AFFIRMATIVE SEXUAL CONSENT IN CANADIAN LAW, JURISPRUDENCE, AND LEGAL THEORY

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Abstract

This article examines the development of affirmative sexual consent in Canadian jurisprudence and legal theory and its adoption in Canadian law. Affirmative sexual consent requirements were explicitly proposed in Canadian legal literature in 1986, codified in the 1992 Criminal Code amendments, and recognized as an essential element of the common law and statutory definitions of sexual consent by the Supreme Court of Canada in a series of cases decided since 1994. Although sexual violence and non-enforcement of sexual assault laws are worldwide phenomena, the international scholarly literature reflects limited awareness of these developments in Canadian law. This article remedies that gap in the literature. The Canadian experience with the definition of sexual consent as communicated "voluntary agreement" demonstrates the value of this conceptualization of consent; the definition provides a well-defined set of nondiscretionary reference points for legal analysis of the facts in sexual assault offenses. The effect is to facilitate effective enforcement of the sexual assault laws and affirm the right to sexual autonomy, sexual self-determination, and equality, consistent with fundamental principles of individual human rights. For all these reasons, familiarity with the Canadian experience may be useful to those engaged with the reform of rape and sexual assault laws in other jurisdictions.

INTRODUCTION

This article examines the development of affirmative sexual consent in Canadian jurisprudence and legal theory and its adoption in Canadian law. Requirements for affirmative sexual consent, or communicated voluntary agreement, were explicitly proposed in Canadian legal literature in 1986,[1] codified in the 1992 *Criminal Code*

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1 In Canada in the 1980s, the accused in sexual assault cases often claimed: "X 'consented' and, in any event, I believed X 'consented'." At trial, judges typically saw the only issue in such cases to be one of "consent" or "non-consent" because once non-consent is proven beyond a reasonable doubt, there is usually little if any evidentiary support for a belief in consent. But many such cases were not prosecuted and therefore did not go to trial. Complainants, police, and prosecutors often believed either that the complainant might have "consented," that the accused might have mistakenly believed that the complainant "consented," or that the accused's alleged

belief in "consent," though mistaken and perhaps less than honest, might nonetheless be found sufficiently credible at trial to raise a reasonable doubt about *mens rea* leading to an acquittal. These issues merited close scrutiny and in 1984-1986 they led me to develop the analysis and theory of sexual assault and affirmative consent that is presented in the 1986 article Lucinda Vandervort, *Mistake of Law and Sexual Assault: Consent and Mens Rea*, 2 CANADIAN J. WOMEN & L. 233 (1987), *available at* http://ssrn.com/abstract=1514924. The objective was to create an approach to the analysis of sexual assault offenses that would: 1) bar defenses of beliefs in consent that were based any of the common social (nonlegal) definitions of consent instead of the legal definition of consent (thereby eliminating defenses based on mistakes about the law of consent); and 2) secure more effective legal protection for sexual integrity. This required a legal definition of consent that was precise and recognized the individual complainant as a decision maker with legal agency and control and with sovereignty over her sexuality. Affirmative sexual consent defined as an unequivocal and expressed "voluntary agreement" was the obvious solution.

The reconceptualization of sexual assault as sexual touching in the absence of express "voluntary agreement" was fundamental to this initiative; this definition of the offense, combined with application of the common law principle that ignorance of the law does not excuse (to bar the accused from relying on mistakes about the legal definition of consent), provided the foundation and tools needed to reconfigure interpretation of the factual and legal elements of the offense of sexual assault. To the best of my knowledge, no author had previously advocated utilization of affirmative sexual consent defined as communicated or express voluntary agreement as the basis for a systematic reinterpretation of the factual and legal aspects of consent, the absence of consent, and the *actus reus* and *mens rea* of the offense of sexual assault or rape. Surprisingly, I also found no evidence that anyone had previously argued that the general principle that ignorance of the law is no excuse, applies to limit the availability of *mens rea* defenses in sexual assault cases. The expectation was that this approach, *properly implemented*, would transform enforcement of the sexual assault laws in Canada. All that was required to generate such a theory was to examine the practical effects of alternate definitions of sexual consent and argue for the adoption of the definition and rules of implementation whose effects are most consistent with long-standing common law principles that affirm the equality of persons, equal sexual autonomy, and equal sexual self-determination. Affirmative consent in the form of expressly communicated voluntary agreement was the simple and obvious result, answer, and solution. It still is.

As is often the case, however, what is self-evident or obvious may depend on the perspective one brings to the issues. If one assumes that all sexual offenses involve physical violence, little attention is directed towards non-consensual sexual activity that entails little or no overt physical violence. The assumption that all sexual assaults either involve physical violence or can only be proven to have occurred if physical violence was used, appears to have had a dominant role in shaping sexual assault legislation and enforcement decisions for many decades in many legal systems. Widespread acceptance of that assumption ensures that the presence or absence of a complainant's voluntary agreement to sexual activity will rarely be used to determine how sexual conduct is categorized even when it is recognized, at least in theory, that the presence of consent or voluntary agreement is an essential element. In cultures in which the dominant working definition of sexual assault relies on the use of violence to identify sexual activity as criminal, it may seem startling, even absurd, to assert that the presence or absence of a complainant's express voluntary agreement to the sexual activity in question is the factor that determines whether the sexual activity is an offense. To make that assertion is to claim that everyone, including those who act in accordance with the principles of nonviolence and practice passive resistance, has a right to control sexual access to his or her body, that the right to bodily integrity is protected by law, and that sexual touching of another person in the absence of that person's express voluntary agreement to be touched is an assault. Whether that assertion is viewed as obvious or utter nonsense depends on the extent to which

sexual self-determination and individual sexual autonomy have concrete practical weight as opposed to merely rhetorical significance. It was obvious to me; I regarded sexual autonomy, mine and everyone else's, to be beyond question.

The only discussion of the potential merits of affirmative sexual consent in the Anglo-American legal literature in the early 1980s appeared to be by Robin D. Weiner, Comment, *Shifting the Communication Burden: A Meaningful Consent Standard*, 6 HARV. WOMEN'S L.J. 143 (1983). State legislation provided some limited evidence of affirmative consent requirements, but as Weiner noted, although as of 1982 the wording of Wisconsin's legislation provided for affirmative consent, it remained unclear from the case law whether Wisconsin judges were convicting because there had been no consent or because the evidence showed that force had been used. *Id.* at 155; *see also* Vandervort, *supra*, at 306 n.180 (commenting on Weiner's Comment and discussing the difference between the Model Penal Code definition based on force, which had been adopted by most states, and the definition used in Washington and Wisconsin where the absence of affirmative consent was an element of the offense). The research for that article did not investigate the legislative history of the statutory provisions enacted in Washington and Wisconsin and therefore the article did not document any exchange of views that may, or may not, have preceded legislative action in those jurisdictions.

Recent years have seen widespread reform of the rape and sexual assault laws in many states in the United States as well as internationally. Sources that provide some evidence of the history of the gradual emergence of support for affirmative sexual consent requirements in the United States of America include: Kathleen F. Cairney, *Addressing Acquaintance Rape: The New Direction of the Rape Law Reform Movement*, 69 ST. JOHN'S L. REV. 291 (1995); Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S.C. L. REV. 777 (1988); Jennifer S. Knies, *Two Steps Forward, One Step Back: Why the New UCMJ's Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put It Back on Target*, 8 ARMY LAW., Aug. 2007, at 1; Lois Pineau, *Date Rape: A Feminist Analysis*, 8 L. & PHIL. 217 (1989); Nicholas J. Little, Note, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321 (2005). Other authors, such as STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (1998) and David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317 (2000), have discussed affirmative consent only to conclude that its implementation in the United States is impractical on cultural grounds. That is less than obvious, however, as cultural attitudes and practices do change over time.

Little, *supra*, at 1363, stated: "An affirmative consent standard is the best way to recognize legally that women are equal partners in any sexual interaction, and that their input is equally valid as that of the male participant." Knies, *supra*, critiques the approach taken by Congress in the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136 (2006), in which a requirement for force is placed at the center of the offense. Knies identifies sexual activity against the will of the victim as the essential harm in sexual assault and suggests that this view has deep roots in common law. She argues:

> [T]o provide a clear standard, prevent miscommunication, and "assist in maintaining good order and discipline," the military sexual assault statute should require affirmative consent from both parties before sexual penetration.
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> . . . Violation of the sexual autonomy of the victim is the heart of the crime . . . . A statutory definition of sexual assault that does not center upon lack of freely given and affirmatively expressed consent misses the fundamental nature of the crime

amendments,[2] and recognized as an essential element of the common law and statutory definitions of sexual consent by the Supreme Court of Canada in a series of cases decided since 1994. The international scholarly literature reflects only limited awareness of these developments. This article fills that gap in the literature.

The Canadian experience with the definition of sexual consent as communicated "voluntary agreement" demonstrates the value of this conceptualization of consent; the definition has proven to be robust. It provides a powerful and well-defined set of nondiscretionary reference points for legal analysis of the facts in sexual assault offenses. The effect is to facilitate effective enforcement of the sexual assault laws and affirm the right to sexual autonomy, sexual self-determination, and equality, consistent with fundamental principles of individual human rights. For all these reasons, familiarity with the Canadian experience may be useful to those engaged with the reform of rape and sexual assault laws in other jurisdictions.

There are many similarities among experiences with sexual assault laws in jurisdictions worldwide. Law enforcement often fails to fulfill the promise of law reform initiatives undertaken to reduce the high incidence of sexual assault and increase the levels of reporting and prosecution.[3] This has also been the experience at the grassroots or local level in Canada, despite progressive developments in the law at the national level. Statistics show that most sexual assaults in Canada are committed by someone known to the assailee,[4] yet

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Knies, *supra*, at 1. Knies suggests that in recent decades, definitions of consent based on use of force, rather than agreement, have often been retained solely to address evidentiary concerns and problems of proof; she argues that this is neither necessary nor desirable.

These articles, and the legislative initiatives and judicial decisions they discuss and critique, provide strong evidence of growing support among legislators, jurists, and scholars in the United States of America for a theory of affirmative sexual consent based on principles of sexual autonomy, sexual choice and self-determination, and equality. Sexual equality requires nothing less than mutual express consent or voluntary agreement to sexual activity. This is simple - an obvious corollary of equality principles.

2 An Act to Amend the Criminal Code (sexual assault), S.C. 1992, c. 38, s. 273.1.

3 *See* U.N. WOMEN, PROGRESS OF THE WORLD'S WOMEN 2011-2012: IN PURSUIT OF JUSTICE 46–63 (2011); WORLD HEALTH ORG. & LONDON SCH. OF HYGIENE AND TROPICAL MED., PREVENTING INTIMATE PARTNER AND SEXUAL VIOLENCE AGAINST WOMEN: TAKING ACTION AND GENERATING EVIDENCE 12–15 (2010) (discussing the prevalence of intimate partner and sexual violence); CORINNA SEITH, JOANNA LOVETT & LIZ KELLY, DIFFERENT SYSTEMS, SIMILAR OUTCOMES? TRACKING ATTRITION IN REPORTED RAPE CASES IN ELEVEN COUNTRIES (2009).

4 Samuel Perreault and Shannon Brennan report:

> Of the sexual assaults reported by respondents to the GSS, 70% involved a female victim. In comparison, females were victims in 38% of physical assaults.

> Three-quarters of all violent incidents reported in 2009 involved only one perpetrator. This was particularly true for self-reported sexual assaults, as 92% of these incidents involved someone acting alone.
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> . . . [I]ncidents of sexual touching, unwanted grabbing, kissing, or fondling accounted for 81% of sexual assaults reported to the GSS. In contrast, sexual attacks, which involve the use of threats or physical violence, accounted for about one in five sexual assault incidents.
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> Self-reported incidents of sexual assault were more likely than robberies and physical assaults to involve an offender who was known to the victim. In over half (51%) of sexual assault incidents, the perpetrator was a friend, acquaintance, or neighbour of the victim, compared to 29% of robberies and 31% of physical assaults.
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> . . . More than half (54%) of sexual assaults reported by Canadians through the GSS took place in a commercial or institutional establishment, such as a restaurant or a bar, compared to 39% of physical assaults.
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> The majority of sexual assaults were not reported to the police (88%).

Samuel Perreault & Shannon Brennan, *Criminal Victimization in Canada, 2009*, JURISTAT, Sept. 28, 2010, at 11, *available at* http://www.statcan.gc.ca/pub/85-002-x/2010002/article/11340-eng.pdf (citations omitted). Samuel Perreault reports:

> Both Aboriginal and non-Aboriginal victims of non-spousal violence often know their perpetrator. In 2009, 68% of Aboriginal victims and 52% of non-Aboriginal victims were victimized by a relative, a friend, an acquaintance, a neighbour or another person known to them (Table 4). The higher proportion of Aboriginal people who knew their perpetrator may be related to the higher incidence of sexual assault among Aboriginal people as this type of offense was more likely to be committed by someone known to the victim than other forms of violence. As well, a larger proportion of Aboriginal people than non-Aboriginal people (56% versus 31%) live outside census metropolitan areas and may therefore be more likely to know a greater proportion of people in their community.

Samuel Perreault, *Violent Victimization of Aboriginal People in the Canadian Provinces, 2009*, JURISTAT, Mar. 11, 2011, at 9, *available at* http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11415-eng.pdf (citations omitted). Shannon Brennan, *Violent Victimization of Aboriginal Women in the Canadian Provinces, 2009*, JURISTAT, May 17, 2011, at 14, *available* at http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11439-eng.pdf, reports:

non-stranger assaults are the least reported and most seldom prosecuted form of sexual assault.[5] These are hardly new phenomena. Non-stranger sexual assault has long been an under-recognized and under-acknowledged category of sexual violence in Canada.

That stands in sharp contrast to the law. National legal standards for the interpretation and application of the sexual assault laws enacted by Parliament have been established by the Supreme Court of Canada in a series of cases over a period of two decades. The definition of consent codified by Parliament in the 1992 amendments has proven to be robust. In reasons for judgment for the majority in a recent case, McLachlin C.J.C. stated:

> Parliament has defined sexual assault as sexual touching without consent. It has dealt with consent in a way that makes it clear that ongoing, conscious and present consent to "the sexual activity in question" is required. This concept of consent produces just results in the vast majority of cases. It has proved of great value in combating the stereotypes that historically have

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In 2009, Aboriginal women were almost three times as likely as non-Aboriginal women to self-report being the victim of a violent crime. The majority of violent incidents against Aboriginal women were perpetrated by males who were acting alone. In addition, most violent incidents did not include the use of weapons or result in injury. The exception to this was incidents of spousal violence, where about half of Aboriginal female victims reported being injured.

In 2009, most violent incidents against Aboriginal women were not brought to the attention of police or any other formal victim service, similar to victimizations in general. Instead, most Aboriginal women chose to confide in an informal source, such as a friend or family member.

See also HOLLY JOHNSON & MYRNA DAWSON, VIOLENCE AGAINST WOMEN IN CANADA: RESEARCH AND POLICY PERSPECTIVES (2011) (including sexual and nonsexual violence).

5 A non-exhaustive list of sources includes Teresa DuBois, *Police Investigation of Sexual Assault Complaints: How Far Have We Come Since* Jane Doe?, *in* SEXUAL ASSAULT IN CANADA: LAW, LEGAL PRACTICE AND WOMEN'S ACTIVISM (Elizabeth Sheehy ed., (2012); TINA HATTEM, DEP'T OF JUSTICE CAN., SURVEY OF SEXUAL ASSAULT SURVIVORS 13, 15, 19 (2000); Ronet Bachman, *The Factors Related to Rape Reporting Behavior and Arrest: New Evidence from the National Crime Victimization Survey*, 25 CRIM. JUST. & BEHAV. 8 (1998); Janice Du Mont, Karen-Lee Miller & Terri L. Myhr, *The Role of "Real Rape" and "Real Victim" Stereotypes in the Police Reporting Practices of Sexually Assaulted Women*, 9 VIOLENCE AGAINST WOMEN 466 (2003); Rosemary Gartner & Ross Macmillan, *The Effect of Victim-Offender Relationship on Reporting Crimes of Violence Against Women*, 37 CAN. J. OF CRIMINOLOGY 393 (1995); Tina Hattem, *Highlights from a Preliminary Study of Police Classification of Sexual Assault Cases as Unfounded*, JUSTRESEARCH, 2007, at 32, *available at* http://canada.justice.gc.ca/eng/pi/rs/rep-rap/jr/jr14/jr14.pdf; Zoë D. Peterson & Charlene L. Muehlenhard, *Was it Rape? The Function of Women's Rape Myth Acceptance and Definitions of Sex in Labeling Their Own Experiences*, 51 SEX ROLES 129 (2004).

> surrounded consent to sexual relations and undermined the law's ability to address the crime of sexual assault.[6]

The next stage in the development of sexual assault law in Canada must focus on designing regulatory and review mechanisms that can be effective to curtail errors of law and abuse of discretion by police, prosecutors, and trial judges who handle sexual assault complaints.[7]

The legal definition of sexual consent as express "voluntary agreement" affirms individual rights to sexual autonomy and self-determination and creates a unique set of well-defined and nondiscretionary reference points to anchor legal analysis of the facts in sexual assault cases. The definition will be as crucial for the effective operation of any new mechanisms that are designed to regulate the decision-making processes used by police and prosecutors, as decisions by the Supreme Court of Canada have shown it to be for judicial analysis of the legal significance of the facts in sexual assault cases. Without the precision and comparative certainty about the legal significance of the facts that the requirement of express "voluntary agreement" to sexual activity provides in case analysis, more effective regulation of police, prosecutorial, and judicial discretion would be far more difficult to achieve.

The definition of sexual consent has a pivotal function in determining how the elements of the offense of sexual assault are applied to the factual circumstances of a sexual assault case. In particular, the definition of consent shapes the legal analysis of the factual circumstances of the offense by determining what the issues are and, in turn, what facts are material. Selecting a different definition is like changing the focal point of

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6 R. v. J.A., 2011 SCC 28, [2011] 2 S.C.R. 440, para. 65 (Can.), *rev'g* 2010 ONCA 226, 260 OAC 248 (Ont.). The case dealt with the legal efficacy of "prior consent" to sexual activity that took place after the complainant lapsed into unconsciousness due to her "erotic" asphyxiation by her husband. In a 6-3 decision the Supreme Court of Canada reversed the decision of the Ontario Court of Appeal and reinstated the trial conviction. Reasons for judgment by McLachlin C.J.C. for the majority followed her analysis of consent in R. v. Esau, [1997] 2 S.C.R. 777 (Can.). In *J.A.* the Supreme Court held that "prior consent" is a legally ineffective form of sexual consent. Sexual consent is ongoing and may be withdrawn at any time, but persons who are unconscious lack the capacity to withdraw consent. If consent were deemed to persist following lapse into unconsciousness, the unconscious person would be vulnerable to abuse. *See also* R. v. Ashlee, 2006 ABCA 244, 61 Alta. L.R. 4th 226 (Can.).

7 The substantive aspects of the law of "sexual consent" will continue to develop in an incremental fashion as appeals are decided. In particular, the law with respect to both "voluntariness" and "capacity" in the context of sexual consent requires further consideration by the appellate courts. For analysis and discussion of the challenges posed by the interpretation of the requirement that agreement be "voluntary," see Lucinda Vandervort, *Sexual Consent as Voluntary Agreement: Tales of "Seduction" or Questions of Law?*, NEW CRIM. L. REV. (forthcoming, 2013).

an optical lens. Facts that are assumed to be material, probative, and relevant for proof of the *actus reus* or *mens rea* when one definition is used, may be irrelevant when a different definition is used. The consequences of defining sexual consent as the communication of "voluntary agreement" for legal analysis of the significance of the facts of a case are examined below, and illustrated by leading decisions by the Supreme Court of Canada. At this stage, however, it may be helpful to provide an introductory overview of consent, defined as "voluntary agreement," and a brief sketch of how this definition, when it is correctly interpreted and applied to the facts, shapes and often dramatically simplifies analysis of the *actus reus* and *mens rea* of sexual assault.

Affirmative sexual consent defined

The term "consent" has been interpreted in many different ways; unqualified use of the term easily gives rise to misunderstanding. Here we are specifically concerned with *sexual* consent, defined as the unambiguous or express communication of "voluntary agreement" to sexual touching.

"Voluntariness" connotes that the agreement is not coerced, that the person who agrees is acting "freely" and has other options or other choices she could make without incurring harm or detrimental consequences. "Agreement" signals that there is specificity in what is agreed—the person agrees to something in particular. The agreement is to a specific sexual activity, at a specific time, with a specific person, and it is revocable. Finally, the agreement must be communicated or it will be legally ineffective to give the other person permission to engage in sexual touching. Communication may consist of either words or conduct but must be express, explicit, and unambiguous.

When consent is defined as the communication of express voluntary agreement, neither passivity, submission, silence, nor refusal constitutes consent for the purposes of proof of the *actus reus*. Facts that show the complainant was passive, submitted, said nothing by means of either words or gestures, or refused to comply with the assailant's requests do not show that the complainant voluntarily agreed to anything. It is an error of law to find consent in the absence of evidence of actual words or conduct by the complainant which constitute express communication of voluntary agreement. As a matter of law, a defense of belief in consent is not available to the accused and therefore may not be considered by the trier of fact, unless the accused can point to specific words or actions by the complainant which communicated agreement to the activity in question, with him, at the time in question. An assailant who seeks to rely on the defense of belief in consent in the absence of such evidence, is liable to be convicted on the ground that his evidence in defense is tantamount to an admission that he committed the *actus reus* and that he did so with knowledge of the

absence of the complainant's consent.

Various scenarios could be examined. The value of the definition of consent as "voluntary agreement" is best appreciated, however, when it is seen at work in the fact-rich and sometimes challenging context of decided cases. The reasons for judgment by the Supreme Court of Canada, in the series of cases examined and discussed below, demonstrate the analytic power and functionality of the definition.

Practical / political significance of affirmative sexual consent

To lay a foundation for discussion of the legal elements of the affirmative sexual consent requirements in Canadian law as established at common law and by statute, we need to be clear about the practical and political significance of these requirements as they operate in concrete social contexts. We need to ask "Isn't consent just that—consent? Isn't consent straightforward and obvious?," "What difference does the definition of sexual consent make?," and "Why is this important?" The response to these questions requires us to consider the relationship between theory and the practical effects a legal regulatory mechanism based on sexual consent defined as "voluntary agreement" is designed to achieve—and actually can achieve—in the range of social contexts in which it is used to protect individual autonomy and sexual self-determination. In the end, the comparative sufficiency and functionality of a definition must be measured by its practical effects. Does it achieve the objectives that it purports to advance? If it could advance the desired objectives in theory but does not do so in practice, does the problem lie in the theory, its application, or push back and resistance from countervailing factors in the social context? All those considerations shape the process of designing the legal institutions to be used in pursuit of the objective in question.

Effective enforcement of a sexual assault law that is based on principles of sexual autonomy and self-determination and is designed to give expression and effect to foundational egalitarian principles, may be difficult to achieve in practice, but that is a distinct and separate issue. The initial step is the development of a design that is sound from the perspective of principle. Here, the core assumption is that a politically coherent theoretical model is essential to provide a foundation for specific substantive and procedural legal arrangements and, in turn, to guide the design and implementation of those arrangements. The problem is the standard one of coherent institutional design. The adoption of foundational principles creates a framework for the definition of goals or objectives and imposes limits on the choices that are permissible in implementing the design. Choices in implementation that violate or undermine foundational principles also undermine or detract from the integrity of the design and can have unintended counterproductive effects.

To put this point in colloquial terms, the familiar practice of saying one thing while actually doing something else, even the opposite, sometimes even in good faith, is self-defeating. Therefore, all approaches and practices used in the interpretation and enforcement of sexual assault laws that have the effect, directly or indirectly, of negating or undermining the foundational principles of sexual autonomy and self-determination, should be avoided.

It is a simple fact that anyone and everyone is vulnerable to non-consensual sexual touching in a variety of circumstances over the course of his or her life. But circumstances affect one's vulnerability; relative vulnerability therefore varies as circumstances change. Those who are especially vulnerable to non-consensual sexual touching, i.e., sexual assault, are those who are: 1) children and lack understanding of what is occurring; 2) asleep or unconscious; 3) physically, cognitively, or emotionally disabled for any reason; or 4) disempowered in one or more respects in relation to the assailant as a consequence of specific socioeconomic relationships or structures. Anyone may be a member of only one of these groups or two or more of these groups simultaneously.

If we take the indicia of the merit of possible alternative definitions of consent to lie in the practical affect the definition has on sexual autonomy and self-determination, then no formulation of the sexual consent requirements is acceptable unless it provides meaningful protection for the bodily integrity of the vulnerable groups listed above. Any definition selected must provide equal protection to those who are vulnerable as well as to those who, for the moment at least, may be or appear to be less vulnerable. Given that the vast majority of all sexual assaults are perpetrated against acquaintances and family members, any definition of consent to sexual contact must be adequate not only to identify sexual assaults by strangers but also sexual assaults that take place in the social contexts in which acquaintances and family members interact. The "'no' means 'no'" standard places the onus on the targeted individual to protest and offers no protection for bodily integrity, human dignity, or privacy until an assault is threatened or already in progress. That type of protection is not meaningful in the intimate social contexts in which acquaintances and family members are typically assaulted. It is too little and too late.

Members of the four categories of vulnerable persons listed above are all at high risk of assault in those more intimate social contexts. Since vulnerability depends on multiple circumstantial factors, and relative vulnerability can change over time, members of the fourth category are likely far more numerous than is generally recognized. A wide variety of interpersonal relationships, familial and non-familial, may serve to disable or disempower one or more parties, either emotionally or in other practical respects, rather than affirm their equality. Within the dynamic of an interpersonal relationship, assaultees[8]

8 In this article the terms "assaultee" or "assailee" are often used instead of the terms "victim" or "complainant."

may find themselves to be expected or pressured to waive the right of refusal under a "'no' means 'no'" standard because assertion of a right to sexual integrity would express discord, defiance of the existing distribution of power in the relationship, or repudiation of the relationship itself. Under these conditions, abuse of power is easily normalized. An assailee may not believe it is either possible or practically feasible to terminate or repudiate the social relationships that render him or her vulnerable to assault. Those social relationships then function as a prison.

By contrast, an affirmative sexual consent standard that prohibits sexual activity in the absence of the express communication of voluntary agreement to the sexual activity, explicitly affirms the right to sexual integrity and confirms that no matter what the basis of a specific interpersonal relationship may be, each person in that relationship retains full rights of sexual self-determination and is not required to take affirmative steps to assert those rights in order to enjoy their protection by law. Assailants can extort apparent affirmative consent by exploiting or abusing an assailee's disability or comparative lack of power and autonomy, but apparent or ostensible affirmative sexual consent obtained by the abuse of power or opportunistic exploitation of circumstances is invalid as a matter of law.

From a theoretical perspective affirmative sexual consent thus offers a measure of protection that the "'no' means 'no'" paradigm does not and cannot provide. This is easily appreciated by anyone who has been sexually assaulted by an acquaintance or relative when asleep, brushing their teeth, taking a bath or shower, or performing any other mundane routine task such as folding laundry, scrubbing a floor, or organizing the papers on the CEO's desk. No one should be put in the position of trying to escape from an assailant's grasp in such situations, first anticipating and then dealing with the personal, interpersonal, and legal consequences. Given that the experience of many assailees is that participation in the mundane activities of everyday life—even just living and breathing—is often alleged to be conduct that is "seductive," that *invites* sexual touching, an affirmative consent standard, whereby "if it's not 'yes,' it's 'no'!," is clearly necessary. The "'no' means 'no'" standard offers little protection and, in the vast majority of sexual assault cases, it is protection that is indeed not only too little but also too late. Most of these cases are never reported, in part for that very reason. A measure of irreparable harm—individual and interpersonal—has already been done and the assailee often concludes that the criminal justice system has no appropriate remedy to offer and does not report the offense.

The use of feminine pronouns to refer to persons who are sexually assaulted is solely for the purpose of stylistic convenience and should not be interpreted as suggesting that only females are sexually assaulted. Persons of all gender identities are subject to sexual assault.

A substantial proportion of those who are assaulted by acquaintances, family members, co-workers, or other non-strangers are likely members of one or more of the four categories of especially vulnerable persons. Sexual assaults against vulnerable persons pose significant challenges for the enforcement of sexual laws in Canada. As noted in the introduction, empirical research in Canada shows that the vast majority of sexual assaults are perpetrated by non-strangers and that these offenses are rarely reported to the police. When these offenses *are* reported, the undeveloped state of the jurisprudence on voluntariness and capacity impaired by the consumption of drugs and alcohol often militates against an adequately nuanced analysis of the facts. Sexual activity initiated by the proverbial stranger who leaps out of the bushes is routinely presumed to be contrary to the wishes of the complainant and not voluntary. By contrast, when sexual activity involves non-strangers it is generally assumed to be voluntary and consensual, unless it involves extreme violence, blackmail, or the complainant is a child or patently lacks capacity on other grounds.

Complainants whose circumstances arguably preclude them from making "voluntary," "capable" decisions often may not appreciate that, as a matter of law, the sexual touching to which they were subjected was an "assault." Few of these assaults are reported. When such an assault is reported, police and prosecutors may assume that no offense was committed if the complainant's words and conduct appear to have given express consent to the sexual activity. As a consequence, few cases of this nature proceed to trial; those that do are likely to be dismissed on the ground of reasonable doubt that consent was absent. A complainant who testifies that she said "yes" only because she was incapacitated by drugs or alcohol, or believed herself to have no "real choice" in the circumstances, is commonly found to lack credibility at trial unless the evidence proves that she was subjected to an easily recognized form of coercion such as violence or blackmail. Canadian police and prosecutors are well aware of the typical impact of these factors on trial decisions and consider this when selecting cases for prosecution.

Judicial practices that are used at the trial level to structure legal analysis of the evidence in sexual assault cases are based on and reinforce habitual reliance on common assumptions. This routinely results in errors of law that perpetuate patterns of non-enforcement of sexual assault laws by police, prosecutors, and other trial judges in subsequent cases.[9] Such practices arguably contributed to shaping the trial decisions in a number of the cases discussed in the following sections of this article. These matters are not the primary focus of this particular article, however, and are only raised to provide a sketch of the legal context within which Canadian sexual assault law is developing. The objective

9 The impact of judicial practices at the trial level on legal reasoning about voluntariness and other crucial elements of the definition of consent is intriguing and merits more extensive treatment than is provided in this article. *See* Vandervort, *supra* note 7.

of this article is to provide the reader with a detailed introduction to the development of affirmative sexual consent law as interpreted to date by the Supreme Court of Canada; the article does *not* attempt to provide a comprehensive portrait of Canadian sexual assault law in action at the trial and pretrial levels. Sexual assault law in action in police stations, prosecutors' offices, and the lower courts, is not always the same as sexual assault law as interpreted by the Supreme Court of Canada. That gap provides clear evidence that there are some issues with respect to the implementation of Canadian sexual assault laws that, as yet, remain unresolved. Nonetheless, the Canadian experience with affirmative sexual consent law merits examination.

Affirmative sexual consent in Canada

At present, the literature includes no account of the history of the development of affirmative sexual consent requirements in Canadian law, jurisprudence, philosophy, and legal theory. The overview and discussion of those developments in this article focuses on: 1) the common law as supplemented by statutory provisions and 2) the jurisprudence interpreting and applying common law and statutory provisions with reference to 3) the Canadian theoretical literature. The stages of development are discussed below under the headings "Pre-1992" and "The 1992 amendments." Leading decisions by the Supreme Court of Canada in sexual assault cases that deal with the definition of sexual consent are identified and examined. The principal focus is on amendments to the sexual assault provisions of the *Criminal Code* as enacted by the federal Parliament in 1992 and interpretation of the statutory and common law definitions of sexual consent by the Supreme Court of Canada since 1994. Both Parliament and the Supreme Court of Canada create law that binds the entire country. The *Criminal Code* is a federal statute.[10] The Supreme Court of Canada is the final arbiter in criminal law matters. Scholarship sometimes develops legal theories that are subsequently used as a reference point, conceptual framework, or template in the creation of legislation or adopted in jurisprudence; scholarship, as such, never creates "law." The law is what Parliament and the Supreme Court say it is.

Pre-1992: Until late 1992, consent in the context of sexual assault was not defined by statute in Canada and was governed solely by the common law definition. Examination of representative older cases shows that when the decision or judgment in a sexual assault or common assault case dealt with the issue of "consent," the term was typically used to refer to a voluntary choice or free act of volition by a person who appreciates the situation and

10 Provincial legislatures may enact "quasi-criminal" legislation that includes limited punitive measures for the purpose of enforcing laws enacted to regulate activities and issues within provincial jurisdiction; criminal law, as such, is within the exclusive jurisdiction of the federal government.

the risks inherent to it, and is not subject to coercion. For example, in reasons for judgment in *R. v. Stanley* in 1977, Branca J.A. in the British Columbia Court of Appeal stated: "There can be no consent, at law, unless it is a free and voluntary one, and I add that where a consent is extracted by threats and violence it does not and cannot amount to a consent in law at all."[11] The focus of the analysis was the individual's state of mind, not the circumstances or his or her conduct. The conduct of the parties and the circumstances were examined for the purpose of making inferences about state of mind, but judges who discussed the definition of consent clearly distinguished state of mind from the objective factors considered in assessing state of mind. The inquiry was directed towards the individual's subjectivity; the objective and subjective were not conflated.[12]

In the pre-1992 sexual assault cases, as at present, it was common for the evidence, analysis, and reasons for decision to focus on the objectively observable conduct of the

11 R. v. Stanley, [1977] 4 W.W.R. 578, para. 73 (Can. B.C.C.A.); *see also id.* at para. 77, *per* McIntyre J.A. who observed:

> In the circumstances of this case it may seem somewhat unrealistic to put the issue of consent to fight to the jury. Stanley was awakened in the night by the arrival of five men, at least one of whom was bent upon a fight. He was confronted in his own home with five intruders, later reduced to two, while three others remained outside, and words passed between him and his visitors. Their presence in these circumstances, threatening as it was, and, after, their refusal to leave, constituted an assault. They stood between Stanley and the only door and one might reasonably conclude that he was placed in a situation in which he had little alternative but to fight if matters proceeded further. However, the trial judge dealt with the subject, and correctly enough as far as it went. However, at no time did he caution the jury on the nature of the consent required to remove the defense of self-defence from Stanley. In a case such as this where self-defence, defence of property or a combination of the two were the only defences open to the appellant, it was of vital importance that this proposition should have been put fully. The jury should have been told that to be effective to remove the defences any consent given by Stanley must have been a genuine consent freely given expressing an acceptance of battle with an appreciation of its risks and with, in his view, freedom to make an alternative choice if he desired. A consent forced upon him by the presence of his adversaries and not freely made would amount only to a submission, an acceptance of what may have seemed to be inevitable. The trial judge should have cautioned the jury to consider all the circumstances and to consider whether any indication of consent which they may have found Stanley to have given was such a genuine consent or merely the act of a cornered man who had no free choice in the matter. Failure to do this upon so vital an issue was in the circumstances of this trial, in my opinion, reversible error. For this reason, in addition to those given by my brother Branca, I would allow the appeal and direct a new trial upon an indictment for manslaughter.

12 This approach continues to be used across the range of contexts (sports, health care, and various forms of interpersonal violence) in which assault is most often at issue. Reasons for decision and judgment often include the observation that distinct policy concerns are relevant in each of these areas.

parties, including the use of any force or deception by the assailant and resistance or submission by the complainant. The complainant's conduct was routinely examined in order to determine whether the claim that she had not consented was credible. Conclusions about both parties' states of mind were thus based, in part or whole, on inferences from findings of fact about their conduct. The accused often did not testify. Judges continued to distinguish between consent as a state of mind and conduct that was consistent with a state of mind of consent. Conviction required proof beyond a reasonable doubt that the complainant's state of mind was one of "absence of consent." Conduct by a complainant that the trier of fact found to be consistent with consent often sufficed to raise a reasonable doubt about the absence of consent, leading to acquittal. Nonetheless, judges continued to affirm that evidence which showed beyond a reasonable doubt that the complainant's state of mind was not one of consent, would establish the element of "non-consent," even if there was no evidence of physical resistance or explicit and overt refusal. In addition, judges clearly appreciated that in some circumstances submission or cooperation was extorted.[13]

That relationship between intimidation and compliance, long recognized at common law, provides the theoretical rationale for section 265(3) of the *Criminal Code,* whereby no consent is obtained when the complainant submits or does not resist "by reason of" the application, or the threat or fear of the application of force to the complainant or another person, fraud, or the exercise of authority.[14] These criteria[15] are used to determine when there is no consent as a matter of law even though the complainant submitted or failed to resist. Codification of these criteria likely ensured some rough measure of uniformity in judicial decision-making in sexual assault cases in which coercion, fraud, or the exercise of authority were used to intimidate complainants into compliance. In the absence of evidence

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13 A typical definition is that used at trial and quoted in the reasons for judgment in *R. v. Frankland*, [1985] 12 O.A.C. 321, para. 17 (Can. Ont. C.A.):

> Now, what do we mean by "consent"? Consent involves knowing what is being proposed and voluntarily permitting it to be done. Mere submission does not necessarily imply consent, because a woman may consent to intercourse because of threats, or fear of bodily harm, and consent extorted in that way is, in law, not consent at all.

See also R. v. Hindle, [1978] 2 W.W.R. 712, para. 11 (Can. B.C. C.A.) (emphasizing that consent must be a free and voluntary act to be a "true consent at law"). In *R. v. Hindle*, the Court stated that evidence that the plaintiff submitted due to fear or threats of violence was relevant to the question of whether consent was genuine. *Id.* at para. 9. For other examples of submission attributed to fear, not consent, see *R. v. Firkins* (1977) 80 D.L.R. 3d 63 (Can. B.C. C.A.) and *R. v. Plummer and Brown*, (1975) 31 C.R.N.S. 220, 24 C.C.C. 2d 497 (Can. Ont. C.A.).

14 Criminal Code, R.S.C. 1985; c. C-46, s. 265(3).

15 The statutory criteria in s. 265(3) are non-exhaustive; further circumstances may be held to vitiate consent at common law on policy grounds. *See* R. v. Jodbidon, [1991] 2 S.C.R. 714 (Can.).

of one of these forms of intimidation, the finding of consent or non-consent was based on the complainant's testimony about his or her state of mind and the whole of the remaining circumstances. Few cases that did not involve the use of coercion or intimidation to obtain compliance appear to have been prosecuted. Successful prosecution was ordinarily seen to be unlikely where there was a lack of evidence of circumstances that the trier of fact could view as substantiating the complainant's assertion that her state of mind was not one of consent.[16] And, of course, it is a state of mind in which consent is absent that the Crown prosecutor must prove beyond a reasonable doubt. Thus the impediment to enforcement of the law was not evidence that the complainant consented, but rather difficulties in proving that consent was absent—a negative proposition. Proof of negative propositions is notoriously difficult.[17]

For this, and a variety of related legal, political, and cultural reasons, Canadian police and prosecutors often chose not to prosecute alleged sex offenders. In the vast majority of cases, the assailee did not even report the alleged offense to the police. Sometimes this was due to her failure to label what had occurred as sexual assault. Other times it was due to the assumption that the police would not lay charges or that, even if charges were laid, the Crown prosecutor would not proceed to trial. Past community experience gave many potential complainants reason to anticipate that participation as the complainant in a sexual assault case could be a time-consuming and extremely negative experience that might irrevocably damage her personal reputation, emotional health, social position, general well-being, and her relationships with members of her family and community. A prosecution that did not result in a conviction could easily leave the complainant at high risk of further assault by the original assailant or anyone else who inferred that charges were unlikely to be laid in subsequent assaults against the same complainant. Moreover, even if charges were laid, an acquittal might be even more likely, either because of the attitudes that had led to the previous acquittal or on the basis of supposition that the complainant fabricated both complaints. It should be obvious that this put potential complainants in an extremely difficult position, between a proverbial rock and a hard place, with nowhere to turn.

In the years leading up to 1992, many women in Canada were aware that the sexual assault laws were seldom enforced. Amendments to the sexual assault provisions of the

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16 Reliable information about the number of complaints and the basis on which decisions were taken by police and prosecutors is not available; the necessary data does not exist. In addition, the reasons for decision in cases that do proceed to trial are not always transcribed or reported.

17 The Supreme Court of Canada addressed this issue in *R. v. Park*, [1995] 2 S.C.R. 836 (Can.). *See infra* text accompanying notes 33–44.

Criminal Code enacted in 1983[18] had done little to change this.[19] Criticism of the law and its application intensified during the 1980s as the number of women with legal training and skills increased. In 1982, the Canadian Charter of Rights and Freedoms was adopted, and in April 1985, section 15 of the Charter and its guarantee of protection for equality rights came into effect. Canadian women increasingly viewed the failure of decision-makers in the Canadian criminal justice system to enforce laws prohibiting sexual violence against women and children as the blatant denial of constitutionally protected equality rights. This was the socio-political climate in 1991 when the Supreme Court of Canada decided *R. v. Seaboyer*,[20] declaring the "rape-shield" provisions of the *Criminal Code* unconstitutional and creating new common law guidelines for the admissibility of evidence of sexual history.

The 1992 amendments: A period of intense lobbying and public consultation about amendments to the sexual assault provisions of the *Criminal Code* followed the release of the Supreme Court of Canada's decision in *Seaboyer*. Kim Campbell, then Attorney General of Canada, embraced the consultation process, using it as an opportunity to ensure that the draft legislation reflected the considered opinions and collective experience of a cross-section of women who had themselves experienced sexual assault or were actively engaged in working with sexual assault complainants as court workers, advocates, lawyers, and counsellors. The consultation process is described in an article by Sheila McIntyre.[21] On December 12, 1991, the federal Department of Justice tabled Bill C-49, a comprehensive set of amendments to the sexual assault provisions of the *Criminal Code*. As ultimately

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18 Key features included gender neutrality, the shift from the singular crime of rape to three levels of sexual assault, and the elimination of spousal immunity and corroboration. *See* CHRISTINE L.M. BOYLE, SEXUAL ASSAULT (1984) (containing a detailed review of the changes enacted in 1983).

19 Complete statistics for this period are not available, but see Rita Gunn & Candice Minch, *Unofficial and Official Response to Sexual Assault*, 14 RESOURCES FOR FEMINIST RES. 47 (1985) (reporting on attrition rates); Julian V. Roberts & Michelle G. Grossman, *Changing Definitions of Sexual Assault: An Analysis of Police Statistics*, *in* CONFRONTING SEXUAL ASSAULT: A DECADE OF LEGAL AND SOCIAL CHANGE 57, 57–83 (Julian V. Roberts & Renate M. Mohr eds., 1994) (reporting an increase in the cases reported to police after the 1983 reforms to the sexual assault laws); and Scott Clark & Dorothy Hepworth, *Effects of Reform Legislation on the Processing of Sexual Assault Cases*, *in* CONFRONTING SEXUAL ASSAULT: A DECADE OF LEGAL AND SOCIAL CHANGE, *supra*, at 113–35 (reporting no change in the percentage of cases classified as "founded" or "cleared by laying of a charge" despite the increase in complaints in 1983 and subsequent years). Roberts and Grossman noted that change in the law does not ensure that social and professional reaction will change. Roberts & Grossman, *supra*, at 57. Overall, studies suggest that the criminal justice system's handling of reported sexual assault cases was slow to change following the 1983 reforms and that change did not occur uniformly.

20 R. v. Seaboyer; R .v Gayme, [1991] 2 S.C.R. 577 (Can.).

21 Sheila McIntyre, *Redefining Reformism: The Consultations that Shaped Bill-49*, *in* CONFRONTING SEXUAL ASSAULT: A DECADE OF LEGAL AND SOCIAL CHANGE, *supra* note 19, at 293.

enacted by Parliament six months later, on June 15, 1992, the Bill included a Preamble[22] setting out the objectives of the legislation, a new "rape shield" provision to curtail the use of sexual history evidence at trial, a detailed codification of the definition of consent, and statutory bars codifying limits on the use of the defense of belief in consent.

The statutory definition of "consent," enacted in 1992 and in effect August 15, 1992, provides:

> 273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
>
> Where no consent obtained

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22 Bill C-49: An Act to Amend the Criminal Code (sexual assault), S.C. 1992, c. 38, pmbl. The preamble states:

> WHEREAS the Parliament of Canada is gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual assault against women and children;
>
> WHEREAS the Parliament of Canada recognizes the unique character of the offence of sexual assault and how sexual assault and, more particularly, the fear of sexual assault affects the lives of the people of Canada;
>
> WHEREAS the Parliament of Canada intends to promote and help to ensure the full protection of the rights guaranteed under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*;
>
> WHEREAS the Parliament of Canada wishes to encourage the reporting of incidents of sexual violence or abuse, and to provide for the prosecution of offences within a framework of laws that are consistent with the principles of fundamental justice and that are fair to complainants as well as to accused persons;
>
> WHEREAS the Supreme Court of Canada has declared the existing section 276 of the *Criminal Code* to be of no force and effect;
>
> AND WHEREAS the Parliament of Canada believes that at trials of sexual offences, evidence of the complainant's sexual history is rarely relevant and that its admission should be subject to particular scrutiny, bearing in mind the inherently prejudicial character of such evidence . . . .

The Preamble is not reproduced in the *Criminal Code* but nonetheless affects the proper construction of the statutory provisions contained in Bill C-49 and must be taken into account whenever constitutional issues are under consideration in relation to these amendments.

> (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where
>
> (a) the agreement is expressed by the words or conduct of a person other than the complainant;
>
> (b) the complainant is incapable of consenting to the activity;
>
> (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
>
> (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
>
> (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
>
> Subsection (2) not limiting
>
> (3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.[23]

It is easily appreciated by students of the common law that the definition of "consent" in section 273.1 is based on the common law concept of consent as developed and articulated in Canadian case law. The section is structured as a positive definition of consent in conjunction with a list of circumstances in which no consent is obtained as a matter of law. Proof of the existence of any of those circumstances shows that consent is absent.[24] Importantly, section 273.1(3) provides for future judicial recognition of further circumstances under which no consent is obtained, ensuring that section 273.1(2) cannot be read as exhaustive. Section 265(3), discussed above, remains in effect and applicable, ensuring that circumstances in which threats or use of force, fraud, or exercise of authority are used to secure submission or passive compliance from a complainant also continue to be circumstances in which no consent is obtained as a matter of law.

Pursuant to section 273.1, "consent" requires voluntary agreement by words or conduct; in other words, the communication of affirmative consent. In the absence of communication

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23 Criminal Code, R.S.C. 1985, c. C-46, s. 273.1.

24 At present, the sexual assault laws of England as well as a number of states in the United States, including Michigan, Washington, Wisconsin, and New Jersey, contain similar provisions.

of valid voluntary agreement, there is no consent. In the alternative, it is possible to establish that consent was absent by proof of the existence of one or more of the circumstances specified under section 265(3) or section 273.1(2) as ones in which no consent is obtained. The relationship between the positive definition of consent and the listed circumstances is complementary. Each of those circumstances, when established, effectively negates one or more of the elements of the definition of consent in section 273.1(1). For example, lack of capacity negates voluntariness and the ability to make knowledgeable or informed choices. Voluntariness and informed choice are both essential prerequisites of a valid agreement. Similarly, expression of refusal negates agreement. Consent expressed by a third party is not agreement by the complainant, etc. Each of the subsections in section 273.1(2) thus also serves to clarify the meaning of the elements of the definition in section 273.1(1) and thereby affirm that sexual consent is personal, voluntary, capable, revocable, and specific as to the participants and the activity.

Interpretation of the definition of sexual consent by the Supreme Court of Canada: In the period after 1992, the Supreme Court of Canada heard and decided a number of appeals in which the common law definition of sexual consent was directly or indirectly at issue. The statutory definition of consent enacted in 1992 was first construed by the Court in *R. v. Esau*[25] in 1997 and again in *R. v. Ewanchuk*[26] in 1999.[27] In many sexual assault cases before the courts in the years immediately following enactment of the 1992 legislation, the alleged

25 R. v. Esau, [1997] 2 S.C.R. 777 (Can.).

26 R. v. Ewanchuk, [1999] 1 S.C.R. 330 (Can.)

27 As in many other jurisdictions that prohibit ex post facto laws, or laws whose effects are retrospective, when Canadian criminal law is amended by statute, changes to the substantive law are prospective and only apply to alleged offenses that occur *after* the amending statute comes into effect. By contrast, (as the fiction goes) the common law never changes although its interpretation and application may. Therefore, the interpretation of common law that is applied in a case governed by common law depends entirely on when the case is heard and decided, *not* when the events at issue in the case took place. As a consequence, "consent" in sexual assault offenses alleged to have occurred prior to enactment of s. 273.1, including historical cases dating from previous decades, is governed by the common law definition of consent *as it is interpreted when the case is actually heard.* The common law also has a role in statutory interpretation in Canada. In this instance, the Supreme Court of Canada viewed the amendments to the sexual consent provisions of the *Criminal Code* as largely a codification of the common law. As a consequence, the jurisprudence developed regarding the definition of consent under s. 273.1 now influences the interpretation of consent at common law in cases in which the alleged conduct occurred prior to enactment of s. 273.1 in 1992. Additionally, all cases on sexual consent previously decided at common law contributed to shaping the interpretation of the statutory definition of consent when the definition was first construed by the Court in *Esau* and in *Ewanchuk*. Parliament amends the *Criminal Code*, but the Supreme Court determines how *Code* amendments are interpreted. Elements that the common law and statutory definitions of sexual consent have in common are given a uniform interpretation in all cases, including both those cases subject to the 1992 amendments and those governed by the common law definition (cases in which the offense occurred prior to August 15, 1992, when the 1992 amendments came into effect).

offense had occurred prior to the date that the amended legislation came into effect and, therefore, the issue of consent was governed by the common law rather than the statutory definition of consent. Three decisions rendered by the Supreme Court in sexual assault cases between 1992 and 1997, *R. v. M. (M.L.)*, *R. v. Park*, and *R. v. Esau* made significant contributions to the development of the common law jurisprudence on affirmative sexual consent.

***R. v. M. (M.L.)*—Submission is not consent:** The reasons for judgment in *R. v. M (M.L.)*[28] are brief but their significance for development of the law of consent in Canada is considerable. The events at issue in the case took place prior to August 15, 1992, when the 1992 amendments to the *Criminal Code* that codified the definition of consent came into effect. Consequently, the Court decided the appeal on the basis of its interpretation of the common law definition of consent. The case involved the sexual touching of a 16-year-old female by her stepfather. The complainant's evidence at trial was that she was afraid of her stepfather and consequently offered no resistance.[29]

The Court of Appeal quashed the trial conviction on the ground that the verdict was not supported by any evidence of coercion of the types specified in section 265(3) and in the absence of evidence of coercion there was no basis to find that consent was not obtained within the meaning of section 265(3).[30] The Supreme Court of Canada granted the Crown's appeal and reinstated the trial conviction on the ground that "[t]he majority of the Court of Appeal was in error in holding that a victim is required to offer some minimal word or gesture of objection and that lack of resistance must be equated with consent."[31]

The approach taken by the Supreme Court of Canada distinguishes "consent" from "submissive, non-resistant conduct" and, by rejecting the reasoning of the Court of Appeal, also affirms, by implication, that section 265(3) does not provide an exhaustive account of the circumstances in which consent is absent.[32] This underscores that consent, whether present or absent for the purpose of analysis of the *actus reus*, is distinct from both the factual circumstances that exist and words and conduct that may or may not reliably and unambiguously communicate the presence or absence of that consent to another person.

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28 R. v. M. (M.L.), [1994] 2 S.C.R. 3 (Can.).

29 *See* R. v. M.L.M. (1992), 117 N.S.R. 2d 74, 79 (N.S. S.C.), for a review of the evidence at trial.

30 *Id.*

31 R. v. M. (M.L.), [1994] 2 S.C.R. at 3.

32 In *R. v. Davis*, [1999] 3 S.C.R. 759, para. 61 (Can.), Lamer C.J.C. notes that opinion in the lower courts is divided on this issue, but does not find it necessary to decide the issue.

This is consistent with the view that "consent" and "non-consent" are choices made by an individual, a social agent. Communication and non-communication of that choice to another person are distinct from the choice itself. Moreover, when consent or agreement is not communicated, the absence of consent as an element of the *actus reus* of sexual assault is to be inferred and is thus proven. Rephrased to focus on the legal effect of non-communication by the complainant, the Supreme Court in effect held that silence means "no." A corollary of this proposition is that there is no middle ground, and, as a consequence, if it's not "yes," it's "no." Soon the Court would say just that in *Park*, *Esau*, and *Ewanchuk*.

***R. v. Park*—Not saying "yes" is equivalent to saying "no":** The issue on appeal in *R. v. Park*[33] was the availability of the defense of belief in consent. The accused, convicted at trial, denied intercourse had taken place and claimed in the alternative that he had believed the complainant consented. The Alberta Court of Appeal ordered a new trial on the ground that the trial judge erred in law when he took the position that the verdict in this "he said/she said" case turned solely on whether there was consent and refused to put the defense of belief in consent to the jury. The Supreme Court of Canada granted the Crown's appeal on the ground that the defense of belief in consent was not available and reinstated the trial conviction.

As in *M. (M.L.)*, the alleged offense had occurred prior to August 15, 1992, and therefore the definition of consent at common law, rather than the statutory definition enacted by Parliament in 1992, was central to analysis of the facts of the case. In order to provide a foundation for analysis of the availability of belief in consent at common law, it was necessary to clarify the common law definition of consent. In her reasons for the Court, L'Heureux-Dubé did this in considerable detail.

She commences by examining consent in the *actus reus* and states: "[C]onsent is, itself, a mental state experienced only by the complainant . . . ."[34] This affirms that analysis of consent in the *actus reus* of sexual assault is concerned with the complainant's subjective state of mind, not her words or conduct. L'Heureux-Dubé notes that in its earlier judgment in *M. (M.L.)*, the Court concluded that "a finding of lack of consent does not, as a matter of law, require some minimal word or gesture of objection."[35]

With respect to *mens rea* in relation to consent, she asserts that awareness that the complainant had *not* communicated consent or said "yes" must be treated as equivalent to

33 R. v. Park, [1995] 2 S.C.R. 836, para. 3 (Can.).

34 *Id.* at para. 16.

35 *Id.* at para. 38.

awareness that the complainant had said "no" or communicated refusal. She states:

> [T]he mens rea for sexual assault is *also* established by showing that the accused was aware of, or reckless or wilfully blind to, the fact that consent was not communicated. *In other words, the mens rea of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying "no", but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying "yes".*[36]

L'Heureux-Dubé J. explains this development as one that is based on a change in the objectives of sexual assault law and the role of consent.

> The role that consent plays in the law of sexual assault depends largely upon the purpose that we ascribe to that offence in contemporary society . . . . The crime of rape has been replaced with the broader offence of sexual assault. Actual intercourse is not a prerequisite for a sexual assault. Moreover, a woman need no longer suffer actual physical injury before she can say that she was sexually assaulted. Sexual assault is now, essentially, a sexual touching without consent . . . . The primary concern is no longer solely with the physical safety of women, but rather with something broader.[37]

In her view, that broader concern is "the belief that women have an inherent right to exercise full control over their own bodies, and to engage only in sexual activity that they wish to engage in."[38]

Justice L'Heureux-Dubé reasons that if this is the case, then:

> [O]ur approach to consent must evolve accordingly, for it may be out of phase with that conceptualization of the law. In this respect, L. Vandervort argues in "Mistake of Law and Sexual Assault: Consent and *Mens Rea*" (1987-88), 2 C.J.W.L. 233, at p. 267, that consent must be regarded from the standpoint of communication, rather than from the standpoint of a private mental state:

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36 *Id.* at para. 39 (second emphasis added).

37 *Id.* at para. 41.

38 *Id.* at para. 42.

> *The social act of consent consists of communication to another person, by means of verbal and non-verbal behaviour, of permission to perform one or more acts which that person would otherwise have a legal or non-legal obligation not to perform* . . . . To consent is to waive a right and relieve another person of a correlative duty . . . .
>
> Acts performed in reliance on such a waiver do not breach any operative legal duty and do not constitute commission of an offence. *It is thus clear that any analysis of consent must consider what, if anything, was actually communicated, as well as whether the communication was voluntary.*

Vandervort concludes as follows, at p. 277:

> The right of the individual to be free of non-consensual sexual contact will be protected only if consent is interpreted as an absolute issue, such that a failure to find that it was present is taken to demonstrate that it was absent . . . . *The law provides that sexual touching is assaultive unless the person touched agrees to be touched. It does not provide that the transaction is non-assaultive unless the person touched objects.*[39]

Whether and how consent is communicated affects analysis of both the *actus reus* and *mens rea*. Accordingly, L'Heureux-Dubé observes that:

> [S]ince consent is, itself, a private mental state, we go about inferring it in much the same way as we would infer *mens rea*. Namely, we look to verbal and non-verbal cues and then draw inferences about a particular mental state by evaluating the individual's behaviour in light of the totality of the circumstances. A finder of fact employs these techniques to determine whether a complainant has, in fact, not consented to a sexual touching. In so far as the *actus reus* of the offence of sexual assault is concerned, the inquiry stops there.[40]

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39 *R. v. Park*, [1995] 2 S.C.R. 836, para. 42 (Can.) (quoting Lucinda Vandervort, *supra* note 1, at 267, 277) (emphasis in original).

40 *Id.* at para. 43.

By contrast, the *mens rea* of sexual assault is proven by evidence showing the accused's awareness of, or recklessness or wilful blindness to, the absence of consent. L'Heureux-Dubé underscores that "[t]he inquiry into absence of consent for the purposes of establishing the *mens rea* of the offence must therefore go one step further, and delve into the *accused's perception* of the absence of consent."[41] To escape conviction, the accused must be capable of pointing to the factual basis for the belief that the complainant actually did consent. As stated by L'Heureux-Dubé, "As a practical matter, therefore, the principal considerations that are relevant to this defence are (1) the complainant's actual communicative behaviour, and (2) the totality of the admissible and relevant evidence explaining how the accused *perceived* that behaviour to communicate consent. Everything else is ancillary."[42]

Thus analysis of *mens rea* focuses on actual communication by the complainant and the perception of that communication by the accused. If the accused is unable to point to specific evidence tending to show that the complainant's consent was communicated, the defense is unavailable as a matter of law and may not be considered by the trier of fact.[43] In the absence of such evidence there is simply no evidentiary foundation whatsoever for the defense of belief in consent. In such circumstances, the conclusion that the accused was aware of or wilfully blind to the absence of consent follows easily.

Readers familiar with traditional approaches to analysis of *mens rea* in sexual assault cases will appreciate that this approach narrows the analytic focus dramatically. Many types of facts that have long played a role in legal reasoning in sexual assault cases, such as how a complainant was dressed, where the complainant was, what she was doing, as well as a broad range of demographic characteristics, are rendered wholly irrelevant. They lack probative value for the issues to be decided and can no longer be used by decision-makers to invoke misogynist stereotypes or other fallacious generalizations in the course of reasoning about the legal significance of the facts. If consent is found to have been absent for the purposes of analysis of the *actus reus*, a defense of belief in consent is only available when the accused is able to point to evidence of specific acts of communication by the complainant that the accused perceived as communication of voluntary agreement. A belief that the complainant would consent is quite different from a belief that she did consent, and a belief that she did consent can only be grounded on evidence of specific acts of communication.

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41 *Id.*

42 *Id.* at para. 44.

43 *Id.* at para. 45.

Five members of the Court who concurred in the reasons for judgment by L'Heureux-Dubé J. in *Park* nonetheless held that, for the purposes of the appeal, it was unnecessary to comment on the interaction between consent and mistake of fact in a sexual assault situation. That position was arguably overly swift, and in subsequent reasons for judgment in *R. v. Esau* and *R. v. Ewanchuck,* first McLachlin J., as she then was, and later the Court, moved to adopt a fully articulated framework for analysis of the evidentiary basis for the defense of belief in consent. Such a framework is needed to provide guidance for trial judges who must determine whether a case is one in which the defense of belief in consent is available as a matter of law, and therefore must be considered by the trier of fact, or one in which it is not available. Error with respect to the availability of a defense is reversible error and a ground for appeal. The key issue is whether there is evidence that *could* lead to an acquittal or not. When there is insufficient evidence to support a lawful acquittal on the basis of a belief in consent, the defense may not be considered by the trier of fact. Consideration of the defense under those circumstances invites error and a perverse acquittal. An analytic framework that bases the decision about availability of the defense of belief in consent on whether there is evidence that the accused perceived specific acts that communicated the complainant's agreement to the sexual activity in question is of great value in assisting trial judges to avoid traditional modes of analysis that rely on nonlegal definitions of consent based on gender stereotypes and invite error.[44]

***R. v. Esau*—The implications of a comprehensive theory of sexual consent for the elements of the offense of sexual assault:** In 1997, two years after the decision in *Park*, the Supreme Court of Canada heard and decided the appeal in *Esau*.[45] The reasons for judgment by McLachlin J., as she then was, though written in dissent, provide a comprehensive analysis of consent and *mens rea* in sexual assault that has been followed and applied by the Court in its decisions in all subsequent appeals dealing with these issues. The reasons for the majority in *Esau* did not address any of these issues and disposed of the appeal on evidentiary grounds.

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44 *See* Lucinda Vandervort, *Sexual Assault: Availability of the Defence of Belief in Consent*, 84 CANADIAN B. REV. 89 (2005), *available at* http://ssrn.com/abstract=863204; Lucinda Vandervort, *The Defence of Belief in Consent: Guidelines and Jury Instructions for Application of* Criminal Code *Section 265(4)*, 50 CRIM. L.Q. 441 (2005), *available at* http://ssrn.com/abstract=863264.

45 R. v. Esau, [1997] 2 S.C.R. 777, para. 33 (Can.). The appeal in *R. v. Esau,* like that in *R. v. Park*, concerned availability of the defense of belief in consent. The trial judge had declined to put the defense to the jury on the ground that the only live issue in the case was the presence or absence of consent by the complainant. The complainant had been extremely intoxicated and testified that she lacked any memory of the alleged assault at her home following a party there, but would not have consented because she was the accused's cousin. The jury returned a verdict of guilty. Mr. Justice Major, for the majority of the Supreme Court of Canada, dismissed the Crown's appeal from the order for a new trial that had been granted by the Court of Appeal on the ground that there was evidence to support the defense of belief in consent.

The events at issue in *Esau* had taken place on March 13, 1994, and were therefore subject to the 1992 amendments.[46] L'Heureux-Dubé J. and McLachlin J., as she then was, dissented. Both discussed the definition of consent at common law.

L'Heureux-Dubé J. affirmed the views on consent contained in her reasons for judgment in *Park*. She again emphasized the functional equivalence between saying "no" and *not* saying "yes" and the practical significance of that equivalence as a means to secure effective legal protection for personal bodily integrity in the interpretation and enforcement of the sexual assault laws.[47] In the absence of evidence of either communication of consent or ambiguity in any communication by the complainant, there was no factual basis for a defense of belief in consent and the trial judge was correct not to instruct the jury on the defense.

McLachlin J. held that section 273.2 of the *Criminal Code* (enacted in 1992) applied to preclude the accused from relying on the defense of belief in consent because there was no evidence that the accused took any steps to ascertain that the complainant was consenting.[48] She held further that application of common law principles led to the same result and proceeded to provide detailed reasons for that conclusion at paragraphs 64 to 82 of the reasons for judgment.[49] The key points are examined below.

McLachlin introduced her discussion of consent at common law as follows:

> I turn next to the common law concept of consent. Much of the difficulty occasioned by the defence of honest but mistaken belief is related to lack of clarity about what consent entails. Consent in the context of the crime of sexual assault is a legal concept. At law, it connotes voluntary agreement. It embraces the notions of legal and physical capacity to consent, supplemented by voluntary agreement or concurrence in the act in question. *Webster's Third New International Dictionary* (1986), at p. 482, defines consent as "capable, deliberate, and voluntary agreement

46 *Id.* at para. 48. *See also supra* note 27 on the role of common law in statutory interpretation in this context.

47 *Esau*, [1997] 2 S.C.R. 777 at para. 34.

48 *Id.* at paras. 49–51. Criminal Code, R.S.C. 1985, c. C-46, s. 273.2, identifies circumstances in which the accused is barred by statute from relying on a defense of belief in consent. These statutory bars effectively codified existing common law.

49 The reasons for judgment in this case that were based on the common law provided guidance for the Court's subsequent interpretation and application of the statutory provisions on consent and availability of belief in consent as enacted in 1992. As we shall see below, in his reasons for the Court in *R. v. Ewanchuk*, Major J. explicitly adopted key aspects of his interpretation of the 1992 amendments from the analyses of consent at common law provided by L'Heureux-Dubé and McLachlin in *R. v. Park* and *R. v. Esau*.

> to or concurrence in some act or purpose implying physical and mental power and free action".[50]

Like L'Heureux-Dubé J. in *Park,* McLachlin J., she then was, views consent as an "act of communication" which in "most cases . . . is clear."[51] Belief in consent is not a live issue unless the trier of fact concludes there was no consent. Accordingly, there must be evidence of ambiguity "to give rise to the defence of honest but mistaken belief in consent."[52] To establish a theoretical and legal framework for analytic purposes, McLachlin states:

> Consent has a legal effect. It changes the rights and duties of the persons involved. As Vandervort, *supra*, at p. 267, puts it:
>
> > The social act of consent consists of communication to another person, by means of verbal and non-verbal behaviour, of permission to perform one or more acts which that person would otherwise have a legal or non-legal obligation not to perform. Consenting, like promising, is thus performative, a behaviour that has normative consequences. To consent is to waive a right and relieve another person of a correlative duty. Consent thus alters the rights and duties between the persons who are parties to an agreement created by communication. When the rights and duties in question are not merely conventional or ethical ones, but are legal rights and duties, consent is an act that has specific legal consequences. The only conditions are that it be voluntary and knowing or informed, that is, freely given with reference to some general or specific concrete objective or content.
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> As Vandervort goes on to point out (at p. 267), it follows that any analysis of consent must consider "what, if anything, was actually communicated, as well as whether the communication was voluntary. We need to know what verbal and non-verbal behaviours constitute communication of consent in the context of a sexual transaction, and how

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50 *Esau*, [1997] 2 S.C.R. 777 at para. 64 (McLachlin, J., dissenting) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 482 (1986)).

51 *Id.* at paras. 66–67.

52 *Id.* at para. 67.

> the voluntariness of the communication is to be assessed" where this is in issue.[53]

McLachlin distinguishes the approach taken under Canadian law to the concepts of wilful blindness and honesty in relation to consent from that used in many states in the United States where the defendant in a sexual assault trial is required to have acted reasonably. At common law in Canada, an accused is permitted to make unreasonable mistakes but, in doing so, is not permitted to be wilfully blind or reckless. She explains the practical implications of the distinction with reference to an accused's awareness of issues of fact and issues of law as follows:

> The term wilful blindness connotes a deliberate avoidance of the facts and circumstances. It is the legal equivalent of turning a blind eye, of not seeing or hearing what is there to hear or see. It is the making of an *assumption* that the complainant consents without determining whether, *as a matter of fact*, the complainant consents. *Blindness as to the need to obtain consent can never be raised by an accused as a defence, since the need for consent is a legal requirement which the law presumes the defendant to know.*[54] On the facts, wilful blindness to conduct or language which might support an inference of non-consent is similarly of no avail. The person who is not wilfully blind is the person who is appropriately aware, not only of the need to obtain consent (which he is presumed to know), but of what the conduct and circumstances reveal to one who looks to see whether that consent was being given or withheld. Second, the requirement that the defendant's belief have been honest has a similar effect. The defendant is not allowed to deceive himself, or to sharply take advantage of a passive or unclear response. He must honestly believe that the complainant consented.[55]

Using that legal framework, within which neither ignorance of the law nor a reckless or wilfully blind or dishonest mistake about the facts affords an accused any excuse, McLachlin J., as she then was, identified and discussed the following range of factual circumstances in which the issue of consent may arise:

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53 *Id.* at paras. 68–69 (McLachlin, J., dissenting) (quoting Lucinda Vandervort, *supra* note 1, at 267).

54 This statement is based on the common law principle that ignorance of the law is no excuse, also codified in the *Criminal Code*. Criminal Code, R.S.C. 1985, c. C-46, s. 19.

55 *Esau*, [1997] 2 S.C.R. 777, para. 70 (last emphasis added).

(a) Explicit consent, where voluntary agreement is expressly communicated by verbal or body language;

(b) Explicit refusal, where refusal of consent is expressly communicated by verbal or body language;

(c) A complainant lacking the capacity to consent or refuse because of unconsciousness or incoherence;

(d) A complainant lacking the legal capacity to consent, e.g., a child;

(e) Consent vitiated by force or duress;

(f) Passivity where neither assistance nor resistance is offered;

(g) Ambiguous conduct, which can be read in different ways;

(h) Ambiguity arising from external circumstances.[56]

Throughout, the focus of the analysis is on communication by the complainant. Explicit consent consists of communication to the accused by a complainant acting with capacity and voluntarily, by means of words or actions that both parties are capable of understanding. Explicit consent precludes a finding of sexual assault. By contrast, McLachlin explains:

> Explicit refusal, on the other hand, makes any suggestion of honest mistake implausible. If the jury finds that the complainant explicitly communicated her refusal to the defendant, then the defendant who receives the communication cannot realistically claim to have made an honest mistake on consent. Only if the defendant can show some additional circumstance taking the situation into the situation of ambiguous conduct (categories (g) and (h)) can he make such a claim.[57]

The third situation, the case of an unconscious or incoherent complainant, involves a complainant who is unable to communicate consent through deliberate voluntary agreement. McLachlin explains why the complainant's inability to communicate renders the defense of honest belief in consent implausible as follows:

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56 *Id.* at para. 71.

57 *Id.* at para. 72.

> Similarly, the defence of honest but mistaken belief in consent cannot be raised in the third situation, the case of an unconscious or incoherent complainant: see Vandervort, *supra*, at p. 269. This category posits a complainant who is unable to communicate consent because she is unconscious or incapacitated. Consent, as noted above, involves "capable, deliberate, and voluntary agreement to or concurrence" (*Webster's Third New International Dictionary*, *supra*). A person who is unconscious or unable to communicate is incapable of indicating deliberate voluntary agreement. At issue, as elsewhere in dealing with consent, is the social act of communicating consent, not the internal state of mind of the complainant. The accused is not expected to look into the complainant's mind and make judgments about her uncommunicated thoughts. But neither is he entitled to presume consent in the absence of communicative ability. The complainant in this category lacks the capacity to communicate a voluntary decision to consent. Such lack of capacity would be obvious to all who see her, except the wilfully blind. This makes any suggestion of honest mistake as to consent implausible. To put it another way, the necessary (but not sufficient) condition of consent—the capacity to communicate agreement—is absent. The hypothetical case of a complainant giving advance consent to sexual contact before becoming unconscious does not constitute an exception. Consent can be revoked at any time. The person who assaults an unconscious woman cannot know whether, were she conscious, she would revoke the earlier consent. He therefore takes the risk that she may later claim she was assaulted without consent.[58]

It follows that the only circumstances in which the defense of honest mistake might be available as grounds for possible acquittal would be circumstances involving ambiguity as to the complainant's capacity or ability to communicate as described above under categories (g) and (h).[59]

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58 *Id.* at para. 73 (quoting Lucinda Vandervort, *supra* note 1, at 269); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 50. These questions were revisited by McLachlin C.J.C. in 2011 writing for the majority of the Court in *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440 (Can.), *rev'g* 2010 ONCA 226, 260 O.A.C. 248 (Ont.); *see supra* note 6.

59 *Esau*, [1997] 2 S.C.R. 777 at para. 74. It should be noted, however, that when the accused pursues sexual activity even though there is ambiguity with respect to the complainant's capacity to communicate consent, ordinarily no defense of honest belief will be available and the accused will be liable to conviction on the grounds of recklessness or wilful blindness. In practice, therefore, ambiguity will assist an accused in only the rarest of circumstances, if ever. These issues are discussed further below with reference to the Court's 1999 decision in *R. v. Ewanchuk*.

In discussing the categories in which the complainant is underage or subject to duress or compulsion, McLachlin J., as she then was, refers to the *Criminal Code* provisions that apply to these categories rather than providing a detailed analysis of the availability at common law of the defense of mistaken belief in consent in such cases. Section 150.1 of the *Criminal Code*[60] deems underage persons to lack the capacity to consent and s. 265(3) provides that force or duress may vitiate consent.[61] The ordinary rules of criminal law statutory construction apply to these provisions. Nonetheless, under Canadian law, common law defenses, including the defense of honest mistake of fact, continue to be available to the extent that they are not inconsistent with statutory criminal law provisions. The interpretation and application of statutory offenses and defenses and the common law defenses are also subject to the provisions of the constitution. Subject to those standard limitations, the legal and theoretical framework that McLachlin J., as she then was, adopted and developed in *Esau* for analysis of availability of the defense of honest mistaken belief is fully applicable to analysis of *mens rea* in relation to consent in cases involving underage complainants and those who are subject to compulsion or duress.[62]

The sixth category, in which the complainant is conscious but passive, was previously addressed at common law by the Court in its brief judgment in *M. (M.L.)*.[63] In her reasons for judgment in *Esau*, McLachlin J., as she then was, develops a detailed analysis of passivity with reference to consent as an act of social communication. Viewed through this lens, passivity is not an act of communication. McLachlin states:

> Failure to indicate yes or no is no communication at all and hence cannot amount to communication of consent. Much less does it offer any indication of capacity, deliberateness or voluntariness. Absent exceptional circumstances, it is unrealistic to suppose that a person acting honestly and without wilful blindness could draw an inference of consent from mere passivity. Putting it another way, to say that passivity amounts to consent is to presume consent. To equate submission with consent is to overlook the essential character of consent as a social act whereby one person confers on another person the right to do something. Women may submit for many reasons inconsistent with consent. For this reason, something more is

60 Criminal Code, R.S.C., 1985, c. C-46, s. 150.1.

61 Criminal Code, R.S.C. 1985, c. C-46, s. 265(3).

62 *Mens rea* and mistake of fact defenses in relation to consent due to duress and fear of physical violence are examined in *Ewanchuk* and discussed below.

63 *See supra* text accompanying notes 28–33.

> required to permit the inference that the passive person is consenting. It follows that passivity alone is insufficient to provide a basis for a defence of honest but mistaken belief. Additional evidence of circumstances or conduct is required to establish the situation of ambiguity that underlies the defence. It is only with such evidence that passivity falls into one of the final two categories: (g) or (h).[64]

McLachlin observes that the choices made when analyzing passivity have a crucial impact on the interpretation and application of the sexual assault laws and points to the "common misconceptions and mistaken generalizations" about passivity that "bedevil the law of sexual assault."[65] These include the assumption that the lack of evidence of a physical confrontation or violence is a basis to infer consent, and its corollary,

> the false notion that unless a woman struggles or has been physically forced, she must have consented . . . . In fact, the absence of violence or struggle is neutral. An accused who infers consent from passivity without more makes a dishonest, irresponsible inference. Since it is as reasonable to infer non-consent as consent from passivity, an honest assessment of passive conduct does not, without more, permit the conclusion that the complainant is consenting . . . . Rather, the effect of passivity on the honest defendant is to create a situation where, before proceeding, he must obtain a positive indication of consent.[66]

The only circumstances in which the defense of mistaken belief in consent is available are those in which either the complainant's conduct or the circumstances give rise to a genuine ambiguity in relation to the communication of consent. McLachlin J., as she was then, underscores that there must be actual evidence of ambiguity in what the complainant did or said. The analysis is fact-based. Confusion or misunderstanding that is based on mere speculation by the accused, rather than on the accused's misperception of facts, is not fact-based ambiguity. If the defense of mistaken belief in consent is to be available there must be evidence of factual circumstances or words and actions of the complainant that are actually ambiguous. Furthermore, any misunderstanding must be "honest" and neither reckless nor wilfully blind.[67] Noting that the latter proposition was codified in 1992 by Parliament in section 273.2(a)(ii) of the *Criminal Code*, which specifies that the defense of

64 R. v. Esau, [1997] 2 S.C.R. 777, para. 76 (Can.).

65 *Id.* at para. 77.

66 *Id.*

67 *Id.* at paras. 78–79.

mistaken belief in consent is not available when the mistaken belief is due to recklessness or wilful blindness,[68] McLachlin emphasizes that:

> The focus in this category, as elsewhere, must be on what the complainant said or did and how that would have impacted on the defendant, acting honestly and without wilful blindness. The defence should be put where there is sufficient evidence to lead the trial judge to conclude that a jury might realistically (i.e., not speculatively) accept that the complainant was refusing consent or incapable of consenting, but that what she said and did were capable of leading the defendant to honestly conclude the opposite.[69]

At common law and pursuant to the *Code*, an accused who perceives his companion's conduct to be "ambiguous or unclear" has a legal duty to abstain from sexual activity or seek clarification of whether his companion has communicated consent.[70] Law, not sexual myths and stereotypes, governs the availability of the defense of mistaken belief in consent. The notion that lack of resistance, or limited but ineffective resistance, is consent, is defunct; it is not to be permitted to distort interpretation and application of the law of sexual consent by judges and juries.[71]

R. v. Ewanchuk*—Affirming the jurisprudence developed in *M. (M.L.), Park, and Esau: The definition of sexual consent was central to the decision by the Supreme Court of Canada in *R. v. Ewanchuk*.[72] The case involved the sexual touching of a complainant who told the accused to stop three times but otherwise remained comparatively passive. Her evidence was that she had been quite afraid of the accused, who was much older and physically larger and heavier, and that she had believed that the door of the trailer in which the assault took place might be locked, preventing her from escaping. At trial the judge found the complainant had not consented but acquitted the accused on the ground that the accused might have believed that she did on the ground of "implied consent." The Alberta Court of Appeal dismissed the Crown's appeal and upheld the acquittal in a 2-1 decision. The Supreme Court of Canada granted the Crown's further appeal, held that under Canadian law there is no defense of "implied consent" to sexual touching or assault, and entered a conviction based on the legal significance of the findings of fact at trial.

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68 Criminal Code, R.S.C. 1985, c. C-46, s. 273.2(a)(ii).

69 R. v. Esau, [1997] 2 S.C.R. 777, para. 79 (Can.).

70 *Id.* at para. 80.

71 *Id.* at para. 82.

72 R. v. Ewanchuk, [1999] 1 S.C.R. 330 (Can.).

Major J. wrote the majority reasons for the Supreme Court. Those reasons affirmed the holding of the Court in *M. (M.L.)* and key aspects of the reasons authored by L'Heureux-Dubé J. and McLachlin J. in *Park* and *Esau*. L'Heureux-Dubé J. and McLachlin J. both authored separate concurring reasons.

In *Ewanchuk,* the trial judge found as a matter of fact that: 1) the accused had repeatedly and deliberately touched the complainant in a sexual manner, and 2) she did not consent to the sexual activity. Proof of the absence of consent as an element of the *actus reus* was therefore not at issue in the appeal. The focus of the appeal was whether the trial judge had erred in law in holding that even though *subjectively* she did not consent, nonetheless the complainant's conduct could be viewed as "implied consent" that provided evidentiary support for a defense of mistaken belief in consent and, in turn, a basis for reasonable doubt about the accused's culpable awareness or *mens rea* in relation to the absence of consent, entitling the accused to an acquittal.

Major J. held that the absence of consent as an aspect of the *actus reus* is "subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred."[73] Major says:

> The rationale underlying the criminalization of assault explains this. Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one's body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the *Code* expresses society's determination to protect the security of the person from any non-consensual contact or threats of force. The common law has recognized for centuries that the individual's right to physical integrity is a fundamental principle, "every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner": see Blackstone's *Commentaries on the Laws of England* (4th ed. 1770), Book III, at p. 120. It follows that any intentional but unwanted touching is criminal.[74]

Major J. noted that the only source of direct evidence of a complainant's state of mind is her testimony but that her credibility must be assessed in the light of the whole of the evidence. "It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her

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73 *Id.* at para. 26.

74 *Id.* at para. 28; *see also* Knies, *supra* note 1 (discussing the common law roots of affirmative sexual consent theory).

mind, did not want the sexual touching to take place."[75] At this stage of the analysis the sole issue is taken to be the complainant's credibility.[76] Major J. briefly discusses the multiple circumstances (force, fear, threats, fraud, etc.) that vitiate the legal effect of "apparent" or "ostensible" consent because they are recognized at common law and under section 265(3) to be inconsistent with the requirement that consent be "freely given" or voluntary. That overview of the prerequisites of legally valid consent concludes Major J.'s examination of absence of consent as an element of the *actus reus*.

The practical significance of the relationship between vitiating circumstances and doubts about the credibility of a complainant's evidence that in her own mind she did not consent is not addressed in that summary. Major J. merely juxtaposes his discussion of the two. Questions about the credibility of a complainant's assertion that she did not subjectively consent are arguably rendered wholly immaterial as a matter of law and therefore irrelevant, however, whenever the trier of fact finds beyond a reasonable doubt that the circumstances are ones under which "no consent is obtained" pursuant to sections 265(3), 273.1(2), or 273.1(3). Similarly, pursuant to common law, consent is vitiated, or rendered legally inoperative and ineffective, when the conditions required for legally valid and effective consent are absent. Perhaps this relationship was so obvious to Major J. that he believed it did not need to be noted. On the other hand, he may have raised the matter of circumstances that are inconsistent with valid consent solely to affirm that evidence of such circumstances could and would be used to assist the trier of fact in assessing the complainant's credibility in any case in which the complainant testified about "consent." Strictly speaking, however, this aspect of Major J.'s reasons for judgment in *Ewanchuk* is *obiter* because consent in the *actus reus* was not at issue in the appeal.

It is often said that the verdict in sexual assault cases turns on the complainant's credibility. For this reason, charges may not be laid by the police and approved for prosecution by the Crown prosecutor where there is reason to believe that at trial the trier of fact *could* have a reasonable doubt about the credibility of the complainant's assertion that she did not consent in her own mind. This, however, should not be an impediment to conviction when the evidence as a whole shows the circumstances to be inconsistent with the conditions required at common law for legally valid consent or to be ones in which no consent is obtained as a matter of law pursuant to section 265(3) or section 273.1.[77] It is

75 *Ewanchuk*, [1999] 1 S.C.R. 330 at para. 29 (Can.).

76 *Id.* at paras. 29–30.

77 See, for example, the fact patterns in *R. v. MacFie (B.S.)*, 2001 ABCA 34, 277 A.R. 86 (Alta.), and *R. v. S. (D.G.)*, [2004] 72 O.R. 3d 223 (Ont.), *aff'd sub nom. R. v. Stender*, 2005 SCC 36, [2005] 1 S.C.R. 914 (Can.). These cases involved violent spousal abduction and exploitation by blackmail, respectively; it might be thought obvious that valid consent cannot be obtained in those circumstances. Nonetheless, at trial both of the accused were acquitted. In

likely, however, that many cases in which the absence of consent in the *actus reus* could be established in this manner, nonetheless continue to be classified as unfounded by the police or rejected for prosecution by Crown prosecutors either because they doubt that the trier of fact will find the complainant credible[78] or on the ground that prosecution is not in the "public interest."[79] None of these cases proceed to trial and as a consequence, the judiciary has limited opportunities to develop the jurisprudence dealing with this issue in relation to

R. v. S. (D.G.), the disputed issue was the validity of consent as an element of the *actus reus*. The Court of Appeal held that the circumstances of the case negatived voluntariness and thereby vitiated the complainant's "consent"; the Court entered a conviction on the basis of the factual circumstances related to the blackmail as found by the trial judge. Often, however, trial judges (like police and prosecutors) rely on the defense of honest mistaken belief in consent to dispose of such cases and do not always provide a full analysis of consent in the *actus reus*. When such cases are appealed, courts of appeal also often focus on the availability of the defense of mistaken belief in consent, rather than analysis of consent in the *actus reus*. The *R. v. MacFie (B.S.)* appeal illustrates this phenomenon. Note that the *R. v. MacFie (B.S.)* court appears to have no difficulty with the proposition that consent was absent in the circumstances proven by the evidence at trial, but that issue was not on appeal and was not "decided" in the appeal. The sole issue in the appeal was the availability of the defense of mistaken belief. The Court entered a conviction on the ground that the defense of honest mistaken belief in consent was not available on the evidence and stated that in the circumstances, only an accused who was reckless or wilfully blind to the impact of his violent behaviour on the complainant could believe that she consented. The same proposition, that violence negatives voluntariness, applied by police and prosecutors in their analyses of the evidence in a case file under review, should shift the focus of analysis from the question of whether the complainant is credible with respect to the issue of non-consent, towards whether consent *could* be obtained in the circumstances as a matter of law. With this approach, the credibility and reliability of the complainant's testimony with respect to her *state of mind* is wholly immaterial; what a prosecutor requires to proceed with the case is reliable and credible evidence from any source about the circumstances in which the allege assault occurred. Whether those circumstances were ones in which consent *could* be obtained is a question of law, not fact. The author analyses some of the implications of these issues for trial practice in Vandervort, *supra* note 7. *See* Lucinda Vandervort, *Honest Beliefs, Credible Lies, and Culpable Awareness: Rhetoric, Inequality, and Mens Rea in Sexual Assault*, 42 OSGOODE HALL L.J. 625, 629–32 (2004), for further analysis of *R. v. MacFie (B.S.)*.

78 For a recent case presenting a twist on this issue, see Indictment No. 2526/2011, *People v. Dominique Strauss-Kahn*, 2011 WL 3671880, in which it was alleged that on May 14, 2011, the accused, then President of the International Monetary Fund, sexually assaulted a hotel housekeeper in his New York City hotel suite. On August 22, 2011, the prosecutor filed a motion for dismissal of the charges. The letter filed in support of the motion refers to the complainant's admission that she had fabricated evidence to support her application for asylum in the United States and alleges that in the course of interviews during the investigation, she made inconsistent statements about her actions in the few minutes immediately following the alleged assault by Strauss-Kahn. Recommendation for Dismissal at 2, People v. Dominique Strauss-Kahn, 2011 WL 3659989, *available at* http://www.nytimes.com/interactive/2011/08/22/nyregion/dsk-documents-and-court-filings.html?ref=dominiquestrausskahn. Her credibility with respect to her statements about the facts related to the alleged assault by Mr. Strauss-Kahn does not appear to have impugned. But in the prosecutor's opinion there was reason to believe that although members of a jury might find her credible—just as the investigators had initially—she was not a reliable witness; to proceed would be to risk a wrongful conviction, hence the request for dismissal. Whether the district attorney's office is as careful in its assessment of the reliability of all of its witnesses as it was in this case is unknown.

79 Non-prosecution on ground of "the public interest" is common. This ground is vulnerable to abuse and influence by implicit bias; some decision makers likely conclude that enforcement is not in the "public interest" precisely because they are applying personal views of what constitutes "real" sexual assault or on the basis of conscious or unconscious discriminatory social judgments about either the accused or the complainant.

the absence of consent as an element of the *actus reus*. It is likely that many cases disposed of by a guilty plea also involve circumstances under which no legally valid consent could be obtained. But because these cases end in a guilty plea, followed by sentencing, not a trial, they do not contribute to development of the jurisprudence on the absence of consent in the *actus reus* either. The outcomes in all these cases, both those that are not prosecuted and those that end in a guilty plea, are shaped by the exercise of prosecutorial and judicial discretion and by the advice given to complainants by prosecutors and to accused by their counsel. Prosecutors and trial judges are rarely required to provide comprehensive analyses of the law and the evidence which purportedly ground any recommendations and decisions they make or approve in these cases. Comparatively few sexual assault cases result in an actual trial. The effect of this pattern of dispositions is that the exercise of prosecutorial and judicial discretion with respect to proof of the absence of consent as an element of the *actus reus* is rarely challenged and the jurisprudence dealing with this issue remains relatively undeveloped.

In *Ewanchuk*, Major J. commences his analysis of *mens rea* and the defense of belief in consent by referring to the decision of the Court in *Park*. Justice Major states:

> As with the *actus reus* of the offence, consent is an integral component of the *mens rea*, only this time it is considered from the perspective of the accused. Speaking of the *mens rea* of sexual assault in *Park*, *supra*, at para. 39, L'Heureux-Dubé J. . . . stated that:
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> > . . . the *mens rea* of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying "no", but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying "yes."[80]

Major J. likewise affirms the validity of the proposition adopted by L'Heureux-Dubé and McLachlin in *Park* and *Esau* whereby the availability of a defense of belief in consent depends on evidence that proves the accused believed that:

> the complainant *communicated consent to engage in the sexual activity in question*. A belief by the accused that the complainant, in her own mind, wanted him to touch her but did not express that desire, is not a defence. The accused's speculation as to what was going on in the complainant's mind provides no defence.
>
> For the purposes of the *mens rea* analysis, the question is whether the

80 R. v. Ewanchuk, [1999] 1 S.C.R. 330, para. 45.

> accused believed that he had obtained consent. What matters is whether the accused believed that the complainant effectively said "yes" through her words and/or actions. The statutory definition added to the *Code* by Parliament in 1992 is consistent with the common law:
>
> > **273.1** (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.[81]

"Consent," used as a term to refer to the subjective state of mind of the complainant who wants the sexual activity to take place, is only material, and therefore relevant, when determining whether the *actus reus* of the offense is proven. Major J. distinguishes this meaning and use of the term from the meaning and use of the term "consent" in the context of *mens rea* where:

> "consent" means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused. This distinction should always be borne in mind and the two parts of the analysis kept separate.[82]

It is thus clear that Major J., like L'Heureux-Dubé and McLachlin in *Park* and *Esau*, held that to provide a basis for the acquittal of an accused who engaged in sexual activity with a person who did not consent, the evidence must show that the accused perceived the complainant to have affirmatively communicated, by words or conduct or both, agreement to engage in the sexual activity. Adopting the proposition set out by L'Heureux-Dubé J. in *Park,*[83] Major J. states in *Ewanchuk* that "[w]hat matters is whether the accused believed that the complainant effectively said 'yes' through her words and/or actions."[84] But the defense of belief in consent is not available to the accused unless there is evidence of words or conduct by the complainant that could be perceived as affirmative communication of agreement to engage in the sexual activity with him. Major J. then refers to reasons by McLachlin J., as she then was, in *Esau,*[85] as authority from the Court for the proposition

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81 *Id.* at paras. 46–47.

82 *Id.* at para. 49.

83 R. v. Park, [1995] 2 S.C.R. 836, para. 39 (Can.).

84 *Ewanchuk*, [1999] 1 S.C.R. 330 at para. 47.

85 R. v. Esau, [1997] 2 S.C.R. 777, para. 79 ("An accused who, due to wilful blindness or recklessness, believes that a complainant . . . in fact consented to the sexual activity at issue is precluded from relying on a

that, at common law and pursuant to section 273.2, the defense of belief in consent is not available where the belief is due to recklessness or wilful blindness.[86]

Citing *M. (M.L.)*,[87] Major J. holds that beliefs about consent that are mistakes of law provide no defense of belief in consent. Specifically mentioned are the beliefs that silence, passivity, or ambiguous conduct constitute consent or that "no meant yes."[88] In short, failure to appreciate the legal significance of facts of which the accused is aware is a mistake of law that bars the accused from relying on a defense of belief in consent based on that mistake.[89] The mistake, however genuine it may be, is not a mistake about a fact, and thus

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defence of honest but mistaken belief in consent, a fact that Parliament has codified: *Criminal Code*, s. 273.2(*a*)(ii).").

86 *Ewanchuk*, [1999] 1 S.C.R. 330 at para. 52.

87 R. v. M. (M.L.), [1994] 2 S.C.R. 3 (Can.).

88 *Ewanchuk*, [1991] 1 S.C.R. 330 at para. 51.

89 The application of this proposition to the offense of sexual assault was first advocated in Vandervort, *supra* note 1. Errors of law by accused and decision makers have analogous effects. Accordingly, failure by a trial judge to appreciate the legal significance of findings of facts is recognized to be an appealable error of law. *See* R. v. Luedecke, 2008 ONCA 716 (Ont.), *per* Doherty J.A, paras. 46–51; R. v. Ewanchuk, [1999] 1 S.C.R. 330, para. 21 (Can.), where Major states:

> 21 The majority of the Court of Appeal dismissed the appeal on the ground that the Crown raised no question of law but sought to overturn the trial judge's finding of fact that reasonable doubt existed as to the presence or absence of consent. If the trial judge misdirected himself as to the legal meaning or definition of consent, then his conclusion is one of law, and is reviewable. *See Belyea v. The King*, [1932] S.C.R. 279, [296 (Can.),] *per* Anglin C.J. . . .:
>
> > The right of appeal by the Attorney-General, conferred by [the *Criminal Code*] is, no doubt, confined to "questions of law." . . . But we cannot regard that provision as excluding the right of the Appellate Divisional Court, where a conclusion of mixed law and fact, such as is the guilt or innocence of the accused, depends, as it does here, upon the *legal effect of certain findings of fact* made by the judge or the jury . . . to enquire into the soundness of that conclusion, since we cannot regard it as anything else but a question of law,—especially where, as here, it is a clear result of misdirection of himself in law by the learned trial judge. [Emphasis added.]

When interpretation of a statutory provision is at issue, see *R. v. Ashlee*, 2006 ABCA 244, paras. 8–9 (Alta.), where Paperny J.A. stated, for the majority: "This appeal turns on the proper interpretation of s. 273.1 of the *Criminal Code*, specifically, what Parliament intended when it negatived consent under s. 273.1(2)(b) where the complainant is 'incapable of consenting' . . . . The proper interpretation of s. 273.1 of the *Criminal Code* is a

is not exculpatory and does not provide the accused with a ground for acquittal.

The reasons for judgment by the Supreme Court of Canada in *R. v. Ewanchuk* thus provide a resounding rejection of the concept of "implied consent," long-recognized in Canada as a major impediment—at least as "implied consent" was commonly interpreted by jurists—to effective enforcement of the laws prohibiting sexual assault. Fraser, Chief Justice of the Alberta Court of Appeal, described the problem "implied consent" posed for effective enforcement of the laws prohibiting sexual assault in her dissenting reasons for judgment in *Ewanchuk*:

> Taken together with Parliament's decision to define "consent" in this context, these amendments represent further legislative steps to overcome the apparent unwillingness by some to let go of the debunked notion that unless a complainant physically resisted or expressed verbal opposition to sexual activity, an accused was entitled to assume that consent existed. Instead, the amendments place the responsibility to ascertain the *presence of consent* to sexual activity precisely where it belongs—on the person, male or female, who wishes to initiate sexual contact with another person.
>
> Parliament also included for the first time ever (in s. 273.1) a statutory definition of consent in sexual assault cases. "Consent" now means the *voluntary agreement of the complainant to engage in the sexual activity in question.* By defining "consent" to mean the *voluntary agreement* to engage in sexual activity, Parliament signalled that the focus should henceforth be on whether the complainant *positively affirmed* her willingness to participate in the subject sexual activity as opposed to whether she *expressly rejected* it. Parliament understood very well that a definition of "consent" was required to overcome the historical tendency by some judges to treat a complainant's silence or non-resistance as "implied consent". It followed in the minds of those who took this view that the Crown could not meet its burden of proving lack of consent by showing that the complainant did not give her affirmative consent. This was not enough. What the Crown

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question of law reviewable on a correctness standard." Thus it is quite clear that errors about the law of consent are grounds for appeal on a question of law. However, the Crown does not always appeal acquittals based on misdirection or self-misdirection. *See* Lucinda Vandervort, *Legal Subversion of the Criminal Justice Process? Judicial, Prosecutorial and Police Discretion in* R. v. Edmondson, Kindrat *and* Brown, *in* SEXUAL ASSAULT IN CANADA: LAW, LEGAL PRACTICE & WOMEN'S ACTIVISM (Elizabeth Sheehy ed., (2012), *available at* http://ssrn.com/abstract=1561462.

> had to do, according to those who endorsed this approach, was to prove that the complainant had expressed her non-consent. In other words, did she say "No" or give the accused a slap in the face or a well-placed knee in the groin or some other incontrovertible overt "No" signal? If she did not, then her consent to what transpired could be presumptively implied by the judge as well as the perpetrator—and often was.[90]

Despite official repudiation of "implied consent" to sexual activity by both Parliament and the Supreme Court of Canada, some Canadians continue to perpetuate the old assumption, described above in the passage by Fraser C.J.A, that consent may be implied, i.e. presumed, quite in the absence of any words or conduct that explicitly and unequivocally communicate consent. This troublesome issue is considered further below.

Since its decision in *R. v. Ewanchuk* in 1999, the Supreme Court of Canada has decided a number of other cases involving the definition of consent and taken an approach consistent with the jurisprudence laid out in that decision. In the judgments in these cases, however, the definition of "consent," as such, is rarely discussed even though the definition often plays a determinative role in framing the issues to be decided. *R. v. Sazant* is one of those rare cases.[91]

R. v. Sazant—Back to the future in the lower courts?: In its 2004 decision in *R. v. Sazant,*[92] the Supreme Court of Canada allowed the Crown's appeal, set aside the order discharging the accused on a historical sexual offense, and remitted the case to the preliminary inquiry judge. The issue in the appeal was whether the preliminary inquiry judge had exceeded his jurisdiction. The inquiry judge had ordered the accused discharged on the ground that a reasonable jury properly instructed could not find that the alleged activity was grossly indecent because, in his view, there was no evidence of non-consent. Following reversals by two further levels of court, Major J. pointed to direct evidence of lack of consent in the transcript of the complainant's testimony at the preliminary hearing and held, for the majority, that the original discharge was based on a jurisdictional error.

The transcript of the preliminary hearing provides evidence of significant confusion about the definition of sexual consent and what constitutes proof of consent and the absence of consent. Major. J. held that the preliminary inquiry judge erred when he concluded that the Crown must to be able to show words or conduct indicating refusal, not simply evidence

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90 R. v. Ewanchuk (1998), 1998 ABCA 52, 57 Alta. L.R. 3d 235, paras. 58–59, (Fraser, C.J.A., dissenting).

91 R. v. Sazant, 2004 SCC 77, [2004] 3 S.C.R. 635 (Can.).

92 *Id.*

of the complainant's state of mind. The judge at the first level of review, recognizing that lack of consent is determined by the subjective state of mind of the complainant at the time of the act, found there was evidence to go to the trier of fact and ordered the accused to stand trial. The Ontario of Court of Appeal reversed that decision and restored the discharge order on the basis of a different interpretation of what constitutes excess jurisdiction, not on the basis of a different understanding of the law of consent. In his reasons for judgment for the Supreme Court of Canada in *Sazant,* Major J. found evidence of significant confusion in the lower courts related to interpretation and application of the law of consent and concluded that any of three possible interpretations of what the preliminary inquiry judge did would result in loss of jurisdiction.[93]

The transcript from the preliminary hearing in this case illustrates the propensity sometimes shown by some decision-makers—from police to prosecutors to trial judges—to exceed their jurisdiction and make decisions that, in law, are not theirs to make.[94] The transcript and subsequent decisions as the review process moved through the courts also illustrate the potential impact of erroneous beliefs about the law of consent on decision-making in sexual assault cases. If charges are not laid or cases are discharged because judges and prosecutors lack an appreciation of the operation of the law of sexual consent and its implications for the disposition of cases before the courts, the law mandated by Parliament is subverted; the effects are almost inevitably regressive. In *Sazant* we see abuse of power, errors in the exercise of discretion, and mistakes of law working in combination in the lower courts to undermine the very legal measures adopted by Parliament to clarify the sexual assault laws and thereby enhance legal protection of sexual integrity and personal security. The irony is breathtaking. One is reminded of the remarks by L'Heureux-Dubé in her reasons for dissent in *Seaboyer* about the futility of relying on the exercise of discretion by trial judges in sexual assault cases. In support of the constitutionality of the pre-1992 "rape-shield" provisions that strictly curtailed judicial discretion to admit evidence of the complainant's sexual history, she stated:

> I have already dismissed the argument that the means would have been better tailored had they left discretion in trial judges. As I said above, the nature of the problem facing Parliament did not admit of a solution through the exercise of discretion of trial judges. History demonstrates that it was discretion in trial judges that saturated the law in this area with stereotype. My earlier discussion shows that we are not, all of a sudden, a society rid of such beliefs, and hence, discretionary decision making in this realm is

93 *Id.* at paras. 19–26.

94 The issue of excess jurisdiction in sexual assault cases merits further study and analysis.

> absolutely antithetical to the achievement of government's pressing and substantial objective.[95]

Those comments about the effects of the exercise of judicial discretion in sexual assault cases remain pertinent even though two decades have passed since the *Seaboyer* decision was rendered.

The gap between law and its implementation

Transcripts of judicial proceedings and decisions rendered in the lower courts since the release of the Supreme Court of Canada's decision in *Ewanchuk* provide other examples of arguably erroneous interpretations and applications of the law of consent.[96] Few of these decisions are appealed when the verdict is an acquittal. At the same time, statistics on rates of reporting and police and prosecutorial decision-making suggest that non-legal stereotypes, beliefs, and attitudes still influence decisions about the processing of the offenses that are reported to the police. Reliance on traditional generalizations and misconceptions continues to ensure that the law of sexual consent is sometimes ignored, sometimes misinterpreted, and often fails to achieve its promise. The working understanding of the law relied on by police, prosecutors, complainants, and assailants continues to be shaped by the decisions made by local judges in the few cases that actually proceed to trial. This, combined with the choices police and prosecutors must often make when working with limited resources, only further reinforces traditional patterns of decision-making and recycles bias and prejudice, ensuring that many reported offenses are not investigated properly and are either classified as "unfounded" or not selected for prosecution. Meanwhile, rates of reporting remain quite low.[97]

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95 R. v. Seaboyer; R. v. Gayme, [1991] 2 S.C.R. 577, para. 275 (Can.) (L'Heureux-Dubé, J., dissenting). At issue was the constitutionality of the statutory "rape-shield" provisions in the *Criminal Code*.

96 The full text of all reported decisions rendered by the courts in Canada is available from Canadian Legal Info. Inst., CANLII, http://www.canlii.org/en/ (last visited Apr. 14, 2012). Some older decisions are not yet available in digital form. Most Canadian courts, federal and provincial, maintain websites that may contain additional open access materials. For example, factums and webcasts of hearings are now posted on the Supreme Court of Canada website, SUPREME COURT OF CANADA, http://www.scc-csc.gc.ca/ (last visited Apr. 14, 2012). For a sample of analysis and criticism of recent trial decisions, see *infra* note 102; Vandervort, *supra* note 89, at 113; and Lucinda Vandervort, *"Too Young to Sell Me Sex!?" Mens Rea, Mistake of Fact, Reckless Exploitation, and the Underage Sex Worker*, 58 CRIMINAL LAW QUARTERLY 330 (2012), HAMISH C. STEWART, SEXUAL OFFENCES IN CANADIAN LAW (2004) is an annually updated and well-organized loose-leaf resource for all aspects of sexual assault law in Canada.

97 For sources of statistics from Statistics Canada, calculations, and discussion of the issues that must be considered when interpreting published statistics, see Holly Johnson, *Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault*, *in* SEXUAL ASSAULT IN CANADA LAW: LEGAL PRACTICE

It is thus undeniable that there is still a significant gap between the law of sexual consent and how it is often applied in practice in Canada. The jurisprudence and legal history reviewed in this article leaves no question but that at present Canadian sexual assault law, as amended by Parliament and interpreted and applied by the Supreme Court of Canada, requires affirmative communication by words or conduct of valid consent or voluntary agreement to sexual contact. At the same time, public legal consciousness, as reflected in academic and journalistic commentary, does not invariably appear to encompass awareness that affirmative sexual consent is not an "emerging" standard, but is required at common law and, since 1992, by statute. There is, of course, considerable pragmatic wisdom in the legal realist view that what the law "is" is seen in its effects—in what police, prosecutors, and trial judges decide in individual cases, most of which are never reviewed by the appellate courts.[98] Members of the public and many academics learn much of what they know about sexual assault law from the "law in action" as complaints are screened and classified by police and prosecutors and cases are disposed of in the lower courts. Some of those decisions are based on errors of law and abuse of discretion and can easily result in a distorted and often misleading portrait of the "law" of sexual consent and sexual assault.[99] But it is *that* law, "law in action," whose effects shape and are seen in the lived experience of complainants.

It is therefore likely that "law in action" in sexual assault cases, as constituted by the totality of the decisions made in the criminal justice system in the process of disposing of

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AND WOMEN'S ACTIVISM (Elizabeth A. Sheehy ed., (2012). Johnson bases her discussion on information about reporting and enforcement obtained from victimization surveys conducted by Statistics Canada about the number of incidents as opposed to the number of cases reported, and statistics that reveal attrition as reported cases progress through the criminal justice system. Johnson reports that three surveys conducted between 1993 and 2004 show that less than 10% of sexual assaults were reported to police. "Founding" rates for sexual assault cases vary, but Johnson reports these are significantly lower than other types of offenses. Since 1994, only 42% of the cases labeled by police as "founded" have resulted in charges. Of these, 11% led to a conviction. In 2004, the Statistics Canada victimization survey found 460,000 incidents of alleged sexual assault. Roughly 0.3% or 1,406 offenders were convicted. On this basis, the attrition rate from alleged incident to conviction is estimated at 99.7%. For discussion of violence of all types against women in Canada, see HOLLY JOHNSON & MYRNA DAWSON, VIOLENCE AGAINST WOMEN IN CANADA: RESEARCH AND POLICY PERSPECTIVES (2011).

98 This strand of legal realism, emphasizing the significance of decision making at the trial level, is seen in JEROME FRANK, COURTS ON TRIAL (1973). Originally published in 1949, the book collects essays and lectures Frank delivered over a number of years.

99 A significant portion of the research and writing about sexual offenses is authored by academics and scholars who are trained in disciplines other than law. In some cases the authors may assume that the decisions about the assault complaints and cases they examine are "correct" in law when they are not. As a consequence, their criticism of "the law" is sometimes misdirected and misses its proper target—decision makers who purport to interpret and apply the law but fail to do so correctly.

sexual assault complaints, is the single most significant cause of both the lack of awareness of what the law actually requires and failure to enforce the law. Those patterns may also explain why the concerns social critics and commentators raise about decisions made by police, prosecutors, and trial judges in sexual assault cases are so similar to those that have been raised by critics and activists for many decades.[100] At the grassroots level, much remains much the same. It is therefore understandable that some critics might conclude—based on complainants' experiences with the criminal justice process over the past dozen years since *Ewanchuk* was decided—that it is self-evident that further reform of the sexual assault laws is needed.

That assumption does not hold up under scrutiny, however. At present, the main impediments to correct interpretation and application of the sexual assault laws in Canada are neither the substantive sexual assault laws nor the evidentiary and procedural provisions used in the interpretation and application of those laws. The sexual assault laws, as such, are quite adequate. Arguably this was also largely the case twenty-five years ago; those of us who may have believed otherwise or assumed that clarifying the law would be sufficient to ensure its correct interpretation and enforcement were idealistic, naïve, or both. Now, however, there can be little doubt but that the law of sexual assault in Canada is not only adequate and squarely grounded on a foundation of common law principles but also comparatively clear and unambiguous.[101]

Nonetheless, it is the case that the sexual assault laws are not being utilized to their full potential and that only marginal changes in enforcement patterns have been achieved since 1992. Many decision-makers at the grassroots level may not fully understand the practical significance of the law as construed by the Supreme Court of Canada and they may be distracted by the challenges and apparent complexity of the cases with which they are presented. The exercise of discretion by police, prosecutors, and trial judges often appears

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100 One example is the interpretation and application of the new "rape-shield" provisions, enacted in 1992 in response to the decision in *Seaboyer*. In many cases decided since 1992, evidentiary rulings by trial judges either ignore the criteria and procedure required by the new "rape shield" provisions or apply the provisions in a manner that exhibits the same type of flaws L'Heureux-Dubé deplored in her dissent in *Seaboyer*. *See supra* text accompanying note 95.

101 The adequacy of the law of consent and sexual assault is demonstrated again and again as it is used to generate definitive responses to previously undecided questions of interpretation and application. *See* R. v. J.A., 2011 SCC 28, [2011] 2 S.C.R. 440 (Can.), *rev'g* 2010 ONCA 226, 260 O.A.C. 248 (Ont.); R. v. Ewanchuk, [1999] 1 S.C.R. 330 (Can.); R. v. Ashlee, 2006 ABCA 244, 61 Alta. L.R. 4th 226 (Alta.); *see also* R. v. Mabior, an appeal from the 2010 decision by the Manitoba Court of Appeal (reported at 2010 MBCA 93 (Can.), heard by the Supreme Court of Canada on February 8, 2012, decision reserved (which this author predicts will similarly demonstrate the "adequacy" of the law in this sense). The central issue in *Mabior* is whether nondisclosure of positive HIV status vitiates consent.

to reflect the private and personal beliefs and attitudes of these decision-makers; many of their decisions do not comply with the rule of law.[102] That is problematic. Whether the failure of decision-makers to adhere to national legal standards and make decisions that comply with the law is due to lack of legal knowledge, bias, or conscious refusal to apply the law, it remains a problem that must be addressed. It is not acceptable for sexual assault allegations that are reported to the police to be held to be unfounded, not prosecuted, or dismissed in the course of judicial proceedings, other than in accord with the rule of law. But the solution does not lie in further amendment of the sexual assault laws. The experiences of sexual assault complainants with the criminal justice process over the last few decades demonstrate that it is foolish to assume that errors in interpretation, application, and enforcement of the law that are due to ignorance of the law, failure to appreciate the legal significance of the facts, or misuse and abuse of discretion can be resolved by further amendments to the substantive, procedural, and evidentiary provisions of the *Criminal Code*. Again and again, codification and reform by means of *Code* amendments have proven to be quite insufficient to address these issues.[103]

The sources of errors of law and abuses of discretion need to be identified, examined, and properly characterized. That project will require empirical study and critical analysis of how discretion is exercised at present by decision-makers in the criminal justice system in sexual assault cases, how the exercise of that discretion is regulated, and how mechanisms which in theory are already available to correct legal errors and limit abuse of discretion are actually operating in practice. Such analyses are needed to determine what new regulatory measures and mechanisms are required to ensure that discretion is exercised in accordance

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102 Ruthy Lazar interviewed prosecutors and defense counsel in wife/partner rape cases. She found that as a group they "*presume* consent to sex in intimate relationships, which, in turn, shapes the way these players construct and litigate wife rape." Ruthy Lazar, *Negotiating Sex: The Legal Construct of Consent in Cases of Wife Rape in Ontario Canada*, 22 CANADIAN J. WOMEN & L. 329, 333 (2010); *see also* Jessica Derynck, *Lacking Context, Lacking Change: A Close Look at Five Recent Lower Court Sexual Assault Decisions*, 14 APPEAL: REV. CURRENT L. & L. REFORM 108 (2009); Melanie Randall, *Sexual Assault in Spousal Relationships, Continuous Consent, and the Law: Honest But Mistaken Judicial Beliefs*, 32 U. MAN. L.J. 144 (2008); Melanie Randall, *Sexual Assault Law, Credibility, and "Ideal Victims": Consent, Resistance, and Victim Blaming*, 22 CANADIAN J. WOMEN & L. 397 (2010).

103 Further law reform initiatives would likely build on and elaborate the existing statutory provisions in order to provide additional statutory guidance for interpretation and application of the law. Ordinarily the appellate courts perform that function in criminal cases. The creation of more detailed guidelines by either method does not guarantee that the law will be followed or enforced, however. The enactment of statutory amendments tends to focus critical attention on the new provision for a time as empiricists attempt to ascertain whether the provision is efficacious. For observers who have seen a number of these cycles of "reform" and "research," the spectacle evokes images of Sisyphus pushing that boulder up the mountain yet again and Nero still fiddling while Rome continues to burn.

with the rule of law in sexual assault cases in the future.

Effective regulation of police, prosecutorial, and judicial discretion is far more feasible now than it was in the past precisely because the requirement of express "voluntary agreement" to sexual activity brings precision and comparative certainty about the legal significance of the facts to case analysis. The legal definition of sexual consent as express "voluntary agreement" is based on a comprehensive conceptualization of consent and protects individual rights to sexual autonomy and self-determination. The definition is robust and creates a unique set of well-defined and nondiscretionary reference points to anchor analysis of the legal significance of the facts in sexual assault cases. This is invaluable for the identification of legal errors and abuses of discretion. The definition will be as crucial for the design and effective operation of any mechanisms that may be required to regulate the decision-making processes used by police and prosecutors, as decisions by the Supreme Court of Canada have shown it to be for judicial analysis of the legal significance of the facts in sexual assault cases. Certainty about what constitutes proper legal analysis of the facts under diverse circumstances will also make it possible to advocate effectively for the adoption of any systemic and regulatory changes that are necessary to curtail the abuse of discretion by police, prosecutors, and trial judges who process sexual assault complaints.

Exactly what those measures can and should be in order to achieve compliance with the rule of law, including the provisions and principles of constitutional and international human rights law, remains to be determined. Canadian experience with the enforcement of the sexual assault laws in recent decades clearly points to one conclusion, however. In the absence of systemic and regulatory initiatives that are effective to limit legal errors and the abuse of discretion by decision-makers in the criminal justice system, interpretation, application, and enforcement of even the best-designed sexual assault laws often fail to comply with the rule of law. The adoption or enactment of well-designed laws is an essential and invaluable first step in bringing the rule of law to bear on sexual assault offenses. It is only a first step, however. Measures that are specifically designed to secure proper implementation and effective enforcement of the law defining sexual consent and sexual assault are also required.