A paper prepared for the Equal Justice Project Outreach Sexual Crime Law Symposium on the 25th of August 2014.

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I Introduction

Various proposals are currently being made on how New Zealand should deal with sexual crime. These proposals have reignited an ongoing debate about the tensions between due process concerns and the low conviction rates for sexual crime. This symposium paper will investigate both the new policies and policies that have been issues in the past.

II Current Evidence law

Generally, in a legal proceeding, evidence is admissible if it is relevant. 'Relevant' means that it tends to prove or disprove a material issue in the case.[1] The presiding judge must exclude evidence, however, if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding, or needlessly prolong it.[2] On top of this, various provisions in the Evidence Act 2006 specifically deal with certain topics (such as opinion evidence, hearsay, and privilege), and stipulate special rules or considerations that are to apply to these topics. Section 44 of the Evidence Act largely governs the current law on the admissibility of evidence in sexual cases.

Section 44, titled "Evidence of sexual experience of complaints in sexual cases", protects complainants from being questioned and having evidence presented about their reputation and past sexual experience. In a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person **other than the defendant**, except with the permission of the judge.[3] The judge must not grant permission unless satisfied that the evidence or question **is of such direct relevance to facts in issue in the proceeding**, or the issue of the appropriate sentence, that it would be **contrary to the interests of justice to exclude it**.[4] The complainant does not need the permission of the judge to contradict or rebut any such evidence presented. When it comes to the complainant's sexual reputation, no evidence or questions whatsoever can be put forward that relate directly or indirectly to the reputation of the complainant in sexual matters.[5]

A rape shield law is a law that limits the scope of permissible cross-examination relating to a complainant's past sexual behaviour. Section 44 serves as a partial rape shield, but not a full one, as the judge can ultimately determine the admissibility of evidence relating to the complainant's previous sexual experience. Further, the provision only covers sexual experience with any person **other than** the defendant. Evidence about the complainant's past sexual history with the defendant may be put forward in open court without prior consideration. As with all evidence, the complainant can challenge this on the general grounds of relevance and unfair prejudice discussed above.

[1] Evidence Act 2006, s 7.
[2] Section 8.
[3] Section 44(1).
[4] Section 44(3).
[5] Section 44(2).

New Zealand now stands out as being one of the few countries where evidence of sexual history between the complainant and the accused is allowed. While here, the use of such evidence can be objected to, other countries take the approach of generally prohibiting it, and allowing it only once the judge is satisfied of its relevance.[6]

III Current evidentiary issues

The current law on evidence in sexual cases in New Zealand is already quite restrictive, with section 44 of the Evidence Act limiting what evidence can and cannot be allowed at trial.[7] Since section 44's enactment, there have been suggestions that the law could further be restricted in order to better protect the rights of the complainant, and to ensure that they are not in any way prejudiced. But any changes in the law would affect the rights of the accused: namely the right to a reasonable defence and a fair trial. Essentially, this dichotomy comes down to the tension between two fundamental aspects of sexual law cases; the right of the accused to a fair trial versus the need to protect victims and complainants of sexual assault. This tension was recognised by McDonald and Tinsely, who wrote that:[8]

> One current challenge is subjecting evidence of the sexual experience of the complainant with the particular defendant to appropriate scrutiny – in a way that reduces the prejudice to the complainant but does not prevent fairness to an accused.

Therefore, these two conflicting rights must be assessed to determine whether the law on evidence in sexual cases would benefit from further restriction, or a retreat back to a more traditional approach.

The Admissibility of a Complainant's Sexual History

As previously identified, New Zealand provides a partial rape shield, where evidence of sexual experience between the complainant and any person other than the accused is not allowed *without prior agreement* of the judge. The key limitation of that shield is that the complainant's sexual history with the accused can still be brought as evidence. The only challenge to this evidence would be on the standard objections that the prosecution can raise.[9] New Zealand stands alone as one of the only countries where evidence of sexual history between the complainant and the accused is allowed, even if it can be objected to, with other countries generally take the approach of prohibiting such evidence, and only allowing it once the judge is satisfied of its relevance.[10]

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[6] Ministry of Justice *Improvements to Sexual Violation Legislation in New Zealand: Public Discussion Document* (August 2008).
[7] Evidence Act 2006, s 44.
[8] Elisabeth McDonald and Yvette Tinsley "Evidence Issues" in Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 279 at 336.
[9] Ministry of Justice, above n 6, at 24.
[10] At 24.

However, there is an argument that the existence of a prior sexual relationship between the complainant and the accused is never relevant. There is concern that allowing the admission of evidence about previous sexual experience with the accused is inconsistent with the notion that a person should consent to sexual activity on each occasion. Consent to sexual activity on one occasion should not imply that a person automatically agrees to the sexual activity on another occasion. Furthermore, bringing up such evidence can in some cases distract the jury to consider behaviour on earlier, unrelated occasions, rather than the case at hand. This can cast doubt on the complainant's character, and as such may lead to a wrong finding that they may have consented. Further, even if there is an objection to evidence led in open court, the jury will hear the evidence regardless and may be persuaded to find that the complainant consented based on the testimony of the defence.[11] Therefore, by restricting section 44 and removing the ability to raise this type of evidence, complainants will be better protected and the possibility of consent being assumed will never be raised in court. Furthermore, the restriction of section 44 will ensure that complainants do not suffer from a "second rape" at trial, as the giving of evidence and being crossed about the nature of any sexual history can be distressing for complainants.

However, although restricting the laws on evidence in sexual cases would provide further protection for complainants and victims of sexual assault and abuse, making evidence of prior sexual history with the accused totally inadmissible ignores the rights of the other party in sex cases: the accused themselves. By disallowing evidence, the accused would have a difficult time proving a defence of reasonable belief on reasonable grounds that the complainant was consenting. Without this evidence, the accused will have no available avenue to protest innocence and may result in a miscarriage of justice. Under this school of thought, a retreat back to a traditional approach is advocated as the best way of ensuring that these rights are not abused, and that justice is served on both parties.[12] Further, it has been argued that restricting the law may also lead to delays as pre-trial applications for leave to cross-examine about sexual history would increase, and as such would increase the burden on our justice system.[13]

However, such a traditional approach cannot stand as the best means of dealing with evidence in sex cases, as it does not account for the needs and rights of the victim enough. Therefore, rather than removing the availability of evidence completely, or alternatively, by admitting any evidence about previous sexual relationships, evidence in section 44 could be limited to occasions only where it is relevant under a section 7 analysis. Although this may result in increased pre-trial applications, it is the one way to ensure that both the rights of complainants and the accused are not abused, whilst ensuring, above all, that victims of sexual abuse are protected under the law.

Ultimately, a balance must be struck between preventing unnecessary and tactical attempts to

[11] Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at 134.
[12] Elisabeth McDonald "Her Sexuality as Indicative of His Innocence: The Operation of New Zealand's "Rape Shield" Provision" (1994) 18 Crim LJ 321 at 321.
[13] Law Commission, above n 11, at 135.

blacken the complainant's character (which can cause shame, embarrassment, and subconsciously sway the jury), and affording an effective defence to the accused:[14]

> One current challenge is subjecting evidence of the sexual experience of the complainant with the particular defendant to appropriate scrutiny – in a way that reduces the prejudice to the complainant but does not prevent fairness to an accused.

In its recent review of the Evidence Act, the Law Commission rejects a "halfway-house" approach which would require any question about the sexual experience of the complainant with the defendant to be of direct relevance to facts in issue in the proceeding:[15]

> With respect to the proposal put forward in the Ministry's 2008 Discussion Document, we do not support the extension of the "rape shield" to relationships between the defendant and the complainant. Cases involving such a prior relationship will almost always turn on the question of consent or belief in consent. Almost inevitably, the existence of a prior sexual relationship will be relevant to this question.
>
> For this reason, an application for leave to cross-examine the complainant on the prior relationship could reasonably be expected to be made in the vast majority of cases involving a prior relationship between the complainant and the defendant, thereby inevitably increasing the number of pre-trial applications and appeals. This would add to delays, which in our view, compounds rather than alleviates problems for complainants.

IV Burden and Standard of Proof of Sexual Offences

As with other forms of criminal proceedings, the general burden of proof falls on the prosecution to prove that the accused committed the crime, being the *actus reus* and *mens rea*.[16] This will be to the standard of "beyond a reasonable doubt." Whilst the defendant will be burdened with casting a reasonable doubt on the prosecution's case against them, a failure to do so will only be fatal should the prosecution successfully prove the Crown's case beyond reasonable doubt. However, should the prosecution fail to meet this standard, then a finding of not guilty will be the outcome.

Of course a standard of beyond reasonable doubt is a high standard, however it is arguably necessary because of the implications of a conviction on the alleged offender. This is even more so in the case of sexual offending, as the consequences for the offender often persist long after the sentence has been completed.

In addition to the general burden of proof falling on the prosecution, should a defendant wish to raise a specific defence, then there is an evidentiary burden that falls on the defendant to raise reasonable evidence that a defence is available. This rule applies to both statutory and common law defences. Once the defendant's evidentiary burden has been met, the legal

[14] See McDonald and Tinsley, above n 8, at 336.
[15] Law Commission, above n 11, at 135.
[16] *Woolmington v DPP* [1935] AC 462, [1935] All ER 1 (HL).

burden falls to the prosecution to prove beyond reasonable doubt that the defence is unavailable.

The right to be presumed innocent until proven guilty is also codified in the New Zealand Bill of Rights:[17]

> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
> …
> (c) the right to be presumed innocent until proven guilty according to law.

The right of presumed innocence can also be seen in the New Zealand cases of *R v Rangi* and *R v Hansen.*[18]

However, there are some exceptions to the general burden of proof. Strict liability offences (such as traffic offences) shift the burden of proof to the defendant to prove 'total absence of fault' once the prosecution has proved the defendant has committed the *actus reus* of the offence. There are also exceptions relating to sexual crime defences involving young persons.

The first relates to the offence of meeting a young person following sexual grooming:[19]

> **131B Meeting young person following sexual grooming, etc**
> (2) It is a defence to a charge under subsection (1) if the person charged proves that,—
> (a)before the time he or she took the action concerned, he or she had taken reasonable steps to find out whether the young person was of or over the age of 16 years; and
> (b)at the time he or she took the action concerned, he or she believed on reasonable grounds that the young person was of or over the age of 16 years.

The second exception relates to a defence to the crime of sexual conduct with a person under the age of 16 years:[20]

> **134A Defence to charge under section 134**
> (1)It is a defence to a charge under section 134 if the person charged proves that,—
> (a)before the time of the act concerned, he or she had taken reasonable steps to find out whether the young person concerned was of or over the age of 16 years; and
> (b)at the time of the act concerned, he or she believed on reasonable grounds that the young person was of or over the age of 16 years; and
> (c)the young person consented.
> (2)Except to the extent provided in subsection (1),—
> (a)it is not a defence to a charge under section 134 that the young person concerned consented; and

[17] New Zealand Bill of Rights Act 1990, s 25(c).
[18] *R v Rangi* [1992] 1 NZLR 385; *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.
[19] Crimes Act 1961, s 131B(2).
[20] Section 134A.

> (b)it is not a defence to a charge under section 134 that the person charged believed that the young person concerned was of or over the age of 16 years.

These sections place a burden on the defendant to prove reasonable steps were taken to avoid committing a crime, and this shifts the burden away from the prosecution. Defences raised in these circumstances are to a civil standard of balance of probabilities. This is a lower standard than the 'beyond reasonable doubt' that applies to most other crimes.

It is clear that the burden and standard of proof for sexual cases is consistent with general principles of criminal law. However there are some exceptions as has been discussed. These exceptions are important to note, as they are specific to offences that are committed against young people, who are a vulnerable group in society particularly when victimised by sexual offending.

What would a change in the burden of proof look like?

A change in the burden of proof in sexual cases would most likely take the form of an accused having the burden to prove that there was reasonable belief that the complainant consented in order to be found innocent. Andrew Little of the Labour Party has suggested such a change, although it is not an official party policy.[21] Currently, rape and unlawful sexual connection is defined as the accused not having consent, or a belief on reasonable grounds that there was consent.[22] The Crown must therefore prove that a) sexual connection took place, b) that complainant did not consent and c) that the accused did not believe on reasonable grounds that the complainant consented. Whilst there is no positive definition of consent, there is a non-exhaustive list to what circumstances do not amount to consent.[23]

The issue here is that the **existence of consent** is a **factual matter** that needs to be proved by prosecution and accepted by either the judge or jury. It is often here that the prosecution fails. By reversing the burden of proof, and requiring the accused to prove that consent was given:[24]

> This approach does not contradict the fundamental principle that a defendant is innocent until proven guilty - the basic facts of the case still have to be made out - but it does mean the prosecution doesn't need to prove a negative, namely that there was no consent.

The implication of this policy is if the Crown has proved a sexual encounter and identified the defendant, it would be rape unless the defendant could prove it was consensual.

As stated earlier, the presumption of innocence is a value the western society holds dear. If the burden of proof were reversed, the presumption of innocence would be greatly affected. Brookbanks says shifting the burden of proof would make it harder for defendants to prove

[21] Derek Cheng "Rape accused would have to prove consent under Labour plan" *The New Zealand Herald* (online ed, Auckland, 8 July 2014).
[22] Crimes Act 1961, s 128.
[23] Section 128A.
[24] Andrew Little "Victims should be at centre of domestic violence measures" (press release, 2 July 2014).

consent:[25]

> Usually in these cases, there are no witnesses. Who do you believe? The defendant has to go the full distance of proving to the satisfaction of the court that it's more probable than not that the victim was consenting. That is a very difficult threshold to reach.

It is suggested that without a positive definition for consent, it would be very difficult for defendants to prove consent if reversal of burden of proof is applied. The greater issue here however, is that the proposal could result in innocent people being convicted. There are not usually any witnesses to sexual violence, which places greater emphasis on the conflicting evidence between two parties.[26] Given that the sentence for sexual violation is liable to imprisonment for a term not exceeding 20 years, the loss of liberty is not a minor consideration.

One of the problems faced by complainants during trial is that they can be vigorously and aggressively challenged while the defendant does not need to present his or her version of events.[27] Because there is no requirement for defendant to give evidence, it is suggested that many complainants feel they are on trial compared to the accused. An inquisitorial courtroom, as opposed to the current adversarial model, is an alternative. Mr Little believes if put into place, it would allow the judge to conduct the cross examination of complainants (with counsel conferring with the judge beforehand), making it less humiliating for the complainants.[28]

The Law Commission has suggested that the defendant be subjected to questioning first, as this can remove the perception that the complainant is on trial. Although this is not strictly a reversal of the burden of proof on the accused, this policy from the Law Commission suggests that defendants has the burden of being questioned contrary to the current status quo. Although this would be an eradication on the right to silence, the Law Commission argues that the defendant can continue to refuse answer questions that are put which is consistent with that right.[29] This suggests for a more effective trial process, with the defendant has a greater burden than it is in the present.

The National Party has made a similar proposal. They want to explore allowing a judge or jury to see an accused's refusal to give evidence as an adverse inference.[30] Again this is criticized as being contrary to the right to silence but is suggested it to be easier for prosecutors to obtain conviction. It is, in the end, a balancing exercise between the interests of justice in a specific case, and the wider human and civil rights we collectively value as a

[25] Cheng, above n 21, at [10].
[26] Ministry of Justice, above n 6, at 93.
[27] Law Commission *Alternative Pre-Trial and Trial Processes: Possible Reforms* (NZLC IP30, 2012) at 34-36.
[28] Cheng, above n 21.
[29] Law Commission, above n 27, at 58.
[30] Derek Cheng "Rape case shakeup on cards this election" *The New Zealand Herald* (online ed, Auckland, 10 July 2014).

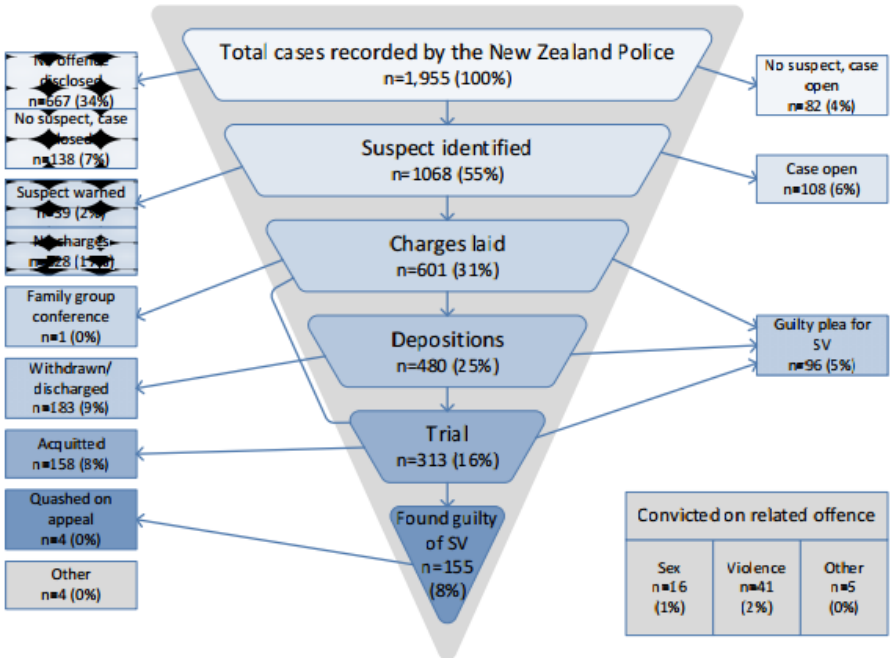
society.

V Why would a change in the burden of proof be justified?

Despite increased reporting, access to justice and increased support for complainants, New Zealand still has low conviction rates for sexual crimes.[31] Added to these disappointing figures are high attrition rates, as most sexual crimes do not proceed through all stages of the criminal justice process. For this reason, some advocates support changing the burden of proof.

Attrition of Sexual Crimes

Figure 2: Attrition and conviction rates of *recorded* sexual violation (SV) offences



The above table illustrates the high attrition rates for charges of sexual violation.[32] Reasons for attrition vary, but researchers have identified insufficient evidence to identify the suspect, intoxication affecting memory, no identified suspects, complainant withdrawal as being important factors.[33] Other factors include the complainant-offender relationship, offence type and the complainant's age. [34]

Whilst more sexual offences are reported, attrition rates continue to be very high. Today, despite 66% valid offences, only 13% are convicted. For the judicial system to be effective and seen to be accountable for the crimes occurring, any mechanisms that increases conviction should be seen as a progressive step, hence the discussion of reversing the burden

[31] Statistics New Zealand "Annual Recorded Offences for the latest Calendar Years" (07 August 2014) Statistics New Zealand <www.stats.govt.nz>.
[32] Ministry of Women's Affairs *Restoring Soul: Effective interventions for adult victims/survivors of sexual violence* (October 2009) at 32.
[33] At 32-33; Jan Jordan and others *Responding to Sexual Violence: Attrition in the New Zealand Criminal Justice System* (Ministry of Woman's Affair, Wellington, 2009) at viii.
[34] At viii.

of proof.

Complainant's Rights

Complainant's rights are another justification to change the burden of proof. As acknowledged through anecdotal evidence, cross-examination and evidence-in-chief can be very difficult for complainants. Often, it is seen as a 'second rape', as they have to relive traumatic experiences for the court. There is a high stress and burden for complainants as they often feel that they are the ones on trial, rather than the accused, due to their requirement to be as convincing as possible. Possibly, a shift in the burden of proof could result in the accused becoming more involved, and as a more active participant in the proceedings.

As most sexual offences are against women, particularly Maori woman, the current system could be perceived as disadvantaging a vulnerable sector of society.[35] Changing the burden onto the accused can be seen as outweighing the harm done on this group. Some of the argued advantages of reversing the burden of proof are:

1. Achiever greater transparency and facts if burden is placed upon accused.
2. Even by changing the burden of proof on consent with the accused part, it does not necessarily erode the right to presumed innocent or the right to silence. It is suggested the facts will still need to be established but consent will be a legal and evidentiary burden on accused. This can already be found with sexual conduct with a person aged under 16 where the defendants must prove the defence exists.[36]
3. Capturing innocent people for this offence will still be avoided and highly unlikely to increase even with the change of burden of proof.

VI Resulting Due Process Issues

The most important application of the rule of law is the principle that governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws. Laws are adopted and enforced in accordance with established procedural steps that are referred to as due process. This principle is intended to be a safeguard against arbitrary governance and ensures that the state respects all of the legal rights that are owed to a person.[37]

The presumption of innocence is fundamental to our legal system. This is because, by its nature, a person who denies a fact cannot produce evidence of its non-existence. Furthermore, the Crown is in a much stronger position to produce evidence in a court of law. It has a much greater access to resources than the average individual, particularly those of low-socioeconomic statuses who depend on legal aid. The burden to collect and present enough compelling evidence to prove fact beyond reasonable doubt can be very expensive and placing it on a defendant potentially restricts access to justice.

[35] Ministry of Women's Affairs, above n 32, at 84.
[36] AP Simester and WJ Brookbanks *Principles of Criminal Law (*4th ed, Brookers, Wellington, 2012) at 39.
[37] Gerald Postema "Law's System: The Necessity of System in Common Law" [2014] NZ L Rev 69.

The greatest concern with reversing the burden of proof is that it erodes the protection of innocent accused. This is particularly dangerous in sexual assault cases because there are often evidentiary difficulties. Usually there are only two parties present – the victim and the accused - and without third party witnesses, the question of consent boils down to one person's word against another's. Consequently, the burden on the defendant to prove to the court that the activity was more likely than not consensual is incredibly onerous.

Warren Brookbanks suggests that Labour's proposed policy challenges the basic principles of the right to silence and the presumption of innocence, which are protected in the New Zealand Bill of Rights Act 1990.[38] He believes it has the potential to "capture the innocent" and potentially lead to a dramatic rise in wrongful convictions.[39] Similarly, Criminal Bar Association President Tony Bouchier said the presumption of innocence and the right to silence "are absolute, almost constitutional" and he condemned "political parties playing ping-pong with such important [legal] presumptions".[40] Criminal lawyer Jonathan Natusch even described Labour's policy as "an insult to the fundamentals of justice". [41]

Indeed, there have been several high-profile cases of wrongly accused individuals being imprisoned for sexual assault with the traditional burden of proof. A promising high school football player in California, Brian Banks, spent 62 months in prison after being falsely accused of sexual assault in 2002.[42] Similarly, three members of the Duke Lacrosse team were wrongly accused and prosecuted for rape in 2006, consequently being expelled from the team and losing athletic scholarships.[43] Wrongful convictions have the potential to ruin lives, yet a traditional burden of proof makes it much more likely to occur.

Thus, with the traditional burden of proof, guilty parties are thought to escape conviction because the victims face an insurmountable evidential burden. Yet if this burden were reversed, then innocent parties face jail time for crimes they did not commit. Faced with such a dilemma, we are reminded of Blackstone's words, "it is better that ten guilty persons escape than that one innocent suffer".[44]

Furthermore, if we reverse the burden of proof for sexual assault cases it will become more difficult to defend the traditional burden in other areas. Victims of assault or fraud, or any other crime for that matter, could reasonably ask why they are any less deserving of a reversed onus. Thus, the legitimacy of our entire legal system will be undermined if we start making exceptions to the fundamental principle of presumed innocence. The law should not discriminate against victims of crime.

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[38] New Zealand Bill of Rights Act 1990, s 23(4) and s 25(c).
[39] Cheng, above n 30.
[40] John Braddock and Tom Peters "NZ Labour Party plans to reverse burden of proof in rape cases" (28 July 2014) World Socialist Website <www.wsws.org>.
[41] Braddock, above n 41.
[42] Jason Kandel "Woman who falsely accused Brian Banks of rape ordered to pay $2.6m" *NBC Los Angeles* (online ed, Los Angeles, 15 June 2013).
[43] Daniel Luzer "The Aftermath of the Duke Lacrosse Rape Case" *Washington Monthly* (online ed, Washington, 1 March 2013).
[44] William Blackstone *Commentaries on the Law of England* (Philadelphia, JB Lippincott Co, 1893) at 358.