CANADIAN SEXUAL ASSAULT LAWS: A MODEL FOR AFFIRMATIVE CONSENT ON COLLEGE CAMPUSES?

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INTRODUCTION

Sexual assault[1] is not a modern crime. Although the media has recently extensively covered the crime and culture[2] that surrounds it,[3] the

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crime, and its punishment and codification, dates back to some of civilization's earliest societies. The crime itself is not modern, yet its definition, elements, and methods of prosecution have changed dramatically since the mid-1960s.[4] While pre-1960s sexual assault laws followed the historical trend of punishing the perpetrator for his[5] crime

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1. Throughout this Article I will refer to the crime as "sexual assault" in some general discussions and in reference to post-1983 Canadian criminal law. However, sexual assault was traditionally referred to as "rape," and still is in many, if not most, jurisdictions. Thus, I will refer to the crime as rape when the relevant jurisdiction or time period would refer to it that way.

2. "Rape culture" or "rape supportive culture" is a term employed,

> [T]o describe a culture in which sexual assault, rape, and violence is common and in which prevalent attitudes, norms, practices, and media normalize, excuse, tolerate, or even condone sexual assault and rape. Examples of behaviors commonly associated with rape supportive culture include victim blaming, sexual objectification, rape-apologism and trivializing violence against women and girls. Although this term contains the word 'rape,' the concept is meant to encompass all forms of violent behavior (stalking, sexual harassment, sexual assault, molestation, street harassment, voyeurism/peeping, etc.).

What is a Rape Supportive Culture?, COLO. STATE UNIV., http://www.wgac.colostate.edu/what-is-rape-supportive-culture (last visited Feb. 12, 2015).

3. *See* Matthew Jacobs, *Landmark Doc 'The Hunting Ground' Hopes To Change The Conversation Around Campus Rape*, HUFF POST (Feb. 26, 2015), http://www.huffingtonpost.com/2015/02/26/the-hunting-ground-campus-rape_n_6751346.html; *see also* Sabrina Rubin Erdely, *A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA*, ROLLING STONE (Nov. 19, 2014), http://www.rollingstone.com/culture/features/a-rape-on-campus-20141119.

4. Patricia L. N. Donat & John D'Emilio, *A Feminist Redefinition of Rape and Sexual Assault: Historical Foundations and Change*, 48 J. SOC. ISSUES 9, 13– 14 (1992).

5. Throughout this Article, I will refer to the perpetrators of sexual assault, or, when discussing the criminal justice system, defendants, by the male pronoun. Victims will be referred to using the female pronoun. This is due to the fact that statistics indicate that women are far more likely to be victims of sexual assault than men. *See Statistics about Sexual Violence*, NAT'L SEXUAL VIOLENCE RES. CTR., http://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_

against another's property, namely a woman's father or husband, mid-1960s legal reforms began focusing on the act as a crime against the victim.[6] Although not immediate, various countries began focusing on specific *mentes reae* involved in the crime, including both the perpetrator's and victim's mental states.[7] This was a significant step forward in recognizing the crime's various elements, but legal scholars, judges, and legislators have had difficulty in defining and applying a workable *mens rea*.[8] While the *mens rea* represents only one aspect of the criminal act, it significantly alters how rapes are reported, how evidence is presented, what defenses are available to defendants, and how the crime is punished. Moreover, it significantly impacts and shapes the discussion and analysis of consent.

In this Article, I will explain, track, and critique the developments of *mens rea* requirements, or lack thereof, for sexual assault in Canada. I will also address the relationship between *mens rea* and consent, and how this connection informed Canada's adoption of affirmative consent requirements. Finally, I will discuss the trend of enacting affirmative consent legislation for college campuses in the United States, and suggest that colleges adopt the Canadian affirmative consent model.

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statistics-about-sexual-violence_0.pdf (last visited Sept. 1, 2015) (noting that "[o]ne in five women and one in 71 men will be raped at some point in their lives"). However, these statistics do not go unchallenged. See Cathy Young, *The CDC's Rape Numbers Are Misleading*, TIME (Sept. 17, 2014), http://time.com/3393442/cdc-rape-numbers, for a contrary opinion.

6. Stacy Futter Jr. & Walter R. Mebane, *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN'S L. J. 72, 72–73 (2013).

7. *See* R. v. Sansregret, [1985] 1 S.C.R. 570, para. 17 (Can.); *see also* MODEL PENAL CODE § 213.1.

8. *See* Robin Charlow, *Bad Acts in Search of a Mens Rea: Anatomy of a Rape*, 71 FORDHAM L. REV. 263, 264–65 (2002) (noting "the still confusing and often controversial world of criminal mens rea in general").

I. THE *MENS REA* OF SEXUAL ASSAULT: A CRIME WITH SEVERAL MENTAL STATES

Although the *mens rea* is a basic element of many crimes, it is unique when discussed in conjunction with the crime of sexual assault. Generally speaking, *mens rea* translates to "guilty mind."[9] However, it is more narrowly defined as "the mental state required for commission of a . . . crime."[10] The Model Penal Code sets forth four possible mental states: purposefully,[11] knowingly,[12] recklessly,[13] and negligently.[14] These mental states can apply in various ways when analyzing and defining sexual assault.

First, and arguably the least important, is a perpetrator's *mens rea* in regard to engaging in the physical act of sexual contact. In theory, a perpetrator can purposefully, knowingly, recklessly, and negligently

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9. *Mens Rea – A Defendant's Mental State*, FINDLAW, http://criminal.findlaw.com/criminal-law-basics/mens-rea-a-defendant-s-mental-state.html (Feb 12, 2015).

10. Staples v. United States, 511 U.S. 600, 605 (1994).

11. MODEL PENAL CODE § 2.02(2)(a)(i)-(ii) (A person acts "purposefully" under the Model Penal Code (MPC) "if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.").

12. *Id.* § 2.02(b)(i)-(ii) ("A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.").

13. *Id.* § 2.02(c) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.").

14. *Id.* § 2.02(d) ("A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.").

engage in sexual activity. However, it is important to note that it is difficult to conceptualize situations in which a perpetrator does not purposefully engage in sexual activity with another individual.[15] While circumstances in which an individual does not knowingly have sex are rare,[16] they can be conceptualized, but may only be evident in the rare cases of sexsomnia[17] and possibly intoxication. Furthermore, instances where a perpetrator engages in sexual conduct recklessly or negligently are even harder to conceptualize.[18] Therefore, judges, statutes, and common law do not generally discuss the perpetrator's mental awareness towards engaging in the physical act of sexual contact.

The second, and most relevant, *mens rea* is the perpetrator's mental awareness[19] towards the victim's consent.[20] In determining whether a perpetrator possessed the requisite *mens rea*, courts analyze whether the perpetrator knowingly had sexual contact with a victim without her consent,[21] or was reckless or negligent as to whether the victim consented.[22] This analysis requires the prosecution to "delve into the *accused's perception* of the absence of consent."[23] When discussing the *mens rea* of sexual assault in this Article, I will be discussing the perpetrator's mental awareness of the victim's consent, or lack thereof.

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15. *See* Charlow, *supra* note 8, at 268.

16. *Id.* at 268 n.24 ("[S]omeone might have intercourse knowingly but not purposefully if he was aware that he was having sex but it was not necessarily his aim or desire to do so, perhaps if he was being seduced without caring about the outcome.").

17. Joyce Friedan, *Sexsomnia: A Case Study of a New DSM-5 Diagnosis*, MEDPAGE TODAY (Oct. 27, 2014), http://www.medpagetoday.com/Psychiatry/SleepDisorders/48257.

18. However, there may be instances in which conduct, other than intercourse, that satisfies the *actus reus* of sexual assault can be reckless or negligent.

19. *Mens rea* is also referred to as mental awareness mental state throughout this article.

20. *See* Charlow, *supra* note 8, at 268.

21. Consent, the presence or absence of, is a critical element in prosecuting sexual assault cases and will be discussed at length. For the purposes of this Article, consent is defined as "the voluntary agreement of the complainant to engage in the sexual activity in question." Criminal Code, R.S.C. 1985, c. C-46, s. 273.1 (Can.).

22. Charlow, *supra* note 8, at 268.

23. R. v. Park, [1995] 2 S.C.R. 836, para. 43 (Can.).

A third mental state is inherent in the concept of consent of the victim: the victim's mental state regarding her desire to engage in sexual activity.[24] This mental state is more difficult to understand because consent can be construed and defined in several ways. However, a somewhat simplified way to view consent is to divide the concept into three categories: (1) objective consent, (2) implied or "attitudinal" consent,[25] and (3) subjective consent.[26]

An individual may objectively consent to sex by indicating verbally or in writing that she wants to engage in sexual activity. This may include an individual saying, writing, or signing an agreement that includes words such as "I want to have sex with you."[27] However, this alone may be insufficient to establish voluntary consent as a victim may be forced to write or say these words,[28] or, likely more common, an individual does not indicate, verbally or in writing, that he or she wants to engage in sexual conduct.[29] Thus, this concept of consent will rarely be determinative in sexual assault cases.

Additionally, an individual may objectively consent to sexual contact not by words but by actions. This is labeled as implied or attitudinal consent.[30] This type of consent often happens in the context of sexual activity as individuals, "brought together by [a] mutual desire" for one another, do not necessarily "discuss consent before" engaging in sexual activity.[31] Consequently, consent is implied through the individuals'

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24. Charlow, *supra* note 8, at 268.

25. Nathan Brett, *Sexual Offenses and Consent,* 11 CAN. J.L. & JUR. 69, 70 (1998).

26. For a more thorough discussion about these categories of consent, see generally Brett, *supra* note 25 and *Acquaintance Rape and Degrees of Consent: "No" Means "No," But What Does "Yes" Mean?*, 117 HARV. L. REV. 2341 (2004) [hereinafter *Acquaintance Rape and Degrees of Consent*].

27. *Acquaintance Rape and Degrees of Consent*, *supra* note 26, at 2349.

28. Brett, *supra* note 25, at 72 ("A person who says 'I consent' (or even signs documents to that effect) is not necessarily consenting, since these words may be, e.g., a response to a threat (or induced by fraud).").

29. *Id.* at 73 ("[I]t would be odd to treat sexual activity which both parties *wanted* to engage in as criminal behaviour, simply on the grounds that permission was not expressed before it took place.").

30. *See id.* at 70.

31. *Id.* at 73.

actions.[32] Implied consent is used by many jurisdictions because judges "want to know whether the person really did approve of the interaction in question and, if so, whether this attitude of approval was engineered in some way that undermines its freedom or (in the case of fraud) means that the approval was misdirected."[33]

Subjective consent, or what I will call pure subjective consent, looks to the state of mind of the victim. Pure subjective consent focuses on what the victim's mental attitude was towards the sexual activity in question. Thus, even if a person verbally states that he or she wants to have sex or engages in conduct, which to a reasonable observer would seem to indicate consent, subjective consent may be absent if the person mentally does not wish to engage in the conduct.[34] Although this form of consent may be the most significant in successfully determining if a victim was sexually assaulted, it is also the most difficult to objectively determine as it is not publicly observable.[35] Thus, judges and juries would be required to make credibility assessments of victims after testimony about their state of mind at the time of the sexual contact. This factor makes subjective consent extremely difficult to apply in sexual assault cases.

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32. Implied consent has been the subject of significant debate, especially in regard to university disciplinary proceedings. As a response to the high number of sexual assaults on college campuses and the need for clarification in disciplinary proceedings, California enacted affirmative consent legislation. Several other states have followed suit. *See* Emily Bazelon, *Hooking Up at an Affirmative-Consent Campus? It's Complicated*, N.Y. TIMES (Oct. 21, 2014), http://www.nytimes.com/2014/10/26/magazine/hooking-up-at-an-affirmative-consent-campus-its-complicated.html; Paul Drewes, *Affirmative Consent Called for at University of Hawaii*, KITV (Feb. 11, 2015), http://www.kitv.com/news/affirmative-consent-called-for-at-university-of-hawaii/31227762; David Collins, *Maryland Considers Affirmative Consent Bill*, WBAL TV (Jan. 29, 2015, 5:34 PM), http://www.wbaltv.com/politics/maryland-considers-affirmative-consent-bill/30993150; Jaclyn Friedman, *Adults Hate 'Yes Means Yes' laws. The College Students I Meet Love Them*, WASH. POST (Oct. 14, 2015), https://www.washingtonpost.com/posteverything/wp/2015/10/14/adults-hate-affirmative-consent-laws-the-college-students-i-meet-love-them/.

33. Brett, *supra* note 25, at 72–73.

34. For example, if a person is forced to say he or she wants to have sex, or fears for his or her life, and then physically consents to sexual contact.

35. Brett, *supra* note 25, at 70.

It is clear that courts use varied approaches to consent. These approaches are sometimes, but not always, seen in statutory definitions of consent and often unsuccessfully communicated within the general statutory elements of sexual assault. Thus, it is often very important, if not necessary, to look to judicial interpretations of sexual assault statutes.

II. HISTORICAL PERSPECTIVE: SEXUAL ASSAULT AS A CRIME OF THEFT

Rape occurred or was portrayed even in some of civilization's earliest days.[36] Stories of sexual assault have been passed down in ancient poetry, reliefs, religious texts, and sculptures.[37] Modern and ancient authors have told accounts of the Greek god Zeus, often portrayed as the "father of gods and men,"[38] raping numerous women through deception, seduction, and force.[39] The Bible depicts even more explicit stories. In *Judges*, a man hands over his concubine to numerous men so that they can have sex with her.[40] As soon as the woman stepped outside, the men took her, "had relations with her and abused her all night until the following dawn."[41]

While various civilizations punished sexual assault, they rarely prosecuted or punished it from the perspective of the victim. Although sexual assault is an act that physically and often emotionally injures another person, legal codes historically treated it as an attack on the

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36. ENCYCLOPEDIA OF RAPE ix (Merril D. Smith ed., 2004) (noting that "[r]ape has always been a part of human culture" and has "had an impact on individual women (as well as men and children of both sexes) . . . [and] has also affected the evolution and development of cultures all over the world").

37. *See Genesis* 34:2–30 (New American Bible) (recounting the rape of Dinah); Gian Lorenzo Bernini, *The Rape of Persephone*, ARTBLE, http://www.artble.com/artists/gian_lorenzo_bernini/sculpture/the_rape_of_persephone (last visited Mar. 28, 2016); William Butler Yeats, *Leda and the Swan*, LITERATURE NETWORK, http://www.online-literature.com/yeats/865/ (last visited Mar. 28, 2016) (depicting Yeat's vision of Zeus, in the form of a swan, raping Leda).

38. Hesiod, *Theogeny*, https://www.msu.edu/~tyrrell/theogon.pdf (last visited Sept. 1, 2015).

39. ENCYCLOPEDIA OF RAPE, *supra* note 36, at 133.

40. *Judges* 19:25 (New American Bible).

41. *Id.*

property of a woman's father or husband.[42] The origins of this concept date back to ancient Greece where, although the word "rape" did not have a literal translation, it was generally understood as the concept of theft.[43] Thus, the etymology of the word mirrors the cultural assumptions and definitions perpetuated for centuries. By defining rape as theft, the perpetrator stole the woman's "virginity" or "honour" from her father or husband.[44] For example, in ancient Israel, rapists were forced to pay fifty shekels of silver to the woman's father as payment for their theft.[45] Scholars have noted that:

> If a woman was raped, a sum was paid to either her husband or father, depending on who still exercised rights of ownership over her, and the exact amount of compensation depended on the woman's economic position and her desirability as an object of an exclusive sexual relationship. The sum was not paid to the woman herself; it was paid to her father or husband because he was the person who was regarded as having been wronged by the act.[46]

While the concept of a woman's body as property seems antiquated, it prevailed in many common law countries until at least the twentieth century and continues to prevail in some places today.[47]

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42. *See* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 185 (1993).

43. Edward M. Harris, Book Review, 16 ÉCHOS DU MONDE CLASSIQUE/CLASSICAL VIEWS 483, 487 (1997) (reviewing RAPE IN ANTIQUITY: SEXUAL VIOLENCE IN THE GREEK AND ROMAN WORLDS (Susan Deacy & Karen Pierce eds., 1997)).

44. Julie Bindel, *Rape: A Burning Injustice*, THE GUARDIAN (Aug. 13 2013), http://www.theguardian.com/lifeandstyle/2013/aug/13/rape-defined-sexual-crime-history ("In the 15th century, the father or husband of a raped woman pressed criminal charges because the legal definition of rape in England had narrowed to apply to the theft of a woman's virtue, either a daughter's virginity or a married woman's honour.").

45. *Deuteronomy* 22:28–29 (New American Bible).

46. LORENNE CLARK & DEBRA LEWIS, RAPE: THE PRICE OF COERCIVE SEXUALITY 115–16 (1977).

47. *Ending Violence Against Women: From Words to Actions*, UNITED NATIONS, 113, http://www.un.org/womenwatch/daw/vaw/publications/English%20Study.pdf (last visited Feb. 1, 2015) ("Marital rape may be prosecuted in at least 104 States. Of these, 32 have made marital rape a specific criminal offence, while the remaining 74 do not exempt

As rape has occurred throughout various civilizations and countries, the crime has also seen various punishments.[48] The Code of Hammurabi, one of the earliest codified sets of laws, provided for the execution of men who sexually assaulted unmarried virgins.[49] However, if a man sexually assaulted a married woman, lawmakers, and often society, deemed the woman an adulteress even if she did not have a culpable mental state.[50] Both she and the perpetrator were thrown in a river to drown unless the woman's husband intervened to save her.[51] Another ancient code, the Code of Nesilim, punished rape to varying degrees based on the distance from the woman's home.[52] If a man sexually assaulted a woman far from her home, he was deemed culpable and sentenced to death.[53] However, if the man sexually assaulted a woman in her home, the woman was deemed responsible, regardless of her culpability, and executed.[54] Thus, although application of *mens rea* to the criminal process was not codified until approximately the twelfth century,[55] it was semi-, albeit unjustly, conceptualized in some of the world's earliest legal codifications.

Although many legal codes codified punishments for those guilty of sexual assault, the same theory of property that punished perpetrators

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marital rape from general rape provisions. Marital rape is not a prosecutable offence in at least 53 States. Four States criminalize marital rape only when the spouses are judicially separated. Four States are considering legislation that would allow marital rape to be prosecuted.").

48. *See* ENCYCLOPEDIA OF RAPE, *supra*, note 36, at 14.

49. *Id.*

50. *Id.* at 14–15.

51. *Id.*

52. *Id.* at 15.

53. *Id.*

54. *Id.*

55. Eugene J. Chesney, *The Concept of Mens Rea in the Criminal Law*, 29 J. CRIM. L. & CRIMINOLOGY 627, 629 (1939) ("Granting the limitations of the early records, it is manifest that at least prior to the twelfth century, criminal intent was not sine qua non for criminality."); DAVID C. BRODY & JAMES R. ACKER, CRIMINAL LAW 68 (2d ed. 2010) ("Up to the twelfth century the conception of *mens rea* in anything like its modern sense was non-existent.").

also protected them from prosecution if the victim was their wife.[56] Status as husband provided immunity from criminal prosecution that would otherwise result in death.[57] In seventeenth century England, a man could not be found guilty of sexually assaulting his wife due to "matrimonial consent."[58] In *History of Pleas of the Crown*, English judge and lawyer, Sir Mathew Hale, opined that "the husband . . . [could not] be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."[59] This statement served as the basis for the defense of marital consent in England for the next 200 years[60] and the concept was also imported into American common law.[61]

While rape as a theory of property continued in many countries until at least the nineteenth century,[62] over time legal systems afforded non-married women the right to file suit against their perpetrators.[63] During the reign of England's Henry II, women could file suit against the rapist

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56. *See Ending Violence Against Women: From Words to Action*, *supra* note 47, at 113 (noting that, at the time of the report, "[m]arital rape [wa]s not a prosecutable offence in at least 53 States"). Caroline Johnston Polisi, *Spousal Rape Laws Continue to Evolve*, WE NEWS (July 1, 2009), http://womensenews.org/story/rape/090701/spousal-rape-laws-continue-evolve ("In North Carolina, for example, until 1993, the penal code's definition of rape noted that a person could not be convicted of the crime of rape 'if the victim is the person's legal spouse at the time of the commission of the alleged rape.'").

57. *See* ENCYCLOPEDIA OF RAPE, *supra*, note 36, at 122.

58. *See* SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN: IN TWO VOLUMES, VOLUME 1 629 (1800).

59. *Id.*

60. *See* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1396 (2000). In 1992, the House of Lords overruled Hale's pronouncement and explained that it was "a common law fiction . . . [that] ha[d] become anachronistic and offensive." Regina v. R., [1992] 1 A.C. 599 (H.L.) 611 (appeal taken from Eng.); *see also* Lily Rothman, *When Spousal Rape First Became a Crime in the U.S.*, TIME (July 28, 2015), http://time.com/3975175/spousal-rape-case-history/.

61. *See* ENCYCLOPEDIA OF RAPE, *supra* note 36, at 122; *see also* Rothman, *supra* note 60 (explaining that until 1978, "most state criminal codes had rape definitions that explicitly excluded spouses").

62. *See* Polisi, *supra* note 56.

63. BROWNMILLER, *supra* note 42, at 24–25.

so long as they were unmarried virgins.[64] However, the evidentiary standards were often too high for women to overcome.[65] Women were required to show blood, torn garments, and the known vocality of a woman's objection.[66] Despite these heavy evidentiary standards, this marked a significant legal shift regarding sexual assault. For unmarried women, the crime could potentially be prosecuted as a crime against a person and the state instead of a crime against property.

III. PRE-1983 CANADIAN SEXUAL ASSAULT CONSTRUCTION

A. Pre-1983 Criminal Code History and Revisions

As a colony of England, Canada adopted its common law, including its definition of rape (as it was then called).[67] In addition to adopting the English definition of rape, the court in *R. v. Francis*, Canada's first reported sexual assault case,[68] also adopted its tradition of high, and often insurmountable, evidentiary standards. In *Francis*, a prisoner escaped and climbed into a married woman's bed while she was asleep.[69] As he attempted to have sex with her, she woke up and escaped.[70] He was charged with "intent to commit a rape upon a married woman," but the Upper Canada Court of Queen's Bench ultimately held that he was not guilty.[71] In its reasoning, the court followed earlier precedent, a leading case from England, in which the English court expressed concern that an adulteress may accuse an individual of rape to save herself from the

64. *Id.*
65. *Id.* at 26.
66. *Id.*
67. Kwong-leung Tang, *Rape Law Reform in Canada: The Success and Limits of Legislation*, 42 INT'L J. OFFENDER THERAPY & COMPARATIVE CRIMINOLOGY 258, 259 (1998).
68. Margaret A. Denike, *Myths of Woman and the Rights of Man: The Politics of Credibility in Canadian Rape Law*, *in* SEXUAL VIOLENCE: POLICIES, PRACTICES, AND CHALLENGES IN THE UNITED STATES AND CANADA 101, 104 (James F. Hodgson & Debra S. Kelly eds., 2002).
69. R. v. Francis, [1856] 13 U.C.Q.B. 116, para. 2 (Can.).
70. *Id.*
71. *Id.*

societal consequences of adultery.[72] The Canadian court reasoned similarly and noted,

> It is possible that—reflecting on the often-stated proposition that the accusation of rape is only easily made, and even if in some respects hard to be proved, yet still harder to be defended and rebutted by the party accused, however innocent he may be—the court may have felt there was danger in implying force from fraud, and an absence of consent, when consent was in fact given, though obtained by deception; and that cases might arise, however extreme, when a detected adulteress, might, to save herself, accuse her paramour of a capital felony.[73]

This high evidentiary standard was also reflected ten years later in *R. v. Fick*, in which another appellate court held that the woman "did not resist as much as she could, and so as to make the prisoner see and know that she was really resisting to the utmost."[74]

In 1867, the British Parliament enacted the British North America Act (the Act), which unified three Canadian colonies into a federal state with a parliamentary system.[75] Six additional colonies were added in 1870.[76] Along with the Act, the Canadian Parliament also enacted the Criminal Code[77] in which rape was prohibited, but not defined.[78] This changed in 1892, when the Canadian Parliament added the following definition:

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72. *Id.*

73. *Id.*

74. R. v. Fick, [1865] 16 U.C.C.P. 379, para. 1 (Can.); see also Bruce A. MacFarlane, *Historical Development of the Offence of Rape* 69 (1993), *available at* http://s3.documentcloud.org/documents/413655/hist-devel-of-offence-of-rape.pdf for a discussion of these cases.

75. W.H. McConnell, *Constitution Act, 1867*, HISTORICA CAN. (Feb. 6, 2006), http://www.thecanadianencyclopedia.ca/en/article/constitution-act-1867/.

76. *Id.*

77. *Criminal Code-General*, CANADIAN LEGAL FAQS (Aug. 2012), http://www.law-faqs.org/national-faqs/criminal-code/criminal-code/ ("[T]he federal government has exclusive jurisdiction to enact criminal law, the provinces have the authority to administer the criminal law.").

78. MacFarlane, *supra* note 74, at 70–71.

> Rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent, or with consent which has been extorted by threats or fear of bodily harm, or obtained by personating the woman's husband, or by false and fraudulent representations as to the nature and quality of the act.[79]

Although the drafters eliminated the "utmost resistance" requirement, rape continued to be a general intent crime.[80] While consent was required, the definition did not include a requisite mental awareness as to the victim's consent.[81] The only hint of a *mens rea* requirement was found in the prohibition against obtaining consent through "threats or fear of bodily harm," impersonation, and fraud because knowledge of a lack of consent could be assumed.[82] Additionally, marital rape was not punishable in the Code.[83]

This definition of rape remained largely unchanged until 1953, when the language was modernized. For the next thirty years, the crime's elements were satisfied when:

> [A man] ha[d] sexual intercourse with a female person who is not his wife,
>
> (a) without her consent, or
>
> (b) with her consent if the consent
>
> (i) is extorted by threats or fear of bodily harm
>
> (ii) is obtained by personating her husband, or
>
> (iii) is obtained by false and fraudulent representations as to the nature and quality of the act.[84]

This 1953 revision included the same elements, gendered language, and shield against marital rape. The crime of rape was not significantly

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79. Criminal Code, S.C. 1892, c. 29, s. 266 (Can.).

80. *Id.*; *see also* R. v. Leary [1977] 1 S.C.R. 29 (Can.) ("Rape is a crime involving only a general intention.").

81. Criminal Code, S.C. 1892, c. 29, § 266.

82. *Id.*

83. *Sexual Assault in Canada: What Do We Know?*, SEX INFO. & EDUC. COUNCIL OF CAN., sexualityandu.ca/uploads/files/SexualAssault-OCT2011-ENG.pdf (last visited March 2, 2015).

84. Criminal Code, S.C. 1953-54, c. 51, § 135 (Can.).

redefined until 1983.[85] Thus, for almost 100 years, rape was defined as a heteronormative crime only punishable outside of marriage.[86]

B. The "Honest, But Mistaken Belief" Defense

In pre- and post-1983 sexual assault cases, defendants utilized the use of the "honest, but mistaken belief" defense, which was, and still is, available to criminal defendants when charged with sexual assault.[87] This defense is used successfully and explained in numerous cases, the first of which being *R. v. Pappajohn.*[88] In *Pappajohn*, the defendant was charged with the rape of his real estate agent after the two went to lunch, consumed a large amount of alcohol, and had sex.[89] The victim and defendant had vastly different stories: the victim explained that the sexual encounter was "completely against her will and over her protests and struggles. . . . [The defendant] spoke of an amorous interlude involving no more than a bit of coy objection on her part and several acts of intercourse with her consent."[90] The defense counsel argued that the defendant "was entitled to have the judge tell the jury that if the . . . [defendant] entertained an honest though mistaken belief that the

85. *See* discussion *infra* Part IV.

86. *See* Criminal Code, S.C. 1892, c. 29, § 266; Criminal Code, S.C. 1953-54, c. 51, § 135.

87. Criminal Code, R.S.C. 1985, c. C-46, § 265(4) ("Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief."). This defense clouds the *mens rea* analysis for sexual assault because, despite sexual assault being a general intent crime, the defense requires courts, and juries, to consider what a defendant "believes or intends" in regard to the victim's consent. Peg Tittle, *Sexual Activity, Consent, Mistaken Belief, and Mens Rea*, http://www.pegtittle.com/Articles/Sexual%20activity%20consent%20mistaken%20belief%20mens%20rea.pdf (last visited March 30, 2016) (pointing out that "if we remove the mental element from one aspect, then to be consistent, we must remove it from all: the 'mistaken belief' defence would then be eliminated and mens rea would become insignificant").

88. [1980] 2 S.C.R. 120 (Can.).

89. *Id.* at para. 79.

90. *Id.* at para. 80.

complainant was consenting to the acts of intercourse as they occurred the necessary mens rea would not be present and the appellant would be entitled to an acquittal."[91] The judge denied the motion because there was insufficient evidence to put the defense to the jury.[92] However, had the defendant had an honest, but mistaken belief supported by evidence, the defense could have been presented.[93]

Admittedly, this defense may provide perpetrators a potentially unjust defense, but it is limited by the "air of reality" test,[94] which requires that the defense be based on reasonable evidence.[95] This limitation imposes an evidentiary burden on the defense and requires the judge to consider the totality of the circumstances in determining whether "[a] jury acting reasonably could draw an inference from the circumstances described by the accused . . . to the reasonableness of his perception that" he believed that the victim was voluntarily consenting.[96] The defendant must present evidence either "appear[ing] from or . . . supported by sources other than the" defendant.[97] But once the defense is presented to the jury it "is not required to find that the belief was reasonable for the defence to succeed."[98] While the air of reality test is theoretically intended to limit the honest, but mistaken belief defense, its application has troubled

91. *Id.* at para. 81.

92. *Id.* at paras. 81, 95.

93. *Id.* at para. 97.

94. *See* Kent Roach, *The Importance of Air of Reality Tests*, 49 CRIM. L. Q. 1, 1 (2004).

95. Criminal Code, R.S.C. 1985, c. C-46, § 265(4) ("Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief."); *see also* Pappajohn, 2 S.C.R. at para. 97 ("There must be . . . some evidence beyond the mere assertion of belief in consent by counsel for the appellant.").

96. R. v. Cinous, [2002] 2 S.C.R. 3, para. 109 (Can.).

97. Pappajohn, 2 S.C.R. at para. 97.

98. Kwong-leung Tang, *supra* note 67, at 264.

women's groups partially because the jury is only required to evaluate the defendant's *subjective* basis for his belief in consent.[99]

IV. POST-1983 CRIMINAL CODE AND JURISPRUDENCE

A. Bill C-127: The Elimination of "Rape"

In 1983, Parliament passed Bill C-127, which redefined the laws of rape, attempted rape, and indecent assault in the Criminal Code.[100] The revised Code significantly changed the crime of rape, not only by altering its elements, but by renaming the crime itself.[101] Parliament incorporated the offense into assault and removed any reference to the word rape.[102] The change had three primary purposes: (1) to reflect that the crime is a physical assault on the victim, and thus, an act of violence as opposed to an act of passion; (2) "[t]o encourage the victims of sexual assault to report incidents to the police[;]" and (3) "[t]o limit judicial discretion."[103] Thus, sexual assault was defined in the same section, 244,[104] as assault.[105] Parliament also included three categories of sexual assault: basic sexual assault, sexual assault with a weapon or threatened

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99. *Id.* at 265 (noting that "[w]omen's groups have opposed the honest-belief issue from the start" and that some "feminists strongly argue that he mental element of the offence should be objectively assessed"); Toni Pickard, *Culpable Mistakes and Rape: Harsh Words on* Pappajohn, 30 U. TORONTO L.J. 415, 419 (1980) (noting that "[i]t would . . . be coherent to argue that rape should require knowledge of non-consent; that liability should never be grounded in recklessness").

100. *See Bill C-46: Records Applications Post-Mills: A Caselaw Review*, DEP'T OF JUSTICE (Jan. 1, 2015), http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr06_vic2/p2.html#f15 [hereinafter *Bill C-46*]; *see also Legislative Influences,* STATISTICS CAN., http://www23.statcan.gc.ca/imdb-bmdi/pub/document/3306_D6_T9_V5-eng.htm (last modified Aug. 18, 2010).

101. Criminal Code, R.S.C. 1985, c. C-46, § 265(1).

102. *Id.*

103. Kwong-leung Tang, *supra* note 67, at 260.

104. The Parliament of Canada re-enacted this unchanged as § 265(1) in 1985. Criminal Code, R.S.C. 1985, c. C-46, § 265(1).

105. An Act to Amend the Criminal Code, S.C. 1980-81-82-83, c. 125, § 19 (Can.). While § 244(1) included the elements for both assault and sexual assault, sexual assault also requires an examination of consent, which is discussed below and in § 244(3), § 271(1), and § 271(3).

violence, and aggravated sexual assault that results in injuries or disfigurement.[106] Under the 1983 changes, a perpetrator committed an assault when:

> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
> (b) he attempts or threatens, by an act or gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
> (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.[107]

While part (a) indicated the requisite *actus reus*, the "appli[cation] [of] force intentionally to another person," as well as the requirement for no consent, it, like its predecessors, did not specify a specific mental state as to consent.[108] Part (b) is similarly silent. Under part (b), an individual could commit the crime by "attempt[ing] or threaten[ing], by an act or gesture, to apply force to another person" with the "present ability to effect his purpose," or in a manner that "cause[d] that other person to believe on reasonable grounds that he ha[d], present ability to effect his purpose."[109] While "purpose" could refer to a specific *mens rea*, it could also be interpreted as referring back to the *actus reus*. Thus, although Parliament included additional language regarding the meaning of consent and the accused's knowledge of consent, § 244(1) did not depart from previous statutes by providing a specific *mens rea.*[110]

While a first glance at § 244(1) seemed to provide a broad definition of sexual assault, courts needed guidance on the elements of the crime following its enactment. For example, the 1983 legislation did not define what made a crime "sexual" assault as opposed to assault.[111] In *R. v.*

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106. *See* Criminal Code, R.S.C. 1985, c. C-46, §§ 265, 267, 272.
107. *Id.* § 265(1).
108. *Id.*
109. *Id.*
110. After the passage of § 244(1), Canadian courts held that sexual assault, like its previous classification, required only a general intent. *See* R. v. Chase, [1987] 2 S.C.R. 293, para. 12 (Can.).
111. *See* discussion *supra* Part IV.A.

Chase, the Supreme Court of Canada provided some of that guidance.[112] In *Chase*, the perpetrator entered the victim's home, without invitation, and "seized the complainant around the shoulders and arms and grabbed her breasts."[113] While the Court of Appeals reasoned that the "sexual" element of sexual assault referred "to parts of the body, particularly the genitalia[,]"[114] the Supreme Court disagreed and broadened the definition.[115] The Court held that sexual assault, "within any [] of the definitions . . . [found] in [§] 244(1) . . . is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated."[116] The Court also provided an objective test for what constitutes sexual nature: "'Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer.'"[117] While this case provided the test for "sexual" nature, the court's definition was tautological in nature.[118]

For further clarification and guidance, Parliament also included § 244(3) in the 1983 legislation, which limited consensual situations. This section provided:

> For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of (a) the application of force to the complainant or to a person other than the complainant; (b) threats or fear of the application of force to the complainant or to a person other than the complainant; (c) fraud; or (d) the exercise of authority.[119]

Although this section lessened the perpetrator's ability to escape conviction, it, like the other 1983 changes, did not delineate a specific

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112. [1987] S.C.R. 293 (Can.).
113. *Id.* at para. 2.
114. *Id.* at para. 3.
115. *Id.* at para. 9.
116. *Id.* at para. 11.
117. *Id.* (quoting R. v. Taylor [1985], 44 C.R. 3d 263, 269 (Can.)).
118. For example, this definition of sexual nature does not take into account consensual BDSM sexual conduct. Additionally, while the test is seemingly objective, the sexual nature of an act can vary significantly from one person, or one judge, to another, which increases the likelihood of the test becoming more subjective than objective.
119. Criminal Code, S.C. 1985, c. 125, § 244(3).

mental awareness in regard to the victim's consent. Thus, while the 1983 legislation was touted for abolishing rules that perpetuated sexual biases toward women, the reforms left significant discretion to the judiciary and juries to define what *exactly* was required for a "guilty mind."[120]

While the Code significantly changed as a result of the 1983 legislation, the honest, but mistaken defense continued, and continues, to succeed in the courts.[121] Surprisingly, case law dealing with this defense provides the most instruction regarding the *mens rea* framework for sexual assault in Canada prior to 1992. In one of the most well-known Canadian sexual assault cases, *R. v. Sansregret*,[122] the trial court applied and seemingly broadened the defense by holding that the honest, but mistaken belief defense could be presented to the jury "even where it is unreasonable."[123] In *Sansregret*, the defendant and victim broke up; however, the defendant proceeded to break into her home on two occasions.[124] During his second break-in, he, while wielding a knife, forced the victim to strip down and then he tied her hands.[125] Because the victim feared for her life, she told the defendant that they could reconcile and submitted to intercourse.[126] The trial judge held that the accused was deceived, albeit irrationally, and thus, honestly believed that the victim consented.[127] The defendant was subsequently acquitted.[128] However, on appeal the Supreme Court held that the defendant was guilty because the honest, but mistaken belief defense is unavailable to a defendant who is "deliberately ignorant as a result of blinding himself to reality."[129] In other words, while the defense could be available to those that have an

120. This is especially relevant when the honest, but mistaken belief is raised.

121. *See* An Act to Amend the Criminal Code, S.C. 1980-81-82-83, c. 125, § 244(4).

122. [1985] 1 S.C.R. 570 (Can.).

123. *Id.* at paras. 21, 25 ("It is not to be thought that any time an accused forms an honest though unreasonable belief he will be deprived of the defence of mistake of fact.").

124. *Id.* at paras. 3, 4.

125. *Id.* at para. 4.

126. *Id.* at para. 5.

127. *Id.* at para. 9.

128. *Id.* at para. 7.

129. *Id.* at para. 24.

honest, but mistaken and unreasonable belief in consent, it is not available to those who willfully blinded themselves to the situation.[130] Judge McIntyre explained that "where the accused becomes deliberately blind to the existing facts, he is fixed by law with actual knowledge and his belief in another state of facts is irrelevant."[131] This indicates that knowledge, not surprisingly, would serve as a culpable mental state.[132] The judge went further, however, and held that "[i]f specific knowledge of the nature of the consent was not attributable to him in such circumstances, then one would think that at the very least recklessness would be."[133] Thus, although the 1983 legislation did not define a specific *mens rea*, the Supreme Court interpreted it to be satisfied when a perpetrator acted knowingly, recklessly, or was willfully blind.[134] However, reckless or negligent perpetrators could successfully utilize the "honest, but mistaken and unreasonable" defense.[135]

B. Bill C-49: The Introduction of Affirmative Consent

In 1992, Parliament made three significant changes to the Criminal Code with the introduction of Bill C-49.[136] First, it further defined and limited consent in § 273.1(1)-(3).[137] Second, it narrowed the mistaken, but honest belief defense in § 273.2.[138] Finally, it codified a "reasonable steps" provision, which, in conjunction with § 273.1, requires affirmative consent before engaging in sexual activity.[139] While these changes reflect an effort to strengthen women's rights, the judiciary, and its interpretations of these provisions, served as the ultimate test regarding the strength of the 1992 legislation, and its effect on the requisite *mens rea* in Canada.

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130. *Id.* at para. 25.
131. *Id.*
132. *Id.* at para. 17.
133. *Id.*
134. *Id.* at para. 15.
135. *Id.* at paras. 15, 21.
136. Criminal Code, R.S.C. 1985, c. C-46, § 265(4).
137. *Id.* § 273.1(1)-(2).
138. *Id.* § 273.2.
139. *Id.* § 273.2(b).

Section 273.1(1) defines consent as "the voluntary agreement of the complainant to engage in the sexual activity in question."[140] This definition demonstrates some of the changes in legal thinking regarding sexual assault since its common law, pre-1983 inception. Section 273.1(1) refers to the crime in gender neutral terms, does not limit rape to extramarital offenses, and criminalizes a broad range of sexual contact, instead of narrowly focusing on vaginal penetration.[141] Additionally, although the 1983 legislation had defined consent in negative terms, the legislature provided no additional, instructive definition.[142] Section 273.1(1)'s definition correctly focuses on voluntariness, which was seemingly what the 1983 legislation was aiming for, but failed to codify.[143] Moreover, the inclusion of the word "agreement" signifies that the parties agree on something *specific*. That is supported by the phrase, "sexual activity in question," which arguably connotes that the agreement is for a specific act at a specific time. Moreover, agreements can be terminated, and thus, consent may also be terminated. Finally, specific agreements are communicated in some way, either through words or conduct. Therefore, consent must be cognizable and affirmative.

Section 273.1 also expanded the ways in which consent is legally invalid.[144] Although Parliament included § 244(3) in the 1983

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140. *Id.* § 273.1(1).

141. *Cf.* Criminal Code, S.C. 1953-54, c. 51, § 135 ("[A man] . . . commits rape when he has sexual intercourse with a female person who is not his wife, (a) without her consent, or (b) with her consent if the consent (i) is extorted by threats or fear of bodily harm, (ii) is obtained by personating her husband, or (iii) is obtained by false and fraudulent representations as to the nature and quality of the act.").

142. An Act to Amend the Criminal Code, S.C. 1980-81-82-83, c. 125, § 244(3) ("[N]o consent is obtained where the complainant submits or does not resist by reason of (a) the application of force to the complainant or to a person other than the complainant; (b) threats or fear of the application of force to the complainant or to a person other than the complainant; (c) fraud; or (d) the exercise of authority.").

143. The 1983 amendments explained ways in which consent was vitiated. Thus, a perpetrator may argue that consent was present due to either word or action by the victim, but, statutorily, there was no consent due to involuntariness on the part of the victim.

144. Prior to the 1992 legislation, § 244(3) had included a list of situations in which consent was could not be obtained. That section remains in the Code unchanged at § 265(3). Criminal Code, R.S.C. 1985, c. C-46, § 265(3).

amendments,[145] many courts had determined that the list was exhaustive.[146] Section 273.1(2) eliminated that assumption, and states:

> No consent is obtained, for the purposes of sections 271, 272 and 273, where
>
> (a) the agreement is expressed by the words or conduct of a person other than the complainant;
>
> (b) the complainant is incapable of consenting to the activity;
>
> (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
>
> (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
>
> (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.[147]

Additionally, Parliament went a step further and included § 273.1(3) which provides: "Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained."[148] The importance of these subsections can only be realized in light of Canadian courts' interpretations of § 244(3). One example of such interpretations is *R. v. Guerrero*.[149] In that pre-1992 case, a fourteen-year old girl consented to sexual contact after the perpetrator threatened to send nude photographs of the victim to her school.[150] While this seems like a clear case for the vitiation of consent under § 244(3)(d),[151] the court held that "[t]he appellant's conduct . . . reprehensible as it was, d[id] not fall within any of the enumerated kinds of conduct."[152] The charge was subsequently

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145. *Id.*

146. R. v. Guerrero, [1988] 27 O.A.C. 244, para. 5 (Can. Ont. C.A.).

147. Criminal Code, R.S.C. 1985, c. C-46, § 273.1(2)(a)-(e).

148. *Id.* § 273.1(3).

149. *Guerrero*, 27 O.A.C. 244 at para. 5.

150. *Id.* at paras. 1–2.

151. An Act to amend the Criminal Code, S.C. 1980-81-82-83, c. 125, § 244(3)(d) ("For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of . . . the exercise of authority.").

152. *Guerrero*, 27 O.A.C. 244 at para. 5.

dismissed.[153] This type of conduct, as well as other situations in which the law was not explicit, were remedied by the addition of § 273.1(2)-(3).

Likely the most important addition to the Criminal Code regarding sexual assault in 1992 was the inclusion of § 273.2.[154] Section 273.2 provides,

> It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
>
> (a) the accused's belief arose from the accused's
>
> (i) self-induced intoxication, or
>
> (ii) recklessness or wilful blindness; or
>
> (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.[155]

The addition of § 273.2 altered the well-known honest, but mistaken belief defense. While the Canadian Supreme Court in *R. v. Sansregret* indicated that this defense was available to criminal defendants who acted recklessly or negligently,[156] § 273.2 eliminated the availability of the defense to those who acted recklessly.[157] Thus, "the *mens rea* of sexual assault contains two elements: intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched."[158]

Section 273.2(b), together with § 273.1, serves as the basis for the requirement of affirmative consent in sexual assault cases. While § 273.1 requires an agreement, expressed either through words or conduct, to engage in sexual activity,[159] § 273.2(b) prohibits the defendant from claiming an honest, but mistaken belief defense when he "did not take reasonable steps, in the circumstances known to the accused at the time,

153. *Id.* at para. 5.
154. Criminal Code, R.S.C. 1985, c. C-46, § 273.2.
155. *Id.*
156. *Sansregret*, 1 S.C.R. at para. 17.
157. Criminal Code, R.S.C., c C-46, § 273.2(a)(ii).
158. R. v. Ewanchuk, [1999] 1 S.C.R. 330, para. 42 (Can.).
159. Criminal Code, R.S.C. 1985, c. C-46, § 273.1.

to ascertain that the complainant was consenting."[160] Thus, in the absence of express words or conduct that would indicate consent, a defendant would need to establish the reasonable steps he took to determine the existence of consent. This sets a high bar for those claiming the defense and limits the defense in ambiguous situations in which the defendant did not take affirmative steps.

C. Judicial Constructions and Interpretations of Affirmative Consent

Although the 1992 amendments to the Criminal Code seemingly established statutory affirmative consent requirements, the judiciary's interpretations of these provisions proved critical in explaining the affirmative consent standard for sexual assault cases.

1. R. v. Park: The Absence of "Yes" Means "No"

In *R. v. Park*, the issue on appeal was whether consent existed, and, if it did not, whether the defense of honest, but mistaken belief should be put to the jury.[161] The victim testified that the defendant pushed her onto the bed while she actively resisted, and then she went into shock.[162] "The next thing that she remembered" was the defendant "pulling his penis out of her and ejaculating" on top of her.[163] The defendant, however, claimed that the victim "actively participated in the sexual activity[,]" and "when he pulled out a condom, she said 'no, not yet.'"[164] He claimed that things began to get "hot" and he ejaculated on her stomach without any intercourse taking place.[165] Based on these facts, the defendant asserted that the victim "consented to the sexual activity or, in the alternative, that he had an honest but mistaken belief that she was consenting."[166]

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160. *Id.* § 273.2(b).
161. *See Park*, 2 S.C.R. at para. 3.
162. *Id.* at para. 7.
163. *Id.*
164. *Id.* at para. 8.
165. *Id.*
166. *Id.* at para. 9.

On appeal, the Supreme Court gave considerable support to the Code's affirmative consent requirement. Writing for the majority, Justice L'Heureux-Dube reasoned that "the mens rea of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying 'no', but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying 'yes.'"[167] Thus, in order to use the mistaken, but honest belief defense, the defendant must "point[] out the basis for that belief."[168] Justice L'Heureux-Dube reasoned that this requires the court to consider two factors: "(1) the [victim's] actual communicative behaviour," and (2) "the totality of the admissible and relevant evidence explaining how the accused *perceived* that behaviour to communicate consent."[169] A criminal defendant can therefore have knowledge of, or be reckless or willfully blind to, the victim's lack of affirmative consent. Moreover, this heightened standard for consent has an additional implication. While "consent may exist in the mind of the [victim] without being communicated in any form, it cannot be accepted by a reasonable finder of fact as having been *honestly perceived* by the accused without first identifying the behaviour that led the accused ostensibly to hold this perception."[170] Thus, if a defendant cannot present any evidence that demonstrates that the victim's consent was affirmatively communicated, he could be convicted despite the victim actually subjectively consenting during the encounter.[171]

2. *R. v. Esau: Limitations on the Honest, but Mistaken Belief Defense*

In *R. v. Esau*, the defendant attended a party at the victim's home where both the victim and defendant drank significant amounts of

167. *Id.* at para. 39.
168. *Id.* at para. 44.
169. *Id.*
170. *Id.* at para. 45.
171. *Id.* The court noted that in some instances passivity can be indicative of consent, i.e., "past sexual [conduct] between the parties . . . may have influenced the accused's honest perception of the complainant's communication relating to the particular sexual activity in question." *Id.*

alcohol.[172] While the victim testified that she was intoxicated and witnesses claimed that she "looked 'pretty drunk[,]'" the defendant stated that "in his view, . . . [she] was in a condition to be 'able to control what she was doing.'"[173] The defendant also testified that the two had kissed one another and that "the [victim] invited him to come to her bedroom where they had consensual sexual intercourse."[174] The victim, however, denied that they had kissed and that she had invited him into her bedroom.[175] Instead, "[s]he testified that she had no memory of [the events] from the time she went to her bedroom until the next morning when she awoke and realized that she had engaged in sexual intercourse."[176] The victim also explained that "she would not have consented" to sex because she and the defendant were cousins.[177]

While the majority held that the evidence, or lack thereof, including the victim's lack of memory and the absence of force, gave "an air of reality to the defence" of an honest, but mistaken belief,[178] the dissent, written by Justice McLachlin, was significant as her implied consent analysis was followed in the court's later jurisprudence.[179] Justice McLachlin relied on § 273(2) and Canadian common law in her analysis.[180] She held that there were two prerequisites for putting the honest, but mistaken belief defense to the jury.[181] There must be

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

173. *Id.*

174. *Id.* at para. 4.

175. *Id.*

176. *Id.*

177. *Id.* at paras. 2, 4.

178. *Esau*, 2 S.C.R. at para. 15 ("The respondent's evidence amounted to more than a bare assertion of belief in consent. He described specific words and actions on the part of the complainant that led him to believe that she was consenting. . . . The complainant's evidence did not contradict that of the respondent, as she cannot remember what occurred after she went to her bedroom. In addition there was no evidence of violence, no evidence of a struggle and no evidence of force.").

179. *See* R. v. Esau, [1997] 2 S.C.R. 777, paras. 43–98 (Can.) (McLachlin, J., dissenting); *see, e.g.*, *Ewanchuk*,1 S.C.R. at paras. 26, 31, 45, 63, 97, 99.

180. *Esau*, 2 S.C.R. at paras. 80–81 (McLachlin, J., dissenting).

181. *See id.* at para. 88.

sufficient[182] evidence of (1) "denial of consent, lack of consent, or incapacity to consent which the defendant interprets as consent," and (2) "ambiguity or equivocality showing how the accused could honestly and without wilful blindness or recklessness, have mistaken the complainant's refusal of consent, lack of consent, or incapacity to consent."[183]

Justice McLachlin also held that § 273(2) prohibited the defendant from offering the honest, but mistaken belief defense because he "did not take 'reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.'"[184] Additionally, Justice McLachlin proposed six situations in which consent may be at issue:

> (a) Explicit consent, where voluntary agreement is expressly communicated by verbal or body language;
> (b) Explicit refusal, where refusal of consent is expressly communicated by verbal or body language;
> (c) A complainant lacking the capacity to consent or refuse because of unconsciousness or incoherence;
> (d) A complainant lacking the legal capacity to consent, e.g., a child;
> (e) Consent vitiated by force or duress;
> (f) Passivity where neither assistance nor resistance is offered;
> (g) Ambiguous conduct, which can be read in different ways; [and]
> (h) Ambiguity arising from external circumstances.[185]

The first two situations are clear examples of when consent is affirmatively given or refused, and, in the second situation, the honest, but mistaken belief defense will almost certainly be rejected absent

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182. *Id.* at para. 57 ("The threshold for putting the defence to the jury is not any evidence, but sufficient evidence. . . . There must be sufficient evidence to make the defence plausible, or a realistic possibility.").

183. *Id.* at para. 88 (the latter prerequisite was adopted in *Ewanchuk*). In *Ewanchuk*, the court held that "a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence." *Ewanchuk*, 1 S.C.R. at para. 51.

184. *Esau*, 2 S.C.R. at para. 49 (quoting Criminal Code, R.S.C. 1985, c. C-46, § 273.2(b)).

185. *Id.* at para. 71.

additional circumstances, which would place the conduct into one of the final two situations.[186] Similarly, the third situation is one in which the honest, but mistaken belief defense will not be successful because the victim lacks the capacity to consent, and this "lack of capacity would be obvious to all who see her, except the wilfully blind."[187] However, certain situations may exist where the perpetrator honestly mistakes the victim's ability to consent.[188] This situation would fall within either category (g) or (h).[189]

Categories (d) and (e) are covered by the Criminal Code in § 150.1[190] and § 265(3)[191] and do not give rise to the honest, but mistaken belief defense.[192] Category (f) deals with passivity, and Justice McLachlin reasons that, because "consent involves the communication of 'capable, deliberate, and voluntary agreement to or concurrence[,]'" something more than passivity is required for valid consent.[193]

The two remaining categories, which deal with ambiguous conduct, are best addressed by applying affirmative consent standards. According to Justice McLachlin, these categories are "the only circumstances where the defence of honest but mistaken belief in consent may arise."[194] Category (g) focuses on ambiguous conduct by the victim. In these situations, "occasionally conduct may be so ambiguous that an

186. *See id.* at para. 72.

187. *Esau*, 2 S.C.R. at para. 73 (McLachlin, J., dissenting). As discussed above, willful blindness is incompatible with the honest, but mistaken belief defense.

188. *Id.* at para. 74.

189. *Id.* at para. 71.

190. Criminal Code, R.S.C. 1985, c. C-46, § 150.1(1) ("Subject to subsections (2) to (2.2), when an accused is charged with an offence under section 151 or 152 or subsection 153(1), 160(3) or 173(2) or is charged with an offence under section 271, 272 or 273 in respect of a complainant under the age of 16 years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.").

191. *See id.* § 265(3) ("For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of (a) the application of force to the complainant or to a person other than the complainant; (b) threats or fear of the application of force to the complainant or to a person other than the complainant; (c) fraud; or (d) the exercise of authority.").

192. *Esau*, 2 S.C.R. at para. 75 (McLachlin, J., dissenting).

193. *Id.* at para. 76.

194. *Id.* at para. 78.

appropriately concerned defendant will honestly misread the [victim's] actual refusal or incapacity as consent with capacity."[195] Category (h) involves ambiguity that arises due to external circumstances.[196] In these situations, "there must be not only conduct or words which are contradictory or ambiguous, but . . . the result . . . must be such that the defendant, acting honestly and without wilful blindness or recklessness, could have concluded that the complainant was capable and consenting."[197] However, an ambiguous situation does not end the inquiry or an individual's duty to ascertain consent. Instead, if he perceives ambiguous conduct, it is that person's duty to either abstain or take "'reasonable steps . . . to ascertain that the . . . [victim is] consenting'" as required by § 273.2(b).[198] These principles, explained by Justice McLachlin, demonstrate the significance of § 273.2(b) and the effects its introduction had on limiting defenses to sexual assault.

3. R. v. Ewanchuk: Implied Consent Does Not Amount to Legal Consent

In *R. v. Ewanchuk*, the Supreme Court adopted Justices L'Heureux-Dube's and McLachlin's rationales in *Park* and *Esau* in holding that

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195. *Id.* at para. 79.

196. *Id.* at para. 83. Justice McLachlin quoted a previous case discussing two examples of this type of situation. *Id.* (citing *Pappajohn* 2 S.C.R. at 133). In one of the examples provided, R. v. Plummer & Brown, Brown had gone to Plummer's residence without knowledge that Plummer had raped the victim using threats. *Esau*, 2 S.C.R. 777 at para. 83 (McLachlin, J., dissenting) (citing *Pappajohn*, 2 S.C.R. at 133 (citing R. v. Plummer and Brown (1975), 24 C.C.C. (2d) 497 (Can. Ont. C.A.))). Brown "had intercourse with her and [the victim] said that because of continuing fear from Plummer's threats, she submitted without protest." *Esau*, 2 S.C.R. 777 at para. 83 (McLachlin, J., dissenting) (quoting *Pappajohn*, 2 S.C.R. at 133 (internal quotation marks omitted)). The Ontario Court of Appeal held that the defense of honest, but mistaken belief should have been put to the jury at the trial. *Plummer & Brown*, 24 C.C.C. (2d) at paras. 8–9.

197. *Id.* at para. 80.

198. *Esau*, 2 S.C.R. at para. 82 (McLachlin, J., dissenting) (quoting Criminal Code, R.S.C. 1985, c. C-46, § 273.2(b)); *see, e.g.*, R. v. Potvin, 2012 CarswellOnt 2068 (Can. Ont. Ct. App.) (WL) (holding that appellant had "obligation to ascertain whether there was a reasonable basis for his belief in the complainant's content" after she "said 'okay' – after repeatedly saying 'no'").

implied consent is not sufficient for legal consent.[199] In *Ewanchuk*, the defendant invited the victim to his trailer, where he touched the victim intimately several times, including massaging the victim, touching her inner thigh, grinding against her, and laying on top of her.[200] The victim repeatedly expressed to the defendant that she wanted him to stop.[201] He eventually exposed his penis, but when the victim said, "'[n]o, stop,'" the defendant "stopped immediately, got off the complainant, smiled at her and said something to the effect of, 'It's okay. See, I'm a nice guy, I stopped.'"[202] The trial court acquitted the defendant based on the defense of implied consent.[203] The Supreme Court followed and quoted Justice L'Heureux-Dube's holding in *Park*: "'the *mens rea* of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying 'no', but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying 'yes.'"[204] Additionally, it followed Justice McLachlin's dissent in *Esau* in holding that "a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence"[205] and therefore, a defendant "cannot rely on the complainant's silence or ambiguous conduct to initiate sexual contact."[206]

While these conclusions deal specifically with consent and the honest, but mistaken belief defense, they are crucial to the understanding of Canadian sexual assault law, which requires proof of the defendant's knowledge of, or recklessness or willful blindness to, the absence of consent. Thus, Parliament's 1992 legislation was critical to the

199. *Park*, 2 S.C.R. at para. 39; *Ewanchuk*, 1 S.C.R. at paras. 26, 31, 45, 63, 97, 99.

200. *Id.* at paras. 4–9.

201. *Id.* at paras. 5–6, 8.

202. *Id.* at paras. 9–10.

203. *Id.* at paras. 16–17.

204. *Id.* at para. 45 (quoting *Park*, 2 S.C.R. at para. 39).

205. *Ewanchuk*, 1 S.C.R. at para. 51; *see also Esau*, 2 S.C.R. at para. 76 (McLachlin, J., dissenting).

206. *Ewanchuk*, [1999] 1 S.C.R. 330, para. 99 (Can.) (L'Heureux-Dubé, J., concurring); *see, e.g.*, R. v. Doll, 2004 CarswellBC 362 (Can. B.C. Prov. Ct) (WL) (applying *Ewanchuk's* implied consent principle and holding that implied consent arising from "the breasts of the complainant [being] exposed" and "the complainant moan[ing] a bit" was insufficient to demonstrate consent).

development and clarification of the required *mens rea* for sexual assault, and distinguished Canada from countries in which force or resistance are required to prove non-consent.

V. AFFIRMATIVE CONSENT ON COLLEGE CAMPUSES

The requirement of affirmative consent on college campuses is a growing trend in the United States. In September 2014, California was the first state to require its colleges to adopt an affirmative consent policy to be eligible for state funding.[207] Following this legislation, Arizona, Connecticut, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Philadelphia, and Utah have introduced or are introducing new legislation requiring affirmative consent.[208] While this new legislation stems from both the high number of sexual assaults that occur in the United States each year,[209] and the

207. S.B. 967, 2013-2014 (Cal.) ("(a) In order to receive state funds for student financial assistance, the governing board of each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions shall adopt a policy concerning sexual assault, domestic violence, dating violence, and stalking . . . . The policy shall include all of the following: (1) An affirmative consent standard in the determination of whether consent was given by both parties to sexual activity. 'Affirmative consent' means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.").

208. *See* Jaclyn Friedman, *Adults hate 'Yes Means Yes' laws: The college students I meet love them*, WASH. POST (Oct. 14, 2015), https://www.washingtonpost.com/posteverything/wp/2015/10/14/adults-hate-affirmative-consent-laws-the-college-students-i-meet-love-them/; *Consent Gamechangers, LLC Launches the Affirmative Consent (Yes Means Yes) Project*, PR NEWSWIRE (Feb. 25, 2015, 8:30 AM), http://www.prnewswire.com/news-releases/consent-gamechangers-llc-launches-the-affirmative-consent-yes-means-yes-project-300040638.html.

209. The United States Department of Justice's National Crime Victimization Survey (2009-2013) reported that "[t]here is an average of 293,066 victims (age 12 or older) of rape and sexual assault each year." *How Often Does Sexual Assault Occur?*,

need for clarification in "internal university investigations of sexual-assault accusations,"[210] the first state to enact such legislation, California, received significant criticism from the media, legislators, and students.[211] One common criticism was, and still is, that the affirmative consent standard puts college men at risk of "accidentally running afoul of consent rules," especially when alcohol is involved in the encounter.[212] Legislators also reason that this standard requires "government intrusion . . . into students' bedrooms."[213] Additionally, if applied to larger communities rather than college campuses, such as the States, some argue that "lower[ing] the burden of proof for the police state to prosecute sexual assault cases" will result in the burden shifting to poor and minority residents.[214] While these are valid concerns, affirmative consent is the best solution available to protect the hundreds of thousands of victims of sexual assault. However, a strict construction of the "yes means yes" policy is impractical in university disciplinary proceedings and students should be able to assert the honest, but mistaken belief defense during the disciplinary process.

RAINN, https://www.rainn.org/get-information/statistics/frequency-of-sexual-assault (last visited Mar. 10, 2015); *see also* CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY xvii (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf.

210. Emily Bazelon, *Hooking Up at an Affirmative-Consent Campus? It's Complicated*, N.Y. TIMES (Oct. 21, 2014), http://www.nytimes.com/2014/10/26/magazine/hooking-up-at-an-affirmative-consent-campus-its-complicated.html?_r=0.

211. *See id.*

212. *Id.*

213. Jessica Bakeman, *'Affirmative consent' creates dilemma for state Republicans*, POLITICO NEW YORK (Nov. 12, 2014, 5:09 AM), http://www.capitalnewyork.com/article/albany/2014/11/8556428/affirmative-consent-creates-dilemma-state-republicans. Additionally, they argued that "is impossible to enforce, would ruin sex, would make every person a rapist and would make it impossible to prove that consent was given short of videotaping sexual encounters." *Id.*

214. Fredrik deBoer, *The Burden of Expanding the Police State's Power to Prosecute Sex Crimes Will Fall on the Poor and the Black*, (Oct. 13, 2014), http://fredrikdeboer.com/2014/10/13/the-burden-of-expanding-the-police-states-power-to-prosecute-sex-crimes-will-fall-on-the-poor-and-the-black/.

A. Applying the Canadian Model of Affirmative Consent to College Campuses

Using the Canadian model of affirmative consent can provide some relief to critics of the new standards being adopted by colleges across the United States as it strikes a balance between victims' rights and procedural fairness. While the Code provides extensive protections for victims through its affirmative consent requirement, it also protects criminal defendants and students from punishment in situations in which they do not possess the requisite mental culpability because of an honest, but mistaken belief in consent.

The Code and California's affirmative consent legislation (Bill No. 967) provide for similar protections for victims. While the Code defines consent as "the voluntary agreement of the complainant to engage in the sexual activity in question,"[215] Bill No. 967 defines consent as an "affirmative, conscious, and voluntary agreement to engage in sexual activity."[216] Both of these laws focus on the sexual autonomy of victims, while also giving judges and university officials clear cut language and limitations as to what constitutes valid consent.

One problem that has plagued the prosecution of sexual assault is the prevalence of stereotypical sexual assault myths, which may cloud the judgment of those determining culpability.[217] These stereotypes often involve a victim's dress or behavior, a previous consensual relationship with the perpetrator, or the lack of force or resistance.[218] By requiring affirmative conduct, and limiting the situations in which consent can be

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215. Criminal Code, R.S.C. 1985, c. C-46, § 273.1(1). This is in conjunction with the "reasonable steps" requirement of § 273.2(b) and the limitations on consent listed in § 273.2(a) and § 271.1(2). Criminal Code, R.S.C. 1985, c. C-46, §§ 273.2(a)-(b), 271.1(2).

216. Cal. Educ. Code Ann. § 67386(a)(1) (2016).

217. Ken Raymond & John Perry, *Prosecutors Battle Common Rape Myths*, OKLAHOMAN (Feb. 25, 2002), http://newsok.com/article/2783426 (noting the "the myths about rape that prosecutors must battle," including the fact that "people often place at least some blame on the victim – thinking the victim should have known what was going on, said 'no' more forcefully or fought off the attacker").

218. *Myths and Facts about Sexual Violence*, GEORGETOWN LAW, https://www.law.georgetown.edu/campus-life/advising-counseling/personal-counseling/sarvl/general-information.cfm (last visited Mar. 12, 2015).

lawfully obtained, judges and university officials are able, and forced, to focus on the crucial difference between legal sex and sexual assault: the absence of voluntary consent.

However, if the affirmative consent standard is adopted in university disciplinary proceedings, the honest, but mistaken and reasonable belief defense should be utilized. While this defense is unpopular with some scholars, it would address the various concerns of college students, the media, and legislators. If a victim alleges that she was sexually assaulted, but the alleged perpetrator had an honest, but mistaken and reasonable belief in consent, the accused will not possess the requisite mental culpability to be held responsible for the university violation. Thus, if universities were to adopt Canadian common law and the Code,[219] those who were negligently, but honestly and reasonably believed that consent existed would not be responsible.[220] This may be helpful in situations involving alcohol, which are all too common on college campuses.[221] But, if colleges adopt § 273(2), the honest, but mistaken and reasonable defense could *not* be utilized by an alleged perpetrator when his belief arose from his own "self-induced intoxication."[222] Thus, the alleged perpetrator who argues that he was too drunk to tell, or remember,

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219. *See* Criminal Code, R.S.C. 1985, c. C-46, § 265(4) ("Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.").

220. *See id.*; *Esau*, 2 S.C.R. at para. 31.

221. This is a heavily debated topic that deserves its own study. For a discussion on the interplay of sexual assault and alcohol on college campuses see Emma Brown et al., *Drinking is Central to College Culture – and to Sexual Assault*, WASH. POST (June 14, 2015), https://www.washingtonpost.com/local/education/beer-pong-body-shots-keg-stands-alcohol-central-to-college-and-assault/2015/06/14/7430e13c-04bb-11e5-a428-c984eb077d4e_story.html for a discussion on sexual assault and alcohol on college campuses (noting that "the combination is combustible: [t]he nation's campuses are filled with concentrations of young people who are exploring their sexuality, inexperienced drinkers enjoying newfound freedom from their parents while gaining access to seemingly unlimited amounts of beer and liquor").

222. Criminal Code, R.S.C. 1985, c. C-46, § 273.2(a)(i).

whether there was consent will not escape punishment.[223] This is also true of the perpetrator who fails to take reasonable steps to ascertain consent, especially in, though not limited to, ambiguous situations. Therefore, although some may argue that this approach provides a loophole for perpetrators of sexual assault, the honest, but mistaken and reasonable belief defense strikes a necessary balance between protecting victims and the interests of the accused, particularly within the quasi-judicial framework used on college campuses.

Although affirmative consent requirements set a higher bar for consensual sexual activity, these requirements are necessary considering the large amount of sexual assaults occurring in the United States today, specifically on college campuses.[224] In utilizing the Canadian model for affirmative consent, individuals are required to take reasonable steps before engaging in sexual activity, which can both lessen the occurrences of sexual assault and put individuals on notice to clarify ambiguous situations before engaging in any sexual activities. While some may view this as impractical, uncomfortable, and invasive, it is the best available solution in light of the high number of sexual assault cases and the evidentiary problems presented to university administrators in conduct hearings.

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223. Amanda Hess, *How Drunk Is Too Drunk to Have Sex?*, SLATE (Feb. 11, 2015), http://www.slate.com/articles/double_x/doublex/2015/02/drunk_sex_on_campus_universities_are_struggling_to_determine_when_intoxicated.html. Hess cites a report by Brett Sokolow, which explains: "a student 'could be stark naked, demanding sex, but if they are incapacitated at the time, and that is known or knowable to the accused, any sexual activity that takes place is misconduct, and any factual consent that may have been expressed is IRRELEVANT.'" BRETT A. SOKOLOW, 2005 WHITEPAPER: THE TYPOLOGY OF CAMPUS SEXUAL MISCONDUCT COMPLAINTS, NAT'L CTR. FOR HIGHER EDUC. RISK MGMT. 11 (2005), *available at* https://www.ncherm.org/pdfs/2005NC3.pdf.

224. DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 27 (2015), *available at* http://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/AAU_Campus_Climate_Survey_12_14_15.pdf ("The estimate . . . for the prevalence of sexual contact by force and incapacitation for undergraduate females . . . [is] 17 percent.").

B. Higher Education v. the Legal System

One reason that many are critical of affirmative consent requirements on college campuses is that they can demand not just affirmative conduct, but also affirmative language.[225] Thus, unlike Canada's affirmative consent standard, college students must receive an affirmative "yes" prior to engaging in sexual conduct.[226] While this can place a greater burden on students wishing to engage in sexual activity, and is often uncomfortable, it would make university disciplinary proceedings more clear cut and render the honest, but mistaken and reasonable defense almost unnecessary. One possible argument for the verbal affirmative consent requirement is that university officials are unequipped to deal with issues inherent in sexual assault cases.[227] Canada and other countries have struggled not only with general conceptions of sexual assault, but also with the highly legal technicalities and definitions

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225. Cathy Young, *Campus Rape: The Problem With 'Yes Means Yes'*, TIME (Aug. 29, 2014), http://time.com/3222176/campus-rape-the-problem-with-yes-means-yes/ (explaining that "as a legal standard, nonverbal affirmative consent leaves campus tribunals in the position of trying to answer murky and confusing questions — for instance, whether a passionate response to a kiss was just a kiss, or an expression of 'voluntary agreement' to have sexual intercourse. Faced with such ambiguities, administrators are likely to err on the side of caution and treat only explicit verbal agreement as sufficient proof of consent."). *See also Policies & Procedures*, OCCIDENTAL C. (Feb. 8, 2016), http://www.oxy.edu/sexual-respect-title-ix/policies-procedures (Although not requiring verbal affirmative consent, the policy cautions that "[r]elying solely upon non-verbal communication can lead to a false conclusion as to whether consent was sought or given."); *Student Sexual Misconduct Policy and Procedures: Duke's Commitment to Title IX*, DUKE, http://policies.duke.edu/students/universitywide/sexualmisconduct.php (last updated Aug. 13, 2015) (defining consent as "an affirmative decision to engage in mutually acceptable sexual activity given by clear actions or words," but cautioning that "[r]elying solely upon nonverbal communication can lead to miscommunication").

226. *See Id.*

227. *See* David G. Savage & Timothy M. Phelps, *How a Little-Known Education Office has Forced Far-reaching Changes to Campus Sex Assault Investigations*, L.A. TIMES (Aug. 17, 2015), http://www.latimes.com/nation/la-na-campus-sexual-assault-20150817-story.html (quoting Terry W. Hartle, senior vice president of American Council on Education, who remarked that "'these cases can be really difficult to resolve fairly'").

of *mens rea*, the reasonableness standard, rules of evidence, and societally ingrained myths and assumptions regarding sexual crimes. It follows that if trained judges and lawyers have difficulties determining and distinguishing between the above concepts, university officials and students sitting on conduct boards will likely have just as much, if not more, difficulty while also dealing with potential biases.[228] These challenges are compounded when university officials are faced with "two conflicting stories, no evidence, no witnesses, and . . . substance abuse," which are all common in sexual assault cases on college campuses.[229] Additionally, because there are several protections afforded at the trial level that are not available at many universities proceedings, such as evidentiary rules, the right to and presence of an attorney, the right to an appeal, and the highest burden of proof,[230] a cleaner, bright-line rule, could avoid imbalanced application of a university policy.[231]

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228. *See* Eliana Dockterman, The Hunting Ground *Reignites the Debate Over Campus Rape*, TIME (Mar. 5, 2015), http://time.com/3722834/the-hunting-ground-provocative-documentary-reignites-campus-rape-debate/.

229. Savage & Phelps, *supra* note 227.

230. *Id.*; *see also* Valerie Bauerlein, *In Campus Rape Tribunals, Some Men See Injustice*, WALL ST. J. (Apr. 10, 2015), http://www.wsj.com/articles/in-campus-rape-tribunals-some-men-see-injustice-1428684187 (noting that "[d]etractors say the directive has led to policies that can violate the accused's rights"); *but see The Process that is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1644 (2012) ("[T]he preponderance of the evidence standard will lend legitimacy and uniformity to school disciplinary proceedings, benefitting both students and their schools.").

231. Some argue that these inherent difficulties mean that sexual assault investigations and adjudications should be left to the police and prosecutors. *See* Tyler Kingkade, *States Want More Campus Rape Reports Sent to Police, But Survivors Feel Differently*, HUFF POST (Jan. 25, 2015), http://www.huffingtonpost.com/2015/01/25/states-campus-rape-police_n_6535074.html. However, this fails to account for re-victimization and personal agency. A major concern is that requiring police or prosecutorial involvement would deter victims from reporting sexual assaults due to a fear of a drawn-out jury trial. *See* Frank Daniels III, *Campus Sex Assaults Should Be Handled by Police*, TENNESSEAN (Feb. 21, 2015), http://www.tennessean.com/story/opinion/columnists/frank-daniels/2015/02/22/campus-sex-assaults-handled-police/23781673/ (explaining that "[s]ome advocates . . . decry that such a requirement will deter victims from reporting their crimes"). Although this is debated, *id.*, victims should still have the option of reporting sexual assaults at the university level as it is a violation of both the criminal system *and* university policy, just like alcohol offenses, which are commonly handled at

However, an easily applied standard is not necessarily the fairest and most practical. And, if applied properly, an affirmative consent (conduct) requirement similar to Canada's may be sufficient on college campuses. Although it is a higher burden on students than those used in the past, it balances and answers various needs and concerns: the disciplinary process is less likely to be stacked against victims due to the absence of ingrained biases and insurmountable evidentiary standards; alleged perpetrators are less likely to be subject to arbitrary or unfair results because of the availability of the honest, but mistaken belief in consent defense;[232] and finally, the lesser standard of requiring affirmative conduct rather than verbal affirmative consent responds, at least in part, to those concerned that "yes means yes" requirements amount to legislating students' bedrooms. Thus, if universities *are* to continue handling sexual assault cases, it seems that the best available option is the adoption of the Canadian standard.

Admittedly, this standard is not without its downfalls. Absent video evidence or a witness to the encounter, sexual assault cases will always be "he-said, she-said."[233] But affirmative consent standards requiring affirmative conduct properly switch the inquiry—"instead of asking a victim if . . . she said 'no' during the alleged attack, the new line of questioning . . . [should] be directed toward the alleged attacker."[234] Moreover, checks such as the honest, but mistaken belief defense and the air of reality test provide at least some safeguards for both alleged perpetrators and victims.

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the university level. However, if victims *do* choose the university process, the Canadian model for affirmative consent should be used.

232. This defense will also be limited by the air of reality defense. Moreover, if students are warned via their school's conduct handbooks that affirmative consent, meaning affirmative conduct, is required, students would be put on notice.

233. Bakeman, *supra* note 213.

234. Zoe Mintz, *'Yes Means Yes' Sexual Assault Prevention Law Has Prototype In Many College Campus Policies*, INT'L BUS. TIMES (Sept. 29, 2014, 6:21 PM), http://www.ibtimes.com/yes-means-yes-sexual-assault-prevention-law-has-prototype-many-college-campus-policies-1696683.

CONCLUSION

Canadian sexual assault laws have made dramatic and positive changes since the crime's common law inception. However, reforms are still needed in this arena of criminal law. Evidentiary standards, heteronormative language, and gendered stereotypes still persist despite the significant changes to the Canadian Criminal Code's sexual assault requirements and defenses in 1992. Despite these shortcomings, universities in the United States struggling with affirmative consent standards should consider the Canadian criminal model. While it is not without its flaws, it provides clear requirements, standards for explicit vitiation of consent, and procedural fairness guarantees for both victims and the alleged perpetrators.