The Supreme Court's recent decision in *R. v. Mills* involved the constitutionality of Bill C-46, which placed restrictions on judicial and defence access to the complainant's private records in sexual cases. The legislation was an "in your face" Parliamentary reply to the court's controversial decision in *O'Connor*. Much more than Parliamentary replies to the court's decisions in *Seaboyer* or even *Daviault* did, Parliament told the court that it had got it wrong and that its minority decision was preferred.

The court in *Mills* gave Parliament much more respect than *O'Connor* received from the elected branch of government. The court rather serenely accepted Parliament's reply as part of the continuing dialogue between courts and legislatures and an acceptable balance of the competing rights of the accused to full answer and defence and the complainant to privacy and equality. Faced with a direct repudiation of its earlier decision, the court not only blinked, but looked away.

Parliament had the last word. This is perhaps inevitable in a democratic society. The court in *Mills*, however, made it too easy on both Parliament and itself. Respect for the rule of law required more. The court should either have admitted that it had been wrong and overruled *O'Connor* or required Parliament to use the s. 33 override.

*Mills* again reaffirms that criminal justice matters will not always be defined as those in which the state is the singular antagonist of the accused. The court stated that it did not hold "a monopoly on the protection and promotion of rights and freedoms; Parliament also plays a role in this regard and is often able to act as a significant ally for vulnerable groups" (*Mills*, at para. 58). As in *Keegstra, Butler* and other examples of the new political case, the s. 15 rights of groups of potential crime victims were balanced against those of the accused.

Balancing rights is appropriate and necessary, but judicial deference to legislative attempts to advance victims' rights at the expense of the accused's rights is troubling. When Parliament uses the criminal law to...
protect vulnerable groups it does so by making it easier to put more unpopular people in jail. It is no accident that harsh criminal justice legislation is politically popular and often whizzes through Parliament with all-party approval. A central part of the courts’ mandate under the Charter is to protect the rights of the accused. To paraphrase the recently retired Chief Justice Lamer in the oft-criticized Collins case, the Charter is designed to protect minorities including the accused. Its enforcement must not be left to the majority including Parliament.

Courts should also apply their expertise about criminal justice to take a realistic view of legislative attempts to protect crime victims. Bill C-46 is designed to protect complainants’ privacy and equality rights, but the complainant must still be subject to adversarial cross-examination. Although the court promises that “the accused is not permitted to ‘whack the complainant’ through the use of stereotypes regarding victims of sexual assault” (Mills, para. 90), it also recognizes that complainants will be cross-examined at preliminary inquiries and trials in an attempt to lay a basis for the production and discovery of their private documents. Complainants will have to give up some of their privacy. The idea of a complete privilege is just not on in a society that still views wrongful convictions as a source of shame. The court should have recognized more clearly the limited effectiveness of the legislation in protecting complainants’ privacy.

The Mills case may unfortunately encourage legislatures to take the court’s Charter decisions less seriously. There is much to the idea that judicial review under the Charter promotes a dialogue between courts and legislatures. The dialogue metaphor is helpful when used to explain the interplay between the court’s decisions and legislative attempts to reformulate laws under ss. 1 and 33. It is less helpful when used by judges to justify a decision that backs away from an unpopular precedent. If taken too far, the notion of judicial accountability to Parliament can undermine the independence of the judiciary and its commitment to the rule of law including stare decisis. And in Canada, there is no need for judicial switches in time in order to respect democracy. The s. 33 override is available. It ensures the serious, sustained and continuing public debate that should occur before a legislature simply overrules a Charter decision of the Supreme Court.

The court’s decision in Mills would have given less concern had the court either overruled O’Connor or been more candid about the extent to which it read down Bill C-46 as inconsistent with the Constitution as interpreted by the majority judgment in O’Connor. The issue was not so much one of “slavish conformity” to the “common law”, but more whether a prior Charter decision balancing conflicting Charter rights was wrong and whether Bill C-46 sufficiently respected the accused’s right to full answer and defence.

There are hints, but only hints, that the court has read down some of the more extreme parts of Bill C-46. Some of the prohibited assertions in s. 278(4) are based on sexist rape myths that should be rejected. Others (i.e., those relating to the complainant’s credibility) are not and should be given less weight. Moreover, Bill C-46 wrongly conflates production to trial judges and discovery to the accused. Restrictions on production severely threaten the accused’s rights by placing him in a Catch 22 while production to trial judges preserves more of the complainant’s privacy and dignity than disclosure to the accused. The court in Mills rightly indicates that judges should in close cases at least look at the documents. Nevertheless, it should have more clearly and sternly curbed Parliamentary overreaching at the production stage. It remains to be seen whether the court has given trial judges enough hints to preserve the accused’s right to full answer and defence.

Respect for both Parliament and the court’s prior decision could have been enhanced by a clearer indication of what applications of the legislation had to be read down as unconstitutional and what parts of O’Connor had to be overruled. By giving both Bill C-46 and O’Connor such easy rides, the court may have unfortunately sent Parliament a signal that its controversial Charter rulings are only provisional. Stealth overrides by Parliament and stealth overruling of controversial decisions by courts do little to promote careful deliberation about complex and difficult questions of competing rights.

K.R.