Academic Paper

Softening the Law's Bite: Law, Fact, and Expert Evidence in R v JA and R v NS

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Introduction

Criminal cases in the post-Charter era often call upon Canadian judges to make decisions about controversial social practices and identities that lie far afield of their own experience. Faced with decisions that bear upon largely unfamiliar realms of social life, courts have become increasingly open to making factual determinations on the basis of social science and other expert evidence. The influx of expert evidence into the courtroom derives both from the increased adjudication of complex social issues under the Charter, and the expansion of relevant research from other disciplines. It also reflects a trend towards interdisciplinarity in legal scholarship and practice. As Christine Boyle and Marilyn MacCrimmon observe:

Historically, the discipline of law has jealously guarded its borders; insights of other disciplines have not readily been incorporated into legal discourse. However, insights from other disciplines can operate to facilitate open-minded fact determination.

4 Boyle & MacCrimmon, supra note 2 at 61.
5 Ibid at 81.
Where expert evidence is provided in litigation, it can broaden the horizons of judicial knowledge, and thereby benefit marginalized social groups. However, courts do not always receive the information they need in order to make informed conclusions about social facts. This paper looks at how courts in two recent criminal cases—*R v JA* and *R v NS*—proceed to determine issues that engage marginalized social interests when the expert evidence available is scant.

Jeremy Bentham famously stated: “The field of evidence is no other than the field of knowledge.” Two centuries later, Boyle and MacCrimmon note that in a society consciously committed to pluralism, the important question is “whose knowledge?” In this paper, I use the term “legal worldview” to refer to the web of experiences and beliefs perpetuated by the common law, whether through legal precedent, convention, or judicial notice—often informally appealed to as “common sense.” As argued by Geoffrey Samuel, law as a system of knowledge is distinct from empirical disciplines in that “epistemological validity arises not from scientific inquiry but uniquely from authority.” Unlike science, law does not demand verification against an external social reality—it is a self-contained system. Building on Samuel’s conception of legal epistemology, I argue that the exposure of “common sense” legal norms to factual scrutiny works to disrupt the hegemony of legal worldviews and thereby recognize marginalized social perspectives and interests. However, as seen in *JA* and *NS*, parties who seek to contest legal norms that exclude or misconstrue their experiences face an uphill battle.

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6 *Ibid* at 62.
8 *R v NS*, 2012 SCC 72, [2012] SCJ No 72 [*NS Supreme Court*].
13 Citing Gramsci, Judith Halberstam powerfully illuminates the link between hegemony and the authoritative pronouncement of “common sense”: “Accordingly hegemony, as Gramsci theorized it and as Hall interprets it, is the term for a multilayered system by which a dominant group achieves power not through coercion but through the production of an interlocking system of ideas which persuades people of the rightness of any given set of often contradictory ideas and perspectives. Common sense is the term Gramsci uses for this set of beliefs that are persuasive precisely because they do not present themselves as ideology or try to win consent.” *The Queer Art of Failure* (Durham: Duke Univ Pr, 2011).
There are two challenges that arise for such litigants. The one most frequently identified is the need to supply adequate expert evidence with respect to the norm at issue. As equality-oriented scholars have noted, this can raise difficulties due both to gaps and biases in the available social science, and to the resources required to engage experts in litigation. This is a significant challenge, and in this paper, I demonstrate that the burden of supplying expert evidence tends to fall on the party seeking to refute the legal norm, rather than the party seeking to rely on it. Where expert evidence is not provided, the courts simply revert back to established legal wisdom, upholding the status quo even while acknowledging the shaky empirical ground upon which it rests.

And yet the principal contribution of this piece is to argue that before the party seeking to contest a legal norm even contemplates the provision of expert evidence, they must first persuade the court to accept a reframing of that norm as a question of fact that is susceptible to proof. Only then will the court entertain evidence, expert or otherwise, with respect to that fact. In other words, the legal norm at issue must be “softened” into fact before the more recognized issue of expert evidence even arises. Thus, the fight to disrupt legal norms (and thereby legal worldviews) occurs in two stages: 1) reframing the norm as a question of fact; and 2) providing expert evidence to prove that fact. A failure at either stage allows the legal norm, and the broader worldview it expresses, to persist. Nevertheless, even if the second stage is not fulfilled, the softening of the norm’s authority at the first stage via the exposure of factual uncertainty opens the door to change at a later date through the incorporation of new knowledge.

I begin by providing a brief overview of JA and NS, focusing on the factual issue for which expert evidence was found to be lacking in each case. I then examine the role of expert evidence in making issues of social difference legible to judges, and how that role has been influenced by the implementation of the Charter.

15 Mayeda, supra note 2 at 204, 223; Boyle & MacCrimmon, supra note 2 at 67. See also Shifting Burdens below.
Having thus set the stage, I address the fraught distinction between law and fact, in order to demonstrate how the issues in *JA* and *NS* are strategically constructed. I then consider how the courts in *JA* and *NS* deal with the acknowledged epistemic deficits in those cases, noting the inward-looking nature of their approach as well as the conservative distribution of burdens of proof. I conclude by offering a measure of hope regarding the progressive potential of cases such as *JA* and *NS*, even when they do not succeed in displacing the status quo.

**The Cases**

*R v JA*

The criminal charges against JA arose from a sexual encounter that took place within a tumultuous long-term relationship marked by both domestic violence and kinky sex. On the evening in question, JA strangled\(^\text{16}\) his partner KD to heighten sexual pleasure—a practice known in the S/M context as erotic asphyxiation. KD lost consciousness as a result, at which point JA tied her up and began penetrating her anally with a dildo. The couple continued with other sexual activities after KD regained consciousness. KD reported the incident to the police a month and a half later, in the midst of arguments with JA over their son. She gave a videotaped statement stating that she did not consent to the encounter. However, at trial, she changed her position, affirming that the encounter was consensual and cooperating with the defense. She was the sole witness in the case.\(^\text{17}\)

The Crown showed the videotaped statement in court but ultimately abandoned the motion to have it formally admitted into evidence. Instead, Crown counsel argued that KD could not legally consent to the bodily harm caused by the strangling.\(^\text{18}\) He also took the position that KD could not legally provide advance consent to the sexual activities that took place while she was unconscious. The latter issue made its

\(^{16}\) The courts use the term “choking” rather than “strangling”. However, the incident is more accurately described as strangling, as it involves external constriction of the neck that impedes both oxygen and blood flow to the brain. Choking occurs when there is an obstruction inside the throat that blocks the airway but not blood flow to the brain. Stephan Stapczynski, "Strangulation Injuries" (2010) 31 Emergency Medicine Reports: The Practical Journal for Emergency Physicians 193 at 194, cited in Karen Busby, “Every Breath You Take: Erotic Asphyxiation, Vengeful Wives, and Other Enduring Myths in Spousal Sexual Assault Prosecutions” (2012) 24:2 Canadian Journal of Women and the Law/Revue Femmes et Droit 328 at 338.

\(^{17}\) *JA* trial, *supra* note 7 at paras 2-7.

\(^{18}\) Ibid at para 12.
way to the Supreme Court of Canada, where the Crown was ultimately successful on a 6-3 majority. The Supreme Court decision on advanced consent generated heated debate amongst feminist legal scholars, raising difficult questions about the nature of consent and the best way to balance concerns about sexual exploitation with the desire to promote sexual agency. However, it is the question of bodily harm, dealt with primarily at the trial level, which is of most interest for this paper. While garnering less attention than the Supreme Court ruling, the trial judge’s assessment of bodily harm highlights the epistemic uncertainty that arises with respect to the sexual behaviour on trial in the case.

The Criminal Code defines bodily harm as “any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature.” In R v Jobidon, the Supreme Court of Canada found that adults could not consent to serious bodily harm in the course of a bar fight, but allowed for consent to risky activities with “positive social value.” The holding in Jobidon was transferred from the bar to the bedroom in R v Welch, where the Ontario Court of Appeal found that a person cannot consent to sexual activities intended or likely to cause bodily harm.

Relying on these cases, the Crown in JA argued that KD’s loss of consciousness as a result of strangulation met the definition of bodily harm. Citing various internet sources as well as the complainant’s own testimony, he claimed that the intended sexual high from erotic asphyxiation occurs only up to the point of unconsciousness, and that unconsciousness itself is not the desired effect of the practice. He also reasoned that an unconscious person would not logically have the capacity to enjoy the intended sexual high. Alternatively, he argued that bodily harm was objectively foreseeable because “common sense dictates that choking someone to the point of unconsciousness is potentially harmful and in some cases deadly.”

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21 RSC 1985, c C-46, s 2.
24 JA trial, supra note 7 at paras 23-25 (quotation at para 24).
defence argued that the risks associated with erotic asphyxiation were beyond common knowledge and required expert evidence, of which the Crown had presented none.\(^{25}\)

The trial judge agreed with the defence that she was “ill equipped” to assess the medical risks of erotic asphyxiation leading to unconsciousness, but nevertheless found that the practice constituted bodily harm on the basis that “the reasonable man would conclude that choking someone to the point of unconsciousness does interfere with that person’s ‘health or comfort’ and can in some cases endanger life.”\(^{26}\) However, she found that the bodily harm in this case did not vitiate consent as it was only transient.\(^{27}\) The Court of Appeal agreed with the accused that “it may have been preferable for the Crown to call expert evidence concerning this issue”, but did not confirm whether the trial judge was entitled to find bodily harm without such evidence or not.\(^{28}\) The Supreme Court of Canada did not address the issue of bodily harm, as the question was not put before them.

\(\textit{R v NS}\)

NS was a complainant who alleged that her uncle and cousin had sexually assaulted her as a child. At the preliminary inquiry, the two accused sought an order to have NS remove her niqab—a face covering worn by some Muslim women in public places—while testifying, arguing that the ability to see her face was crucial to the accused’s right to make full answer and defence.\(^{29}\) NS refused to remove the niqab for religious reasons, raising the issue of her right to religious freedom. The judge conducted an informal \textit{voir dire} regarding NS’s religious belief and ultimately ordered that NS remove the niqab. NS brought an application in the Superior Court of Justice to have the order quashed and replaced with an order permitting her to wear the niqab while testifying at the preliminary inquiry. The case made its way to the Supreme Court of Canada, where the Court split three ways on how to balance the competing \textit{Charter} rights at

\(^{26}\) \textit{Ibid}.
\(^{27}\) \textit{Ibid} at para 45.
The decision with respect to NS was remitted back to the preliminary inquiry judge.

The question of whether NS’s right to religious freedom was triggered called for a case-specific inquiry as to the sincerity of her religious belief. The engagement of the accused’s fair trial rights, however, rested upon a broader factual proposition: that facial demeanour is an important tool for evaluating a witness, both in terms of the trier of fact’s assessment of credibility and the defence’s conduct of an effective cross-examination. NS contested the validity of this claim.

The Superior Court judge found that if NS could demonstrate that she wore the niqab for religious reasons, she should then be allowed to testify wearing it, and it would be up to the preliminary inquiry judge to determine whether the resultant cross-examination was adequate based on his own observations. The Court of Appeal found that the relevance of demeanour to the assessment of credibility and cross-examination was a matter of judicial notice. Not till the case reached the Supreme Court of Canada was the need for expert evidence on the issue even acknowledged. Lacking such evidence, both the majority and dissent nevertheless affirmed the value of facial demeanour as a tool for witness evaluation. As in the JA trial decision, the Court was pressed to make a decision despite an acknowledged epistemic deficit.

**Lived Social Difference**

“The phenomenological - i.e., experiential - basis of equality is fundamentally a recognition that others experience the world differently from the way we do”, observes Graham Mayeda. Both JA and NS involve experiences of lived social difference that do not fall within the realm of traditional legal

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30 NS Supreme Court, * supra* note 8.
31 The preliminary inquiry judge ordered NS to remove the niqab on the basis that her religious belief was open to exceptions and thus “not that strong” (* supra* note 29 at para 35). However, the upper courts rejected both the informal manner in which NS was questioned by the judge on this point, and the reasoning that led him to this conclusion.
32 In the context of the preliminary inquiry, the focus was on effective cross-examination (NS Superior Court, * supra* note 29 at para 109). However, the assessment of credibility was addressed in the case as an anticipated trial issue.
33 NS Superior Court, * supra* note 29 at para 48.
34 *Ibid* at paras 89-107.
36 NS Supreme Court, * supra* note 8 at paras 27 and 82.
37 *Supra* note 2 at 201.
knowledge. In *JA*, the experience stems from JA and KD’s participation in kinky sexual activities associated with S/M. In *NS*, it relates to the Muslim practice of veiling. While we cannot know the meaning of these practices to the specific parties involved, it is fair to assume that they may, at least in some cases, be integrally linked to marginalized social identities, i.e. kinksters (a broad term for those engaged in non-normative sexual practices) and Muslim women.

I should pause here to note that in *JA*, the stakes are complicated by the fact that the case also raises the issue of the marginalization of women via the experience of domestic violence. While Canadian courts have consciously acknowledged and grappled with expert knowledge about domestic violence, and a number of criminal justice system reforms have been undertaken in an attempt to address the problem, there is no doubt that judges have often denied or misapprehended the experiences of women in abusive relationships (and that they continue to do so). Nevertheless, the courts arguably display even greater ignorance and prejudice with respect to the taboo subject of S/M. Furthermore, as Karen Busby points out, the Canadian judiciary’s lack of knowledge regarding S/M may actually contribute to its inability to properly recognize instances of abuse. For these reasons, my focus is on the court’s treatment of kinky sexuality as a marginalized and poorly understood social practice.

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38 At the time JA was sentenced, he had three previous convictions for domestic violence, two of which were against KD. *R v JA*, 2008 ONCJ 624, [2008] OJ No 4814 at para 2 [sentencing].
40 Johnson and Fraser observe that: “Over the last 30 years, social science research and the battered women’s movement have been integral to the expansion of criminal justice responses to domestic violence which has included pro-arrest policies, no-drop prosecution polices, and specialized domestic violence courts.” *Ibid* at 7.
41 In the few Canadian cases that raise the issue of S/M, medical or psychological (though not empirical) expert evidence has sometimes been presented, but almost always for diagnostic purposes—to determine whether a person exhibits pathological sexuality. However unlike battered women, who are pathologized as helpless and thereby afforded leniency under the law, kinksters are pathologized as deviant and violent in order to justify criminal punishment or the denial of rights to their children. For a comprehensive review of the relevant cases, see Khan, *supra* note 20 at 242-252 and 280-293. A notable exception is the case of *Hayes v Vancouver Police Department and Barker*, 2010 BCHRT 324, wherein Dr. Charles Moser provided non-pathologizing expert testimony about kinky sexuality in order to help the British Columbia Human Rights Tribunal determine whether a kinky identity fit into the category of “sexual orientation.” *Supra* note 16 at 358.
Although the claims at issue in JA and NS do not speak directly to the traits of kinksters and Muslim women, they do support legal norms that threaten to exclude or misconstrue the experiences of these groups. In JA, erroneous assumptions about the dangers of erotic asphyxiation may lead the court to mistake non-normative sexuality for violence, or visa versa. As argued by Ummni Khan, the resulting conflation of S/M with violence threatens to dehumanize those who seek pleasure in such practices. In NS, the belief about the importance of seeing a witness’ face to trial fairness threatens to exclude veiled Muslim women, first from the legal process, but also in terms of their lived social experience. After all, the belief that seeing a person’s face is necessary for effective communication throws into question a veiled woman’s capacity to communicate meaningfully with others on a daily basis, diminishing her personhood in the eyes of the law.

Because the experiences at issue in JA and NS are unfamiliar to the common law and likely also to individual judges, in order to give them fair consideration judges must look to outside sources of knowledge. Expert evidence offers one (though not the only) means by which they may do so. As Boyle and MacCrimmon observe: “Judges and lawyers are increasingly aware of the importance of taking social location into account. This awareness has lead to a scepticism about common sense assumptions and an openness to expert opinion to correct misperceptions about human behaviour.” Without such skepticism, judges risk the uncritical promulgation of norms derived either from their own life experience or from that

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43 Khan, supra note 20 at 305.
44 The exclusion of Muslim women from the justice system is discussed by both the majority and the dissent at the Supreme Court of Canada, but only in the context of NS’s right to religious freedom. It does not inform the analysis regarding the right to a fair trial. NS Supreme Court, supra note 8.
45 J LeBel’s comments about how the niqab restricts acts of communication are telling in this regard. See NS Supreme Court, supra note 8 at para 77.
46 Of course, expert evidence may import its own biases and assumptions. As Brockman notes, “In suggesting that the law might benefit from the use of social science to correct underlying assumptions of fact, it is necessary not to lose sight of the fact that social science might also benefit from an examination of the assumptions of fact which permeate its work.” (supra note 14 at 235) Moreover, it may be more empowering (though not necessarily more legally effective) for socially marginalized litigants to present evidence through their own direct testimony in certain circumstances. The key point for the purposes of this paper is that the presentation of evidence about key social issues, whether in the form of expert testimony or otherwise, helps to illuminate perspectives beyond the legal worldview.
47 Supra note 2 at 80.
of past judges (via precedent) and legislators, and the resulting exclusion of perspectives that lie outside of those limited and privileged realms of understanding.  

According to Boyle and MacCrimmon, paying attention to differing perspectives about facts actually accords with foundational legal principles such as accountability and equality. This is especially true in light of the Charter. Because the Charter aims to protect minority rights in the face of majoritarian legislation and state actions, it calls upon courts to better understand marginalized perspectives and experiences through extra-legal sources of knowledge. Indeed, as exemplified by the recent cases on polygamy, prostitution, and assisted suicide, Canadian courts have repeatedly demonstrated a hunger for expert evidence from the social sciences when faced with Charter challenges that engage the interests of marginalized groups.

However, courts must also grapple with issues of social difference in cases that do not involve direct Charter challenges. Criminal cases such as JA and NS are a prime example. Although not formally framed as Charter challenges, judges must nevertheless account for Charter values in deciding these cases. In this sense, the Charter's counter-majoritarian orientation sheds a new light on judicial decision-making more broadly.

Unlike Charter litigants, however, criminal defendants and complainants often lack the resources to present extensive expert evidence in support of their positions. The cases I am looking at here raise issues of social marginalization very much akin to those that often form the subject of Charter litigation, but where the expert evidence on offer is severely limited.

**Law and Fact**

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48 Brockman, *supra* note 14 at 216. See also Mayeda, *supra* note 2 at 204.
49 *Supra* note 2 at 85.
53 Mayeda, *supra* note 2 at 223.
The call for expert evidence in *JA* and *NS* signals the factual characterization of the claims at issue. This is because in the world of litigation, evidence is used to establish facts, to which the law is then applied. The very notion of evidence presumes a factual inquiry, as distinct from a legal one.

Of course, facts about the medical risks of a sexual practice or the interpretive value of facial demeanour differ from facts about who did what, when, where and to whom. In 1942, Kenneth Culp Davis drew a distinction between adjudicative facts, which determine what occurred between the parties in a particular case, and legislative facts, which inform decisions about broader questions of law and policy.54 Building on Davis’ terminology, the Supreme Court of Canada has further divided non-adjudicative facts into social and legislative facts, as articulated in *R v Spence*: “Such non-adjudicative facts are now generally called "social facts" when they relate to the fact-finding process and "legislative facts" in relation to legislation or judicial policy.”55

The factual propositions in *JA* and *NS* may fit best into yet another category, that of ‘social framework.’ John Monahan and Lorens Walker coined this term to refer to “the use of general conclusions from social science research in determining factual issues in a specific case.”56 For example, they describe a murder case dependent on the testimony of two eyewitnesses, wherein expert evidence was called to shed light on factors that affect the accuracy of eyewitness testimony.57

Taxonomical issues aside, the increasing prominence of expert evidence in the adjudication of complex social issues reflects the growing importance of broad factual determinations that extend beyond the immediate knowledge of the parties. However, while the sharp distinction between law and fact continues to underpin the litigation process, judges and scholars have long recognized its illusory nature. In 1927, 54

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57 *Supra* note 46 at 470.
John Dickinson remarked that “[m]atters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law.” In 1930, Leon Green put the point colourfully:

No two terms of legal science have rendered better service than ‘law’ and ‘fact.’ They are basic assumptions; irreducible minimums and the most comprehensive maximums at the same instant. […] What judge has not found refuge in them? The man who could succeed in defining them would be a public enemy.

More recently, Henry Monaghan posited that “law and fact have a nodal quality; they are points of rest and relative stability on a continuum of experience.” These statements reflect a view of law and fact as more like end points on a spectrum than dichotomous opposites.

In *Au-Dela de la Distinction du Fait et du Droit en Matiere Constitutionnelle: Les Postulats Necessaires*, Danielle Pinard applies this notion of a law/fact continuum to two Supreme Court of Canada decisions, including *NS*. She argues that the factual presumptions underlying legal rules—such as the need for an accused to see a witness’ face in *NS*—actually operate more like norms than “ordinary” facts. Pinard suggests that despite the courts’ occasional treatment of general claims about society as matters of fact, they often have more in common with questions of law in that they raise issues more suited to resolution by reasoned debate than empirical verification, are beyond the immediate experience of the parties, and seem to have precedential value.

According to Pinard, the categorization of claims in litigation as either law or fact stems more from practical concerns than ontological ones. As Monaghan states: “In our legal system, the categories have functioned as crucially important constructs that permit us to understand, organize, and regulate certain forms of social experience.” Pinard applies Monaghan’s insight to judicial decision-making. She points out that factual claims are particular to the case, not subject to appeal, and must be proved by the parties through evidence according to distributed burdens of proof. Legal claims, on the other hand, are general

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59 Leon Green, *Judge and Jury* (Kansas City: Vernon Law Book Co, 1930) at 270.
61 Postulats Necessaires, *supra* note 3 at 8.
63 *Ibid*. 
(they hold precedential value), appealable, and can be affirmed without any onus on the parties. Thus, the distinction between fact and law serves a strategic function – “soit d’assurer a certaines questions un statut particulier dans l’ordre juridique.”

Pinard argues that the initial decision to frame an issue as a question fact (as well as subsequent decisions about what level of generality the fact is pitched at, at what stage of the legal analysis, requiring what kind of proof, and on the part of whom) has significant substantive consequences, giving judges a great deal of room to manoeuvre. As will be seen in my analysis of JA, the same can be said for the parties, to the extent that they can influence the characterization of issues through argument.

In *Constitutional Tipping Points*, Suzanne Goldberg links the strategic construction of facts in litigation to the affirmation of marginalized social identities. She argues that when American courts are called upon to make controversial decisions about the status of social groups, they resort to a strategy of “fact-based adjudication” which serves to obfuscate their normative choices. While judges justify their conclusions in these cases on the basis of facts, Goldberg notes that empirical research alone cannot answer the legal questions at issue—the judges must still decide the correct inferences to be drawn from that information.

Taking JA as an example, the trial judge had to determine whether erotic asphyxiation to the point of unconsciousness met the definition of “bodily harm.” Even if she had received the sought after expert evidence on the risks of the practice, she would still have had to make a normative judgment about what level of risk was acceptable.

Goldberg argues that the emphasis on facts in controversial cases is strategic. It hides what the courts are really doing—that is, making a choice between competing norms in a live social debate. More importantly, it allows judges to induce progressive shifts in the status of marginalized groups by relying

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64 Pinard, Postulats Necessaires, *supra* note 3 at 24-25.
69 *Ibid* at 7. This harkens back to Thayer when he said: “In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved.” JB Thayer, "Judicial Notice and the Law of Evidence” (1890) 3 Harv. L Rev 285 at 287-88.
70 Goldberg, *ibid* at 5.
upon new facts about those groups. Goldberg gives the example of *Brown vs. Board of Education*.\(^71\) Rather than explicitly rejecting discriminatory views of African Americans, the Supreme Court of the United States in that case appealed to the harmful psychological effects of racial segregation to justify the move to desegregation.\(^72\)

According to Goldberg’s theory, judges look to facts as a safe ground for decision-making in times of normative uncertainty. However, the attention to facts is transitory, serving mainly as a catalyst for the transformation of legal norms: “Over time, in some cases, these fact-based decisions accrete and begin to reflect a coherent new view of a social group.”\(^73\) Consequently, “…by tracking and interrogating the way that courts reify the boundary between facts and norms, we can begin to demystify and critique the process by which courts absorb societal change.”\(^74\)

Goldberg’s analysis sheds light on how the characterization of the claims in *JA* and *NS* affects the law’s capacity to affirm the perspectives and interests of the marginalized groups involved. Because the claims in *JA* and *NS* pertain to social framework, they lie mid-spectrum between law and fact and are thus especially susceptible to strategic construction.

*JA*

The contrasting arguments advanced by the Crown and defence in *JA* regarding the harm of erotic asphyxiation exemplify how different castings of the issue seek to achieve different goals. By focusing on the legal test for bodily harm and proposing an answer based on “common sense,” the Crown frames the issue as a matter of law. In calling upon the court to denounce the “reckless behaviour” at issue, he encourages the court to take a normative stand and establish a precedent for future cases.\(^75\) The defence, on the other hand, argues that the issue calls for expert evidence.\(^76\) He thereby urges the court to test the claim as fact. This particularizes the issue and attempts to task the Crown with the burden of presenting evidence to establish the harmfulness of the practice (though not successfully, as discussed below under *Shifting*


\(^{72}\) *Brown*, *ibid* at p. 494.

\(^{73}\) Goldberg, *supra* note 67 at 23.

\(^{74}\) *Ibid* at 9.

\(^{75}\) *JA* trial, *supra* note 7 at para 25.

\(^{76}\) *Ibid* at para 26.


**Burdens**. The argument here is not only about what the correct answer is, but about how the question should be characterized, and thereby answered. Of course, as Pinard highlights, the how matters a great deal to the what.

Yet another possible framing of the erotic asphyxiation issue is altogether absent from the decision. Rather than focusing on the medical assessment of risk, a more equality-oriented inquiry might seek to understand the role and nature of erotic asphyxiation within S/M communities. Social science evidence in this regard would address two important issues: 1) whether the practice of erotic asphyxiation has “social value” and thus warrants an exception to the bodily harm rule according to Jobidon; 2) whether what occurred between JA and KD actually fits the description of erotic asphyxiation as it is commonly practiced within S/M communities.

The above inquiries might cast doubt on “common sense” (i.e. non-kinky) perspectives that might otherwise be perpetuated in law. For instance, in refutation of the Crown’s argument that unconsciousness precludes sexual enjoyment, Khan notes that a queer view of time recognizes “the psychic satisfaction of imagining what will happen during future unconsciousness, and what did happen during past unconsciousness.” On the other hand, Busby questions whether the incident in JA meets widely followed community safety standards, noting that most S/M educators discourage erotic asphyxiation as too risky. Unfortunately, because the defence in JA does not pursue an explicitly equality-oriented strategy, these views are lost.

**NS**

While the factual inquiry in JA promises to correct judicial ignorance about an unfamiliar sexual practice, the claim in NS threatens to unsettle one of the criminal justice system’s longstanding assumptions. Because the value of facial demeanour as a tool for witness assessment already forms part of the legal status quo, when framed as a question of law it is uncontroverted. However, as Pinard observes,

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77 Khan, *supra* note 20 at 258.
78 *Supra* note 16 at 338. Busby does, however, acknowledge that this is a point of controversy within the community. For a view of erotic asphyxiation as a legitimate S/M practice, see Khan, *ibid* at 258-259.
“[I]’efficace des postulats factuels du droit tient en effet à leur invisibilité.” ⁷⁹ By reframing the issue as a question of fact, NS exposes a longstanding legal convention to empirical scrutiny. This endangers the legitimacy of the legal rule, and thereby increases NS’s legibility as a legal subject.

The lower courts frustrate NS’s potential disruption of the legal norm by declining to consider the interpretive value of facial demeanour as an empirically verifiable factual claim. Instead, the Superior Court treats the matter as resolvable by judicial observation and experience alone. By insisting at multiple points that the veiled testimony be videotaped at the preliminary inquiry in order to create an evidentiary record for appellate review, ⁸⁰ the Superior Court judge implies that an appellate court could make a meaningful determination about whether the niqab prevented effective cross-examination simply by seeing it for herself. The judge once again affirms this view by citing with approval a New Zealand decision regarding a woman who testified wearing a burqa—a garment that covers the face and body, worn in public by some Muslim women:

His [the judge’s] experience was that a sense of her character emerged much more slowly than it did with witnesses who could be seen. He observed that there was a strong sense of disembodiment, far greater than arises when receiving evidence by video link or the playing of a videotaped statement. He described the experience that he had as slightly unreal. It was Judge Moore's belief, based on his experience as a trial judge and on what he saw and heard from Mrs. Salim, that evidence given from within a burqa would have less impact than evidence from a person whose face could be seen. ⁸¹

Here, the Superior Court judge assumes that the New Zealand judge was competent to determine the impact of the burqa on the defence’s capacity to evaluate the witness through his faculties of perception alone. ⁸² This reliance upon judicial experience reflects a legal framing of the issue; the judge’s assessment is taken as authoritative, and the burqa’s negative impact becomes a given, rather than a matter susceptible to proof.

The above passage demonstrates how characterizing the demeanour issue as a matter that the law can resolve internally via the application of judicial experience precludes meaningful consideration of lived

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⁷⁹ Postulats Necessaires, supra note 3 at 7.
⁸⁰ NS Superior Court, supra note 29 at paras 78, 118, 121 and 143.
⁸¹ Ibid at para 131.
⁸² The Court of Appeal makes a similar assumption when it suggests that the inquiry into religious belief gives the judge an opportunity to evaluate how much the niqab will interfere with the judge’s own credibility assessment (supra note 35 at para 76). However, the Supreme Court of Canada warns judges against making “over-confident predictions” in this regard (supra note 8 at para 44).
social difference. One cannot help but wonder whether the New Zealand judge’s “sense of disembodiment” spoke more to his unfamiliarity with women who wear burqas than to any actual procedural disadvantage. From a legal perspective, that sense of unfamiliarity—especially if shared by the broader public—might count for more than the empirical veracity of the link between facial demeanour and witness evaluation. Pinard argues that legal rules are formulated on the basis of values rather than factual considerations, and that the underlying facts only come into play when the legal rule is challenged.\footnote{Supra note 3 at 46-47.} The primacy of the value over the underlying fact in NS comes through in one of the Superior Court judge’s concluding remarks: “It may be that Canadians would not believe, despite judicial pronouncements concerning its unreliability, that you can know fully what a person is saying without seeing the person.”\footnote{NS Superior Court, supra note 29 at para 135.}

While the Superior Court appeals to judicial observation and public values to address the question of demeanour, the Court of Appeal focuses squarely on legal tradition. Interestingly, the Court begins by validating NS’s argument that “credibility assessments based on demeanour can be unreliable and flat-out wrong” and “can reflect cultural assumptions and biases.”\footnote{NS appeal, supra note 35 at para 55.} At one point, the Court even goes so far as to suggest that permitting NS to wear the niqab might enhance the ability to evaluate her truthfulness, because she would be comfortable and therefore act more naturally. Were she to show her face, “[a] trier of fact could be misled by her demeanour. Her embarrassment and discomfort could be misinterpreted as uncertainty and unreliability.”\footnote{Ibid, at para 81.} Yet, this observation does not stop the Court from assuming the relevance of demeanour to both credibility assessment and effective cross-examination.\footnote{Ibid at paras 54 and 99.} Indeed, the Court finds that these are matters of which judicial notice can be taken.\footnote{Ibid at para 72.} It justifies this seemingly contradictory result as follows:

The criminal justice system assumes that the truth is most likely to emerge through a public adversarial process. Face-to-face confrontation, especially between an accused and his accuser, is a feature of that adversarial process. The value of confrontation to the

\begin{footnotesize}
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\item 83 Supra note 3 at 46-47.
\item 84 NS Superior Court, supra note 29 at para 135.
\item 85 NS appeal, supra note 35 at para 55.
\item 86 Ibid, at para 81.
\item 87 Ibid at paras 54 and 99.
\item 88 Ibid at para 72.
\end{itemize}
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cross-examiner cannot be dismissed because credibility assessments based on demeanour, like credibility assessments based on anything else, can prove to be wrong. 89

The Court’s consideration of the issue on the basis of legal convention over empirical fact once again illustrates Pinard’s point. One is left to wonder exactly how the truth will “emerge” from potentially erroneous assessments of credibility. Richard Lempert view is apt here when he argues that evidence law “… does not respond to the realities of the actual world, rather it responds to the supposed realities of a world it has established and modeled as if it were the actual world.” 90 Lempert’s point relates to Samuel’s more general notion of law as a self-contained system. 91 The practical consequence of this epistemic insularity is the denial of NS’s worldview.

Epistemic Deficits

In order to disrupt the legal status quo, the parties in JA and NS must first convince the relevant court that the issues at play ought to be treated as questions of fact. Legal scholars focused on the availability of expert evidence, or the capacity of resource-poor groups to provide it, have overlooked the importance of this first stage in the battle to dismantle exclusionary legal norms. Establishing the need for a factual assessment provides an opportunity for the introduction of expert evidence that may then cast doubt on the dominant legal perspective. If no factual inquiry is called for, then there is no place for the relevant evidence, whether or not it is available. By dismissing the need to look outside the law for answers, the Crown in JA and the lower courts in NS cut off the law’s capacity to consider alternative perspectives, thwarting meaningful recognition of the marginalized interests at play. Of course, once the court does acknowledge a factual issue, empirical evidence must still be presented as a means of assessment. The following section explores what happens after the trial judge in JA and the Supreme Court in NS accept the need for a factual approach, but find that the requisite evidence is lacking.

JA

89 Ibid at para 60. See also para 56.
90 Supra note 12 at 344.
91 See footnote 12.
Although the trial judge in JA accepts the need for expert medical evidence on the dangers of erotic
asphyxiation, none is available.\textsuperscript{92} Her response to this gap in the record is my key point of interest here. For ease of reference, I offer the relevant quotation in full:

\begin{quote}
I do agree however with defence that, without expert evidence, I am ill equipped in this case to decide the medical mechanism of unconsciousness, the degree of force required, the duration of force required to cause loss of consciousness, and likely injuries associated with choking, strangulation or unconsciousness. Defence also argues that I am not able to draw conclusions with respect to the degree of risk involved in this sexual practice, even if it consensual. It is my belief that the reasonable man would conclude that choking someone to the point of unconsciousness does interfere with that person's "health or comfort" and can in some cases endanger life. If this were a case of domestic assault and the accused had choked his partner and rendered her unconscious in a physical dispute, I have no doubt a conviction for bodily harm could ensue.\textsuperscript{93}
\end{quote}

Despite her acknowledged lack of medical knowledge on the issue, the judge does not hesitate to exercise discretion with respect to the question at hand. One senses that her conclusion stems from little more than her own intuition, though the invocation of the classic figure of legal reasoning—"the reasonable man"—at least gestures at objectivity. The problem is that the case calls for interpretation of a scenario likely to be unfamiliar both to the judge personally, and to the average person as judicially imagined. Indeed, a similar problem occurs whenever the court confronts experiences of lived social difference—the very stuff of criminal and Charter litigation.\textsuperscript{94}

The judge attempts to dodge the novelty of the issue by appealing to how the law would treat the strangling if it took place within the more familiar context of domestic violence. While not surprising, this move is deeply problematic, in that the case effectively hinges on whether the incident in question is a manifestation of abuse or not. To assume that the domestic violence analogy is apt comes dangerously close to begging the question.

Some feminist scholars would disagree. Noting that the incident in JA took place within an abusive relationship and that strangulation is "one of the most lethal forms of domestic violence"\textsuperscript{95}, Busby approves

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\textsuperscript{92} Medical experts rarely testify in strangulation cases unless death occurs (Busby, supra note 16 at 341).
\textsuperscript{93} JA trial, supra note 7 at para 26.
\textsuperscript{94} Mayeda makes a similar point, noting that "the experience of most equality-seeking groups is not shared by the average juror" (supra note 2 at 208).
\textsuperscript{95} Busby, supra note 16 at 340-341.
\end{flushleft}
of the judge’s comparison to other cases of domestic violence, and laments the fact that the higher courts failed to make the same link.96 Similarly, though focusing on the question of consent rather than bodily harm, Lise Gottell argues that the Supreme Court of Canada in JA fails to pay enough attention to the abusive context within which the interaction took place.97 However, as Khan notes, none of JA’s previous assaults against KD occurred in a sexual context, and the couple was engaged in an “established kinky relationship.”98 It is only due to the court’s lack of knowledge about kink, then, that “domestic violence and sexual danger becomes the master narrative for interpreting erotic asphyxiation.”99

My point here is not to argue that JA was an instance of S/M rather than sexual assault. I wish only to demonstrate that without the benefit of outside knowledge, the court cannot tell the difference, because it does not even know what S/M looks like. In the passage above, the judge’s uncritical assumption of domestic violence denies the kinky perspective. However, later in the decision, the judge threatens to err in the other direction. First, she observes that “[s]exual practices such as rough sex, bondage, sexual asphyxia, the use of dildos, form part of the sex life of some consenting adults it would appear.”100 She goes on to state that her decision will rely solely on current law, and notes that no cases were submitted that equate strangling or unconsciousness with bodily harm.101 Ultimately, she concludes that there was bodily harm, but that it was transient, and thus not really bodily harm at all. The judge’s reasoning here reflects Busby’s concern that “increased social openness to BDSM may also permit defendants to claim a BDSM practice by relying on judicial ignorance about BDSM practices.”102

Though motivated by different sets of concerns, Busby and Khan both point to a lack of understanding about S/M as the source of the problem. For Khan, the court’s perspective is limited by a “vanilla sensibility,” which ultimately dehumanizes S/M practitioners.103 In Busby’s view, “judges either need to be better educated about BDSM, or expert evidence needs to be used more often to ensure that they do not

96 Ibid at 343.
97 Gotell, supra note 20 at 378. See also Busby, supra note 16 at 336.
98 Supra note 77 at 264; 261.
99 Ibid at 260.
100 JA trial, supra note 7 at para 28.
101 Ibid at para 31.
102 Supra note 16 at 346.
103 Supra note 77 at 256.
make wrong assumptions about BDSM practices and permit violence against wives to be dressed up as consensual pleasure." 104 Either way, the court’s reliance on inadequate legal analogies and judicial intuition are to blame for the failure.

NS

If the problem in JA is one of judicial ignorance, in NS it is one of unwarranted assumption. So deeply attached is the criminal justice system to seeing the faces of witnesses that uncertainty regarding the rule’s empirical basis is not even acknowledged until the case reaches the Supreme Court of Canada. There McLachlin C.J., speaking for the majority, openly laments the dearth of available expert evidence. 105 She responds to this shortage of information as follows:

This much, however, can be said. The common law, supported by provisions of the Criminal Code, R.S.C. 1985, c. C-46, and judicial pronouncements, proceeds on the basis that the ability to see a witness’s face is an important feature of a fair trial. While not conclusive, in the absence of negating evidence this common law assumption cannot be disregarded lightly. 106

According to the majority, then, the factual presumption underlying the rule must be taken as true because the rule itself is so central to the common law. Not only that, but the presumption also serves to justify other foundational legal principles. The Court notes for example that the rationale for appellate deference to the trier of fact rests on the assumed advantage of being able to directly observe witnesses. 107 In the words of Pinard, “le fait existe parce que le droit pense que le fait existe, et non de façon indépendante.” 108 The problem, as she puts it elsewhere, is that:

Une proposition factuelle n’est pas plus vraie, ne correspond pas plus au réel, parce qu’elle a déjà été acceptée par un tribunal. Elle est cependant plus acceptable à l’intérieur du monde du droit, pour les juristes. Ce qui n’est pas rien, mais qui est autre chose. 109

104 Supra note 16 at 358.
105 NS Supreme Court, supra note 8 at para 17.
106 Ibid at para 21.
107 Ibid at para 25.
108 Postulats Necessaires, supra note 3 at 39.
The point is similar to Lempert’s contention about the self-referential nature evidence law. What the above quotation highlights is the majority’s inward looking approach in the absence of proferred expert evidence. When empirical research is not presented in the appropriate form, the majority reverts back to established legal wisdom, even as it admits that that wisdom rests on shaky empirical ground.

Even Abella J.’s powerful dissent does not dare break with the law’s longstanding assumption about the importance of seeing a witness’ face. For her, the question is not whether facial demeanour serves as a reliable tool for the assessment of truthfulness, but only whether the niqab’s interference with that tool is significant enough to outweigh NS’s right to religious freedom. However, as acknowledged by the Court of Appeal, allowing NS to wear the niqab may not actually impede the assessment of credibility or cross-examination at all—it may have the opposite effect, by preventing misperceptions about demeanour that could result from NS’s discomfort. The empirical question is not only about how much assistance the observation of facial cues provides to the defence, but whether it provides any assistance at all. In the absence of expert evidence, the Court is united in relying on the longstanding assumption that it does.

Shifting Burdens

At this point, an objection might be leveled that courts have nowhere else to turn to but legal sources when faced with a shortage of expert evidence. In the face of factual uncertainty, the law calls for decision. However, the distribution of burdens of proof determines who bears the cost of that uncertainty. According to Pinard, “c'est la partie à qui incombe le fardeau de preuve d'un fait qui assumera le coût de l'incertitude scientifique relative à ce fait.” But that is not quite what happens in JA and NS. These cases suggest that where a party attempts to assert a marginalized interest by reframing a legal norm as a question of fact, that party will bear the burden of providing the requisite empirical evidence regardless of the usual distribution of burdens of proof.

10 See footnote 69.
11 NS Supreme Court, supra note 8 at para 82.
12 NS appeal, supra note 35 at para 81.
13 Gestion de risques, supra note 109 at 194.
Take *JA* as an example. In criminal law, the Crown normally bears the burden of proving the elements of the offence beyond a reasonable doubt. In *JA*, the burden should therefore rest on the Crown to demonstrate that what occurred between the couple met the standard of bodily harm. The Crown, however, fails to provide empirical evidence on this point, relying instead on arguments from “common sense”. Despite the trial judge’s acceptance that there is a valid factual issue to be determined via expert evidence, she does not ultimately impose that burden on the Crown. Instead, she agrees with the Crown’s common sense approach.

In *NS*, the two accused seek an order for NS to remove her niqab on account of their fair trial rights. Given that they raised the issue, they ought to bear the burden of demonstrating that NS’s refusal to show her face actually does impinge on the right. One might object that NS could just as easily be seen to have raised the issue by refusing to remove the niqab on religious grounds. Even allowing that the origin of the claim is unclear, surely the accused bear as much of a burden to show that the niqab violates their right to a fair trial as does NS to show that being forced to unveil violates her freedom of religion. Yet, in the absence of expert evidence, the Court assumes the validity of the link between facial demeanour and the right to a fair trial. It is up to NS to present evidence to rebut the legal norm, even when uncertainty regarding its factual underpinning is conceded.

A number of scholars focused on equality issues have expressed concern about the burden imposed upon marginalized groups to provide expert evidence in support of their legal claims. Mayeda notes that “accused from equality-seeking groups often lack the resources to gather the relevant research,” assuming that the research exists at all.\(^\text{114}\) Boyle & MacCrimmon make a similar point regarding the adjudication of Aboriginal rights: “Characterizing issues as factual and complex then placing the burden on Aboriginal peoples to establish these facts has affected their access to justice in several ways.”\(^\text{115}\) Of course, in *JA* there are important equality concerns on both sides of the issue, and neither *JA* nor *NS* is directly framed as an equality claim. Nevertheless, in each case, the burden of presenting expert evidence falls on the party seeking to make a marginalized perspective legally intelligible.

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\(^\text{114}\) *Supra* note 2 at 223.

\(^\text{115}\) *Supra* note 2 at 67.
**Measured Hope**

In this paper, I have sought to demonstrate that challenging exclusionary legal norms is a double contest. First, the norm must be successfully reframed as a question of fact. Second, the party seeking to challenge the norm must present expert evidence to support that fact. A failure at either stage causes courts to revert back to established legal wisdom, precluding the recognition of marginalized interests.

At first blush, this sounds like a story about judicial conservatism. The outcomes in *JA* and *NS* seem to reflect the courts’ failure to incorporate new social perspectives. However, I would like to suggest a more hopeful reading, one that returns to Goldberg’s theory of social change in American courts.

Recall Goldberg’s thesis that when courts are called upon to make controversial decisions about shifting social norms, they rely on facts to ground their decisions. Goldberg offers a number of explanations for this behaviour, two of which are particularly relevant here. First, she notes that since facts are case-specific and subject to change, they allow for future flexibility in decision-making. Thus, while characterizing an issue as factual may impose an onerous burdens of proof on a marginalized party and thereby prevent a successful claim in a given case, judges “ouvrent par le fait même la porte à d'autres contestations des mêmes dispositions mais à partir d'une preuve autre.” As the majority of the Supreme Court remarks in *NS*: “Future cases will doubtless raise other factors, and scientific exploration of the importance of seeing a witness's face to cross-examination and credibility assessment may enhance or diminish the force of the arguments made in this case.”

Second, Goldberg argues that the courts’ emphasis on facts corresponds with how people actually change their minds about social groups according to cognitive science: “fact-based adjudication is a byproduct of people's ability to absorb new factual information more quickly than they can reshape their underlying

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116 Goldberg, *supra* note 67 at 49.
117 Pinard, *supra* note 3 at 54.
118 *Supra* note 8 at para 44.
conceptions to correspond to the new information.” According to this theory, the course of legal change mirrors the psychological mechanism of belief revision. Both proceed incrementally, through a process of destabilization and restabilization.

If we accept that courts are a human institution, the analogy is compelling. I have previously argued that “belief revision does not always work like an on-off light switch. Instead it can involve a tentative unsettling of a belief that will eventually lead to its dislodgement.” I used the analogy of a loose tooth that takes a bit of wiggling to come out. In the same way, legal norms must first be loosened into questions of fact before they can be displaced. Even if the fact cannot be proven in a given instance, its very contestation invites further scrutiny from outside sources of knowledge, softening the law’s bite, and perhaps, eventually, changing it altogether.

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