law.

In some of these cases, even the "typical" characteristics associated with FMS (long-forgotten memories, the recovery of memories, and "memory-shaping" therapeutic techniques) are notably absent. *R. v. R.B.*, for example, concerned an adult woman's allegations of contemporary sexual assault against her ex-spouse.<sup>154</sup> Defence counsel used statements

<sup>147</sup> *C.S.*, *supra* note 143; *L.G.*, *supra* note 143; *R. v. G.P.J.* (2001), 153 Man. R. (2d) 191 (C.A.); *R. v. R.B.*, [2002] N.J. No. 176 (N.L.S.C.(T.D.)) (QL) [*R.B.*]; *W.G.*, *supra* note 103.

<sup>148</sup> In one very brief and conclusory set of reasons, no rationale for disclosure was even discussed. See *R. v. W.C.*, [1999] M.J. No. 542 (Q.B.) (QL).

<sup>149</sup> *K.A.G.*, *supra* note 128.

<sup>150</sup> *L.P.M.*, *supra* note 103.

<sup>151</sup> *R. v. D.H.*, [2000] A.J. No. 142 (Prov. Ct. (Youth Div.)) (QL).

<sup>152</sup> As Susan Vella notes, "F.M.S. is a phrase which has been coined by a private American non-profit organization called The False Memory Syndrome Foundation ... F.M.S. purports to describe a condition whereby a patient (usually female) has been influenced, through suggestions made by her therapist, into genuinely believing she was the victim of historical childhood sexual abuse when the alleged sexual abuse never in fact occurred ... This Foundation primarily consists of parents who have been accused of sexual assault by their children and includes a small number of women who have recanted their allegations of sexual assault against their parents. It also has an advisory board consisting of academic researchers in the field of memory": Susan M. Vella, "Recovered Traumatic Memory in Historical Childhood Sexual Abuse Cases: Credibility on Trial" (1998) 32 U.B.C. L. Rev. 91 at 92 and n. 5.

<sup>153</sup> "[F.M.S.] has yet to be recognized by the American Psychiatric Association as a medical disorder, much less a "syndrome" which connotes a widespread phenomenon," *ibid.* at 93.

<sup>154</sup> *R.B.*, *supra* note 147.

made at the preliminary inquiry—where the complainant admitted to flashbacks of childhood abuse, being on antidepressants, and undergoing counselling both before and after laying the complaint—as the basis for a theory of FMS and the foundation for access to counselling records. To bolster this claim, defence counsel submitted an expert opinion claiming that “any time therapy is involved in a case in which memory is the only evidence (as I believe it is in the above matter), it is crucial that the therapeutic notes from counselling sessions be examined... .”<sup>155</sup> Clearly influenced by this sweeping claim, the trial judge ordered production of all therapeutic records both because counselling had occurred before the complaint was laid and because “[t]he complainant’s recall of events is clearly an issue at trial and a review of the procedures followed concerning her memory and the techniques probed, may well be relevant and probative.”<sup>156</sup> This order was made despite the fact that there was no evidence that the allegation was based on recovered memories. In fact, the preliminary record shows the complainant emphatically denying this assertion:

*Well when you got the fellow you’ve been going out with and the father of your two kids for fifteen years on you, assaulting you and you’re having a flashback of your father putting a gun to your mother’s head, yes, I think I can separate the difference .<sup>157</sup>*

Strong, clear words of denial, however, seem inadequate to resist the hysterization and syndromization of complainants that pervades cases on production and disclosure. A vulnerability to syndromization may be particularly acute when a complainant’s life history, as in *R.B.*, appears marked by many incidents of sexualized violence. There is a second, closely related theme in these cases: the untempered judicial hostility to social, political, and feminist understandings of coercive sexuality. Where complainants’ narratives challenge a liberal, legalistic, and rigidly individualized construction of rape, they may be most vulnerable to disclosure and to the ultimate disqualification of their claims. This is apparent in cases like *R.B.*, where the pervasiveness of sexualized coercion in the complainant’s own life renders her crazy and unstable, the very antithesis of the rational legal subject. Judicial hostility to social and political analyses of sexualized coercion is also revealed in cases where complainants acknowledge a reinterpretation of their past in light of new

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<sup>155</sup> *Ibid.* at para. 23.

<sup>156</sup> *Ibid.* at para. 29. See also paras. 27, 28, 30, 34.

<sup>157</sup> *Ibid.* at para. 21.



knowledge about the pervasiveness of rape and its devastating consequences. In *W.G.*, for example, an adult male complainant laid a charge of historical sexual abuse after reading the report of an inquiry into sexual abuse by clergy members that, in his words, “made him aware of the severity of child sexual abuse.”<sup>158</sup> This admission provides the crucial element in a theory of false memory, leading to the disclosure of several years of counselling records.<sup>159</sup>

In *G.P.J.*, the view of feminist therapy as inherently suspect underpins an appellate decision upholding an acquittal and an order for production and disclosure to the accused of some twelve years of therapy records that were the basis of the Crown’s appeal.<sup>160</sup> In this case, the complainant alleged repeated rape by her brother-in-law, beginning when she was eleven and lasting for ten years. In the decision, the possibility of memory manipulation is raised repeatedly, owing to the complainant’s testimony that she “was getting more memory ... [o]f things that happened.”<sup>161</sup> It is not simply coincidental that the agency where she received therapy was a feminist agency that counselled women.<sup>162</sup> Statements made by the complainant during trial influenced by feminist understandings of sexual violence were used to support the order for production and disclosure and, in the end, destroy her credibility. She had, for example, made the mistake of using terms like “victimized,”<sup>163</sup> she had talked about it being a “natural thing” for sexual abuse victims to see themselves as being in love with their abusers; and she had testified that she learned this from other sexual abuse victims.<sup>164</sup> Feminist therapy is constructed here as being intrinsically manipulative and justifying defence counsel’s access to confidential records. Relying on the fact that the complainant alleged repeated rape, yet had never become pregnant,<sup>165</sup> the appeal judge contended that credibility was at issue because “of the troubling and sometimes bizarre tale of sexual abuse by the accused that she related. It was a story that at times challenged believability.”<sup>166</sup>

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<sup>158</sup> *W.G.*, *supra* note 103 at para. 8.

<sup>159</sup> *Ibid.* at paras. 11-21.

<sup>160</sup> *G.P.J.*, *supra* note 147.

<sup>161</sup> *Ibid.* at 200.

<sup>162</sup> *Ibid.* at 199.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.* at 198.

The “unbelievability” of this story, at least in part, seems to lie in its gestures to a systemic and feminist understanding of sexualized coercion. Legal hostility to the claim that sexualized violence is systemic and to the insistence that this understanding should influence decisions on access to complainants’ records is also apparent in the undisguised hostility of some judges to the legislative framework imposed by section 278. As argued above, in cases where records are found not likely relevant, it is almost exclusively on a narrow understanding of privacy rights, with little recognition of the broader social consequences of this practice. In cases where records are found likely relevant, not only is the analysis of “equality rights,” “discriminatory myths,” consequences for “reporting,” and access to “counselling” largely ignored, it is sometimes actively resisted. According to the *R.B.* decision, for example,

counselling services certainly should continue to encourage people who are suffering from abuse to continue to be counselled. In the large scale of the criminal justice system one cannot remove the right to make full answer and defence because some victims may not avail of counselling. This is only one factor which a judge should consider in a review under section 278.1.<sup>167</sup>

Similarly, in *G.P.J.*, the trial judge dismissed the need for any consideration of “society’s interest in reporting” in the following terms: “... the mere possibility of production of counselling records may have an impact on complainants in cases involving sexual offences, but that has not seemed to have affected them, considering the number of such offences that we are presently dealing with in the court on a day-to-day basis.”<sup>168</sup> Here, facilitated through an inviolable interpretation of fair trial rights, the legislative scheme regulating access to complainants’ records is rendered virtually meaningless.

#### VIII. CROSS-EXAMINATION AT THE PRELIMINARY INQUIRY: SUBVERTING THE PROTECTIONS OF SECTION 278

As I have suggested, the post-*Mills* terrain is highly unstable. Contradictory interpretations of section 278 mark the case law, drawn from and legitimized by the ambiguities in the decision itself. There is very strong support for the claim that complainants remain vulnerable to defence records applications and to the hysterization on which this practice is based. And, ironically, it may be that the most encouraging aspect of recent case

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<sup>167</sup> *R.B.*, *supra* note 147 at para. 33.

<sup>168</sup> *G.P.J.*, *supra* note 147 at 197.

law has generated a new defence strategy that holds the potential to undermine the protections offered by section 278.

Given judicial endorsement of the necessity of an evidentiary foundation for a finding of likely relevance, defence counsel, always adept at finding ways around legislative protections for complainants, have initiated a reinvented strategy. This strategy rests on grilling complainants on their records at the preliminary inquiry and it has become a crucial new battleground in the quest for disclosure. An article in the Criminal Lawyers Association newsletter, appearing shortly after the release of the *Mills* decision, counselled defence lawyers to rigorously cross-examine complainants during the preliminary inquiry as a mechanism for building the evidentiary basis for a finding of likely relevance.<sup>169</sup> The *Mills* decision itself is cited as the legal basis for such a tactic because the majority had emphasized the questioning of complainants and other Crown witnesses at the preliminary inquiry as one means of constructing a case-specific evidentiary foundation.<sup>170</sup> The article also relies on commentaries in cases where records were not disclosed, admonishing defence counsel for not engaging in cross-examination on records. Judicial endorsement of preliminary cross-examination on records was also apparent in the post-*Mills* cases examined for this article. In *M.(D.)*, for example, a decision denying production of a diary on the basis of a lack of case-specific evidence, the trial judge remarked critically, “no attempt was made [during preliminary cross-examination] to discover the timing of relevant entries, the degree of writing i.e. pages of narrative or summary reference only, or the nature of entries i.e. detailed history of abuse or recordings of feelings or emotions.”<sup>171</sup>

When complainants are forced to answer intrusive questions about their records at the preliminary inquiry, the protections afforded by section 278 are seriously eroded. While complainants are not compellable at a section 278 hearing (which is a private hearing), they are compellable at the preliminary inquiry as the Crown’s principal witness (which is a public hearing). There have been two significant appellate decisions establishing the ability to cross-examine on confidential records at the preliminary inquiry, based upon the presumed requirements of full answer and defence: *R. v. Kasook*,<sup>172</sup> involving counselling records and the implication of

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<sup>169</sup> Skurka & Renzella, *supra* note 92.

<sup>170</sup> *Mills*, *supra* note 12 at 744.

<sup>171</sup> *M.(D.)*, *supra* note 112 at 94.

<sup>172</sup> [2001] 2 W.W.R. 683 (N.W.T.S.C.) [*Kasook*].

memory-inducing therapy; and *R. v. B.(E.)*,<sup>173</sup> concerning an adolescent boy's diary, which according to his testimony, contained no references to the assault. The decisions in these cases affirm that privacy should limit the scope of questioning. The essential boundary drawn is between existence and nature, on the one hand, and contents, on the other.<sup>174</sup> Complainants can be asked about the existence and character of records, but not about their detailed contents. In *Kasook*, however, permissible subjects were judged to include some invasive lines of questioning about counselling, including whether: the complainant had undergone counselling; records were kept; the counselling involved memory work; and counselling had affected the decision to report.

These cases are crucial because, in establishing the right to preliminary cross-examination on records, they potentially increase successful defence applications. In a cruel twist, it is the complainant who will furnish the evidentiary basis for these applications. Cross-examination at preliminary hearings can also induce complainants to withdraw complaints, to refuse to testify, or not to report in the first place. A 1998 survey of sexual assault survivors revealed that concern over the possibility of record disclosure was a major reason for not reporting: "women said that they were unwilling to risk being re-victimized by 'being put under a microscope during the trial'... ." <sup>175</sup> This potential still exists and is given new life in the post-*Mills* context through the legal prioritization of fair trial rights in section 278 applications and the defence emphasis on preliminary cross-examination as a central means of establishing the basis for these applications.

## IX. CONCLUSION

Against the much repeated claim that a contextualized, equality-sensitive framework for adjudicating sexual assault is finally emerging in Canadian law, this analysis of access to complainants' records suggests a less sanguine conclusion. Emerging out of the tensions inscribed within *Mills*, recent decisions continue to privilege the legal rights of the accused and to reinforce a liberal legalistic construction of sexual violence. Policy making and legal reform in this area are subordinated to the presumed requisites of the *Charter*, while recognition of the systemic nature and complexities of sexual violence has been actively resisted in legal decision

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<sup>173</sup> *R. v. B.(E.)* (2002), 570 O.R. (3d) 741 (C.A.).

<sup>174</sup> *Kasook*, *supra* note 172 at 695; *B.(E.)*, *ibid.* at 745-46.

<sup>175</sup> Hattem, *supra* note 46 at 9.

making. Paradoxically, the image of progress may have the effect of locating the problem of coercive sexuality more firmly within the terrain of criminal law, legitimizing a narrow conception of rape as a discrete and isolated event.

As I have suggested, privacy, conceived as the right to contain narratives of sexualized violence within a bounded personal space, provides tenuous protection against vigorous pursuit of records by defence counsel. When complainants can be constructed as failing to enact the new characteristics of ideal victimhood, their entitlement to privacy is discounted. When the psychological coherence and rigid individualism of ideal victimhood cannot be performed, the invasion of privacy knows no bounds, extending to an interrogation not only of what has been said, but also of what has not been said. In fact it seems that in records application cases, complainants are inevitably called upon to resist their own syndromization; this becomes a cruel prerequisite for seeking legal redress.

But there is another peril of privacy that is suggested by this analysis of access to complainants' records—the peril of depoliticization. The threat of disclosure of confidential records works to inhibit social and legal recognition of sexualized violence by constructing the private as the only legitimate realm for reflection. Feminists did break the silence around sexualized violence in the last part of the twentieth century; yet we could characterize the current period as one where a new silence is being re-established. One mechanism for enforcing silence is judicially sanctioned access to records. Underlying the probing of complainants' records is the message that we need to be very careful of what we say about sexual assault. Discourses about sexual violence, once breaking into public discourse, are increasingly reprivatized.

## Appendix A: Post-Mills Cases Analyzed (37)

- R. v. B.(E.)* (2002), 570 O.R. (3d) 741 (C.A.).  
*R. v. Batte*, [2000] 49 O.R. (3d) 321 (C.A.).  
*R. v. C.S.* (2000), 195 Nfld. & P.E.I.R 219 (Nfld. S.C.(T.D.)).  
*R. v. D.H.*, [2000] 142 A.J. (Prov. Ct. (Youth Div.)) (QL).  
*R. v. D.M.*, [2000] O.J. No. 3114 (Sup. Ct) (QL).  
*R. v. D.P.F.* (2000), 194 Nfld. & P.E.I.R. 51 (Nfld. S.C.(T.D.)).  
*R. v. D.W.L.*, [2001] N.S.J. No. 269 (C.A.) (QL).  
*R. v. E.A.N.*, [2000] B.C.J. No. 298 (C.A.) (QL).  
*R. v. G.P.J.* (2001), 153 Man. R. (2d) 191 (C.A.).  
*R. v. Hammond*, [2002] O.J. No. 1596 (Ct. J.) (QL).  
*R. v. Howorka*, [2002] A.J. No. 665 (C.A.) (QL).  
*R. v. Hudson*, [2001] O.J. No. 5456 (Sup. Ct.) (QL).  
*R. v. K.A.G.* (2001), 192 N.S.R. (2d) 5 (Fam. Ct.).  
*R. v. Kasook*, [2001] 2 W.W.R. 683 (N.W.T. S.C.).  
*R. v. L.G.*, [2000] O.J. No. 5090 (Sup. Ct.) (QL).  
*R. v. L.P.M.*, [2000] O.J. No. 4076 (Sup. Ct.) (QL).  
*R. v. L.S.*, [2000] O.J. No. 3991 (Sup. Ct.) (QL).  
*R. v. Lalo*, [2002] N.S.J. No. 342 (S.C.) (QL).  
*R. v. M.A.S.*, [2001] M.J. No. 516 (Q.B.) (QL).  
*R. v. M.G.*, [2001] M.J. No. 61 (Prov. Ct.) (QL).  
*R. v. N.P.*, [2001] O.J. No. 1828 (Sup. Ct.) (QL).  
*R. v. P.E.*, [2000] O.J. No. 574 (C.A.) (QL).  
*R. v. P.J.S.*, [2000] Y.J. No. 119 (S.C.) (QL).  
*R. v. Perry*, [2000] O.J. No. 2112 (C.A.) (QL).  
*R. v. R.B.*, [2002] N.J. No. 176 (S.C.(T.D.)) (QL).  
*R. v. R.C.*, [2002] O.J. No. 865 (C.A.) (QL).  
*R. v. S.P.*, [2001] O.J. No. 2898 (Sup. Ct.) (QL).  
*R. v. Shearing* (2002), 214 D.L.R. (4<sup>th</sup>) 215 (S.C.C.).  
*R. v. Stewart*, [2000] B.C.J. No. 1815 (C.A.) (QL).  
*R. v. Sutherland*, [2001] 156 C.C.C. (3d) 264 (Ont. C.A.).  
*R. v. Tatchell*, [2001] 207 Nfld. & P.E.I.R. 131 (S.C.(T.D.)).  
*R. v. Thompson*, [2001] 52 O.R. (3d) 779 (C.A.).  
*R. v. W.C.*, [1999] M.J. No. 542 (Q.B.) (QL).  
*R. v. W.G.*, [2000] N.J. No. 86 (S.C.(T.D.)) (QL).  
*R. v. W.P.N.*, [2000] N.W.T.J. No. 15 (S.C.) (QL).

Appendix B: Production and Disclosure Decisions – Decisions on Likely Relevance (27)

Decisions in Which Records Were Found Likely Relevant (9):

- R. v. C.S.* (2000), 195 Nfld. & P.E.I.R. 219 (Nfld. S.C.(T.D.)).  
*R. v. D.H.*, [2000] A.J. No. 142 (Prov. Ct. (Youth Div.)) (QL).  
*R. v. G.P.J.* (2001), 153 Man. R. (2d) 191 (C.A.).  
*R. v. K.A.G.* (2001), 192 N.S.R. (2d) 5 (Fam. Ct.).  
*R. v. L.G.*, [2000] O.J. No. 5090 (Sup.Ct.) (QL).  
 \*\**R. v. L.P.M.*, [2000] O.J. No. 4076 (Sup. Ct.) (QL).  
*R. v. R.B.*, [2002] N.J. No. 176 (S.C.(T.D.)) (QL).  
 \*\**R. v. W.C.*, [1999] M.J. No. 542 (Q.B.) (QL).  
 \*\**R. v. W.G.*, [2000] N.J. No. 86 (S.C.(T.D.)) (QL).

Decisions in Which Some Records Found Likely Relevant (4):

- R. v. D.P.F.* (2000), 194 Nfld. & P.E.I.R. 51 (Nfld. S.C.(T.D.)).  
*R. v. Hudson*, [2001] O.J. No. 5456 (Sup. Ct.) (QL).  
*R. v. L.S.*, [2000] O.J. No. 3991 (Sup. Ct.) (QL).  
 \**R. v. W.P.N.*, [2000] N.W.T.J. No. 15 (S.C.) (QL).

Decisions in Which Records Were Found Not Likely Relevant (14):

- R. v. Batte*, [2000] 49 O.R. (3d) 321 (C.A.).  
*R. v. D.M.*, [2000] O.J. No. 3114 (Sup. Ct.) (QL).  
*R. v. D.W.L.*, [2001] N.S.J. No. 269 (C.A.) (QL).  
*R. v. E.A.N.*, [2000] B.C.J. No. 298 (C.A.) (QL).  
*R. v. M.A.S.*, [2001] M.J. No. 516 (Q.B.) (QL).  
*R. v. M.G.*, [2001] M.J. No. 61 (Prov. Ct.) (QL).  
*R. v. N.P.*, [2001] O.J. No. 1828 (Sup. Ct.) (QL).  
*R. v. P.E.*, [2000] O.J. No. 574 (C.A.) (QL).  
*R. v. P.J.S.*, [2000] Y.J. No. 119 (S.C.) (QL).  
*R. v. R.C.*, [2002] O.J. No. 865 (C.A.) (QL).  
*R. v. S.P.*, [2001] O.J. No. 2898 (Sup. Ct.) (QL).  
*R. v. Sutherland*, [2001] 156 C.C.C. (3d) 264 (Ont. C.A.).  
*R. v. Tatchell*, [2001] 207 Nfld. & P.E.I.R. 131 (Nfld. S.C.(T.D.)).  
*R. v. Thompson*, [2001] 52 O.R. (3d) 779 (C.A.).

\*indicates disclosure decision, not disclosed

\*\*indicates disclosure decision, records or portion of records disclosed

