

Law and history: why isn't rape shield legislation working?

'Nocha denait in lucht so fiadnaisi ar nech, uais ni dlegar do neoch a ngabail ... ban-fiadaise .i. ecoitcenn eisinnruic' (These people do not give evidence about anyone, because it is not legal for anyone to accept it: ... women's evidence, ie biased and untrustworthy): commentary on Irish legal tract, possibly eighth century.¹

'An underlying assumption [is] that women, in particular those who are promiscuous, are prone to untruthfulness and are unreliable witnesses': commentary on Scottish legal system, 1983.²

Judging by the extent of academic comment and continuing review by law reform bodies, the law relating to sexual history evidence as it now stands cannot be said to serve the needs of justice adequately. Extraordinarily low conviction rates³ appear to suggest at least two deficiencies in the legal process which might be attributed to deficiencies in the law relating to sexual history evidence. Firstly, the evidence that is presented in court may not be such as to lead the decision-maker to find guilt in cases where it is in fact present. This might mean that evidence relating to sexual history on some occasions leads the decision-maker to an incorrect conclusion. Secondly, the nature of proceedings in sexual assault cases may be such as to discourage sexual assault victims from pursuing charges. This might mean that the knowledge that their sexual history is likely to be discussed in court discourages sexual assault victims from proceeding with their cases. This paper will examine these propositions, by a close reading of a relevant leading authority, *Bull v R* (2000). The paper will suggest that the common law system is

¹ D A Binchy (ed), *Corpus Iuris Hibernici* (1978) at 45: my translation.

² G Chambers & A Millar, *Investigating Sexual Assault* (1983) at 105-6.

³ A study carried out in Vancouver, Canada, over the five years from January 1993 to December 1997 traced the outcomes for the 462 cases in which women presented to a certain hospital claiming to have been sexually assaulted and then reported the assault to the police. Charges were filed in only 32.7% of these cases, of which only 33.8% (11% of those reported) resulted in a conviction: Margaret J McGregor, Janice Du Mont & Terri L Myhr, 'Sexual Assault Forensic Medical Examination: Is Evidence Related to Successful Prosecution?' (2002) 39 *Annals of Emergency Medicine* 639. These percentages compare to United States government statistics from 2004 where 68% of all felony cases tried resulted in conviction: *Criminal Case Processing Statistics* (25 April 2008) Bureau of Justice Statistics <<http://www.ojp.usdoj.gov/bjs/cases.htm>> accessed 12 May 2008. In a Scottish study, 30% of incidents reported to the police resulted in a finding of guilt of full or partial charges (representing 66% of charges laid): Gerry Chambers & Ann Millar, *Prosecuting Sexual Assault* (1983) at 57; L Smith, *Concerns about Rape* (1989). This figure seems high on its face value, but another survey found that in Scotland only 7% of sexual assaults were reported to the police: G Chambers & J Tombs (eds), *The British Crime Survey, Scotland* (1984) at 15. In New South Wales, government statistics from 1995 to 2004 show that less than 16% of sexual offence charges result in conviction. This combines with data indicating that only 10 – 30% of victims of sexual assault report to the police and charges are laid in only 21% of those cases: Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2006) at 9-16.

in conflict with the process of statutory reform, and judicial interpretation inhibits progress toward appropriate treatment of evidence in rape trials.

In Australia, all jurisdictions have statute law restricting the admissibility of sexual history evidence. Interpretation of the statutes has occasioned considerable judicial ingenuity, particularly in the High Court of Australia.

One such case of judicial ingenuity is a leading authority, *Bull v R* (2000) 201 CLR 443. This concerned an appeal from the Supreme Court of Western Australia and gave rise to a lengthy joint judgement by McHugh, Gummow and Hayne JJ. The ground for the appeal was that evidence had been disallowed under sections 36B, 36BA and 36BC of the *Evidence Act 1906* [WA] of telephone conversations between the complainant and the accused. The conversation showed that the complainant had gone to the defendant's house to smoke marijuana and drink vodka, and there was also conversation with sexual innuendo. It was argued that this evidence should have been admitted, as it tended to prove the complainant's state of mind and purpose in going to the place where the alleged offences occurred. The majority judgement focuses on the question of how best to construe sections 36B, 36BA and 36BC.⁴ The application to the facts of the case is of less interest here than the reasoning in the judgement, which, being laid out at considerable length, was presumably intended to make clear a binding authority for lower courts, as indeed it has.⁵

⁴ 36B. Sexual reputation of complainant, evidence of
In proceedings for a sexual offence, evidence relating to the sexual reputation of the complainant shall not be adduced or elicited by or on behalf of an accused.

36BA. Sexual disposition of complainant, evidence of
In proceedings for a sexual offence, evidence relating to the disposition of the complainant in sexual matters shall not be adduced or elicited by or on behalf of an accused.

36BC. Sexual experience of complainant, evidence of
(1) In proceedings for a sexual offence, evidence relating to the sexual experiences of the complainant, being sexual experiences of any kind, at any time and with any person, not being part of the *res gestae* of the proceedings, shall not be adduced or elicited by or on behalf of an accused unless leave of the court has first been obtained on application made in the absence of the jury (if any).

(2) The court shall not grant leave under subsection (1) unless satisfied that —

(a) what is sought to be adduced or elicited has substantial relevance to the facts in issue; and
(b) the probative value of the evidence that is sought to be adduced or elicited outweighs any distress, humiliation or embarrassment which the complainant might suffer as a result of its admission.

⁵ Eg *R v OL* [2004] QCA 439; *R v Wannan* (2006) 94 SASR 521; *Bolton v Western Australia* [2007] WASCA 277.

The analysis of the sections takes as its starting point the apparently groundless suggestion that if 36BA and 36BC required the rejection of evidence relating to the disposition or sexual experiences of the complainant then a 'question arises as to whether it was admissible under s36BC of the Act on the ground that it was part of the *res gestae* of the proceedings'.⁶ It is difficult to see how this question can properly arise, given that the sections are framed as reasons to exclude evidence, not to include it, and there is no express intention that evidence which is inadmissible under one section should have a 'second chance' under another section. Indeed, the second reading speech, when these sections were added to the Act (quoted at length in this judgement), is clear that 'evidence of the victim's sexual reputation and sexual disposition will be *absolutely* inadmissible on behalf of the defendant' (emphasis added).⁷ The majority judgement then poses the question '[d]oes this mean that s 36BA prohibits the admissibility of evidence relating to the sexual disposition of the complainant when it would otherwise be admissible under s 36BC?'⁸ The straightforward answer is 'yes, it does'. There can be no reason to suppose that the statute intended evidence that is inadmissible under one section to be admitted on the basis that it is not inadmissible under another. Nonetheless, the judgement claims that 's 36BC impliedly authorises the admissibility of evidence of sexual experiences where it is part of the *res gestae* of the proceedings and expressly authorises it where the court gives leave to adduce such evidence'.⁹ What 36BC in fact does is to exempt such evidence from the inadmissibility imposed within s 36BC itself. Why does the judgement choose this reading? The answer perhaps lies in its statement that 'the common law regarded a complainant's sexual reputation, sexual disposition or sexual experiences as relevant to issues of credibility and consent'.¹⁰ I suggest that this judgement is an example of a resistance on the part of the judiciary to the replacement of the common law position with statute law.

Having set up a supposed conflict in the statute, the judgement then proceeds to consider means of resolving it. The judgement tells us that '[o]ne way in which the conflict between ss 36B and 36BA and 36BC may be reconciled is to construe the

⁶ *Bull v R* (2000) 201 CLR 443 at 451.

⁷ *Id* at 457.

⁸ *Id* at 458.

⁹ *Ibid*.

¹⁰ *Id* at 457.

words “evidence relating to” as meaning “evidence adduced for the purpose of proving”.¹¹ In deliberately attributing a meaning other than that clear in the words of the statute, the judgement interferes with the statutory intention. That this effect is perhaps intended is suggested by the judgement’s claim that this construction ‘would *cut down* the effect of ss 36B and 36BA’ (emphasis added).¹² This might be necessary or desirable if there were a conflict or inconsistency inherent in the statute, but in this instance there is not, despite the judgement’s repeated claim that the construction would ‘reduce, if it did not abolish, the conflict’.¹³ Rather than existing within the statute, the conflict is between the statute and the common law provisions which the statute deliberately sets out to replace. In its treatment of the wording in the statute, the judgement renders the statute incapable of fulfilling its purpose: that of replacing the common law provisions on sexual history evidence.

The judgement offers three possible constructions of the newly problematised 36BA. The first is that it ‘unconditionally prohibits the tender of any evidence which in any way reveals or discloses the disposition of the complainant in sexual matters’.¹⁴ The second is that it prohibits evidence that is tendered ‘for the purpose of asserting that, by reason of a general or particular disposition in sexual matters, it is probable that the complainant consented to the sexual activity charged or is unworthy of belief’.¹⁵ The judgement rightly points out that this construction would undermine the legislative intention of protecting complainants. However, the judgement also suggests that ‘evidence that tends to prove the sexual experiences of the complainant will in most cases, perhaps always, go to the issue of consent or some other fact in issue such as honest belief of consent’.¹⁶ This, surely, is precisely the attitude that the statute sets out to combat. It may in limited circumstances be acceptable to contemplate whether sexual experiences of the complainant are relevant to consent or belief in consent, but to suggest that this would usually or always be the case is contrary to the body of law reform reports which have informed relevant legislative enactments across the jurisdictions. Such an approach echoes the outmoded belief that a sexually

¹¹ Id at 462.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Id at 470.

¹⁶ Id at 471.

experienced woman is likely to consent to any sexual act with any man, and is not tenable in the twenty-first century. Similarly, the suggestion that evidence that a woman had 'always consented' to intercourse with the defendant and others 'would be proof of a fact (willingness to have indiscriminate sexual relations) relevant to a fact in issue (consent)' perhaps speaks to the attitudes of the middle-aged males constituting the court.¹⁷ The equation of consensual intercourse with a number of people including the defendant with 'indiscriminate sexual relations' is flawed, and the very use of the word 'indiscriminate' appears to suggest an inappropriate moral judgement.

The judgement favours, and proceeds in accordance with, its third postulated construction of 36BA, a prohibition on evidence tending to prove sexual disposition unless it is 'evidence of the sexual experiences of the complainant and is admissible under s 36BC'.¹⁸ However, in order to make this construction work, even more shifting of meaning is required. It is now asserted that 36BC

'prima facie forbids the chain of "reasoning" that asserts that, because the complainant has a certain sexual reputation or disposition in sexual matters or has had certain sexual experiences, he or she is the "kind of person" who is likely to have consented to the sexual activity which is the subject of the charge. Yet such evidence would be relevant to the charge'.¹⁹

This remarkable statement could be taken as a suggestion that the writers consider similar fact evidence as generally probative. However, similar fact evidence is not generally considered significantly probative in the criminal justice context, and is generally inadmissible unless it is so compelling that it cannot reasonably be viewed as consistent with the innocence of the accused.²⁰ The judgement under discussion makes no such distinction, apparently considering that any evidence of tendency on the part of the complainant is probative. It is unreasonable and illogical that a form of evidence that is not considered probative with reference to a defendant should be considered probative with reference to a complainant. This is not a standard-of-proof issue, where the defendant may be

¹⁷ Id at 472.

¹⁸ Id at 473.

¹⁹ Id at 475.

²⁰ See, eg, *DPP v Boardman* (1975) AC 457; *Pfennig v The Queen* (1995) 182 CLR 461.

entitled to some benefit: it is a fundamental question as to what is probative and what is not.

The dissenting judgements by Gleeson CJ and Kirby J reject the reasoning of the majority judgement as to the correct construction of the sections. Nevertheless, they reach the same conclusion as to the admissibility of the evidence in question. As Tony Blackshield and Francesca Dominello point out, ‘the two judicial approaches undermine each other. Although they reach the same result, each effectively rebuts the other’s reasoning’.²¹ The common feature of all three judgements, also highlighted by Blackshield and Dominello, is their resistance to statute taking precedence over common law. It is as though the statute directs a course which the judges do not wish to pursue. The two judicial approaches both reach the goal of avoiding that course, but by completely different routes. Common to both routes is their diminution of the statute in their willingness to employ creative construction to reach their own understanding of a desired outcome. To quote Blackshield and Dominello again,

‘[t]hroughout the judgements there are fulsome protestations that the judges are committed to the implementation of the statute. Yet the way they interpret it belies this. If they had been, they would have held that the telephone evidence should be disregarded’.²²

A similar approach may perhaps be discerned in *R v Morgan* (1993) 30 NSWLR 543. In this earlier case, again heard by Gleeson CJ, the statute in question disallows evidence relating to sexual experience or activity of the complainant. The exception discussed in *Morgan* is where the evidence

‘(i) is of the complainant’s sexual experience or lack of sexual experience or of sexual activity or lack of sexual activity taken part in by the complainant, at or about the time of the commission of the alleged prescribed sexual offence, and

²¹ Tony Blackshield & Francesca Dominello, ‘High Court Fails Women’ *The Age: News Extra* (20 May 2000) at 4.

²² *Ibid.*

(ii) is of events that are alleged to form part of a connected set of circumstances in which the alleged prescribed sexual offence was committed'.²³

The appeal concerned the admissibility of evidence that the complainant had participated in consensual intercourse with her partner within a short time after the alleged offence. Gleeson CJ opined that

'[s]ince the evidence in question is, by hypothesis, relevant and of probative value (otherwise it would be inadmissible without the need for any statutory exclusion), no narrow approach should be taken to that part of the statutory provision which permits its reception'.²⁴

Mahony J considered that

'[e]stablished principles of construction and of justice require that the court adopt a construction which favours the accused. Section 409B may result in an accused person, male or female, being imprisoned where otherwise he or she would not be'.²⁵

These two remarks could be construed as implying that both judges were unwilling to see the common law conventions superseded by statute. Mahony J, in particular, could be read as suggesting that he disapproved of the provisions of the statute. It is clear that the evidence in question does not meet the statute's criteria for admission. It could probably be said to have taken place at or about the time of the offence, but the statute requires two criteria to be met: chronological proximity and circumstantial connection. There appears to have been no argument at all that there was any connection between the evidence in question and the offence, other than temporality: only one of the criteria is met.

Perhaps, though, the most unfortunate aspect of this judgement is its comment that the complainant's participation in consensual intercourse shortly after the alleged offence was 'contrary to human experience'.²⁶ The judgement in *Morgan* was subsequently defended by a NSW Law Reform Commission review, which

²³ *Criminal Procedure Act 1986* (NSW) s 293 (4)(a).

²⁴ *R v Morgan* (1993) 30 NSWLR 543.

²⁵ *Ibid.*

²⁶ *Ibid.*

distinguished between 'generalisations about human behaviour' and 'morality based presumptions about women's behaviour'.²⁷ The generalisation here, though, is not about an experience shared by all humans: it is peculiar to women, and indeed to those who have been sexually assaulted. The comment is not underpinned by research or a desire to understand.²⁸ Whether or not it is based in morality, it is certainly a (male) presumption about women's behaviour. The inference a jury might draw from the supposedly unlikely nature of the complainant's actions is clear: that her account lacked credibility. Again, this judgement calls for the admission of evidence explicitly prohibited by the statute, and invites a conclusion that the statute was created to avoid.

In England, the process of addressing the perceived shortcomings in the common law has undergone several stages. In 1976 a statute was enacted which imposed a general exclusion of sexual history evidence, with judges holding a discretionary power to admit such evidence, based on the principle of fairness to the defendant. In practice, this seemed to result in very few refusals of evidence.²⁹ An apt example is *R v Viola* (1982), in which the defence sought to cross-examine the complainant concerning possible sexual activities with other men on the days before and after the alleged offence, relevant to the issue of consent. The trial judge disallowed the cross-examination. On appeal, the conviction was quashed, without a retrial ordered. All three judges concurred in a judgement including the statement that

'after the so-called rape her vagina was sore, the inference being that it was because the sexual intercourse had been without consent that she suffered that pain. We are told, although it is not in evidence, that there was some difficulty about the real cause for the girl's soreness; it was suggested perhaps it was the size of the appellant's male member that had caused the soreness rather than the lack of consent'.³⁰

²⁷ NSWLRC Report 87 (1998), *Review of Section 409B of the Crimes Act 1900* cited in Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2006) at 54.

²⁸ Even cursory research would reveal that rape trauma syndrome has been medically recognised since the 1970s and can manifest in many different ways: see, eg, Desiree Hanson, *What is Rape Trauma Syndrome?* (1992) University of Capetown Institute of Criminology Social Justice Resource Project <<http://web.uct.ac.za/depts/sjrp/publicat/rape.htm>> accessed 15 May 2008.

²⁹ Jennifer Temkin, 'Sexual History Evidence – Beware the Backlash' (2003) *Criminal Law Review* 217.

³⁰ *R v Viola* (1982) Cr.App.R. 125.

There are so many problems with this statement that it almost beggars belief. The labelling of the complainant, a 22-year-old mother of two, as ‘the girl’ is perhaps one of the less astonishing. It is difficult not to conclude that the statement is an extraordinary and misconceived exercise in judicial notice. Elsewhere, the judgement claims that

‘she suggested that one or other might like to try out her new bed; she made physical contact with one of them by rubbing his back, and so on; in other words indicated that she would not be averse to sexual intercourse with them’.

If discussing a piece of furniture and rubbing a back meet the judicial definition of consent, it is scarcely surprising that legislators have attempted to limit judicial discretion in sexual assault matters.

It was presumably in response to such judgements as this that the legislature introduced further changes to the statute governing sexual history evidence. Section 41 of the *Youth Justice and Criminal Evidence Act* has met with considerable criticism on the basis that it seeks to stipulate an exhaustive list of exceptions to the prohibition on sexual history evidence. There is a feeling that this is an inappropriate undertaking, that no list can be absolutely exhaustive and that it risks the exclusion of important probative evidence.³¹ This concern is a very valid one in principle, although critics seem to have difficulty postulating any such evidence that could not be admitted under the current legislation and that would genuinely be significantly probative. More importantly, though, the critics advocate the reintroduction of a judicial discretion clause as the solution. In light of such judgements as *Viola*, made under a regime of inadmissibility with judicial discretion, it might reasonably be suggested that the reintroduction of discretion would work against the interests of justice. Such a suggestion gains considerable support from research indicating that at the Old Bailey in 1978-79, 75% of applications to admit sexual history evidence were successful, despite the fact that many were ‘on the basis that lack of consent could only be determined if a good deal was known about the complainant’s sexual proclivities’. There were even

³¹ See, eg, D Birch, ‘Rethinking Sexual History Evidence: Proposals for Fairer Trials’ (2002) *Criminal Law Review* 531.

cases where the judges themselves ‘probed complainants about their sexual lives in the absence of any application by the defence to do so’.³²

It might be argued that some of these examples relate to the 1970s, a whole generation ago. But how far have we really progressed? In the examples I have discussed, Australia’s very recently retired Chief Justice and his colleagues offered opinions which, although adopting the veneer of twenty-first-century sensitivities, appear to have their roots, conscious or otherwise, in a nineteenth-century belief that a certain sort of woman is likely to have consented to any sexual act under consideration.

An interesting exercise in cross-jurisdictional comparison in the United States was carried out by Spohn and Horney in 1991.³³ The authors surveyed a selection of judges, prosecutors and defenders in six jurisdictions to ascertain their views on the probability of sexual history evidence being admitted in six hypothetical cases. They also interviewed the respondents to obtain their views on the application of law relating to sexual history evidence. Despite the variation in the law across the jurisdictions, the variation in answers related more to the kind of scenario posed than to the applicable law. For instance, evidence that the complainant had had prior sexual encounters with men she met at singles bars was mostly thought to be inadmissible, despite the actual law applying in each jurisdiction.³⁴ This may be a result of perceived ‘normal’ behavioural expectations, where it is now perceived as normal behaviour for single persons who meet in bars to engage in sexual activity. Such a conclusion might perhaps be supported by the responses where the complainant’s prior sexual experiences involved groups of men and the alleged offence involved a gang rape. Some respondents believed this evidence was relevant and would be admitted, even though it was prohibited by the law in their jurisdiction. Their reasons referred to the ‘unusual’ or ‘bizarre’ nature of the behaviour.³⁵

³² Adler, *Rape on Trial* (1987): cited in Jennifer Temkin, ‘Sexual History Evidence – Beware the Backlash’ (2003) *Criminal Law Review* 217 at 219.

³³ Cassia Spohn & Julie Horney, “‘The Law’s the Law, but Fair is Fair’: Rape Shield Law and Officials’ Assessments of Sexual History Evidence’ (1991) 29 *Criminology* 137.

³⁴ *Id* at 150.

³⁵ *Id* at 151; see also discussion at 155.

The discussion offered by respondents to the survey was also illuminating. Many stated that although the evidence ought to be inadmissible by statute, or at least to require an in-camera hearing to determine admissibility, they believed that it was relevant to the issue of consent and ought to be admitted. Further, many stated that such inadmissible evidence would be admitted in their jurisdictions. Amongst the reasons cited was a belief that judges would admit it for fear of being overruled at appeal. Several of the answers made it clear that they expected judges to admit evidence even where the relevant law ought to exclude it.³⁶

A strong point to emerge from Spohn & Horney's survey is that judges and prosecutors do not routinely comply with the formal requirements of the law. Not only does statute law require judicial interpretation which, as we have seen in the Australian and English jurisdictions, can be deployed to interfere with the original intent of the statute, but in the US,

'[i]f the law conflicts with the courtroom work group's prevailing norms of relevance, the likelihood of the law being effectively implemented is reduced. Reformers should not assume that judges and prosecutors will comply with the formal requirements of the law'.³⁷

Jennifer Temkin draws a similar conclusion in England: 'experience shows that whatever form the rape shield takes, it will meet with serious attempts to resist and undermine it.'³⁸

Judges and others in the court systems persist in the belief that sexual history evidence is relevant in trials for sexual offences. This is most frequently associated with the issue of consent. The fundamental problem is that sexual history evidence is not significantly probative of consent, since consent is by definition given explicitly and afresh on every occasion of sexual contact. It is this basic principle which common law judges seem not to accept at some fundamental level. Ian Dennis's argument that, given the difficulty of finding any probative evidence at all in sexual assault cases, a defendant must be afforded every possible chance of arguing his innocence is a forceful one.³⁹ Nonetheless,

³⁶ Id at 152.

³⁷ Id at 156.

³⁸ Jennifer Temkin, 'Sexual History Evidence – Beware the Backlash' (2003) *Criminal Law Review* 217 at 241.

³⁹ Ian Dennis, *The Law of Evidence* (3rd ed, 2007) at 605-608.

as the introduction of these statutes acknowledges, it is necessary to strike a balance between what might be seen as the competing interests of justice in, on the one hand, ensuring that the innocent are not convicted and, on the other hand, seeking to ensure that crimes will be reported and brought to trial, and more importantly that decisions will be made on the basis of probative evidence and not of stereotypes or prejudiced attitudes.

The Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General in Australia has pointed out that 'evidence of reputation, even if relevant and therefore admissible, is too far removed from evidence of actual events or circumstances for its admission to be justified in any circumstances'.⁴⁰ I take this statement as meaning that evidence of sexual reputation is not sufficiently probative of any fact in issue to be admissible in sexual offence trials. This contrasts markedly with nineteenth-century views highlighted by Dennis, when a defendant could not testify in his defence and could effectively only proceed by challenging the complainant's credibility.⁴¹ In an era with very different views about morals, female sexuality and female independence, it is unsurprising that stereotypes which are repugnant to the modern mind were often invoked, together with chains of reasoning which in the twenty-first century are considered to be flawed.

There is an inherent conflict in this. It is now accepted that these attitudes are not valid, but can the common law change quickly enough to reflect changing social values? The view of statute-makers is apparently that it cannot: otherwise statutes would be unnecessary. The remaining question, then, goes to whether the keepers of the common law, that is the judges, and to a lesser extent the barristers, respond appropriately to the imposition of statutes. In Australia's legal system, as in England's, statutes are supposedly binding on the courts, although they do require interpretation by judges. The concern is that, particularly with reference to sexual offences, this need for interpretation may be taken one step too far. Constructions that are not consistent with the intent of the statute are imposed by the courts. Judges resist the replacement of common law with statute,

⁴⁰ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code* Chapter 5: Sexual Offences Against the Person – Report ('999) at 219.

⁴¹ Ian Dennis, *The Law of Evidence* (3rd ed, 2007) at 605-606.

while simultaneously giving hints that twenty-first-century enlightenment about women in society is often a thin veneer over nineteenth-century prejudice. The legal system fails to serve the needs of justice and history inhibits law's proper function.