
Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief

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Women with mental disabilities experience high rates of sexual assault. The authors trace the history of the criminal law's treatment of cases involving such acts in order to evaluate whether the substantive law of sexual assault is meeting the needs of this group of women. In particular, the authors focus on the legal issues of consent, capacity, and mistaken belief.

The authors situate this discussion in the context of current debates in feminist and critical disability theory, grounding the theory in scholarly research on sexual assault of women with mental disabilities. In considering the law's treatment of sexual violence against this group of women, the authors engage two key theoretical tensions: (1) the supposed dichotomy of protection and autonomy, and (2) the shift from biomedical to social models of disability.

The authors conclude that the substantive law of sexual assault is inadequate to meet the needs of women with mental disabilities. The authors propose, as a partial solution, a reformed legal analysis that focuses on the accused's abuse of a relationship of power or trust, the accused's coercive behaviour, and the complainant's voluntariness. While the authors acknowledge that women with mental disabilities face certain unique challenges, they reject the creation of special legislative provisions as a solution; they assert instead the importance of recognizing the common experience of inequality that this group shares with other women.

In a subsequent paper, published in Issue 3 of Volume 52 of the *McGill Law Journal*, the authors examine whether the present procedural and evidentiary laws allow the stories of women with mental disabilities to be heard and responded to in Canada's criminal justice system.

Les femmes souffrant de déficiences mentales sont souvent victimes d'agression sexuelle. Les auteures tracent l'historique des dispositions de droit criminel en la matière dans le but d'évaluer si le droit substantiel est apte à répondre aux besoins de ces femmes. Les auteures mettent de l'emphase particulièrement sur les questions de droit tel que le consentement, la capacité et la croyance erronée.

Les auteures situent cette discussion dans le contexte des débats actuels sur les théories féministes et la théorie critique sur l'incapacité, basant leur théorie sur la recherche académique ayant trait à l'agression sexuelle des femmes souffrant de déficiences mentales. Prenant en considération la façon dont le droit traite la violence sexuelle contre ce groupe de femmes, les auteures présentent deux courants théoriques : (1) celle de la prétendue dichotomie entre la protection et l'autonomie et (2) celle du transfert du modèle biomédical au modèle social de l'handicap.

Les auteures concluent que le droit substantiel sur l'agression sexuelle est inadéquat en guise de réponse aux besoins des femmes souffrant de déficiences mentales. Comme solution partielle, les auteures proposent une analyse de l'abus d'une relation de pouvoir ou de confiance par l'accusé, du comportement coercitif de l'accusé et de la volonté du plaignant. Bien que les auteures admettent que les femmes avec des problèmes d'ordre mentaux font face à certaines difficultés uniques, elles rejettent la possibilité d'instaurer des dispositions législatives distinctes. Par ailleurs, ceux-ci mettent l'emphase sur l'importance de reconnaître l'expérience collective d'inégalité que ce groupe partage avec le reste des femmes.

Dans un article subséquent, publié dans le troisième numéro du volume 52 de la *Revue de droit de McGill*, les auteures analysent le droit de la procédure et celui de la preuve en se demandant si ces branches du droit donnent la possibilité aux femmes souffrant de déficiences mentales et qui ont subi une agression sexuelle d'être écoutées et si la justice criminelle du Canada répond à leurs besoins.

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To be cited as: (2007) 52 McGill L.J. 243

Mode de référence : (2007) 52 R.D. McGill 243

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Introduction

Women with mental disabilities experience high rates of sexual assault.¹ In this article, we evaluate whether the criminal law of sexual assault, both in its statutory provisions and in the way that courts apply the law, is taking into account the experiences and meeting the needs of women with mental disabilities.

Over the past fifteen years, the criminal law of sexual assault has undergone significant amendment. These changes were driven in part by criticisms that sexual assault laws were based on sexist assumptions and stereotypes that impede women's access to full and equal justice.

In assessing whether our current legislative provisions are adequate to meet the needs of complainants with mental disabilities, we consider whether targeted legislative provisions for this group of complainants are necessary and/or appropriate. In particular, we consider the effect of the 1998 offence of sexual exploitation of a person with a disability, as well as the meaning of incapacity to consent as it is applied to complainants with mental disabilities. We also discuss whether the evolving definitions of consent and mistake of fact are being developed in the case law with this group of complainants in mind.

Having reviewed the case law, we conclude that the law fails to provide justice for women with mental disabilities. The substantive law of sexual assault is, in many respects, premised on the assumption that complainants do not have disabilities. We suggest that by moving the experiences of women with mental disabilities from “[m]argin to [c]entre,”² we stand to gain in our understanding of sexual violence as an act of sex discrimination against all women. In particular, we argue that the supposed dichotomy between, on the one hand, the need to protect women from sexual exploitation and, on the other hand, the need to promote the sexual autonomy of women, is not a useful or accurate way of thinking about sexual violence. Rather, freedom from sexual violence is a necessary precondition for sexual autonomy. When feminist theory focuses on the supposed tension between autonomy and protection, this reality is obscured.

This is the first of two papers examining the effectiveness of sexual assault law in this context. We focus here on the substantive law dealing with the elements of sexual assault in the *Criminal Code*³ and the ways in which courts interpret and apply these provisions; we pay special attention to the issues of consent, capacity, and mistaken belief. In a subsequent paper, we examine the law that governs the criminal trial process, with the aim of determining whether procedural and evidentiary laws allow

¹ See text accompanying note 64 for our definition of “mental disability” and Part IV for a discussion of the prevalence of sexual assault against this group of women.

² bell hooks, *Feminist Theory: From Margin to Center* (Boston: South End Press, 1984).

³ R.S.C. 1985, c. C-46.

the stories of women with mental disabilities to be heard and responded to by the criminal justice system.⁴

The present paper begins with a review of the history of the criminal law's treatment of sexual assault cases involving women with mental disabilities as well as modern legislative attempts to address this category of sexual assault. We situate this discussion in the context of current debates in feminist and critical disability theory. We then use our analysis of the case law on the substantive elements of sexual assault to reconsider these debates. Our analysis draws out both the common experiences that women with mental disabilities share with other women, as well as the unique challenges that this group of women faces in attempting to seek justice.

I. History of the *Criminal Code* Provisions

The *Criminal Code* ("Code") has addressed the sexual assault of women with disabilities in various ways since its inception. The original 1892 Code contained a provision making it an offence to have "unlawful carnal knowledge" of any "female idiot or imbecile, insane or deaf and dumb woman or girl, under circumstances which do not amount to rape but which prove that the offender knew, at the time of the offence" that the woman belonged to one of the groups listed.⁵

The offence was made more expansive in ensuing versions of the Code. In 1900, the knowledge requirement was changed, slightly, to include situations in which the accused "had good reason to believe" that the complainant fell into one of the listed categories.⁶ Later versions were expanded to include women who were "feeble-minded", which the Code defined as including "a person in whose case there exists from birth or from an early age, mental defectiveness not amounting to imbecility yet so pronounced that he or she requires care, supervision and control."⁷ This version continued in force until 1954, when the language was changed slightly and the reference to "deaf and dumb" removed. The maximum penalty of four years imprisonment (increased to five years in 1954) was lower than for the crime of rape, which carried a maximum penalty of death (later reduced to life imprisonment).⁸

⁴ We recognize that the distinction between substance and procedure is not watertight and that the two are in many ways interdependent. Nevertheless, we consider this a workable division for dealing with such a large topic. We consider related issues of evidence and the procedure in a subsequent article (Janine Benedet & Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues" (2007) 52 McGill L.J. [forthcoming]).

⁵ *The Criminal Code, 1892*, S.C. 1892, c. 29, s. 189. The provision first entered Canadian law in 1886 (*An Act to punish seduction, and like offences, and to make further provision for the Protection of Women and Girls*, S.C. 1886, c. 52, s. 1(2)). The original provision did not use the phrase "deaf and dumb"; this is a later addition.

⁶ *The Criminal Code, 1892, ibid.*, s. 189, as am. by S.C. 1900, c. 46, s. 189.

⁷ *Criminal Code*, R.S.C. 1906, c. 146, s. 2(14)(a), as am. by S.C. 1922, c. 16, s. 10.

⁸ *Criminal Code*, S.C. 1953-54, c. 51, s. 140.

This lesser offence was likely considered necessary because the general crime of rape was extremely difficult to prove, even for women who did not have disabilities. In order to prove that sexual intercourse had occurred without the woman's consent, the Crown usually had to show that the woman had physically resisted the accused or that she failed to resist because of threats of violence.⁹ In cases where the complainant had a mental disability, there might have been no physical resistance and no evidence of threats by the accused that could be relied on to explain why resistance was absent.

In one sense, then, the targeted offence could be seen as a progressive step within the confines of a sexist rape law. After all, although there were scores of rapes in which women without mental disabilities failed to physically resist, such cases were rarely prosecuted. Thus the provision could be seen as providing more expansive protection to women with disabilities, on the assumption that they were more vulnerable to sexual exploitation by men.

In practice, however, the application of the "carnal knowledge" section was not always so salutary. Corroboration of the complainant's testimony was still required, and the jury was instructed that it would be unsafe to convict based on the woman's testimony alone.¹⁰ In addition, despite the fact that the Code section made no mention of "consent", some courts may have been influenced by the common law cases that held that the accused should be acquitted if the woman had submitted out of "an animal instinct"¹¹ caused by her "idiotic state".¹²

Other courts rejected this approach, not because describing women as motivated by "animal" passion was insulting or discriminatory, but because animal passion should be seen as proof of an inability to control sexual impulses, and therefore supportive of a conviction.¹³

⁹ See Christine Boyle, *Sexual Assault* (Toronto: Carswell, 1984); Lorenne Clark & Debra Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: Women's Press, 1977) at 162.

¹⁰ See *R. v. Probe*, [1943] 3 D.L.R. 32, [1943] 2 W.W.R. 62, 79 C.C.C. 289 (Sask. C.A.). See also *R. v. Kyselka*, [1962] O.W.N. 160, 133 C.C.C. 103 (C.A.) [cited to O.W.N.] (complainant was described as "mentally retarded" and functioning at a grade six level (at 160); three accused were charged with rape, not the carnal knowledge offence; convictions were overturned because of the judge's failure to issue the warning that it was unsafe to convict on her uncorroborated testimony of resistance); *R. v. Reeves* (1941), [1942] 1 D.L.R. 713, 57 B.C.R. 90, 77 C.C.C. 89 (C.A.) (confirming the need for corroborative evidence and holding that the carnal knowledge offence is not an included offence in a charge of rape).

¹¹ *R. v. Fletcher* (1859), 8 Cox Crim. Cas. 131 at 134 (Ct. Crim. App.). This approach was affirmed in *R. v. Fletcher* (1866), 10 Cox Crim. Cas. 248 [*Fletcher*] (finding evidence from a "medical man" "that strong animal instincts might exist, notwithstanding her imbecile condition" at 248). See also *R. v. Barratt* (1873), 12 Cox Crim. Cas. 498 (Ct. Crim. App.). The concept of "animal passion" was referred to (and rejected on the facts) in the Canadian case of *R. v. Walebek* (1913), 10 D.L.R. 522 at 525, 23 W.L.R. 931 (Sask. S.C.).

¹² *R. v. Barrat*, *ibid.* at 499.

¹³ See *R. v. Red Old Man* (1978), [1979] 8 Alta. L.R. (2d) 101, 44 C.C.C. (2d) 123 (Dist. Ct.). In the early Canadian case of *R. v. Connolly* (1867), 26 U.C.Q.B. 317 (C.A.), the court cites the rule in

In the major 1982 redrafting of the sexual offence provisions, the “carnal knowledge” provision was repealed.¹⁴ Its only analogue today is a reference in the definition of consent, added in 1992, that “[n]o consent is obtained, for the purposes of sections 271, 272 and 273, where ... the complainant is incapable of consenting.”¹⁵ The incapacity provision in paragraph 273.1(2)(b) ostensibly applies to all sources of incapacity including, for example, intoxication and unconsciousness, as well as to incapacity as a result of mental disability.

In the 1980s and 1990s, groups representing persons with disabilities began to campaign for changes to both the substantive criminal law and the law of evidence and criminal procedure to address the high rate of sexual violence against persons with disabilities—particularly, women with mental disabilities. Disability rights groups recognized that persons with disabilities were especially vulnerable to physical and sexual abuse from caregivers and other persons in authority. They suggested that some sort of criminal offence, perhaps one modelled on subsection 153(1) of the Code, which criminalizes the sexual exploitation of a young person, be created to specifically address these assaults.¹⁶

Subsection 153(1) was added to the Code in the 1987 revisions dealing with the sexual abuse of children.¹⁷ It makes it an offence for a person to have sexual contact with a young person (defined as a person between the ages of fourteen and seventeen, inclusive) where that person stands in a relationship of authority, trust, or a position of dependency with the young person or, as added in 2005, where the relationship with the young person is exploitative.¹⁸ Nonconsent is not an element of the offence.

Fletcher, *supra* note 11 with apparent approval, noting that it could not be presumed that an idiot or lunatic woman was incapable of consent, but that evidence of her habits, character, decency, or chastity was required. The court held that where a woman was of proper moral habits, she would have the capacity to refuse consent, such that her lack of protest or resistance could be equated with consent. The court appears to be implying that animal instincts, by contrast, would suggest an incapacity to consent.

¹⁴ *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1982, c. 125, s. 8, amending R.S.C. 1970, c. C-34 [1982 amendments].

¹⁵ *Criminal Code*, *supra* note 3, s. 273.1(2)(b), as am. by *An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38, s. 1.

¹⁶ For example, the Department of Justice, in its consultations on sexual exploitations in 1997, noted strong support in the disability community for a new offence modelled on the sexual exploitation offence. See Department of Justice, “Index of Past Consultations: I. Sexual Exploitations” (12 September 1997), on file with author.

¹⁷ *An Act to amend the Criminal Code and the Canada Evidence Act*, R.S.C. 1985 (3d Supp.), c. 19, s. 1, amending *Criminal Code*, *supra* note 3.

¹⁸ *Criminal Code*, *supra* note 3, s. 153(1), as am. by *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32, s. 4(1) (determining an exploitative relationship by the nature and circumstances of that relationship, including the age of the complainant, the age difference between the two participants, the evolution of the relationship, and the degree of influence or control exercised by the accused over the complainant child).

While supporting such an offence, groups representing persons with disabilities also argued that “any new provision must be drafted so it would not prevent such dependent adults from freely consenting to sexual activity, even with their caregiver.”¹⁹ The Criminal Lawyers’ Association, an association of defence counsel, also argued strongly that nonconsent should be an element of any new offence, and argued that even with such an addition, the offence was overbroad and “makes relationships between spouses, acquaintances, and employers very difficult.”²⁰

In 1998, Parliament added to the *Criminal Code* section 153.1, which creates the offence of sexual exploitation of a person with a disability:

(1) Every person who is in a position of trust or authority towards a person with a mental or physical disability or who is a person with whom a person with a mental or physical disability is in a relationship of dependency and who, for a sexual purpose, counsels or incites that person to touch, without that person’s consent, his or her own body, the body of the person who so counsels or incites, or the body of any other person, directly or indirectly, with a part of the body or with an object, is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.²¹

This provision makes it an offence to have sexual contact with a person with a disability in circumstances in which there is a relationship of authority or dependency between the accused and the person with a disability, and where the person with the disability does not consent to the contact. The term “disability” is not defined. “Consent” has the same definition as for sexual assault generally. The maximum penalty for the offence is five years’ imprisonment. The new offence is clearly modelled on the offence of sexual exploitation of a young person, except that proof of nonconsent is also required.²²

In the seven years since section 153.1 was enacted, it has rarely been used. The only cases we could find were two decisions from Quebec in which convictions under section 153.1 formed parts of the guilty pleas submitted by the accused to a number of sexual offence charges. In one case, the accused was the victim’s brother; in the

¹⁹ Department of Justice, *supra* note 16.

²⁰ House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 36th Parl., 1st sess. (25 March 1998) at 17:50-17:55 (Irwin Koziembrocki, Treasurer, Criminal Lawyers’ Association) [Standing Committee on Justice and Human Rights].

²¹ *Criminal Code*, *supra* note 3, as am. by *An Act to Amend the Canada Evidence Act, the Criminal Code, and the Canadian Human Rights Act*, R.S.C. 1998, c. 9, s. 2. At the same time, some procedural changes were made to the *Canada Evidence Act*, R.S.C. 1985, c. C-5 to address the needs of witnesses with disabilities. See *ibid.*

²² In the debate that culminated in the minister of justice’s tabling of the bill in the House of Commons, an explicit parallel was drawn between the two provisions. See *House of Commons Debates*, No. 057 (11 February 1998) at 3742 (Paul Forseth).

other, he was her therapist.²³ This lack of use is not surprising, since the provision tries to satisfy both the goals of protection from harm and the promotion of sexual autonomy in contradictory ways.

Adding a nonconsent requirement to section 153.1 means that the offence adds nothing to the Code. The crime of sexual assault already criminalizes sex without consent, without requiring proof of “disability” plus one of the listed power relationships. Since the maximum penalty in section 153.1 (five years) is actually lower than the penalty for sexual assault under section 271 (ten years), there is little incentive to lay charges under the section. Indeed, the practical disutility of section 153.1 appears to have been recognized even before it was passed. Both in the House of Commons and in committee, members raised concerns that “the current section 271, which refers to sexual assault for anyone, is much broader and calls for a stronger sentence of [up to] ten years as opposed to five.”²⁴

If section 153.1 had simply criminalized sex with a person with a disability where one of the specified power relationships existed, as is the case with the sexual exploitation of a young person offence, it would have added something to the Code. However, it might also have limited the sexual autonomy of some women with disabilities. For example, it would not be unusual for a woman with a disability to find herself in a relationship of dependency and trust with her spouse; this dependency should not automatically make sexual contact between them a crime.

It appears that there was support for the new offence at the time of its enactment because of the perceived denunciatory effect of section 153.1, in that it recognized explicitly the problem of sexual abuse by caregivers.²⁵ Yet passage of such “symbolic” criminal legislation may actually be quite harmful. Presumably, the campaign for law reform in this area was prompted by the perception that the general sexual assault provisions had failed persons with mental disabilities. Creating this new, symbolic offence may have deflected attention from this failure by misleading the public into thinking that this problem has been addressed in a meaningful way.

II. Mental Disability and Sex Discrimination

Feminists arguing in favour of rape law reform in the 1970s and 1980s powerfully articulated the misogyny of traditional rape laws as written and applied. They showed how sexual assault is both an instrument of male domination of women

²³ See *R. c. K.L.*, [2004] R.J.Q. 2851 (C.Q. crim. & pén.) (brother); *R. c. Houle*, [2002] J.Q. no 9316 (C.Q. crim. & pén.) (QL) (therapist).

²⁴ *House of Commons Debates*, No. 096 (30 April 1998) at 6385-86 (Peter MacKay). See also Standing Committee on Justice and Human Rights, *supra* note 20 (25 March 1998) at 18:05-18:10 (Elizabeth Shaughnessy Cohen & Howard Hilstrom).

²⁵ See Standing Committee on Justice and Human Rights, *ibid.* (12 March 1998) at 15:45-15:50 (Hon. Anne McLellan).

as a class and a lynchpin of women's inequality on the basis of sex.²⁶ They argued for changes to criminal laws that would expand the definition of sexual assault to include all acts of sexual violence (not just heterosexual intercourse), and replace the resistance requirement with a definition of nonconsent based on whether the woman freely desired that sexual relations take place.²⁷ Their goal was to promote the personal security and sexual self-determination of women as necessary components of sex equality.

At the same time, feminists also argued that women's sexual autonomy meant not only freedom from unwanted sex, but also the freedom to be sexual, unconstrained by male-defined limitations on appropriate sexuality for women. They argued that women, and especially those groups of women whose sexuality has historically been denied, distorted, or suppressed—such as lesbians, Aboriginal women, women of colour, and women with disabilities—should be recognized as sexual beings whose expressions of desire are worthy of respect and support.²⁸ Yet these strands of the feminist critique of rape have sometimes found themselves in conflict: measures suggested to protect women from sexual assault have been characterized as limiting women's sexual freedom, just as arguments for women's sexual freedom have been characterized as failing to recognize their vulnerability as targets for abuse.²⁹

The supposed tension between protection and autonomy is reflected in the somewhat contradictory stereotypes of hypersexuality and asexuality themselves illustrated by the old “carnal knowledge” offence. On its face, that offence seemed to establish that sexual intercourse with a woman who had a mental disability was per se criminal. The offence reflected a stereotype that such women are sexually voracious and therefore indiscriminate in their choice of sexual partners.³⁰ These beliefs were promoted and reinforced through “scientific” reports that purported to show that masturbation both caused and worsened mental disability, and that children in schools for the disabled needed to be cured of their “pernicious habit[s]” if they were ever

²⁶ For early pioneering works in Canada, see Lorene M.G. Clark, *Rape: The Price of Coercive Sexuality* (Toronto: Women's Press, 1977). For the United States, see Susan Brownmiller, *Against our Will: Men, Women and Rape* (New York: Bantam Books, 1975).

²⁷ See Robin Morgan, *Going Too Far: The Personal Chronicle of a Feminist* (New York: Random House, 1978) at 165; Pauline Bart, “Rape as a Paradigm of Sexism in Society: Victimization and its Discontents” (1979) 3 *Women's Studies International Quarterly* 11.

²⁸ For some of the earliest expressions of these sentiments, see Robin Morgan, ed., *Sisterhood is Powerful: An Anthology of Writings from the Women's Liberation Movement* (New York: Vintage Books, 1970). See also Shere Hite, *The Hite Report: A Nationwide Study of Female Sexuality* (New York: MacMillan, 1976).

²⁹ For a helpful exposé of the mischaracterization of radical feminism as sexual puritanism, see Diane Richardson, “‘Misguided, Dangerous and Wrong’ on the Maligning of Radical Feminism” in Diane Bell & Renate Klein, eds., *Radically Speaking: Feminism Reclaimed* (Melbourne: Spinifex, 1996) at 143.

³⁰ See Jennifer Keilty & Georgina Connelly, “Making a Statement: An Explanatory Study of Barriers Facing Women with an Intellectual Disability when Making a Statement about Sexual Assault to Police” (2001) 16 *Disability & Society* 273 at 280-81.

going to be able to learn.³¹ This stereotype of the mentally disabled as hypersexual is also reflected in the “animal instinct” argument found in early cases.³²

The suppression of the sexuality of persons with disabilities was linked to the eugenics movement, which sought, among other things, to prevent the hereditary transmission of “mental defects”. Methods used to help realize this goal included segregating adults with mental disabilities from the rest of the population in single-sex institutions or wards, and sterilizing women who were considered to be mentally disabled.³³ In a social context in which the only legitimate purposes for women’s sexuality were satisfying their husbands’ sexual demands and bearing children, women with mental disabilities could not lay claim to any socially sanctioned sexuality, since they were seen as inherently unsuitable for both marriage and motherhood.

This absence of an acceptable zone of sexual behaviour, in turn, reflected a somewhat contradictory stereotype that women with mental disabilities were “asexual”, in the sense that they had no particular need or right to develop sexual relationships with others and that they could or should live their adult lives without sexual activity of any kind. This stereotype persisted even as society began, slowly, to recognize the right of other women to sexual pleasure and sexual relationships that were not strictly procreative.³⁴

While the emphasis of the old Code provisions was protective, it appears as though women with disabilities were being protected as much from their own unnatural instincts as from abuse by men. The common law of rape is replete with distinctions in the application of rape laws based on categories of presumed capacity, including those based on previous chastity, marital status, and age.³⁵

These categories have, historically, served the purpose of distinguishing those women who are worthy of the criminal law’s protection (e.g., young, chaste, unmarried) from those who are not (e.g., prostituted, unchaste, married), with most

³¹ Rita Rhodes, “Mental Retardation and Sexual Expression: An Historical Perspective” in Deborah Valentine & Romel Mackleprang, eds., *Sexuality and Disability: A Guide for Human Service Practitioners* (New York: Haworth Press, 1993) 8:2 *Journal of Social Work & Human Sexuality* 1 at 4. Such women were even thought to have a higher fertility rate than other women. See *ibid.* at 3-4, 12.

³² See *ibid.* at 3-4.

³³ See *ibid.* at 6-11. Support for compulsory sterilization was expressed in many forums, including the U.S. Supreme Court decision in *Buck v. Bell*, 274 U.S. 200, 47 S. Ct. 584, 71 L. Ed. 1000 (1927). Justice Holmes, for the court, supported compulsory sterilization with the infamous line, “Three generations of imbeciles are enough” (*ibid.* at 207).

³⁴ See Rhodes, *supra* note 31 at 1, 4, 12; Winifred Kempton & Emily Kahn, “Sexuality and People with Disabilities: A Historical Perspective” (1991) 9 *Sexuality and Disability* 93 at 95-97.

³⁵ The marital exemption, abolished in the 1982 amendments, *supra* note 14, defined rape to exclude the possibility of a husband raping his wife. The seduction offences had applied only to young women of “previously chaste character” (*Criminal Code*, R.S.C. 1970, c. C-34, s. 146(2)(b)). The age of consent had also operated to prohibit sexual intercourse with unmarried girls (*ibid.*, s. 146(2)(c)).

women falling into the latter category. In effect, our criminal law divided women into the categories of those women who can never say “yes” and those who can never say “no”.³⁶

The ostensible tension between freedom from violence and freedom to be sexual is in some sense the flip side of the competing stereotypes of asexuality and hypersexuality underlying the original carnal knowledge offence. It is important to consider critically the degree to which the current feminist debate is influenced in some lingering way by these stereotypes. Does focusing on the vulnerability of women with mental disabilities and their protection from violence, for example, reflect an impulse of pity based on a stereotype of asexuality? For example, Sherene Razack has argued that “[t]he use of vulnerability as a construct carries a major risk in the legal context. Pity is the emotional response to vulnerability, a response that does not necessarily lead to respect—that is, to a willingness to interrogate and ultimately to change the conditions that hurt people with disabilities.”³⁷

Similarly, we might ask whether focusing on the promotion of sexual freedom reflects an assumption that all women with mental disabilities are, or want to be, sexually active in ways that replicate dominant, often sexist, paradigms of heterosexuality. British researcher Michelle McCarthy has cautioned that so-called “scientific sexological research” has often been highly prescriptive and supportive of socially constructed sexual norms. McCarthy argues that even the more recent research conducted by women has been “written from a perspective that seems indiscriminately positive about women’s sexual activity with men” without any consideration of conflicting data or any gendered political understanding of sexual relations.³⁸ Similarly, the movement that took root in the 1970s and 1980s to provide sexual health education to persons with disabilities, while laudable, often ignored the prevalence of sexual coercion in the lives of women. An approach that focuses largely on encouraging the sexual expression of people with disabilities within existing norms may ignore the systemic factors that permit the targeting of women with disabilities for sexual abuse.

A second theoretical tension engaged by the problem of sexual violence against women with disabilities is the one implicated in the recent shift, in critical disability scholarship, from a biomedical to a social model of disability. A biomedical model of disability focuses on the physiological manifestations of particular diseases, abnormalities, or illnesses. It endeavours to mitigate or correct these conditions in order to achieve optimum functioning in society. In other words, the goal is to make

³⁶ See Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989) at 175-76.

³⁷ “From Consent to Responsibility, from Pity to Respect: Subtexts in Cases of Sexual Violence Involving Girls and Women with Developmental Disabilities” (1994) 19 *Journal of Law & Social Inquiry* 891 at 902.

³⁸ Michelle McCarthy, *Sexuality and Women With Learning Disabilities* (London: Jessica Kingsley, 1999) at 29-30.

the person with a disability “more like us”. A social model of disability, by contrast, considers the ways in which assumptions about normality create functional limitations for those individuals who are deemed to fall outside of the norm. This model focuses on the acceptance of, and even pride for, persons with disabilities, and on the removal of socially constructed barriers that prevent full participation.³⁹ The aim is to change society and its perceptions rather than to “fix” the person with a disability.

The social model of disability, because of its focus on changing social attitudes, provides a more useful political tool in pursuing improved access for this group of women. However, both models were primarily developed in a paradigm of physical disability, in which individuals typically have the capacity to participate in spheres of daily activity—such as working for pay, forming and raising a family, and making basic choices about issues such as health care, diet, entertainment, and managing money—once barriers to that participation are removed. It remains an open question whether all mental disabilities—including developmental disabilities, mental illness, and cognitive impairment arising from brain injury—fit neatly within either model of disability.⁴⁰ The threshold of a given community for labelling a person as “mentally handicapped” may vary not only according to the individual’s skills and abilities, but also according to how complex daily life is in that particular society.

Women with mental disabilities might benefit from combining a social model of disability with feminist theory. In particular, the work of feminists trying to undermine the notion of a male norm to which women must conform or be compared, when combined with the social model of disability, suggests that not only are disabilities constructed by social norms, but that the standards by which we judge “ability” (e.g., the capacity to hold full-time employment for pay, to live independently, and so on) need to be challenged as well. Feminist theory also reminds us that women’s sexuality, and human sexuality more generally, is also socially constructed by interlocking systems of oppression.⁴¹

In our review of the case law, we reconsider these themes in light of the experiences of women with mental disabilities, both in their exposure to sexual violence and in their involvement with the criminal justice system. These judicial decisions are, of course, imperfect “stories” that do not always record the voices of

³⁹ See Bill Hughes & Kevin Paterson, “The Social Model of Disability and the Disappearing Body: Towards a Sociology of Impairment” (1997) 12 *Disability and Society* 325; Liz Crow, “Including all of our Lives: Renewing the Social Model of Disability” in Jenny Morris, ed., *Encounters with Strangers: Feminism and Disability* (London: Women’s Press, 1996) 206.

⁴⁰ There is some literature that argues that the social model works well for psychiatric illnesses. See Julie Mulvany, “Disability, Impairment or Illness? The Relevance of the Social Model of Disability to the Study of Mental Disorder” (2000) 22 *Sociology of Health & Illness* 582.

⁴¹ For a recent attempt to integrate feminist legal theory and disability theory, see Fiona Sampson, “Beyond Compassion and Sympathy to Respect and Equality: Gender Disability and Equality Rights Law” in Dianne Pothier & Richard Devlin, eds., *Critical Disability Theory: Essays In Philosophy, Politics, Policy, and Law* (Vancouver: University of British Columbia Press, 2006) 267.

women in a complete or direct fashion. But they do illustrate situations in which women with mental disabilities are sexually violated and how the criminal law understands those experiences. Building on our research, we argue that assuming that freedom from sexual violence can only be gained at the expense of sexual autonomy is not helpful for women who have neither safety nor the space and support to identify and to realize fully the sexual lives they would like to have. We also argue that the creation of a targeted offence for women with mental disabilities is misguided because it is premised on an assumption that disability is a fixed state of being that can be objectively defined by others. In coming to these conclusions, we hope to highlight the similarities among all women. We want to affirm that women with mental disabilities are women, not, as some cases suggest, children,⁴² and that sexual violence against them is part of a gendered practice of sex discrimination.

III. The Reality of Sexual Assault For Women with Mental Disabilities

Canadian studies on the prevalence of sexual assault among women with mental disabilities unanimously find that women with disabilities—and particularly women with mental disabilities—are at a higher risk of physical and sexual violence than women in general.⁴³ One study suggests that thirty-nine to sixty-eight per cent of women with a mental disability will be sexually assaulted before they reach the age of eighteen.⁴⁴ As with sexual assault generally, this is a gendered phenomenon, though the rate of sexual assault against men with mental disabilities is also higher than for other men.⁴⁵ Overall, studies suggest that women with mental disabilities are from two⁴⁶ to ten⁴⁷ times more likely to be the victim of sexual assault than women without a disability.

⁴² The infantilization of women with mental disabilities is discussed in detail in our forthcoming article (Benedet & Grant, *supra* note 4).

⁴³ Synthesizing the Canadian data on the prevalence of sexual assault of women with mental disabilities is complicated because the studies often measure different things and are thus not easily comparable. In addition, very low reporting rates complicate the task of arriving at accurate numbers.

⁴⁴ Roeher Institute, *No More Victims: A Manual to Guide Counselors and Social Workers In Addressing the Sexual Abuse of People with a Mental Handicap* (North York: Roeher Institute, 1992) at 25 [Roeher, *No More Victims*]. The rate of spousal violence for women with mental disabilities is also higher than that for women without disabilities (thirty-nine vs. twenty-nine per cent, respectively).

⁴⁵ Between sixteen and thirty per cent of men with mental disabilities will have been sexually assaulted before they reach the age of eighteen. See Roeher, *No More Victims*, *ibid.* at 25.

⁴⁶ See Roeher Institute, *Harm's Way: The Many Faces of Violence and Abuse Against Persons with Disabilities* (North York: Roeher Institute, 1995) at 9 [Roeher, *Harm's Way*]; Dick Sobsey, *Violence and Abuse in the Lives of People With Disabilities: The End of Silent Acceptance?* (Baltimore: Paul H. Brookes, 1994) at 69.

⁴⁷ See Miriam Ticoll & Melanie Panitch, "Opening the Doors: Addressing the Sexual Abuse of Women with an Intellectual Disability" (1993) 13 *Canadian Women's Studies* 84 at 85.

In some studies, almost all of the women interviewed had experienced some form of sexual abuse.⁴⁸ For example, through in-depth interviews with seventeen women with mental disabilities, of whom roughly half lived in institutions and half in the community, Michelle McCarthy found that fourteen of the seventeen women reported nonconsensual sexual activity. McCarthy also found collateral evidence of sexual assault for two of the other women. Nine of the women reported multiple instances of sexual assault. All of the women living in institutions had at some time received money, cigarettes, or some other “reward” for engaging in sexual activity with men.⁴⁹

The sexual abuse of women with mental disabilities is often chronic, occurring repeatedly over a period of years, sometimes committed by the same offender, sometimes by multiple offenders.⁵⁰ Sexual abuse may be a cause of mental disability in an otherwise nondisabled woman or may exacerbate existing disabilities through its traumatic impact. These are real consequences of sexual assault for many women.⁵¹

It appears that charges are rarely laid in cases of sexual assault of women with mental disabilities.⁵² One study, for example, estimated that only one in thirty cases involving sexual assault of a woman with a disability is reported, compared with one in five cases for women who do not have a disability.⁵³

McCarthy’s research with women with mental disabilities in England has indicated that women with mental disabilities report high levels of sexual abuse and a lack of control over, and pleasure in, their sexuality.⁵⁴ She found that this was true both for women who live in institutional settings and for those living in the community. McCarthy has described the sexual lives of women with developmental disabilities as existing in “a world which has both changed hugely and hardly at all.”⁵⁵ She adopts a model of sexuality as being socially constructed, arguing that sex is, socially, a special act because we have been taught to believe that it is special. In her work with women with mental disabilities, she has found that these women do not

⁴⁸ These numbers do not differentiate between male and female perpetrators, although studies consistently show that between 88.5 and 98 per cent of the perpetrators are male. See Sobsey, *supra* note 46 at 75.

⁴⁹ McCarthy, *supra* note 38 at 46, 120-26, 150-53, 162-64.

⁵⁰ See Sobsey, *supra* note 46 at 73.

⁵¹ See Dick Sobsey & Tanis Doe, “Patterns of Sexual Abuse and Assault” (1991) 9 *Sexuality and Disability* 243 at 247; Maureen Crossmaker, “Behind Locked Doors—Institutional Sexual Abuse” (1991) 9 *Sexuality and Disability* 201 at 202.

⁵² See Joan R. Petersilia, “Crime Victims with Developmental Disabilities: A Review Essay” (2001) 28 *Criminal Justice and Behavior* 655.

⁵³ See Deborah Tharinger, Connie Burows Horton & Susan Millea, “Sexual Abuse and Exploitation of Children and Adults with Mental Retardation and Other Handicaps” (1990) 14 *Child Abuse and Neglect* 301 at 304.

⁵⁴ *Supra* note 38 at 71-75.

⁵⁵ *Ibid.* at 16.

consider sexuality to be an important part of their lives. She argues that this is consistent with the social view that sex is not appropriate for them.

Why is there such a high rate of sexual assault for women with mental disabilities? McCarthy's findings are consistent with an approach that views sexual assault as mediated by a gendered imbalance of power. Women with mental disabilities are more likely than other women to be dependent on others for their basic needs and economic welfare. Women with mental disabilities may have very limited opportunities to meet and to develop relationships with people who are not in a position of trust or authority over them. There is also a high level of segregation for women with mental disabilities, whether institutionally or in the community, in education, employment, and housing. Poverty and social isolation are strongly associated with disability and with sexual assault.⁵⁶ Women with disabilities tend to have very limited financial resources and may be forced to stay in situations involving abuse.⁵⁷

One theory posits that women with mental disabilities are at high risk because they are seen as easy targets by potential offenders who do not fear prosecution because they assume that women with mental disabilities will not complain and have even less access to the criminal justice system than other women.⁵⁸ When sexual assaults against women with mental disabilities are reported, the accounts are often not believed, not fully investigated, or not prosecuted because of problems seen as emanating from the complainant's disability.⁵⁹

Many women with mental disabilities have lives that are highly controlled by others, be that control medical, social, or parental. As a result, some women with mental disabilities have learned a high level of compliance when it comes to people in a position of authority over them. They may not be aware that they can decline to participate in sexual activity simply because they do not want to participate. They may also have learned through experience that compliance with sexual demands is the price of inclusion in certain groups or activities.⁶⁰

In most studies, caregivers constitute a significant percentage of those who sexually assault women with mental disabilities.⁶¹ Caregivers may include doctors, residential workers, teachers, or other people providing care for the complainant. Caregivers have easy access to women with mental disabilities, and there is a relationship of dependency. In addition, a large number of offenders who are not personally in caregiving positions gain access to women through their caregivers. Dick Sobsey and Tanis Doe found that in 162 reports of sexual abuse involving

⁵⁶ See Petersilia, *supra* note 52 at 657.

⁵⁷ See *ibid.* at 667.

⁵⁸ See *ibid.* at 657.

⁵⁹ See Roehrer, *Harm's Way*, *supra* note 46 at 24-25.

⁶⁰ For an example of behaviour that could be interpreted in that way, see e.g. *R. v. B.M.*, [1994] O.J. No. 2242 (Prov. Div.) (QL) [*B.M.*].

⁶¹ See Sobsey, *supra* note 46 at 75-79

victims with disabilities, forty-four per cent of all offenders against people with disabilities made initial contact with their victims through the web of special services provided to people with disabilities.⁶² Thus, women with mental disabilities are at risk from the people upon whom they depend the most.

The law cannot solve all the problems that cause the high incidence of sexual assault against women with mental disabilities. It is important, however, that the law recognize, and respond to, the criminal behaviour of those who exploit women with mental disabilities.

IV. The Legal Treatment of Sexual Assault Complainants with Mental Disabilities

A. Our Study

Our study considered all cases reported on Quicklaw that were decided between 1984 and 2004 in English, and all cases between 1994 and 2004 in French, where a written judgment was issued, as well as relevant evidentiary or procedural rulings.⁶³ Each case involved one or more charges against a male accused of committing a sexual offence against a female complainant with a mental disability. We defined mental disability as including a developmental disability, a psychiatric disability, or some other chronic nonepisodic mental disability.⁶⁴ We excluded cases in which the impairment appeared to have little or no effect on communication, cognition, decision making, or sexual development (e.g., episodic depression or epileptic seizures causing occasional memory loss). We also excluded the few cases in which the complainants were male, recognizing that this subset of cases deserves its own study.⁶⁵ Finally, we excluded those cases in which the complainant was below the legal age of consent, preferring instead to focus on cases involving adult women⁶⁶ for

⁶² *Supra* note 51 at 248.

⁶³ The sample also had forty-two sentencing cases.

⁶⁴ We did not find any reported or unreported decisions in which the complainant and the accused were both women.

⁶⁵ It might be argued that if male complainants with disabilities experience similar problems to women complainants in sexual assault trials, this shows that there is no sex discrimination at work, since both sexes are treated equally poorly. We disagree for two reasons. First, this argument misses the point that male sexual violence is itself an act of sex discrimination, regardless of the sex of the victim, because it sexualizes male aggression and dominance over a feminized “other”. Second, it is quite possible that the criminal justice system applies sexist norms and stereotypes specific to male victims of sexual assault that also deny male victims equality, such as the view that a real man could resist a rape if he really wanted to, and that gay male victims are probably consenting. We emphasize that this under-researched topic deserves independent study.

⁶⁶ In this context, “adult” means women who were fourteen years of age or older at the time of the offence.

whom questions of consent, capacity, and sexual self-determination are squarely at issue. This left us with just over one hundred cases.

We recognize that our sample is not exhaustive. We could not consider cases where there was a jury trial with no written judgment, nor cases where a plea bargain was reached without any written judgment. Nor does our study attempt to examine cases in which victims declined to report to the police, or ones in which the police failed to lay charges. In addition, because of the numerous expressions used to describe different kinds of mental disability, we may not have found every case. Obviously, then, this review was not designed to be a comprehensive study of all cases, but rather a means of identifying trends in how such cases are dealt with by the criminal justice system.

The large majority of our cases involved charges of the least serious form of sexual assault. In the majority of cases where the nature of the disability was clear (eighty per cent), the complainant had an intellectual disability. These included learning disabilities, Down syndrome, and other developmental disabilities. Almost all of the remaining complainants had a brain injury or a neurological illness like multiple sclerosis, epilepsy, or Alzheimer's disease, or a psychiatric disability like schizophrenia.

Our review of the cases suggests that women with mental disabilities are most likely to be sexually assaulted by someone without a mental disability. The accused also had a mental disability in less than twenty per cent of the cases for which this information was available. This finding could in part reflect the fact that cases involving accused men with mental disabilities are prosecuted less vigorously.

In a related vein, we found very few cases dealing with women who lived in institutions. In the few cases we did find, the accused was likely to be a caregiver or in some other position of authority over the complainant. We found no cases in which the accused was also a resident of the institution. The research literature makes clear that there is a high incidence of sexual assault in institutions.⁶⁷ One could speculate that cases in which the accused has a mental disability or is a resident of the institution are less likely to be addressed by the criminal justice system. They may be dealt with by the institution as an internal disciplinary matter or simply ignored, thus potentially leaving women more vulnerable.

As with sexual assault generally, most women in our sample were assaulted by someone they knew. There were a large number of cases (seventy-two per cent) in which the accused was in a relationship of trust with the complainant.⁶⁸ In the ninety-nine cases in which this information was available, thirty-two per cent of the accused were involved in some form of caregiver relationship with the complainant. This is

⁶⁷ See McCarthy, *supra* note 38; Sobsey & Doe, *supra* note 51 at 248; Crossmaker, *supra* note 51 at 204-207.

⁶⁸ See Ticoll & Panitch, *supra* note 47.

consistent with rates found in other studies.⁶⁹ Other persons in a relationship of trust with the complainant included the complainant's regular bus driver,⁷⁰ a teacher,⁷¹ a landlord,⁷² an uncle,⁷³ a father,⁷⁴ a stepfather,⁷⁵ a medical doctor,⁷⁶ and a psychiatrist.⁷⁷

Our goal was to use these cases as a means of exploring the effects that the 1982 and 1992 revisions to the sexual offence provisions of the *Criminal Code* have had on women with mental disabilities. Specifically, in 1982 the Code was amended to abolish the offences of rape and indecent assault, and to replace them with the offences of sexual assault, sexual assault with a weapon, and aggravated sexual assault. The carnal knowledge offence, as noted above, was also abolished.⁷⁸ The offences were made gender-neutral on their face; the seriousness of the sexual assault was to be measured according to the degree of additional violence that accompanied it, rather than the nature of the sexual acts involved. The marital rape exemption, and the rules of corroboration and recent complaint, were also abolished⁷⁹. Sexual assault was defined as any sexual contact without consent.⁸⁰

In 1992, the *Criminal Code* incorporated, for the first time, a definition of consent as "the voluntary agreement of the complainant to engage in the sexual activity in question."⁸¹ This same section provides a nonexhaustive list of circumstances in which no consent is deemed to have been obtained. These include circumstances in which the complainant is incapable of consenting to the activity, as well as those in which the accused induces the complainant to submit to the activity by abusing a position of trust, power, or authority.⁸² Finally, the defence of mistaken belief in consent was modified to exclude situations in which the accused "did not

⁶⁹ See Sobsey, *supra* 46 at 76 (citing studies that show that between fourteen to thirty-three per cent of offenders are caregivers). These studies do not include offenders who gained access to the victims through their caregivers, such as where the offender is the male partner of a female caregiver.

⁷⁰ See *R. v. Hundle*, 2002 ABQB 1084, 10 C.R. (6th) 37 [*Hundle*].

⁷¹ See *R. v. Jackson*, [1994] O.J. No. 453 (Gen. Div.) (QL) (the accused was a senior counselor in the group home where the complainant resided).

⁷² See *R. v. A.A.* (2001), 144 O.A.C. 382, 155 C.C.C. (3d) 279, 43 C.R. (5th) 272 [*A.A.*] (the accused was the superintendent of the building in which the complainant resided).

⁷³ See *R. v. G.A.M.*, [1993] O.J. No. 476 (Gen. Div.) (QL).

⁷⁴ See *R. v. G.H.S.*, 2001 BCSC 766, [2001] B.C.J. No. 1425 (QL).

⁷⁵ See *R. v. D.K.R.* (1998), 104 B.C.A.C. 296, 38 W.C.B. (2d) 42.

⁷⁶ See *R. v. Chin*, [1989] B.C.J. No. 539 (C.A.) (QL).

⁷⁷ See *R. v. Ryan* (1993), 26 B.C.A.C. 43, 80 C.C.C. (3d) 514.

⁷⁸ 1982 amendments, *supra* note 14, ss. 6, 8, 19.

⁷⁹ *Ibid.*, s. 5.

⁸⁰ *Ibid.*, s. 19. These provisions currently appear in *Criminal Code*, *supra* note 3, ss. 265, 271, 272, 273.

⁸¹ *Supra* note 3, s. 273.1(1), as am. by *An Act to amend the Criminal Code (sexual assault)*, *supra* note 15, s. 1.

⁸² *Criminal Code*, *ibid.*, ss. 273.1(1), (2)(b), (2)(c).

take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.”⁸³

In our study we wanted to ask whether women with mental disabilities benefited from these reforms. If not, what sorts of problems recur in the cases and how could those problems be addressed? We also wanted to consider whether the kinds of cases making it to trial favoured particular kinds of victims or fact scenarios. Finally, we wanted to explore whether the themes of protection and autonomy are reflected in judicial decision making.

In this paper, we focus on issues relating to the elements of sexual assault itself: nonconsent, capacity to consent, and mistaken belief in either consent or capacity. While women with mental disabilities face many of the same problems that other women face in the context of sexual assault, the disability may make the resolution of these issues more complex.

B. Elements of Sexual Assault: Consent, Capacity, and Mistaken Belief

In order for there to be a conviction for sexual assault, the Crown must prove a sexual touching, the absence of consent on the part of the complainant, or an incapacity to give consent (the *actus reus*), and that the accused knew or was reckless with respect to whether the complainant was not giving consent (the *mens rea*).⁸⁴ In the following sections, we present a brief summary of the relevant law and then examine each element in detail in the context of complainants with mental disabilities.

1. Consent

In a series of cases culminating in *R. v. Ewanchuk*,⁸⁵ the Supreme Court of Canada has held that, for the purpose of the *actus reus*, nonconsent is determined entirely from the perspective of the complainant. Consent focuses on whether “the complainant in her mind wanted the sexual touching to take place.”⁸⁶ Consent cannot be implied from silence, passivity, or ambiguous behaviour, because it is the complainant’s state of mind that is at issue. Evidence about her behaviour may be relevant to whether the trier of fact believes the complainant’s assertion of nonconsent, but the focus is still on her thought process, not her actions or inaction.

Ewanchuk is an important development for women generally because it shifts the starting point from the assumption that women are in a perpetual state of consent to a

⁸³ *Ibid.*, s. 273.2(b).

⁸⁴ See *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 23, 169 D.L.R. (4th) 193 [*Ewanchuk* cited to S.C.R.]. The assault must be intentional, an issue that does not arise in our cases.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.* at para. 48.

requirement that there be some positive evidence of consent. This does not change the burden of proof; the Crown must still prove that there was no positive agreement. This shift may be of particular importance for some complainants with mental disabilities. It is not uncommon in these cases to see acquiescence or compliance in sexual activity coupled with no real evidence of affirmative consent. Compliance is particularly relevant in the context of mental disability because the complainant in these cases is often in a position of dependency vis-à-vis the accused, and sometimes other adults without a disability. *Ewanchuk* confirms that mere compliance does not constitute consent in Canadian law.⁸⁷

However, if consent is viewed entirely subjectively, from the point of view of the complainant, how can one determine whether a complainant with a mental disability who complies with sexual demands wanted the sexual activity to take place? In some situations, she may not even have realized that what she wanted matters. There are several cases where a failure to express nonconsent explicitly is confused with consent by trial judges.

In *R. v. Parsons*,⁸⁸ for example, the trial judge acquitted the accused because he had a reasonable doubt about consent. The complainant was a twenty-six-year-old woman with cerebral palsy who was said to function at the mental level of a seven-year-old. The accused, a stranger, stopped his truck by the side of the road and asked the complainant to get in. He drove to a remote area and engaged in sexual activity with her. The trial judge, in leading up to his finding that a reasonable doubt existed as to the *actus reus* component of nonconsent, described her behaviour as follows:

The evidence supports the fact that there was nothing in words or conduct to suggest that [the complainant] did not wish to engage in sexual activity. Indeed, the opposite as I see the evidence is true. [The complainant] willingly got into the truck; willingly consented to fondling; willingly consented to sit next to the accused when he was driving towards Mud Lake; willingly lay in a position to facilitate intercourse, and willingly engaged in other activities suggested or carried out by the accused. The only shred of evidence that there was non consent in this area was when she said that at one stage she attempted to push him off but he was too heavy. There was no evidence that this was conveyed to the accused, and no evidence to suggest that he would have known that she was attempting to withdraw her consent. Indeed, his willingness to comply with her withdrawal of consent to intercourse is in his statement, but more particularly the complainant's evidence confirms as well that when she complained that intercourse hurt, he ceased the activity. His willingness to give his name and his request to meet her again are inconsistent with someone involved with sexual assault.⁸⁹

⁸⁷ It is important to note that s. 273.1(2)(c) provides that there is no consent where "the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority" (*Criminal Code*, *supra* note 3). This section does not appear to have been widely used, despite its potential application to a number of the cases we considered.

⁸⁸ (1999), 170 Nfld & P.E.I.R. 319 (Nfld. S.C. (T.D.)) [*Parsons*].

⁸⁹ *Ibid.* at para. 19.

There is nothing in this description that supports a conclusion that the complainant wanted the sexual activity to take place. It shows, merely, that she did not actively resist—beyond trying to push his body off her. The trial judge interpreted the accused’s behaviour as supporting consent. Perhaps the complainant, inside the truck of a man she did not know, in an isolated area, felt “unable to refuse” the sexual advances.⁹⁰

A lack of express objection to sexual activity should not be misconstrued as consent, particularly when dealing with women with mental disabilities. *Parsons* was decided just before *Ewanchuk*, where the Supreme Court held that lack of verbal resistance is not “implied” consent and that “a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence ...”⁹¹

The court in *Parsons* equated the complainant’s failure to communicate nonconsent with reasonable doubt as to consent in her own mind. Perhaps this inquiry should have focused instead on whether this encounter looked anything like consent for this particular woman, given her abilities and lack of relationship to the accused. A strange man picked her up and told her what to do. We are told that the complainant has the intellectual ability of a seven-year-old, yet the accused did not converse with her enough to identify her disability. She did not kick and scream, but she did not say “yes” either. After exiting the truck, she went immediately into a store for help. Blood was later found on her underwear. Nothing in these facts suggests a subjective desire on her part to participate in sexual intercourse with the accused.

In *R. v. Harper*,⁹² the thirty-one-year-old complainant had a severe form of sudden-onset multiple sclerosis that had left her with significant physical and cognitive limitations. She lived in a nursing home in the Yukon that had a wide range of residents, from teenagers to elderly patients. She was unable to walk, spent a good portion of her day in bed, was incontinent, and had extremely poor eyesight. The multiple sclerosis also created serious memory problems that made it difficult for her to retain a consistent understanding of past events. The complainant was virtually unable to form new long-term memories.

The accused, Harper, was the son of an elderly resident at the facility. He had had some prior contact with the complainant and they knew each other only on a first-name basis. Harper’s behaviour had been sufficiently problematic to have spurred the facility to write him a letter about the appropriate boundaries between him and the complainant. Yet at trial it was the complainant’s previous conduct that came under a microscope:

⁹⁰ Cf. Susan Stefan, “Silencing the Different Voice: Competence, Feminist Theory and Law” (1993) 47 U. Miami L. Rev. 763 at 799.

⁹¹ *Supra* note 84 at para. 51.

⁹² 2002 YKSC 18, [2002] Y.J. No. 38 (QL) [*Harper*].

The staff were very aware that the complainant was attractive and sometimes followed by other male residents. She was known to be uninhibited and sometimes too friendly toward males.⁹³

On the day of the alleged sexual assault, the nurses were alerted to the complainant's room by the ringing of her emergency bell in her washroom. The nurses found the door to the complainant's room locked, an unusual situation. They found her shaking and distraught with her clothes in disarray, and perceived a strong smell of alcohol in her room not coming from the complainant. The accused was found in the hall with a strong smell of alcohol and was escorted out of the building. The complainant told the nurses that the accused had come into her room while she was having her afternoon sleep, undressed her, and climbed on top of her. She told the nurses that she had not wanted to have sex with Harper, that he had been drinking, and that she found him disgusting. Shortly after, she repeated this story to a police officer and a social worker. She had bruises on her inner thighs and at the entry to her vagina.

Several hours after the alleged assault, the complainant was unable to repeat her allegations on videotape for the police officer. This later interview did not contain an explicit recantation of the allegations, but she did state that the events as described by the officer were not true. It was evident from the interview that the questioning was increasingly confusing for the complainant, and that her memory was failing her. In her testimony at trial, she had no memory of the events that had occurred sixteen months earlier. The primary argument for the defence was that she had consented but, if she had not consented, that Harper mistakenly thought that she had.

The trial judge rejected the mistaken belief in consent argument before even addressing the issue of consent. He then decided that there was a reasonable doubt as to whether the complainant had consented to the sexual activity, despite the facts that she was asleep when the accused entered her room, that she had made immediate allegations of sexual assault, that she had been found by the nurses to be traumatized and shaking, and that she had bruises on her thighs and vaginal area. Where is the evidence that she wanted sexual activity with Harper to take place?

Given the complainant's cognitive limitations, she did a remarkable job of telling the right people what had happened to her and of seeking help immediately. The last interview, however, created a reasonable doubt in the mind of the trial judge—not that the complainant had made up the story (because the trial judge did find that sex took place), but rather that she had consented to sex with a drunken man who entered her bedroom while she was asleep. The judge was clearly looking for evidence of an expression of nonconsent from the complainant, something that may not have been possible in her circumstances.

In *Harper*, the fact that the complainant was seen as being “too friendly toward males”⁹⁴ may have contributed to creating a reasonable doubt as to whether she

⁹³ *Ibid.* at para. 16.

consented to have sex with a drunken man when he awakened her from her afternoon sleep. Because MS had severely hindered her ability to form long-term memories, the fact that, after an extraordinarily long and traumatic day, she was not able to repeat those allegations was taken to create a doubt about nonconsent. Does the ruling in *Harper* mean that a woman who cannot form long-term memories can be raped with impunity because, several hours after the sexual activity, she may not be able to tell us what she wanted at the time?⁹⁵ Clear extrinsic evidence of nonconsent—her agitation and shaking and physical injuries—lent credence to her immediate complaint of sexual assault.

When determining whether a complainant with a mental disability freely consented to sexual activity, it is essential to take into account her abilities, her perceptions, and, to the extent possible, her perspective on the encounter. Was she coerced by the accused? Did the imbalance of physical strength and power between them make it impossible for her to say “no”? Did she understand the nature of the activity in which she was engaging?⁹⁶ In what ways could she communicate consent or nonconsent? As stated by the trial judge in *R. v. R.R.*:

It is not sufficient to simply determine whether an individual said yes when asked if they would submit to or engage in a particular activity. It must be determined whether that individual made such a decision of their own free will, fully aware of or apprised of the proposed activity and its consequences.⁹⁷

In both *Parsons* and *Harper*, there was not even a “yes” whose voluntariness could be questioned. Silence and lack of resistance should not be equated with consent for any complainant, but this is particularly important for complainants with mental disabilities because of the power imbalance in many of their relationships.

While *Ewanchuk*’s affirmation that passivity is not consent may be very helpful for women with mental disabilities, *Harper* demonstrates that the *Ewanchuk* definition of consent may pose problems in some cases. The focus in *Ewanchuk* on what the complainant was thinking may create difficulties where, for some reason, the complainant is unable to communicate to the court what was going on in her mind at the time of the alleged assault. This inability could be due to memory problems, communication problems, or because the complainant was not thinking in terms of consent or nonconsent—because she simply did what she was told to do. The test is also not well suited to those complainants who can be induced to participate in sexual activity for a token reward, such as a toy or some cigarettes.⁹⁸ How can one assess

⁹⁴ *Ibid.*

⁹⁵ We return to this question in detail in our forthcoming article (Benedet & Grant, *supra* note 4).

⁹⁶ This inquiry, however, opens the door to the introduction of sexual history evidence, a danger we also explore in our subsequent article (*ibid.*).

⁹⁷ (2001), 151 O.A.C. 1 at para. 44, 159 C.C.C. (3d) 11, aff’d 2003 SCC 4, [2003] 1 S.C.R. 37 [*R.R.* cited to O.A.C.].

⁹⁸ See Bernadette McSherry, “Sexual Assault Against Individuals with Mental Impairment: Are Criminal Laws Adequate?” (1998) 5 *Psych., Psychology & L.* 107; McCarthy, *supra* note 38 at 150-53.

whether the complainant wanted the sexual activity to take place in the sense contemplated by *Ewanchuk*? The law of sexual assault needs a way of focusing on the behaviour of men who knowingly take advantage of women with mental disabilities that does not depend entirely on the complainant's ability to communicate her wishes.

A related problem is the tendency to make (often false) assumptions about how women with mental disabilities, and women generally, should respond to uninvited sexual advances—for example, the assumption that only active resistance is sufficient to establish nonconsent. This can be seen in *Parsons*, where the judge assumed that if a woman got into a truck, sat next to the accused, and did what he told her to do, that this demonstrated consent to sexual activity. There was no attempt in that case to view the situation through the eyes of the complainant. Maybe she had simply learned to act that way with men, or with more powerful adults generally, in her life. Did she really understand that she could say “no”? Or did she understand, as other women often do, that saying “no” would not have made much difference to the outcome?

Such assumptions can have serious implications for the assessment of consent. In *R. v. Brown*,⁹⁹ for example, the accused was driving by a townhouse complex in which the complainant lived with her mother. After a brief conversation, she got into the car with him and drove to her home, where they had sexual intercourse. The trial judge found that the sex was consensual because the accused, allegedly invited by the complainant, returned to the complainant's house one week later to see her. The trial judge found this evidence conclusive as to consent. He stated:

In my view, this piece of evidence confirms the consensual nature of the sexual activity on the day in question. It strains credulity that the accused, having had sexual intercourse with another person against that person's will, would return to the very scene where that sexual misconduct had taken place for whatever continuing contact the accused might have had in mind.¹⁰⁰

The fact that the accused returned tells us absolutely nothing about what was going on in the complainant's mind at the time of the alleged assault nor whether she wanted to engage in the sexual activity. There could be numerous reasons why a woman would continue to see a man who has sexually assaulted her. She may not want to believe what has happened to her; she may feel somehow responsible for what happened to her; or she may hope for social acceptance from the accused. From the accused's perspective, he may have thought the complainant was an easy repeat-target or he may have wanted to persuade her not to report the assault. There could well be other explanations for his return that do not necessarily indicate consent in the initial encounter. One large study from the United States demonstrated that over forty

⁹⁹ [2003] O.J. No. 5341 (Sup. Ct.) (QL).

¹⁰⁰ *Ibid.* at para. 15.

per cent of complainants who had been victims of acquaintance rape had subsequent sexual contact with the accused.¹⁰¹

Finally, while a complainant's disability may well be relevant to consent, it should not be used to infer consent. For example, courts need to consider carefully, in a substantive equality framework, how to deal with consent in the context of women who have been repeatedly targeted as an "easy mark" for sexual aggressors, either because of their lack of understanding of sexual activity or because they have learned that coerced sex is the price of inclusion in a particular group. The fact that a woman may have acquiesced in the past should never be sufficient to find consent on a later occasion.

For example, in *B.M.*, the three young accused and the complainant attended a school for persons with learning disabilities. The complainant was, in the words of the judge, "the most challenged" of all the individuals involved.¹⁰² The evidence made clear that she had been socially ostracized by many of the students at the school.

On the date in question, the three accused and the complainant were at the back of the school on their lunch break. At least one of the accused was chasing the complainant. The evidence given by each of the three accused and by the complainant differed greatly. What is unusual about this case is that there was an independent adult witness, Mr. Lee, with no connection to any of the parties involved, who corroborated much of the complainant's story. Lee heard the complainant call out loudly, "[W]hat are you doing?" "[B]ehave yourself", and "[S]top it guys".¹⁰³ After the third yell he went to investigate and saw three young men holding the complainant down on the ground. As he approached, the three males ran away and he found the complainant curled up on the ground with no top or bra on, her shorts pulled down to her knees, and her underwear out of position. The complainant alleged that the three accused were sexually assaulting her and had stopped when Lee arrived.

Given this evidence, it is remarkable that consent was the primary issue at trial. This was not a woman who acquiesced in the sexual activity in question but rather one who said "no" repeatedly. The question of consent was raised through defence allegations that the complainant had a history of willingly having oral sex with

¹⁰¹ In Mary Koss's study of three thousand college-aged women in the United States, forty-two per cent of the women who reported having been raped said that they had intercourse with the rapist again after the assault (Mary P. Koss, "Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education" in A.W. Burgess, ed., *Rape and Sexual Assault II* (New York: Garland Publishing Company, 1988) at 16). It is not known in which of these cases the subsequent intercourse was also forced, but it is reasonable to assume that in some of these cases the sex was "consensual".

¹⁰² *Supra* note 60 at para. 2.

¹⁰³ *Ibid.* at para. 42.

multiple young men at the school.¹⁰⁴ A trial that was set down for three days took six to seven times as long and transpired over the course of a year, drawn out by motions about the admissibility of evidence relating to past sexual activity. Several friends of the accused testified about previous sexual encounters the complainant had had with students at the school. Of the numerous allegations put forward by the defence, the trial judge found evidence of only one previous consensual incident. This, in his view, was admissible for the purpose of potentially “level[ing] the playing field” with respect to the likelihood of the complainant consenting to oral sex with three young men on her lunch hour.¹⁰⁵ Aside from the fact that using sexual history evidence for such a purpose, in our view, runs into direct conflict with the limitations on such evidence imposed by subsection 276(1) of the *Criminal Code*, how could this possibly be relevant given the facts of this case?

There was clear evidence in this case of nonconsent or, at the very least, a withdrawal of consent that was clearly communicated to the accused. This evidence was supported by both a disinterested witness and other physical evidence. Why was this a difficult case? Was it the stereotype of the hypersexual young woman with a mental disability, who would do anything to fit in, that allowed the case to be derailed by the red herring of the complainant’s sexual history? The history of this complainant—socially ostracized, more developmentally challenged than the other students—should have led the court to be even more rigorous in ensuring that a noncoerced consent was present; yet, it had the opposite effect. The mental disability of the complainant made the defence’s assertions of consent much more plausible than the evidence warranted. It was only the presence of an independent, able, male witness that enabled the trial judge to convict in this case, and even then after a humiliating trial experience for the complainant.

The cases involving consent in our study had clear similarities with sexual assault cases generally. Reputation and sexual history are used to bring consent into question; women with prior sexual experience tend to be disbelieved; and acquiescence is sometimes confused with consent—especially where the accused is in a position of power over the complainant. Occasional reference in the case law to the sexual freedom or autonomy of women with mental disabilities carries little weight because these women are denied the right to make meaningful choices about their sexuality free from sexual violence. Disability may be used to assume consent (as in *B.M.*) or disability may be invisible in the analysis (as in *Parsons*). But little effort is made to understand what real consent or nonconsent might look like for the complainant in question. While *Ewanchuk* is a positive development for dealing with cases involving

¹⁰⁴ This case has disturbing similarities to the now infamous *Glen Ridge* case in the United States in which several teenaged boys lured a seventeen-year-old girl with a mental disability into a basement where she was subjected to horrible indignities, including having foreign objects forcibly inserted into her vagina. Defence counsel focused on her “sexually aggressive” and “deceptive” nature to suggest that she consented to the sexual violence in question (*New Jersey v. Scherzer*, 301 N.J. Super. 363, 694 A.2d 196 at 212-13 (1997) [*Glen Ridge*]).

¹⁰⁵ *Ibid.* at para. 9.

apparent acquiescence, the focus on the subjective wishes of the complainant may leave unprotected those women who are unable to communicate what their wishes are in a manner acceptable to the courts. The exclusively “subjective” focus also obscures the potential for various kinds of coercion on the part of the accused.

2. Capacity to Consent

Consent to sexual activity is contingent upon the complainant being legally capable of giving consent. In other words, “Capacity is integral to consent.”¹⁰⁶ Paragraph 273.1(2)(b) of the *Criminal Code* states the obvious: no consent is obtained where the complainant is incapable of consenting. Proof of noncapacity, therefore, is a substitute element for nonconsent. In the vast majority of sexual assault cases, it is assumed that an adult complainant is capable of giving consent to sexual activity. Unless there is evidence of intoxication, impaired consciousness, or mental disability, capacity is rarely mentioned.¹⁰⁷

Capacity to consent is touched on superficially in a number of the cases we surveyed, but it is surprising how rarely it is argued by the Crown or addressed in anything more than a passing reference by trial judges. It is possible that Crown counsel are reluctant to raise the issue of incapacity in all but the clearest of cases. Because incapacity to consent may be incorrectly associated with an inability to remember or recount events accurately, evidence that a woman was incapable of understanding the sexual activity or giving meaningful consent may, directly or indirectly, undermine her as a witness and as a complainant.

Where judges discuss capacity, the law does little to inform the analysis.¹⁰⁸ Expert evidence may be given but it is not required.¹⁰⁹ Determinations are almost entirely fact-based. Moreover, rather than assessing capacity on a situational basis, judges tend to treat capacity as a static and absolute condition: one is capable of consenting to any sexual activity or to none at all.

In our view, there may be differences in capacity depending on the nature of the relationship between the accused and the complainant, particularly where the accused is in a relationship of trust with, or position of authority over, the complainant. For

¹⁰⁶ *R.R.*, *supra* note 97 at para. 52.

¹⁰⁷ In a recent two-to-one decision on incapacity due to intoxication, the Alberta Court of Appeal reversed the decision of the trial judge. The trial judge had held that the accused should be acquitted because the Crown had failed to disprove the theory that the complainant, before she became unconscious, might have given consent to be touched while unconscious. The two accused were observed touching the complainant’s breasts on a public street in the daytime. The majority of the Court of Appeal held that the Crown had proved that at the time of the sexual touching the complainant lacked the capacity to consent, and that the accused could not rely on an expression of prior consent once the complainant lost consciousness (*R. v. Ashlee*, 2006 ABCA 244, 391 A.R. 62, 61 Alta. L.R. (4th) 226).

¹⁰⁸ See e.g. *Parsons*, *supra* note 88.

¹⁰⁹ See *A.A.*, *supra* note 72; *R. v. Aminian*, [1999] O.J. No. 4240 (C.A.) (QL) [*Aminian*].

example, one could imagine a situation in which a woman with a mental disability could be capable of consenting to sex with her boyfriend but not with her doctor.

A more nuanced assessment of capacity might also consider the nature of the sexual acts involved and the degree of risk associated with them. For example, an individual with a moderate to severe mental disability who resides in a residential facility might be able, through targeted sexual education and assistance from staff, to consent to sexual activity with a fellow resident.¹¹⁰ That same person might not have the capacity to consent to sexual activity with a stranger who is visiting the facility. Of course, applying a situational approach to capacity could still have the effect of circumscribing the sexual self-determination of women. In order to understand the appropriate legal role for capacity in the context of mental disability, it is important to determine exactly what it is we are trying to identify when assessing capacity.

This issue arises most often in the context of women with developmental disabilities, based on the assumption that a certain level of cognitive ability is necessary for exercising choice about sexuality. If incapacity is understood as a general condition, a finding of incapacity can result in criminalizing all sexual relationships for that woman, a conclusion that should be avoided where possible. Thus, the starting point should be that a woman is capable of giving consent unless the Crown establishes otherwise.

A finding of incapacity leads inevitably to a finding of nonconsent because the complainant is unable to provide a legally valid consent. Yet the precise relationship between capacity and consent is complex. It might appear logical to say that capacity should be addressed prior to consent because capacity is a prerequisite to consent. Thus, one could argue that a woman who is incapable of giving consent is also incapable of withholding consent.

We believe, however, that the level of understanding required to give meaningful consent to sexual activity may be higher than that which is required to withhold it. In other words, we believe it is possible for a woman to be incapable of giving consent in a particular situation, and yet be capable of withholding it. For example, a woman could know that she doesn't want any physical contact with the man in question, even if she does not understand the sexual nature of the activity or its potential consequences. Because of the serious implications of finding someone incapable of consenting, we suggest that where there is evidence of nonconsent, that evidence should be looked at before considering capacity. This was the approach of the trial judge in *A.A.*, who, on urging from the Crown, told the jury that it did not have to consider capacity to consent if it found that there was no consent.¹¹¹

¹¹⁰ See Fred Kaeser, "Can People with Severe Mental Retardation Consent to Mutual Sex?" (1992) 10 *Sexuality and Disability* 33.

¹¹¹ *Supra* note 72.

In *R. v. Jensen*,¹¹² a sexual assault case involving potential incapacity due to intoxication, the Ontario Court of Appeal did not take this view. The court held that the trial judge erred in concluding that either the complainant was incapable of consenting or that she did not consent, ruling that these two conclusions were inconsistent. *Jensen*, however, was decided before *Ewanchuk*, and the majority held that if the complainant did not say “no” (although there was unrefuted evidence that she did say “no”), she probably meant “yes”—a finding that is no longer permissible after *Ewanchuk*.¹¹³

In Canada, capacity tends to be considered in those cases where the disability is profound. One of the few cases in which the complainant was found to be incapable of consent involved a woman with advanced Alzheimer’s disease.¹¹⁴ The threshold for incapacity appears to be much higher in Canada than in the United States, where complainants are routinely found to be incapable of consent. Most state penal statutes have a provision, similar to our old carnal knowledge offence, that explicitly criminalizes sexual activity with women labelled as mentally disabled, sometimes still using obsolete language like “mental deficiency”,¹¹⁵ “mentally defective”,¹¹⁶ or “mentally retarded”.¹¹⁷

One problem found in the U.S. case law is that the inquiry into the nature of a woman’s disability and associated mental capacity may preclude any inquiry into whether there was evidence of nonconsent. In some cases, clear evidence of force and nonconsent is ignored; once the complainant is deemed capable, the accused is acquitted, since nonconsent is not an element of the special offence. Alternatively, in other cases one sees evidence of consent or nonconsent being used to influence the decision about capacity—if there is evidence that a woman submitted to sexual activity without protest, the court may be more likely to find that she was capable of consenting.¹¹⁸

Susan Stefan describes the manner in which these cases sometimes allow a focus on capacity to subsume evidence of nonconsent:

¹¹² (1996), 90 O.A.C. 183, 106 C.C.C. (3d) 430, 47 C.R. (4th) 363, aff’d [1997] 1 S.C.R. 304, 112 C.C.C. (3d) 384 [*Jensen*].

¹¹³ We also agree with the dissent in the Ontario Court of Appeal in *Jensen, ibid.*, which held that so long as the trial judge did not have a reasonable doubt regarding consent, it was immaterial to the outcome whether he based that decision on incapacity or on nonconsent. Both lead to the same legal result. See *R. v. Thatcher*, [1987] 1 S.C.R. 652, 39 D.L.R. (4th) 275, 32 C.C.C. (3d) 481.

¹¹⁴ See *R. v. W.L.* (1994), 123 Nfld. & P.E.I.R. 357 (Nfld. Prov. Ct. Youth Ct.) (assuming, with almost no discussion, that the complainant, a fifty-nine-year-old woman in the advanced stages of Alzheimer’s disease, was incapable of consenting).

¹¹⁵ Idaho Code Ann. §18-6101(2) (2000).

¹¹⁶ Ala. Code §13A-6-62(a)(2) (2006); Conn. Gen. Stat. Ann. §53-A-71(a)(2) (West 2004); Haw. Rev. Stat. §707-730(1)(d) (2006). See also Stefan, *supra* note 90 at 796.

¹¹⁷ 720 Ill. Comp. Stat. 5/12-14(c) (2004).

¹¹⁸ See Stefan, *ibid.* at 796-99.

These cases are not about criminalization of consensual sexual behavior with handicapped women who consented to intercourse, but rather about criminalization of nonconsensual sexual behavior with women who have capacity to understand the nature of the act and who object to sex. The woman does not meet the statutory standard at all: she does not lack the capacity to understand the meaning of sexual intercourse. She just does not want to have sex. However, these are cases where standard rape law would not have sufficed to sustain a conviction. There is little or no resistance beyond the hesitation or reluctance that clearly conveys the woman's distaste for and desire to avoid intercourse. The woman says, "No," or "Do I have to?" Under [U.S.] law, this would never be enough to convict a man of rape.¹¹⁹

Thus, U.S. law may have developed this focus on incapacity because the understanding of nonconsent in that country has not, generally, advanced to the level expressed in *Ewanchuk*, but rather still requires proof of a clear expression of resistance in the face of force before reaching a finding of rape.

In the United States, where criminal law is a matter within state jurisdiction, different state courts have adopted different standards for capacity in the context of mental disability.¹²⁰ The lowest threshold is illustrated by New Jersey, where, in order to be capable of providing consent, the complainant only needs to know the physical nature of the sexual act and that she has the right to refuse it.¹²¹ At the other extreme, courts in seven states, including New York, have held that the complainant must not only understand the physiological aspects of sex, but also be able to appraise its potential consequences (such as pregnancy or sexually transmitted diseases) and the moral dimension of choosing to engage in sexual activity.¹²² While this is an onerous test that could negate capacity in situations that otherwise appear to be consensual, courts do stress that the complainant need only understand that society has these views; she need not adhere to them herself.¹²³ The middle ground, which seems to prevail in the majority of states, is that the complainant must understand the physiological aspects of sex as well as its potential consequences of pregnancy and disease transmission.¹²⁴

¹¹⁹ *Ibid.* at 797-98 [footnotes omitted].

¹²⁰ For a more nuanced discussion of the different tests, see Deborah W. Denno, "Sexuality, Rape, and Mental Retardation" (1997) U. Ill. L. Rev. 315.

¹²¹ See e.g. *New Jersey v. Olivio*, 123 N.J. 550, 589 A.2d 597 (Sup. Ct. 1991). Lowest threshold states include California, Delaware, Florida, Kentucky, Louisiana, Maine, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Texas, and Utah. See Denno, *supra* note 120 at 345 (current to 1997).

¹²² See e.g. *New York v. Cratsley*, 653 N.E. 2d 1162, 86 N.Y. 2d 81, 629 N.Y.S. 2d 992 (C.A. 1995); *New York v. Easley*, 364 N.E. 2d 1328, 42 N.Y. 2d 50, 396 N.Y.S. 2d 635 (C.A. 1977) [*Easley*]. Highest threshold states include Alabama, Colorado, Hawaii, Idaho, Illinois, New York, and Washington. See Denno, *supra* note 120 at 344 (current to 1997).

¹²³ See *Easley*, *ibid.*

¹²⁴ See e.g. *Jackson v. Alaska*, 890 P.2d 587 (Alaska C.A. 1995); *Adkins v. Virginia*, 20 Va. App. 332, 457 S.E. 2d 382 (1995). Middle threshold states include Alaska, Arizona, Arkansas, Indiana, Iowa,

Missing from the Canadian cases we reviewed is any clear discussion of how to determine the threshold of capacity to consent. Given the fundamental nature of this debate, we would like to see more discussion in the case law as to how the line should be drawn.¹²⁵ In one of the few Canadian cases in which capacity is discussed, the trial judge adopts a test similar to the middle ground in the United States, with one important addition:

There is no doubt in my mind that [the complainant] had no appreciation of the nature and consequence of the sexual intercourse, nor the consensual ability to choose with respect to the sexual activity. To put the matter slightly differently, [the complainant's] mental incapacity was such that she did not have the cognitive or intellectual capacity to understand or comprehend the sexual activity in question, its implications, and *the right to choose or not to choose to engage in it*.¹²⁶

The judge's recognition that capacity includes an understanding of the absolute right to choose whether to engage in sexual activity is crucial yet often overlooked by courts.

In arguing for both caution and clarity, we are not suggesting that incapacity is functionally irrelevant in all cases. Rather, we argue that letting an inquiry into incapacity preclude an inquiry into nonconsent could have dangerous implications for the sexual autonomy of women with mental disabilities. Too high a threshold of capacity risks labelling all sexual activity by women with mental disabilities as nonconsensual; the New York test requiring an understanding of the moral nature of engaging in sexual activity sets too high and ambiguous a threshold. That said, setting the threshold too low runs the risk of failing to protect women with mental disabilities from exploitative sexual behaviour. Given the low threshold for capacity that appears to be operating in Canadian courts, it is even more important to inquire rigorously into whether a voluntary consent has been communicated to the accused. Where there is evidence of nonconsent, it is generally more respectful of the complainant's agency to focus on that nonconsent than to focus on her capacity.

The cases we have reviewed also demonstrate that it is sometimes difficult to determine what is really being assessed in the capacity inquiry. While the cases inquire into whether a woman understands the nature of the sexual activity, the capacity inquiry does not go further; it does not extend, for example, to examining whether the woman had the ability to understand that she was being misled or taken advantage of in the sexual encounter. And while this risk may exist for a broader group of women beyond those with mental disabilities, the inquiry should be particularly rigorous where disability is the source of the incapacity.

Kansas, New Mexico, Oklahoma, Pennsylvania, Tennessee, Vermont, Virginia, and Wyoming. See Denno, *supra* note 120 at 345 (current to 1997).

¹²⁵ By contrast to capacity to consent, a lot of attention is given in the case law to capacity to give evidence, both under oath or on a promise to tell the truth. See e.g. *R. v. Parrott*, 2001 SCC 3, [2001] 1 S.C.R. 178, 194 D.L.R. (4th) 427, 150 C.C.C. (3d) 449.

¹²⁶ *Aminian*, *supra* note 109 at para. 5, citing the trial judge [emphasis added].

In our view, the Canadian approach of setting a relatively high threshold for incapacity is preferable to the lower thresholds seen in the United States, where the capacity inquiry tends to subsume the nonconsent inquiry. While we do believe that women should be found incapable of consenting in certain circumstances, evidence of nonconsent should always be considered first, before a finding of incapacity is made. Courts should define capacity in relation to the situation giving rise to the charge and not only to factors internal to the complainant, recognizing that the capacity to refuse and the capacity to consent voluntarily are two independent assessments.

3. Mistaken Belief

a. Mistaken Belief in Consent

The fault requirement (*mens rea*) for nonconsent is that the accused must know, or be reckless with respect to the fact that, the complainant is not giving consent.¹²⁷ Thus, if there is a reasonable doubt that an accused mistakenly believed that the complainant was consenting, the Crown has failed to prove the mental element of sexual assault. The Supreme Court of Canada has indicated that in such claims, mistaken belief should be treated as a defence, placing the evidentiary burden on the accused to provide an air of reality to the claim of mistake in order to get it before the jury. The early cases established that the test for a mistaken belief was subjective: an accused could make an unreasonable mistake but still be acquitted, so long as his belief was honestly held.¹²⁸

Subsection 273.2(b), enacted in 1992, modified the common law by requiring that an accused wanting to argue mistaken belief have taken reasonable steps, in the circumstances known to the accused at the time, to ascertain whether the complainant was consenting. The precise interpretation of the reasonable steps provision has still not been settled, but it does appear to incorporate an objective element into the mistaken belief inquiry. In *R. v. Esau*, a majority of the Supreme Court of Canada held that the air of reality test was a precursor to the application of the reasonable steps provision, such that the absence of reasonable steps was not germane to whether an air of reality existed on the question of mistake.¹²⁹ This means that the issue of mistake should be left with the jury whenever the conduct or words of the complainant provide an air of reality to the accused's asserted belief; the jury must then decide whether reasonable steps were present. The dissent preferred an approach in which the presence or absence of reasonable steps formed part of the air of reality

¹²⁷ See *Ewanchuk*, *supra* note 84 at para. 23; *R. v. Pappajohn*, [1980] 2 S.C.R. 120, 111 D.L.R. (3d) 1, 52 C.C.C. (2d) 481.

¹²⁸ See *R. v. Pappajohn*, *ibid.*; *R. v. Robertson*, [1987] 1 S.C.R. 918, 39 D.L.R. (4th) 321, 33 C.C.C. (3d) 481; *R. v. Sansregret*, [1985] 1 S.C.R. 570, 17 D.L.R. (4th) 577, 18 C.C.C. (3d) 223.

¹²⁹ [1997] 2 S.C.R. 777, 148 D.L.R. (4th) 662, 116 C.C.C. (3d) 289.

assessment. We prefer this view, since it recognizes that the reasonable steps component is an integral part of the reality of the belief. The minority position was adopted, without reference to *Esau*, by the Ontario Court of Appeal in a 2003 decision.¹³⁰

Ewanchuk confirmed that the *mens rea* analysis focuses on whether the accused believed that the complainant communicated consent, not whether she communicated an absence of consent:

In the context of *mens rea* – specifically for the purposes of the honest but mistaken belief in consent – “consent” means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused.¹³¹

A mistake must be a mistake about whether consent was positively communicated, rather than a mistake about whether the complainant adequately demonstrated her lack of consent.

This was an important development because the Court confirmed that a lack of active resistance does not form an adequate basis on which to find a reasonable doubt about mistaken belief in consent. In the earlier concurring judgment of Justice L’Heureux-Dubé in *R. v. Park*, she stated, “[T]he *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’*.”¹³² The Court in *Ewanchuk* unanimously agreed with this approach. In other words, the starting point has shifted from presuming consent, unless the complainant clearly demonstrates otherwise, to presuming nonconsent unless the complainant has communicated otherwise. In the words of Justice Major in *Ewanchuk*:

In order to cloak the accused’s actions in moral innocence, the evidence must show that he 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.¹³³

These two dimensions of consent, whether the complainant actually consented (relevant to the *actus reus* determination) and whether she communicated consent to the accused (used to establish the *mens rea* requirement), are sometimes difficult to separate completely. This difficulty arises because the same evidence used to demonstrate what was going on in the complainant’s mind is likely to be relevant in determining whether the accused believed that consent had been communicated.

¹³⁰ *R. v. Comejo* (2003), 68 O.R. (3d) 117, 179 O.A.C. 182, 181 C.C.C. (3d) 206, leave to appeal to S.C.C. refused, [2004] 3 S.C.R. vii.

¹³¹ *Supra* note 84 at para. 49.

¹³² [1995] 2 S.C.R. 836 at para. 39, 169 A.R. 241, 99 C.C.C. (3d) 1 [cited to S.C.R., emphasis added].

¹³³ *Supra* note 84 at para. 46 [emphasis in original].

The trier of fact should only consider mistaken belief if it has found that there is no consent. This is not to suggest that the accused must concede nonconsent in order to raise mistake. Rather, the trier of fact should address nonconsent before assessing whether there is a reasonable doubt about mistaken belief in consent. In both *Harper*¹³⁴ and *B.M.*,¹³⁵ the trial judges easily dismissed the assertion of mistaken belief in consent and only then went on to consider the *actus reus* issue of nonconsent. In *Harper*, this was particularly troublesome—while the trial judge acknowledged that there was *nothing* in the evidence that could have given Harper a mistaken belief in consent, he nevertheless found something that gave him a reasonable doubt about consent.

The problem of mistaking compliance for consent carries over into the *mens rea* for sexual assault, because compliance is often manifest in the complainant's failure to communicate consent (or nonconsent). In *R. v. Sam*,¹³⁶ decided prior to the 1992 enactment of the reasonable steps provision, the accused was charged with sexually assaulting a seventeen-year-old girl with a severe developmental disability. The trial judge first found that there was no consent:

[O]n the issue of consent I had no doubt. I accept that she did not want to happen what was happening. What may have been apparent compliance was not real. ... She said she felt awful. ... I had no doubt she did and I have no doubt this was not an after-the-fact rejection. It was the state of her response at the time and that response was not consent.¹³⁷

However, despite there being no other evidence to support a mistaken belief in consent, the trial judge nonetheless acquitted the accused on that basis. He began by discounting the complainant's testimony that she objected, a puzzling finding given the conclusion that no consent was given:

[The complainant] testified that she told the defendant "don't do that" as he touched her sexually but that Mr. Sam wouldn't listen. That had a sense of truth but in light of the difficulty I've had with [the complainant's] evidence generally, I concluded I should not accept it as conclusive or determinant on refusal of consent, or rather an expression of the refusal of consent.¹³⁸

Instead of pointing to evidence that might support a mistaken belief that consent was communicated, he rejected her communication of nonconsent, essentially concluding that no one would be so foolhardy as to assault a young woman when her parents were home:

[The complainant's] parents were home. Her sister was still up. Mr. Sam is not stupid. It would be very difficult to accept that he would make a sexual advance he thought might be rejected if all [the complainant] had to do to stop it was

¹³⁴ *Supra* note 92.

¹³⁵ *Supra* note 60.

¹³⁶ [1987] B.C.J. No. 3158 (Co. Ct.) (QL) [*Sam*].

¹³⁷ *Ibid.* at para. 13.

¹³⁸ *Ibid.* at para. 14.

shout. I did not find that his state of knowledge of [the complainant's] compliant nature was such that he could be said to have expected silence.¹³⁹

The accused knew that he was sexually exploiting a young woman with a mental disability. Any belief that this was lawful, today, should be treated as a mistake of law. This case, decided before the reasonable steps provision was enacted, demonstrates the dire need for such a provision. But on any standard, the length to which the judge went to acquit the accused in *Sam*—in the face of the evidence to the contrary—is troubling.

The defence of mistaken belief in consent may be complicated where the accused also has a mental disability. In *R. v. White*, the appellate court noted:

Reasonableness may be looked to for guidance in assessing the honesty of an accused's belief in consent. However, in this case there was uncontradicted evidence that the accused had disabilities (although this evidence was never adverted to by the Trial Judge in his reasons), evidence that does raise a concern about using reasonableness as the sole guide for assessing the accused's honesty.¹⁴⁰

While we agree that the accused's developmental disability is relevant to mistake, he should still have to take reasonable steps to inquire into consent based on his level of understanding and knowledge of the circumstances.

It is noteworthy that no case in our sample applies the reasonable steps provision in the context of a complainant with a mental disability. As will be discussed below, the one case that addresses this provision does so in the context of capacity to consent. In *R.R.*,¹⁴¹ the court held that in the capacity analysis, the accused's responsibility is heightened where the complainant has a mental disability. The same level of scrutiny should be applied to the determination of mistaken belief in consent in cases where the complainant has a mental disability.

b. Mistaken Belief in Capacity

Some courts have also found that there is a *mens rea* component where capacity to consent is at issue. The accused must have known or been reckless with respect to the fact that the complainant was incapable of consenting.¹⁴² Thus, a new layer is added to the offence: a man may make a mistake about a woman's capacity to consent, and a reasonable doubt about such a mistake is sufficient to win an acquittal. In our view, a mistaken belief in capacity should be considered a mistake of law, thereby precluding the defence, so long as the accused was aware of the

¹³⁹ *Ibid.* at para. 20.

¹⁴⁰ (2001), 45 C.R. (5th) 332 at para. 24, 51 W.C.B. (2d) 150 (Ont. C.A.) [*White* (C.A.) cited to C.R.].

¹⁴¹ *Supra* note 97.

¹⁴² See *ibid.*

circumstances that gave rise to the incapacity.¹⁴³ In other words, if the accused had knowledge of the nature of the complainant's disability, this should be sufficient to satisfy the *mens rea* requirement—he should not have to understand that the disability made her legally incapable of consenting. This rule should apply equally to other sources of incapacity, such as intoxication.

The Ontario Court of Appeal has held that an accused should not be able to argue mistaken belief in consent where he gave no thought whatsoever to the complainant's capacity to consent.¹⁴⁴ In *R.R.*, the accused was the middle-aged neighbour of the teenage complainant whom he had known for many years. He invited the complainant to his house to pick some vegetables from the garden for her mother, an activity she had carried out on prior occasions. The accused touched the complainant sexually and encouraged the complainant to touch him. In assessing mistaken belief in consent or capacity, the trial judge gave little weight to the defence's argument that the complainant had not said "no" or "stop". Instead, the trial judge found that the fact that the accused gave no thought to capacity—despite being aware of the nature of the complainant's disability—ruled out this defence.¹⁴⁵

Justice Abella in the Court of Appeal held that, where the accused knows that the complainant has a mental disability, the obligation to take reasonable steps to inquire into consent "escalates exponentially":

Under any circumstances, there is a responsibility, prior to engaging in sexual activity, to take reasonable steps to ascertain consent: *Criminal Code*, s. 273.2(b). But in circumstances such as these, where one of the participants has demonstrable mental limitations, the threshold of responsibility escalates exponentially. This is not to suggest that persons who are developmentally disabled cannot consent; rather, it requires that prior caution be exercised to avoid the exploitation of an exceptionally vulnerable individual.¹⁴⁶

While Justice Abella does not explicitly state that the reasonable steps provision applies to asserted mistakes about capacity, the accused's failure to consider capacity in this case meant that he could not successfully raise mistaken belief in consent:

It is utterly unrealistic for the appellant to argue that he had an honest but mistaken belief in the complainant's consent, when he acknowledged that he gave no thought whatever to her capacity to consent. The appellant's willingness to suspend all knowledge of her profoundly reduced mental abilities and assume her capacity to consent in these circumstances, defies reality.¹⁴⁷

¹⁴³ Cf. Lucinda Vandervort, "Sexual Assault: Availability of the Defence of Belief in Consent" (2005) 84 Can. Bar Rev. 89 at 104.

¹⁴⁴ See *R.R.*, *supra* note 97.

¹⁴⁵ *Ibid.* at para. 53.

¹⁴⁶ *Ibid.* at para. 57 [references omitted].

¹⁴⁷ *Ibid.* at para. 59.

In other words, inquiring into capacity may be required as part of the reasonable steps provision, thereby ruling out a mistaken belief where no such inquiry was made.

V. Discussion

In the preceding sections, we examined the interaction between a complainant's mental disability and the substantive elements of the crime of sexual assault. Disability weaves through these cases in different ways. In some cases, preconceived ideas about women with mental disabilities shape—and sometimes distort—the meaning of consent. In other cases, it is the failure to acknowledge the relevance of disability that is problematic. Thus far, we have analyzed cases in which the complainant has a mental disability, focusing on problems in the statutory provisions themselves or in the way judges apply them. In the present section, we synthesize our findings and set out some options for ways in which the law could be improved. In so doing, we hope to identify mechanisms for improving some of the problems identified above.

The experiences of women with mental disabilities who complain of sexual assault, as seen through our review of the available case law and social science literature, demonstrate that sexual autonomy and freedom from sexual violence are not mutually exclusive goals but are rather closely linked and mutually reinforcing. Satisfying both of these goals is not easy, however, as the failure of the special offence in section 153.1 attests. Our research shows that progress toward these goals is impeded for this group of women by the competing stereotypes of hypersexuality and asexuality.

The lives of women with disabilities generally, and of women with mental disabilities in particular, are often lived under the close control of others. Even those women who live “independently” in the community often have their day-to-day experiences controlled by a variety of family members and social service providers, who determine their access to educational, vocational, and recreational opportunities. For these women, continued participation in the community is often effectively dependent on the approval of outsiders.

For example, in *R. c. Gagnon*, the complainant testified that she had oral sex with her adapted transport bus driver because he had allowed her to smoke on the bus on a number of occasions in contravention of the transit policy. She claimed that she had feared that being caught smoking would lead to her being banned from the bus, limiting her ability to attend educational programs.¹⁴⁸ The trial judge acquitted the accused, finding the sex consensual. In *White*, the complainant faced censure by school officials and classmates when they saw her with a man she had met on her commute to school; in light of this disapproval, it had become difficult to tell whether

¹⁴⁸ [2000] J.Q. No. 1368 (C.Q. crim. & pén.) (QL).

their relationship had in fact departed from their earlier consensual conduct.¹⁴⁹ The accused was convicted, but this conviction was overturned on appeal.¹⁵⁰ The complainant in *Parsons* appeared to have been pressured by her mother both to make and later recant several prior complaints of sexual assault.¹⁵¹ Some of the women whose cases we reviewed appeared to face censure or disapproval from caregivers for engaging in any sexual or “romantic” relationships at all.¹⁵²

Some researchers have argued that this high level of control over the lives of persons with mental disabilities, especially when coupled with a lack of knowledge about sexuality and the right to sexual self-determination, can produce high levels of compliant behaviour.¹⁵³ This may make women with mental disabilities more likely to accede to requests or demands for sexual activity without regard to their own needs and desires. This problem may in some cases be heightened for those women who are trying hard to fit in to a group or setting from which they are repeatedly excluded.

One might expect the cases to reflect these facts and demonstrate judicial attempts to exert a high degree of control and judgment over the sexual lives of women with disabilities in order to protect them from what the court considers inappropriate sexual conduct. In fact, the cases overwhelmingly do not support such a conclusion. For example, none of the accused in the three cases described above was convicted; this suggests that disapproval of the complainant’s behaviour does not translate automatically into disapproval of the actions of the accused, at least in the criminal law context. Moreover, we did not find a single case in which a man was punished for having sex with an “incapable” complainant in the face of her claim that she consented. The courts rarely invoked the language of protection or vulnerability in cases involving complainants with mental disabilities. Instead, we saw several cases in which judges invoke the language of autonomy to justify acquitting the accused.¹⁵⁴

In addition, we did not see the prosecution of cases in which women with mental disabilities were induced to participate in sexual activity with promises of monetary reward or inclusion in social groups, despite the evidence that such acts are commonplace in the lives of at least some women with disabilities.¹⁵⁵ We surmise that these cases are not prosecuted because of the apparent difficulty of proving nonconsent and the reluctance of the Crown to invoke the doctrine of incapacity as a substitute for this proof. Again, this could be viewed as an overemphasis on purported

¹⁴⁹ *R. v. White*, [2001] O.J. No. 3367 (Sup. Ct.) (QL).

¹⁵⁰ See *ibid.*; *White* (C.A.), *supra* note 140.

¹⁵¹ *Supra* note 88.

¹⁵² See e.g. *Harper*, *supra* note 92 at para. 16; *White* (C.A.), *supra* note 140 at paras. 4-5. See also *Sobsey & Doe*, *supra* note 51 at 247-48.

¹⁵³ See e.g. Sheila Lynn Doncaster, *The Role of Compliance in the Sexual Abuse and Assault of Disabled Individuals* (M.Ed. Thesis, University of Alberta, 1991) [unpublished] at 30-34.

¹⁵⁴ See e.g. *Parsons*, *supra* note 88.

¹⁵⁵ See *McCarthy*, *supra* note 38 at 234-35.

sexual autonomy and a disregard of exploitation and abuse.¹⁵⁶ We hope that more research will be done in this area, particularly in the Canadian context.

What we did find were cases in which the accused attempted to invoke the purported sexual promiscuity of the complainant to justify his assaulting behaviour—in the face of clear testimony by the complainant that she did not consent.¹⁵⁷ The cases are replete with examples of both defendants and courts blaming the complainant for any hint of sexuality in her past. From the complainant in *Harper* who was “too friendly toward males,”¹⁵⁸ to the complainant in *R. v. D.* whose sexual history was admitted as evidence on the accused’s bail application,¹⁵⁹ there is a tendency to label any sexual activity for women with mental disabilities as inappropriate, while at the same time denying them protection from sexual violence in the name of their “right” to consent.

A reflexive nod by the courts to “sexual autonomy” is not enough to guarantee sex equality for women with mental disabilities. It is not possible for women with mental disabilities to explore and develop their own sexuality in a way that brings meaning or value to their lives if their actions are constrained by the omnipresent threat of male violence. This is true both because violence itself is disabling, coercive, and antithetical to free choice, but also because the way in which women’s sexuality is socially manufactured makes it difficult to develop an “authentic” female sexuality under such conditions. This is especially true for women with mental disabilities, but it is also true for many other women, who may also lack the basic tools necessary to make informed choices about their sexual lives, and who perceive no guarantee that those choices would be accepted or validated in any event.

Just as we reject placing protection and autonomy in binary opposition, we also believe it is better to avoid placing the impairment or biomedical model of disability as necessarily in competition with the social model. The social model of disability was helpful in understanding some of the cases we considered, as it points out that just as sexuality is socially constructed in many respects, so too is disability. For example, the extent of a woman’s apparent “mental disability” in the context of sexual decision making is influenced by her knowledge of sexual matters generally, and in particular by her knowledge of her right to be free from unwanted sexual contact. The kind of training and support afforded to persons with disabilities may influence the assessment of their capacity to consent to sexual intercourse. This is true both because a lack of education may leave such women unaware of the possible consequences of sexual activity, but also because it may limit their own ability to

¹⁵⁶ The *Sexual Offences Act 2003* (U.K.), c. 42, which for the first time codifies all English sexual offences, contains a number of particular offences for mentally disabled complainants, and in particular creates the offence of using inducements or deception to procure sexual intercourse with a person with a mental disorder (s. 34).

¹⁵⁷ See *R.R.*, *supra* note 97; *B.M.*, *supra* note 60.

¹⁵⁸ *Supra* note 92 at para. 16.

¹⁵⁹ [2000] O.J. No. 3645 (Sup. Ct.) (QL).

decide if particular sexual activity is wanted or unwanted. The biomedical model has explanatory value in particular in the cases where memory loss or other barriers to communication make it impossible to determine what happened in the absence of independent witnesses.¹⁶⁰

A. Coercion and Voluntariness

One possible solution to the problems we have identified is to shift the focus from whether the complainant consented to whether the accused's actions were coercive. The earliest rape law reforms of the 1970s in the United States followed this model, defining rape as sex plus force, with no reference to consent.¹⁶¹ Many U.S. states now use this formulation in their criminal laws. It has the potential advantage of focusing on the actions of the accused rather than on the quality of the complainant's resistance or the clarity of her communication. It also obviates the need for the defence of mistaken belief in consent, a defence that tends to privilege the male view of where to draw the line between rape and sex.

In practice, however, some state courts have nonetheless recognized consent as an affirmative defence, thus implicitly recognizing that consent may be given notwithstanding the existence of force.¹⁶² In addition, such states may end up having to define "force" broadly to include situations where no apparent force or coercion is present, such as where the complainant is asleep, unconscious, or intoxicated.¹⁶³

One compromise between these two models would be to give the Crown the option of proving either sexual contact without consent or sexual contact by coercion. If sexual assault laws were drafted in this way, there would at least be the option of focusing on the accused's coercive behaviour, rather than the complainant's purported equivocation or compliance.

Another option not requiring legislative amendment is to focus on the voluntariness requirement in the definition of consent:

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.¹⁶⁴

In cases where a woman perceives that withholding consent is not an option, courts need to scrutinize whether the apparent consent was given voluntarily.

¹⁶⁰ We explore this further in our subsequent article (Benedet & Grant, *supra* note 4).

¹⁶¹ The state of Michigan was the first to pass such a law; other states soon followed. See Leigh Bienen, "Rape III—National Developments in Rape Reform Legislation" (1980) *Women's Rts. L. Rep.* 173.

¹⁶² See e.g. *People of the State of Michigan v. Khan*, 264 N.W. 2d 360 at 366-67, n. 5, 80 Mich. App. 605 (1978).

¹⁶³ See e.g. Mich. Comp. Laws Ann. § 750.520b(1)(f) (West 2006).

¹⁶⁴ *Supra* note 3 [emphasis added].

Although the leading case on voluntariness, *Stender*,¹⁶⁵ does not involve a complainant with a mental disability, its reasoning holds promise for such cases. In *Stender*, the accused and the complainant had been in a romantic relationship that had ended prior to the sexual assault. The accused had, without the complainant's knowledge, taken pictures of the complainant while they were involved in sexual activity. He coerced her into sexual activity by threatening to distribute those pictures to the complainant's friends and acquaintances.

The Crown relied primarily on paragraph 273.1(2)(c), arguing that the conduct of the accused amounted to extortion and that the accused had abused a position of power over the complainant to coerce consent. The trial judge agreed that there was an abuse of power, but was not convinced that the nature of the threat in question was meant to be criminalized. He acquitted the accused.

The Ontario Court of Appeal quashed the acquittal and entered a conviction, holding that it was unnecessary to consider whether or not an abuse of power of this kind vitiated consent because there was no *voluntary* consent to begin with:

Throughout her testimony, [the complainant] repeatedly stated her belief that she had no choice but to submit to intercourse with the respondent; that her purpose in going to the respondent's apartment (on both occasions) was to secure the deletion of the respondent's computer files containing the nude photographs so as to avoid their dissemination and the reputational injury that would follow; that she told the respondent during both attendances at his apartment that she did not want to have sex with him; that the respondent knew that she "fought him off"; and that he pressured her to engage in sex as a condition for the deletion of the computer files. On [the complainant's] evidence, therefore, she did not wish the sexual touching to occur, and no actual consent to the touching was ever given.¹⁶⁶

The Court of Appeal relied on the Quebec Court of Appeal decision in *R. v. St-Laurent*¹⁶⁷ where Justice Fish held that consent requires an informed choice, and that there could be no such choice where the complainant did not realize that she could refuse to participate:

[C]onsent implies a reasonably informed choice, freely exercised. No such choice has been exercised where a person engages in sexual activity as a result of fraud, force, fear, or violence. Nor is the consent requirement satisfied if, because of his or her mental state, one of the parties is incapable of understanding the sexual nature of the act, or of realizing that he or she may choose to decline participation.

¹⁶⁵ *R. v. D.G.S.* (2004), 72 O.R. (3d) 223, (*sub nom. R. v. Stender*) 190 O.A.C. 127, 188 C.C.C. (3d) 514, *aff'd* [2005] 1 S.C.R. 914, 258 D.L.R. (4th) 577 [*Stender* cited to O.R.].

¹⁶⁶ *Ibid.* at para. 49.

¹⁶⁷ (1993), [1994] R.J.Q. 69, 90 C.C.C. (3d) 291, leave to appeal to S.C.C. refused, (1994) 175 N.R. 240.

“Consent” is thus stripped of its defining characteristics when it is applied to the submission, non-resistance, non-objection, or even the apparent agreement, of a deceived, unconscious or compelled will.¹⁶⁸

The Supreme Court of Canada, giving only brief reasons, upheld the Ontario Court of Appeal’s decision in *Stender*.¹⁶⁹ This decision means that a threat need not necessarily relate to physical force in order to render consent involuntary.¹⁷⁰ A woman who does not want the sexual activity to take place, but who believes that she has no choice but to participate, is not consenting voluntarily. Believing that one is unable to refuse is not the same as wanting the sexual activity to take place.¹⁷¹

This holding could be important for women with mental disabilities whose conduct might be characterized as displaying “apparent agreement” despite their not wanting the sexual activity to take place. For example, an accused who persists in his demands for sex despite the complainant’s initial negative response might pressure the complainant into saying “yes” because she does not think her views could govern. *Stender* makes clear that participation must be the result of free choice.

B. Abuses of Power or Trust

The tendency of courts to find a reasonable doubt as to nonconsent often leads to characterizing the complainant as having acquiesced in the sexual act. Rather than focus on the definition of consent, another option is to consider the relationship between the parties. The definition of consent is limited by subsection 273.1(2) of the Code, which states in part:

No consent is obtained, for the purposes of sections 271, 272 and 273 where

...

(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority ...¹⁷²

We were surprised to find that this provision was rarely discussed in our sample of cases, despite the fact that many of the cases involved an accused who was in a position of power or trust. There is an interaction between the abuse of trust, power,

¹⁶⁸ *Ibid.* at 82. Both these decisions, therefore, are consistent with the judgment in *Ewanchuk*, *supra* note 84, which shifted the focus to what the complainant wanted, and away from whether she just gave in.

¹⁶⁹ *Supra* note 165.

¹⁷⁰ See *R. v. Cuerrier*, [1998] 2 S.C.R. 371, 162 D.L.R. (4th) 513, 127 C.C.C. (3d) 1, rev’g 141 D.L.R. (4th) 503, 111 C.C.C. (3d) 261 (in order for fraud that does not go to the nature of the act to negate consent, there must be a risk of serious harm).

¹⁷¹ Although we do recognize that such an approach may increase the number of cases in which the accused relies on mistaken belief in consent, we would hope that the “reasonable steps” provision would be applied rigorously in such circumstances.

¹⁷² *Supra* note 3.

and authority and the voluntariness requirement, given that a woman may feel she has no choice but to engage in sexual activity with a man who holds power over her.

Paragraph 273.1(2)(c) requires not only that there be the relationship of trust, power, or authority, but also that consent be vitiated by *an abuse* of that relationship. This provision is different than subsection 153(1)—the provision pertaining to the sexual exploitation of young persons—because section 153 requires that the Crown prove only the relationship of trust, and not necessarily that the trust was abused.¹⁷³ In other words, for a person in a position of trust vis-à-vis an adolescent between the ages of fourteen and seventeen, any sexual activity is deemed an abuse of that relationship, rendering all such sexual activity criminal.

We agree that there are circumstances in which a sexual relationship between a woman with a mental disability and a person in position of trust, such as a spouse, should not be criminalized. However, we also argue that the existence of sexual activity in the context of certain relationships should be presumed to be an abuse of that relationship unless there is clear evidence indicating otherwise. We would argue, for example, that where the accused is the complainant’s parent or step-parent, doctor or therapist, or her community support worker or institutional caregiver, the starting point should be that consent is vitiated unless there is clear evidence to the contrary.

Paragraph 273.1(2)(c) needs to be interpreted purposefully in order to recognize the inherent power imbalances that exist where the accused does not have a mental disability, or where the complainant is dependent on the accused for care, transportation, or even social approval (e.g., in the sense of friendship or access to peer group activities). The question should be whether the accused used his position of authority over the complainant to coerce sexual compliance. The relationship of dependency should be examined from the complainant’s perspective.

One interesting development in this area is found in the 2005 amendment to section 153 of the *Criminal Code*.¹⁷⁴ This act amended section 153 (sexual exploitation of a young person) to add relationships that are “exploitative of the young person” to the list of relationships considered to substitute for proof of nonconsent.¹⁷⁵ The judge is permitted to infer that the relationship is exploitative “from the nature and circumstances of the relationship,” including the age difference between the parties, the evolution of the relationship, and the degree of control or influence the accused has over the young person.¹⁷⁶ This amendment was presumably made in response to cases in which the courts acquitted an adult accused who had

¹⁷³ See *R. v. Audet*, [1996] 2 S.C.R. 171, 135 D.L.R. (4th) 20, 106 C.C.C. (3d) 481.

¹⁷⁴ *An Act to Amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, *supra* note 18.

¹⁷⁵ *Ibid.*, s. 4(1), amending *Criminal Code*, *supra* note 3, s. 153(1).

¹⁷⁶ *Ibid.*, s. 4(2), amending *Criminal Code*, *supra* note 3, s. 153(1.2).

sexual relationships with young adolescents on the ground that there was no formal relationship of authority, trust, or dependency between them.¹⁷⁷

No similar amendment was made to section 153.1 despite the parallels between the two offences. This may have been a mere oversight, or it may have reflected the fact that section 153.1 contains the additional element of nonconsent. It would seem untenable to create an offence that contemplates that a person with a disability could consent to sex in a relationship of exploitation. Yet a similar formulation could be useful for women with mental disabilities if it instructed judges to consider, in the context of a complainant with a disability, the difference in intellectual ability between the accused and the complainant, the evolution of their relationship, and the degree of influence the accused exercised over the complainant.

In some important respects, the treatment of some women with mental disabilities by the criminal justice system shares similarities with the treatment of adolescent women. This is perhaps not surprising, given the tendency to treat women with mental disabilities as much younger than they really are. For both of these groups, society struggles with how to protect them from exploitation while at the same time recognizing their sexuality. The problem is, of course, magnified for adolescents with developmental disabilities, whose lack of sophistication and assertiveness may make them prime targets for exploitation.

We question whether women's sexuality generally, as reflected and processed by the sexual assault trial, is ever really socially sanctioned. The comments by a few trial judges that suggest that women with mental disabilities have the "right" to be as sexually promiscuous or cavalier as any woman conveniently overlook the fact that such acts carry a high price in terms of credibility. All women may have the "right" to get into a truck with an unknown man who offers them a ride, but few will be believed when they later complain of sexual assault.

C. Rethinking Capacity to Consent

We are not convinced that there is anything to be gained by shifting the focus away from nonconsent to capacity to consent. In the U.S. context, the focus on capacity to consent has a tendency to overshadow evidence of force. Once the complainant is deemed capable, the accused is acquitted.¹⁷⁸ We argue that these cases put the emphasis in exactly the wrong place. If the complainant did not voluntarily consent, her "incapacity" is irrelevant. Certainly, the focus on incapacity presents real dangers in permitting an inquiry into the complainant's sexual history in aid of determining her knowledge of sexual matters. Capacity, under its current binary definition (i.e., the complainant can consent to all sexual activity or none at all) has

¹⁷⁷ See e.g. *R. v. Galbraith* (1994), 18 O.R. (3d) 247, 71 O.A.C. 45, 90 C.C.C. (3d) 76.

¹⁷⁸ See Stefan, *supra* note 90. Such an outcome is likely where there are two separate offences of forcible rape and sex with a mentally deficient person and the defendant is charged only with the former.

the potential to limit sexual autonomy while doing very little to protect women with mental disabilities from sexual abuse. The capacity inquiry focuses on the “defects” of the complainant rather than on the coercive behaviour of the accused.

We argue that where consent is in issue, “capacity” is really part of the voluntariness inquiry for any sexual assault complainant. We agree with the court’s decision in *Stender*¹⁷⁹ that the assessment of whether any apparent consent was voluntarily given is part of the inquiry into whether the complainant actually wanted the sexual activity to take place. Consent must be free and informed for it to be a valid reflection of the complainant’s choice to engage in sexual activity. For some complainants, an assessment of voluntariness may include evidence of how their understanding, knowledge, or judgment (or any combination of these) is affected by their disability. This approach might permit a more situation-specific approach to capacity that would recognize that the capacity to say “yes” is more complex than the capacity to say “no”, and also that a complainant may have the capacity to voluntarily consent in some circumstances but not in others. We would stress, however, that capacity or voluntariness is not even at issue, logically, unless the accused can point to evidence of a “yes”, whether by words or by clear conduct. In almost all of the cases we considered in which the accused attempted to argue either consent or mistake, there was evidence of a “no”. The debate about capacity and how high the threshold should be set directly raises the tension between autonomy and protection. The threshold needs to be high enough to protect women who do not have the ability to understand what they are consenting to, especially since such women are more likely than others to be repeated targets of sexual assault. At the same time, it should not be so high that women with mental disabilities are prohibited by law from having a sexual life.

Capacity is one of the inquiries for which we find the social model of disability useful. The capacity threshold is, in essence, a normative assessment of the level of understanding that society requires before one can give consent to sexual activity. Where the law draws that line reveals much about society’s attitudes toward disability, and about the potential for women with disabilities to live a full social and sexual life. We need to acknowledge this explicitly, rather than pretending that there is an objective threshold of capacity to consent that can be scientifically measured, such as, for example, through an IQ test.

Conclusion

While it is important not to lose sight of the unique problems experienced by women with disabilities, it is perhaps even more important to identify sites of common experience with other women. Certainly, this was one of the most striking conclusions from our study. Women with mental disabilities are women; they experience the same or very similar kinds of unfairness as sexual assault

¹⁷⁹ *Supra* note 165.

complainants as all women. It is not only women with mental disabilities who find themselves being judged on the quality of their verbal or physical resistance when trying to establish the credibility of their claims of nonconsent. It took until 1999 for the Supreme Court of Canada to recognize conclusively, in *Ewanchuk*, that silence, passivity, or compliance cannot be equated with consent. Prior to that decision, courts routinely held that the Crown had failed to prove nonconsent beyond a reasonable doubt because the complainant did not adequately object physically or verbally to the accused's actions, regardless of the complainant's subjectively held disinterest in sexual activity with the accused.¹⁸⁰

A robust application of the *Ewanchuk* standard has so far eluded women with mental disabilities. The quality of women's resistance, verbal and physical, is still judged against their claims that they did not want to have sex with the accused. In several of the cases in which judges had a reasonable doubt about consent, or about mistaken belief in consent, the court focused almost exclusively on the actions of the complainant and ignored evidence of predatory behaviour by the accused. Yet, in the cases we reviewed, the accused men rarely tried to develop any kind of mutual, intimate relationship with complainants. Instead, they enticed complainants to accompany them with offers of a ride,¹⁸¹ of garden vegetables,¹⁸² or of a chance to see some rabbits.¹⁸³

The similarities among women sexual assault complainants lead us to conclude that a separate provision for women with mental disabilities is not the answer. It is true that women with disabilities are particularly vulnerable to sexual assault, and that a special provision could address the most common or pressing problems for this group of victims (such as sexual assaults committed by persons in a position of trust or authority). A targeted offence would also acknowledge formally the high incidence of sexual violence for women with disabilities. Nevertheless, many of the problems women with mental disabilities face in the context of sexual assault are the same faced by all women. Enacting a provision that further isolates women with mental disabilities from women generally perpetuates the idea that women with mental disabilities are "different" from other women. The idea that there are two categories of women, those with disabilities and those without, ignores the complexity of gender-based inequalities. In highlighting this complexity, we do not wish to make disability invisible but rather to acknowledge that it is one of many circumstances experienced by women that perpetuate systemic inequality.¹⁸⁴

Even if one supported a targeted offence for complainants with disabilities, there would be problems of definition. The offence would require drawing a clear

¹⁸⁰ See *R. v. Letendre* (1991), 5 C.R. (4th) 159 (B.C.S.C.); *R. v. M.L.M.* (1992), 117 N.S.R. (2d) 74, 78 C.C.C. (3d) 318, 18 C.R. (4th) 186 (C.A.), rev'd [1994] 2 S.C.R. 3, 131 N.S.R. (2d) 79.

¹⁸¹ See *Parsons*, *supra* note 88.

¹⁸² See *R.R.*, *supra* note 97.

¹⁸³ See *R. v. K.E.T.*, [1990] O.J. No. 2674 (Dist. Ct.) (QL).

¹⁸⁴ See *Sampson*, *supra* note 41.

distinction between women who have disabilities and women who do not. Particularly in the context of developmental disabilities, ability and disability exist on a continuum; disability is not an either/or category. In some cases it will be obvious that the woman in question had a disability, but in others it will be less clear. Who is in the best position to determine whether a woman has a mental disability? Such an inquiry would almost certainly medicalize the proceedings, with experts testifying on both sides about the definition of disability and the particular complainant's abilities. For many women with mental disabilities, physicians and other members of the "helping professions" already play too prominent a role in their lives. This requirement in itself could deter Crown counsel from using such a provision.

While recognizing the similarities among all women, it is also important to acknowledge that the consequences of making a sexual assault complaint may be very different for a woman with a mental disability. Women with mental disabilities tend to have their lives controlled by people in positions of authority or trust. While all complainants share the trauma of the criminal justice process, the sexual assault prosecution may result in subjecting a woman with a mental disability to even more control in the name of protecting her from further abuse. She may find that she has even less freedom or autonomy than before she made her complaint. There may well be much stronger efforts to limit any access to a sexual life for her. If she lives in an institution, the controls already in place will likely be strengthened, which could isolate her even further from social interaction and frustrate any attempts to develop meaningful and positive intimate relationships.

What would sexual assault law look like if it were designed with women with mental disabilities in mind? We conclude that the statutory law might not look very different, but that it would be interpreted and applied very differently than it often is today. It should be possible to create a sexual assault law that acknowledges the harm all women experience from sexual violence without preventing them from choosing when, and with whom, to exercise their sexual autonomy. Such a law would not have to ignore the very real differences between this group of women and women who are not classified as having a mental disability.
