PROTECTING THE DIGNITY AND AUTONOMY OF WOMEN: RETHINKING THE PLACE OF CONSTRUCTIVE CONSENT IN THE TORT OF SEXUAL BATTERY

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I. INTRODUCTION

Sexual wrongdoing is a fundamental violation of a person's personal autonomy, bodily integrity, and security. Victims, often already vulnerable, are further denied the right to self-determination, sexual autonomy, and human dignity.[1] As a result, victims of sexual abuse are increasingly seeking redress through the civil justice system either as a complement to or in substitution of criminal prosecution. A tort claim may provide personal and meaningful remedies for victimization, although there is room for improvement. Survivors have not always found justice in torts:[2] although tort liability is generally based on a standard of proof lower than that applied in criminal law, liability for sexual wrongdoing tends to require a higher threshold. However, unlike other tort cases, findings of liability for sexual wrongdoing often carry a stigma and are viewed as a reflection of depravity—hence the higher threshold.[3]

The objective of this paper is to show that the defence of constructive consent as articulated in *Non-Marine Underwriters, Lloyd's of London v.*

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[1] See Nora West, "Rape in the Criminal Law and the Victim's Tort Alternative: A Feminist Analysis" (1992) 50 U. T. Fac. L. Rev. 96 at 103-04; Joan McGregor, "Force, Consent and the Reasonable Woman" in Jules Coleman & Allen Buchanan, eds., *In Harm's Way: Essays in Honor of Joel Feinberg* (Cambridge: Cambridge University Press, 1994) 231 at 235.

[2] A civil suit may not always be appropriate for all victims, for example, because of the cost involved and the typically drawn-out length of proceedings, both of which could actually delay healing. In addition, not all survivors will be emotionally able to survive, having to relive the ordeal through testifying in court, etc. This paper's focus is on those who are willing and able to initiate a civil suit but are unlikely to get justice. See West, *ibid.* at 115-17; Bruce Feldthusen, "The Civil Action for Sexual Battery: Therapeutic Jurisprudence?" (1993) 25:1 Ottawa L. Rev. 203 at 218-22 [Feldthusen, "Civil Action for Sexual Battery"].

[3] See Denise Réaume, "Insurance and Intentional Torts: The Case of 'Sexual Battery'" (2004) 12 Torts Law Journal 76 at 87.

Scalera,[4] although intended to benefit victims of sexual abuse, in fact makes it more onerous to obtain a civil remedy. The objective ascertainment of reasonable belief in consent is likely to privilege a gendered, raced, and classed perspective that favours white heterosexual male defendants, and potentially constitutes gender discrimination. Victims of sexual wrongdoing are predominantly women and girls. Yet many women do not meet the standard of the 'typical' victim nor do many exhibit supposedly reasonable responses to unwanted sexual overtures. Misconceptions about women's sexuality in myths of male innocence and female guilt in sexual encounters pervade religious, philosophical, and scientific texts, mass media, and popular culture.[5] Furthermore, they are likely to influence assessments of constructive consent to the detriment of women victims.

Objective ascertainment of consent also poses a risk for marginalized women such as Aboriginals, women of colour, and impoverished women—all of whom are often targets for sexual abuse.[6] In addition, minority women also experience racialized myths and misconceptions about their sexuality—for instance, through media representations that portray them as sexual deviants—which can influence responses to their sexual victimization.[7] In short, the

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[4] [2000] 1 S.C.R. 551, 185 D.L.R. (4th) 1, 2000 SCC 24 [*Scalera* cited to S.C.R.].

[5] See Lynne Henderson, "Getting to Know: Honoring Women in Law and in Fact" (1993) 2 Tex. J. Women & L. 41 at 43-51; Holly Johnson, *Dangerous Domains: Violence against Women in Canada* (Toronto: Nelson Canada, 1996) at 7-8; Gayle MacDonald argues that the portrayal of women as sexual deviants is socially constructed and furthers hegemonic processes through legal method: Gayle MacDonald, "In Absentia: Women and the Sexual as Social Construct in Law" in Gayle MacDonald, Rachael Osborne & Charles C. Smith, eds., *Feminism, Law, Inclusion: Intersectionality in Action* (Toronto: Sumach Press, 2005) 50.

[6] See British Columbia Law Institute, *Civil Remedies for Sexual Assault: A Report Prepared by the British Columbia Law Institute* (BCLI Report No. 14, 2001), (Vancouver: British Columbia Law Institute, 2001) at 4-5 [BCLI]. See also West, *supra* note 1 at 110, 116; Statistics Canada, *Family Violence in Canada: A Statistical profile* (Catalogue no. 85-224-XIE) (Ottawa: Canadian Centre for Justice Statistics, 2004) at 1 [Statistics Canada, *Family Violence*]; Kari Fedec, "Women and Children in Canada's Sex Trade: The Discriminatory Policing of the Marginalized" in Bernard Schissel & Carolyn Brooks, eds., *Marginality and Condemnation: An Introduction to Critical Criminology* (Halifax, N.S.: Fernwood, 2002) 253 at 256-57; Youth Safety Survey Project, *Speak Up: Toronto Youth Talk about Safety in their Community* (Toronto: City of Toronto, 2002) at 12; Sherene Razack, "From Consent to Responsibility, From Pity to Respect: Subtexts in Cases of Sexual Violence Involving Girls and Women with Developmental Disabilities" (1994) 19 Law & Social Inquiry 891 [Razack, "Subtexts"]. See generally Warren Goulding, *Just Another Indian: A Serial Killer and Canada's Indifference* (Calgary: Fifth House Publishers, 2001), in particular, comments by Wright J. at 188.

[7] See *e.g.* Augie Fleras & Jean Leonard Elliot, *Unequal Relations: An Introduction to Race and Ethnic Dynamics in Canada*, 4th ed. (Toronto: Prentice Hall, 2003) at 138-39; Daiva K. Stasiulus, "Feminist Intersectional Theorizing" in Peter S. Li, ed., *Race and Ethnic Relations in Canada*, 2d ed. (Oxford: Oxford University Press, 1999) 347 at 364; Wanda A. Wiegers, "Compensation for Wife Abuse: Empowering Victims?" (1994) 28 U.B.C. L. Rev. 247 at 256-

possibility of a successful defence of constructive consent coupled with myths and stereotypes about women's sexual behaviour could put a civil remedy beyond the reach of many victims. This possibility will weaken the deterrence of tort suits, reduce the potential therapeutic benefits for victims, and diminish the ability of tort law to remedy the sexual exploitation and oppression of women. It can also potentially perpetuate socially constructed hierarchies among women based on stereotypes about 'other' women—especially racialized and impoverished women—as promiscuous, sexually aggressive, and unrapeable. Failure to recognize the racialization of sexual behaviour, the detrimental impact of dismissive responses to allegations of sexual violation on women belonging to visible minorities, and the risk of objective ascertainment of consent, all fall into the colour-blind trap that creates 'othering' and further oppresses racialized women. It also furthers the power structure maintained by the complex combination of systemic forces and discourse that underlie "institutional mechanisms of power and inequality, including those of gender, sexuality ... and class."[8]

The defence of constructive consent is inappropriate in the context of sexual battery claims. Given the sociological framework within which sexual wrongdoing occurs, as well as its effects on women's equality rights, bodily integrity, and security, such a defence should not be permitted in sexual battery claims because of its potential to undermine the autonomy and dignity of women. While giving meaning to sexual self-determination and sexual autonomy, the power to consent to sexual interaction symbolizes control over one's body in a fundamental way. A regime that permits the objective ascertainment of consent undermines this basic right. Further, the defence of constructive consent is inconsistent with protection extended to victims of sexual assault, including that in section 273.2(b) of the *Criminal Code* of Canada[9] that negates consent where it is obtained through an abuse of power and authority,[10] not to mention the very concerns underlying Justice

57; Fauzia Ahmad, "Still 'in Progress?'—Methodological Dilemmas, Tensions and Contradictions in Theorizing South Asian Muslim Women" in Nirmal Puwar & Parvati Raghuram, eds., *South Asian Women in the Diaspora* (Oxford: Berg, 2003) 43; Ali Rattansi, "On Being and Not Being Brown/Black-British: Racism, Class, Sexuality, and Ethnicity in Post-Imperial Britain" in Jo-Anne Lee & John Lutz, eds., *Situating "Race" and Racisms in Time, Space and Theory: Critical Essays for Activists and Scholars* (Montreal and Kingston: McGill-Queens University Press, 2005) 46 at 58.

[8] Stasiulis, *ibid.* at 365-56.

[9] *Criminal Code*, R.S.C. 1985, c. C-46 [*Code*].

[10] See *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, 92 D.L.R. (4th) 449 [*Norberg*], where Mr. Justice La Forest for the majority, in reliance on public policy, expanded the grounds on which consent could be vitiated to include relationships of inequality where the dominant party has exploited the plaintiff's vulnerability for their sexual gratification to the detriment of the plaintiff. In this case, the Court found that the defence of implied consent was not available to

McLachlin's decision in *Scalera*.[11] Accepting the defence of constructive consent to claims of sexual wrongdoing could perpetuate violence against women, particularly minority women. Only voluntary and affirmative consent should be accepted as a valid defence to claims of sexual wrongdoing.[12]

In part II, this paper points out the importance of maintaining a tort action as a viable and realistic option for survivors of sexual abuse. In part III, the paper explores the defence of constructive consent as articulated in *Scalera* and its implications for victims of sexual wrongdoing. The paper focuses on some of the difficulties in the objective ascertainment of consent in particular situations, as a further reason not to recognize constructive consent as a legitimate defence to claims of sexual wrongdoing. In part IV, this paper examines the circumstances in which mistake can be accepted as a legitimate defence in response to an intentional wrongdoing, noting that the defence of mistake is not warranted in actions for sexual battery. In part V, the paper emphasizes the susceptibility of discussions about sexual wrongdoing to be influenced by misconceptions about perpetrator and victim characteristics including their racial, ethnic, or socio-economic backgrounds. The paper shows how this can be detrimental to women's equality, in particular that of marginalized women, and to the legitimate expectations of victims in civil suits. Finally, in part VI, this paper argues for the recognition of a separate tort of sexual battery with distinct requirements that promote protection of women, are consistent with women's equality rights, and address the sexual subordination of women—in particular, minority women.

II. THE IMPORTANCE OF TORT ACTIONS FOR SURVIVORS OF SEXUAL WRONGDOING

Criminal prosecution for sexual assault serves important functions such as deterrence, denunciation, separating perpetrators from society, and ensuring the safety of complainants and other potential victims. However, criminal prosecution may not always be a practical remedy, it may not always be available, and it may not adequately provide the kind of personal remedy that victims desire. For example, because of the higher standard of proof in criminal prosecutions, low conviction rates, Crown Counsel's refusal or

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the defendant doctor who had initiated a sex-for-drug arrangement with the plaintiff, a chemically dependent patient, notwithstanding that he did not coerce her into submission and her dependency had not interfered with her ability to give valid consent.

[11] *Supra* note 4.

[12] See Martha Chamallas, "Consent, Equality, and the Legal Control of Sexual Conduct" (1988) 61 S. Cal. L. Rev. 777 at 800, referring to the restrictive definition of consent adopted in the state of Wisconsin [Chamallas, "Legal Control"].

unwillingness to prosecute,[13] and possibly as well a victim's reluctance to have perpetrators prosecuted,[14] the needs of many victims are not met. In addition, victims may not find personal satisfaction, among other things, because the harm in question is perceived to be against the state with the complainant only being a witness in the case against the perpetrator. This can engender feelings of marginalization in the criminal process; aside from the declaration of violation of the victim's rights with a guilty verdict, the complainant does not receive a personal remedy in the form of damages for their victimization. Not surprisingly, survivors are thus increasingly seeking tort remedies, in addition to or instead of criminal prosecution.

Nora West notes that part of the dissatisfaction with the criminal justice system stems from its failure to challenge and address the broader context within which sexual wrongdoing occurs, as well as its failure to conceive of such wrongs as part of the subordination of women's sexuality and women generally. As well, the criminal justice system fails to respond specifically to women's needs. Thus, although the criminal justice system is useful, it is not well suited by itself to adequately address sexual violence in society and reaffirm victims' worth and autonomy.[15] Notwithstanding efforts to make the criminal process sensitive to women's interests and needs, dramatic changes may not be realistic, at least not in the short term, given the emphasis on procedural safeguards accorded to accused persons under the *Canadian Charter of Rights and Freedoms*.[16]

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[13] Interest in seeking civil remedies has been sparked by a number of factors including dissatisfaction with the criminal justice system, the activism of feminist lawyers in fighting sexual violence against women, and increasing judicial awareness of harm to victims of sexual wrongdoing. See West, *supra* note 1. See also Feldthusen, "Civil Action for Sexual Battery", *supra* note 2; Law Society of British Columbia, *Gender Equality in the Justice System: A Report of the Law Society of British Columbia Gender Bias Committee* (Vancouver: Law Society of British Columbia, 1992) vol. 1 at 6-12—6-13.

[14] See West, *ibid.* at 113; Elizabeth A. Sheehy, "Compensation for Women Who Have Been Raped" in Julian V. Roberts & Renate M. Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 205 at 205-06. For an example of some of the politics surrounding sexual assault investigations, see Jane Doe, *The Story of Jane Doe: A Book about Rape* (Toronto: Random House, 2003) at 85-86, 89.

[15] The principal focus of the criminal justice system appears to be the promotion of public interest in crime control. Determinations of what the public interest in particular situations may be are influenced by factors not necessarily consistent with the interests and needs of victims. See Feldthusen, "Civil Action for Sexual Battery", *supra* note 2 at 213.

[16] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. See Lise Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the *Charter* for Sexual Assault Law" (2002) 40 Osgoode Hall L.J. 251 at 254 [Gotell, "Implications of the *Charter*"]. See also Elizabeth Comack & Gillian Balfour, *The Power to Criminalize: Violence, Inequality and the Law* (Halifax: Fernwood, 2004) at 33

In contrast to criminal prosecution, civil actions may offer victims personal and meaningful redress for their victimization. In theory, tort claims are open to all victims of sexual wrongdoing willing to institute such claims, although in practice only those with financial means can do so.[17] As parties to tort actions, victims can personally direct the litigation, as well as confront and seek justice against the perpetrator on their own terms (to the extent permitted by the legal system), rather than simply being witnesses in criminal prosecution initiated and directed by the state. Compensation constitutes recognition of the violation of a victim's bodily autonomy and dignity.[18] It also provides monetary compensation for tangible and intangible harms arising from abuse, even if a particular claimant considers the financial gain incidental. Payment of damages by the perpetrator also serves punitive and deterrence purposes.[19] In addition, civil actions hopefully promote healing: For

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[Comack & Balfour]; Margaret Denike, "Dignifying Equality: The Challenge of Reform in Sexual Assault Proceedings" (1999) 19:1&2 Canadian Woman Studies 81 at 82.

[17] Perpetrators of sexual wrongdoing often target vulnerable and marginalized women and girls. See *supra* note 5 and accompanying text. For most of these victims, the high cost of litigation and the unavailability of legal aid for tort cases make it unlikely that they will be able to initiate actions unless they can negotiate contingency fee arrangements or are fortunate enough to get a lawyer to conduct the case on a pro bono basis. The lower quantum of damages in sexual wrongdoing cases compared to other personal injury cases creates further barriers to justice, because many lawyers are reluctant to take on such cases for fear that damage awards might not be sufficient to pay for their fees. There is also a further risk of victims only obtaining a Pyrrhic victory, which also makes civil suits unlikely if the principal reason is to obtain monetary compensation. Even aside from the legal representation and monetary concerns, some victims might not want to publicize their victimization for fear of being stigmatized or to avoid feeding into racist stereotypes about members of their racial/ethnic/cultural background. See BCLI, *supra* note 6 at 78; CRIAW, "Women's Experience of Racism: How Race and Gender Interact: Access to Justice" *Factsheet* (July 2002), online: Canadian Research Institute for the Advancement of Women <http://www.criaw-icref.ca/indexFrame_e.htm>.

[18] For a general discussion of the importance of compensation for healing, see *e.g.* Rebecca Tsosie, "Acknowledging the Past to Heal the Future: The Role of Reparations for Native Nations" in Rahul Kumar & Jon Miller, eds., *Reparations: An Interdisciplinary Examination of Some Philosophical Issues* (Oxford: Oxford University Press, forthcoming). It must, however, be noted that the claim that financial compensation promotes healing remains equivocal. In fact, some complainants have said that was neither their expectation, nor their experience, from civil suits.

[19] Personal accountability is still at the heart of intentional torts. Tortfeasors often have to personally pay for damages because the intentional injury exception prohibits insurance coverage for intentional wrongdoing. Although a battery can be committed either intentionally or negligently in Canada, the modern tort of battery is often reserved for intentional wrongdoing. More importantly, the Supreme Court of Canada held in *Scalera*, *supra* note 4, that, as a matter of public policy, insurers have no duty to defend and indemnify defendants in cases of sexual battery. Punitive damages are often awarded in cases of sexual wrongdoing to punish the defendant and deter others who might be similarly inclined. Even if punitive damages are not awarded, there can still be an element of deterrence as compensatory damages

some victims, a major motivation for civil action is the potential therapeutic benefit, which may outweigh financial gains anticipated from suits (some claimants even initiate a suit in spite of knowledge of a perpetrator's insolvency). Claimants may simply want their day in court, to obtain public vindication for their victimization, to make peace with themselves, and sometimes to seek retribution—the possibility of financial compensation is less significant.[20] This is particularly important for victims whose allegations of sexual wrongdoing are not criminally prosecuted.

A tort suit can have both specific and general therapeutic benefits. Victims may feel empowered for having been strong and courageous enough to challenge their sexual victimization on their own terms. Findings of liability not only constitute a formal and public recognition of plaintiffs' victimization and perpetrator responsibility for that victimization, but can also help prevent self-blame by victims. In addition, successful claims can be viewed more broadly by women as challenging their subordination and sexual victimization.[21] Access to a tort remedy is therefore important for victims of sexual wrongdoing and women's equality more generally. The expectation is that given the lower civil standard of proof, courts will approach the consent requirement cautiously, in ways that will promote women's equality and reflect the power imbalance and breach of trust typical of relationships in

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can have punitive effects on defendants. See *Whiten v. Pilot Insurance Co*, [2002] 1 S.C.R. 595 at 655, 209 D.L.R. (4th) 257, 2002 SCC 18.

[20] Feldthusen, "Civil Action for Sexual Battery", *supra* note 2 at 210-12. See Bruce Feldthusen, "Discriminatory Damage Quantification in Civil Actions for Sexual Battery" (1994) 44 U.T.L.J. 133 at 135-36 [Feldthusen, "Discriminatory Damage"]. See also Bruce Feldthusen, Olena Hankivsky & Lorraine Greaves, "Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse" (2000) 12 C.J.W.L. 66 at 98-100 [Feldthusen *et al.*]. In their survey of how survivors of sexual abuse experience the legal system, the authors observe that some complainants actually felt dissatisfied with their damage awards by referring to it as "dirty money" or "blood money", and made them feel cheap because they saw the awards as payment for their ordeal. These comments should not be taken to diminish the importance of financial compensation for some survivors who see it as an opportunity to help them deal with some of the effects of abuse and put their lives back on track. For example, see "Section 4.3.2: The Financial 'Award'" in Ministry of the Attorney General, *Evaluation of the Grandview Agreement Process: Final Report* by Deborah Leach (Ontario: Ministry of the Attorney General, 1997), where she notes that a substantial number of recipients found the financial award helpful for making positive changes in their lives, contributed to a sense of validation, and gave them financial security and independence.

[21] See West, *supra* note 1 at 112; Sheehy, *supra* note 14 at 206. It is worth pointing out that advocates for a separate civil action for sexual wrongdoing, including West, recognize the limits of the civil litigation process, and the fact that it might not be appropriate for all victims or suitable for all types of abuses, particularly those involving violence. See West, *ibid.* at 115-17; Feldthusen *et al.*, *ibid.*; Feldthusen, "Discriminatory Damage", *ibid.* at 218-22.

which sexual abuses occur.[22] However, a successful defence of constructive consent can undermine these anticipated benefits of tort actions.

III. SEXUAL BATTERY IN THE SUPREME COURT OF CANADA

There is no distinct tort of sexual battery in Canada. Sexual battery is considered a particular kind of battery where the offensive or harmful contact was sexual in nature.[23] Like traditional battery, a complainant's case is made out upon proof of physical contact of a sexual nature without having to prove lack of consent; absence of consent is presumed. The defendant's fault arises from the intentional violation of the plaintiff's bodily security in a sexual manner. In accordance with traditional battery principles, the defendant bears the onus of proving consent, constructive or otherwise.[24] Constructive consent is to be objectively determined based on whether the complainant's conduct lent itself to a reasonable inference of consent to sexual contact. There must be a reasonable basis for the defendant's belief in the plaintiff's consent; a reasonable person in the defendant's position should have believed the plaintiff consented to sexual contact in the particular circumstances.[25] Situational factors at the time of contact are key in this determination. The focus of the inquiry is on the complainant's demeanour as well as the surrounding circumstances at the time of the alleged violation.[26]

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[22] West, *ibid.* at 112-13. Examples of women-favourable analyses of consent include cases like *Harder v. Brown* (1989), 16 A.C.W.S. (3d) 347, 50 C.C.L.T. 85 (B.C.S.C.) and *Norberg*, *supra* note 10, where it was held that the apparent consent of the plaintiff was vitiated in light of the plaintiff's vulnerability in the circumstances, which was exploited by the defendant for his own benefit, or more generally, given the inequalities between the parties.

[23] *Scalera*, *supra* note 4 at 572. See also *Norberg*, *ibid.* at 246; Feldthusen, "Civil Action for Sexual Battery", *supra* note 2 at 206.

[24] *Scalera*, *ibid.* at 560.

[25] *Ibid.* See Lewis N. Klar, *Torts Law*, 3d ed. (Toronto: Thomson Carswell, 2003) at 118; William Page Keeton *et al.*, *Prosser & Keeton on the Law of Torts*, 5th ed. (St. Paul, Minn.: West Publishing Co., 1984) at 113.

[26] *Scalera*, *supra* note 4. References to *Scalera* to date, in relation to sexual wrongdoing, tend to focus on who bears the onus of proving consent and/or the need to adopt a contextualized approach to ascertaining the existence of consent in dependency or trust relationships, bearing in mind the inequality of power between the parties. For examples of this approach, see *E. M. v. Reed* (2000), 24 C.C.L.I. (3d) 229 (Ont. Sup. Ct. J.), aff'd (2003), 49 C.C.L.I. (3d) 57 (Ont. C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 334; *M.(K.I.) v. Perri Estate*, [2001] O.T.C. 325 (S.C.). Existence or absence of consent has not been the main issue in most sexual wrongdoing cases either because the defence is a complete denial of the alleged acts, or because they were institutional abuse cases where the central issues were employer liability and/or damages. See *J.A.S. v. Gross* (2002), 299 A.R. 111, 36 C.C.L.I. (3d) 25 (C.A.); *D.S. v. Mascoll* [2000], O.J. No. 5006 (S.C.) (QL).

The *Scalera*[27] decision appears to be a feminist victory, at least in respect of the presumption of lack of consent and placing the burden of proving consent on the perpetrator. Madam Justice McLachlin (as she then was) rejected Mr. Justice Iacobucci's position of the need to recognize a new tort of sexual battery that would have required complainants to prove lack of consent as part of their claim. She reminded us that the purpose of the battery action is the protection of personal autonomy rights.[28] It would therefore be unfair and contrary, given the rights-based focus of battery, to expect a person whose bodily integrity has been violated in such a fundamental way to have to prove the perpetrator's fault by showing that contact was non-consensual. Justice McLachlin's decision marks a rejection of the formal equality of plaintiffs and defendants that underlies most civil litigation. Rather, she recognized the power imbalance present in sexual abuse as well as its often gendered nature, the inherent wrong to victims of sexual abuse, and more generally, persons who have suffered intentional invasions of their personal autonomy and dignity. Presumably, placing the burden of proving consent on the perpetrator was partly to help overcome some of the traditional difficulties in establishing non-consent in criminal prosecutions. Ostensibly, establishing constructive consent by reference to objective indicators is a positive development given the historical subjectivity in assessing *mens rea* and mistaken belief in consent for sexual assault, which as Réaume points out, sets an artificially high threshold for conviction, leaving many complainants without a remedy.[29]

However, notwithstanding the strong emphasis on complainants' rights and women's equality rights generally in *Scalera,* the possibility of a defendant escaping liability on the basis of constructive consent may be detrimental to the interests of survivors and feed into the commodification of women's sexuality. The case didn't indicate how the defence of constructive consent should operate, other than that it is to be objectively assessed, and that it is not necessarily dependent on the defendant's subjective state of mind as to the claimant's consent to contact.[30] Would a successful defence of constructive consent require the defendant to adduce evidence about reasonable efforts to ascertain the claimant's consent in the circumstances similar to the requirements under section 273.2(b) of the *Code*[31] regarding the defence of honest but mistaken belief in consent? Relying on objective factors to determine the complainant's consent in particular circumstances rather than

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[27] *Supra* note 4.

[28] *Ibid.* at 565-56.

[29] Réaume, *supra* note 3 at 87, 90.

[30] *Scalera*, *supra* note 4 at 560, 575.

[31] *Supra* note 9.

requiring unequivocal expression of consent may be unfair: It makes the complainant's perception of events and experience of sexual violation irrelevant provided there is a 'reasonable' basis for the defendant's belief in her consent, while also excusing male sexual aggression.[32]

What constitutes reasonable or objective belief about consent in particular circumstances? Ideological representations about people who share certain characteristics are likely to influence assessments of reasonable belief in consent. The existence of constructive consent could therefore be determined by myths and stereotypes about complainants based on, for example, factors such as gender, race, material condition, and the space one inhabits; not necessarily by factors specific to a victim or what might have actually transpired.[33] Reference to how 'ordinary' and 'reasonable' people may construe a situation is inconsistent with the protection of individual autonomy that is central to the tort of battery. Unarticulated discriminatory assumptions about particular groups can taint the reasonableness of belief in the complainant's consent. As well, this may be perceived by complainants as an attempt by courts to define their experiences of sexual violation—usually from a male, mainstream perspective—something complainants find offensive and demeaning.[34] This makes the tort of battery or at least the defence of constructive consent ill-equipped to protect the autonomy and dignity interests of victims of sexual violations, and in particular, those living on the margins of society.

An emphasis on reasonable belief in consent gleaned from events or interactions between the parties at the time of the alleged wrongdoing offers limited insight into the systemic nature of sexual abuse, and avoids addressing the gendered framework within which both the incident itself and analysis of consent operate. The focus appears to be on the discrete and isolated incident of abuse, and the defendant's conduct is perceived as a personal moral failing. The incident in question is de-contextualized from any background factors,

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[32] See Jane Harris Aiken, "Intimate Violence and the Problem of Consent" (1996-97) 48 S.C.L. Rev. 615 at 617, 630-31. Courts in the Unites States have rejected the privileging of objective factors in sexual harassment cases in favour of a two-pronged test that combines objective and subjective factors to determine whether the conduct in question created a hostile work environment for the plaintiff. Specifically, a reasonable person must find the conduct in question hostile, and the victim must in fact have perceived it to be offensive. See *Faragher v. City of Boca Raton*, 524 U.S. 775 at 787 (1998). Piefer notes that given the perception gap between men and women about sexual violation, sexual harassment claims should be considered only from the victim's perspective or more generally based on a reasonable woman's perspective. Sally A. Piefer, "Sexual Harassment from the Victim's Perspective: The Need for the Seventh Circuit to Adopt the Reasonable Woman Standard" (1993) 77 Marq. L. Rev. 85 at 109-13.

[33] See Comack & Balfour, *supra* note 16 at 46.

[34] See Jane Doe, *supra* note 14 at 272; MacDonald, *supra* note 5 at 52, 53, 57-58.

including prior interactions between the parties that might have culminated in the alleged abuse or the complexities of sexual abuse more generally. Emphasis on discrete events limits the focus of the inquiry and risks de-politicizing sexual wrongdoing, prior marginalization, or social forces that constrain women's choices and behaviour—all of which may provide a context for understanding a particular complainant's response to the defendant's sexual advances.[35]

How courts in the United States approach the requirement that complainants alleging sexual harassment prove they did not welcome the defendant's conduct or behaviour (the "unwelcomeness standard") might provide some insight to the potential dangers women face with an objective assessment of consent. Sexual harassment constitutes gender discrimination under Title VII of the *Civil Rights Act* of 1964 as amended[36]—protection against discrimination in the workplace. Actionable conduct includes "unwelcome sexual advances, requests for sexual favours and other verbal or physical conduct of a sexual nature."[37] Whether offensive conduct is unwelcome depends on the complainant's testimony, which must be corroborated by her behaviour; did she do or say anything to suggest she solicited or incited the offensive behaviour in question? Evidence of "unwelcomeness" may be gleaned from factors such as the complainant's manner of dressing, engaging in sexually suggestive conversations, lifestyle, etc. Attempts to restrict admission of behavioural indicators in the determination of consent to offensive conduct have been strongly opposed, for example, by the United States Supreme Court. This casts doubts on how seriously the rule will be interpreted and adhered to, especially in relation to advances that are not obviously offensive.[38] Opposition to reforms intended to protect women's rights in sexual harassment cases reflects a resistance to reforms in sexual assault laws generally, as well as the pervasiveness of myths about women's sexuality. There is therefore reason to be uncomfortable with a regime that determines whether consent is present based on objective criteria because it will inevitably be prejudicial to women's interests no matter how well intentioned.

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[35] See Gotell, "Implications of the *Charter*", *supra* note 16 at 293; Aiken, *supra* note 32 at 616, 629-30.

[36] 42 U.S.C. § 2000e (1988).

[37] *Guidelines on Discrimination Because of Sex*, 29 C.F.R. § 1604.11 (1996).

[38] The United States *Federal Rules of Evidence* (28 U.S.C. §412 (2004)) limits reliance on a complainant's behaviour to indicate consent to unwanted sexual conduct: Aiken, *supra* 32 at 637-38. See also Jennifer Ann Drobac, "Sex and the Workplace: 'Consenting' Adolescents and a Conflict of Laws" (2004) 79 Wash. L. Rev. 471 at 488, who notes how prior sexual history of minor victims may still be admitted in evidence in spite of rape shield laws.

It is unclear from *Scalera*[39] whether there are sufficient safeguards to ensure fair treatment of complainants regardless of their background or in ways that fully appreciate the social context in which sexual violation often occurs. Grace and Vella point to Justice McLachlin's reference to the *Code*[40] provision to draw parallels between the defence of consent in criminal and tort actions.[41] However, this safeguard is not clear from the decision. Reference to the *Code* provision in *Scalera* was intended to emphasize the protection accorded to complainants in criminal trials for sexual assault, which historically focused on the complainant's behaviour, and redirected attention to the defendant's conduct. As Justice McLachlin pointed out, the new focus on the defendant and the higher threshold for a successful defence of honest but mistaken belief in consent in criminal cases mirrors protections traditionally accorded to plaintiffs in battery actions, which should be retained for claims of sexual battery. The Justice's comments were in response to the proposed shift of onus of disproving consent to sexual contact onto the plaintiff, which she rejected as contrary to the purpose of the battery action.[42] Thus, reference to the criminal law provision on mistake does not appear to have been intended to offer guidance on how constructive consent is to be construed, nor on its potential impact on claimants.

The defence of constructive consent will likely operate in similar ways to the criminal defence of honest mistake. The *Code* and the Supreme Court of Canada decision in *R. v. Ewanchuk*[43] have severely limited the applicability of the defence of mistake in sexual offences, but the introduction of the defence of constructive consent into tort law, without more, does not necessarily mean the legislative and judicial developments in criminal prosecutions would automatically be applicable to tort claims. Justice McLachlin's reference to safeguards in section 273.2(b) of the *Code* cannot therefore be taken as justification for the defence of constructive consent in battery claims or as guaranteeing the protection of complainants' interests.[44] Rather, it appears to

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[39] *Supra* note 4.

[40] *Supra* note 9.

[41] Elizabeth K.P. Grace & Susan M. Vella, *Civil Liability for Sexual Abuse and Violence in Canada* (Markham, Ont.: Butterworths, 2000) at 137-38.

[42] *Scalera*, *supra* note 4 at 573-75.

[43] [1999] 1 S.C.R. 330, 169 D.L.R. (4th) 193 [*Ewanchuk* cited to S.C.R.].

[44] It is worth pointing out that some feminist scholars fundamentally *oppose* the defence of mistaken belief in consent, however liberally constructed to benefit the complainant. The defence subordinates women's autonomy rights to seemingly honest mistakes by men about a woman's willingness to engage in sexual contact, which in any event can be exaggerated and is not subject to any precise proof. The fluidity and subjectivity in finding the appropriate *mens*

be aimed at buttressing the importance of protecting complainants in sexual wrongdoing claims by not requiring them to disprove consent. The *Code*[45] provision in question focuses on the defence of mistaken belief, which is not generally recognized as a defence to trespass to the person.[46] In any event, the normative standard for ascertaining reasonable inference of consent in a given situation can still be problematic, given the prevalence of myths about women's sexuality and disregard for women's sexual autonomy, among other things, due to "many aspects of male socialization that militate against scrupulous regard for the sexual autonomy of others."[47] There is a perception gap between men and women in relation to sexual violation. A male-oriented and allegedly objective assessment of whether an inference of consent was reasonable in a given situation is bound to be prejudicial to women's interests. As well, given the seriousness of the label of sexual aggressor and the stigma attached to sexual wrongdoing, the threshold for liability is likely to be high, thereby conflating the civil and criminal standards for liability. Justice Iacobucci may have hinted at an acceptable threshold for civil liability when he noted that to constitute sexual battery the defendant's conduct must go beyond mere negligence towards sexual assault (referring to the crime of sexual wrongdoing in the criminal context).[48] However, this is likely to result in a judicial reluctance to characterize fact situations as involving culpable negligence. Most situations are likely to be characterized as mere negligence in ascertaining a complainant's consent, which may not lead to a finding of liability so long as a reasonable person in the defendant's situation would have thought the same. This will raise the fault threshold required for a finding of liability to something akin to gross negligence, making it difficult for complainants to sustain their claims.[49] It will also affect the assessment of damages, particularly non-pecuniary damages, as well as the availability of punitive damages.[50] Such trends will be prejudicial to the interests of women

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rea for a conviction is evidenced by the highly-charged debate between Parliament and the Supreme Court of Canada since the 1980s. See comments in Réaume, *supra* note 3 at 87, n. 30.

[45] *Supra* note 9.

[46] The limited availability of the defence of mistake in tort actions will be discussed below.

[47] Réaume, *supra* note 3 at 87. See also Johnson, *supra* note 5 at 115, 120; Robin D. Wiener, "Shifting the Communication Burden: A Meaningful Consent Standard in Rape" (1983) 6 Harv. Women's L.J. 143 at 147-48; Piefer, *supra* note 32 at 86.

[48] *Scalera*, *supra* note 4 at 624.

[49] See Réaume, *supra* note 3 at 89.

[50] Unlike other heads of damage available in civil suits, punitive damages are non-compensatory. They are intended to punish the defendant for his reprehensible conduct. The availability of punitive damages therefore depends on the existence of subjective wrongdoing by the defendant. A finding of liability based on the fact that there was no reasonable basis for

and are inconsistent with the aims of tort liability. They can also feed into the perception that sexual wrongdoing is an aberration rather than a pervasive problem for women and girls.[51]

Subsuming sexual battery into the rules governing traditional battery caused Grace and Vella[52] to express concern that consent to sexual wrongdoing may be implied from the woman's conduct at the relevant time in the same way as in other battery cases. They, however, tried to allay such fears by stating that it is highly unlikely for the defence of implied consent to be successfully asserted in civil sexual abuse cases. They found further comfort in *Ewanchuk*,[53] where the Supreme Court of Canada held that there was no defence of implied consent to sexual assault in criminal law. Since *Ewanchuk* predates *Scalera*,[54] this paper doesn't share Grace and Vella's optimism that the defence of constructive consent would rarely succeed. In fact, it has been observed that life has not improved significantly for complainants in criminal sexual assault cases in spite of legislative and judicial changes aimed at protecting women complainants, which have expanded significantly since the 1980s. Complainants continue to be perceived as "liars," "fabricators" and "attention-seekers".[55] As well, complainants' status or past experiences have sometimes been used to cast doubts on their credibility. Intense scrutiny of complainants' lives has even

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belief in a complainant's consent would give the impression that although the defendant deliberately engaged in sexual contact with the plaintiff, he may not be morally culpable because he was not subjectively aware that he was violating the plaintiff's rights. This will be similar to the basis of liability in negligence law. It is less likely for a court to award punitive damages in these circumstances. Generally, punitive damages are not awarded in respect of negligent conduct. This would also affect awards for non-pecuniary damages, which is the head of damage most often claimed by claimants in sexual assault cases. As Sutherland points out, although the valuation of non-pecuniary damages is supposed to be based on the plaintiff's harm and the extent to which money can provide solace, courts often determine the appropriate amount based on their perception of the extent of the defendant's culpability. See Kate Sutherland, "Measuring Pain: Quantifying Damages in Civil Suits for Sexual Assault" in Ken Cooper-Stephenson & Elaine Gibson, eds., *Tort Theory* (North York: Captus University Publications, 1993) 212 at 214-17.

[51] For example, see the findings of the Law Society of British Columbia's Gender Bias Committee in relation to sexual harassment, *supra* note 13, at 3-3, 3-7.

[52] *Supra* note 41.

[53] *Supra* note 43.

[54] *Supra* note 4.

[55] See *e.g.* Jane Doe, *supra* note 14 at 3.

forced some women to abandon their sexual abuse claims.[56] There are no guarantees that there are sufficient safeguards to ensure that the defence of constructive consent does not become a further tool of oppression of women. Therefore, it is simply better to not recognize it.

Subsuming sexual battery under traditional battery, and hence making it subject to the same rules, presupposes that sexual battery may arise from intentional *or* negligent conduct.[57] Yet, the Supreme Court has characterized sexual battery only as an intentional wrongdoing. Hence, no duty to defend or indemnify policyholders arises pursuant to this intentional injury exception. This prejudices complainants where perpetrators cannot satisfy judgments from their personal assets. Furthermore, Réaume cautions that referring to sexual battery as an intentional tort does not adequately reflect the Canadian law of trespass.[58] She notes that the narrow focus on intentional wrongdoing in *Scalera*,[59] which was aimed at precluding the perpetrator from benefiting from his homeowner's insurance policy, prejudices the claims of victims of negligent sexual contact who would otherwise have obtained compensation from insurance funds. Ultimately, she argues that *Scalera* deprives victims of access to compensation in a way not experienced by other battery victims. This constitutes gender discrimination against the predominantly female victims of sexual wrongdoing, while relieving insurance companies of the duty to defend and indemnify policyholders sued for sexual wrongdoing.

While this critique of *Scalera* is fair, at least in relation to complainants' need for compensation, the view that sexual battery can arise from negligent conduct is problematic. Negligence in this context relates to failure to adequately gauge the complainant's consent as a reasonable person would have done—that is, proceeding with sexual activity in circumstances where a reasonable person would have known the complainant was not consenting.[60] In this sense, the defendant's fault stems from a failure to meet an objective standard judged by reference to the principle of reasonableness.[61] Réaume argues that there is no reason to exclude negligent defendants from insurance coverage because no moral hazards arise from such coverage. It is problematic

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[56] See generally "Chapter 5: Whacking the Complainant Hard: Law and Sexual Assault" in Comack & Balfour, *supra* note 16. See also Laura Hengehold, "An Immodest Proposal: Foucault, Hysterization, and the 'Second Rape'" (1994) 9:3 Hypatia, 88 at 99-100.

[57] According to *Cook v. Lewis*, [1951] S.C.R. 830, [1952] 1 D.L.R. 1 [*Cook*] (affirmed in *Scalera*, *supra* note 4), the tort of battery can arise from intentional or negligent conduct.

[58] Réaume, *supra* note 3.

[59] *Supra* note 4.

[60] Réaume, *supra* note 3 at 84.

[61] *Ibid.* at 79.

to equate non-consensual sexual activity with intent to injure in order to bring the defendant's conduct within the exclusion clause. However, the element of intent for purposes of the tort claim refers to the defendant's deliberate decision to interfere with the complainant's sexual autonomy, even if the failure to adequately gauge her consent amounted to carelessness or negligence on his part. Negligence in ascertaining the complainant's consent does not affect the character of the defendant's conduct as a deliberate act of sexual contact with the plaintiff's person. Thus, although battery may be committed intentionally or negligently in Canada, given the nature of sexual battery as a targeted and deliberate act, it is fundamentally an intentional tort.[62]

IV. IMPLICATIONS OF THE REASONABLE STANDARD IN ESTABLISHING FAULT FOR SEXUAL BATTERY

What are the implications of the objective ascertainment of a defendant's fault in claims of sexual battery? Resorting to objective indicators to foreground reasonableness allows mistake to creep into the determination of culpability for a trespassory tort.[63] Constructive consent will seem to raise the threshold for liability in civil cases relative to the criminal standard, which would be contrary to limitations on the use of implied consent in criminal law.

The purpose of tort law in the common law tradition is the protection of individual rights.[64] The historical basis of tort liability in the Anglo-American tradition is premised on a theory of strict liability, or at least something akin to a system of strict liability.[65] A defendant's fault is not traditionally a relevant

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[62] See Lewis Klar, "Intentional and Negligent Trespass: It is Time to Clarify the Law" (2004) 28 Advocates' Q. 410 at 422-23 [Klar, "Trespass"].

[63] This is contrary to the justificatory purpose of the tort of battery as envisioned in *Scalera*, *supra* note 4.

[64] Izhak Englard, *The Philosophy of Tort Law* (Aldershot: Dartmouth Publishing Co., 1993) at 22.

[65] Historically, a claimant could obtain a remedy for trespass by simply establishing interference by the defendant, regardless of the defendant's state of mind. *Weaver v. Ward* (1616), 80 E.R. 284 [*Weaver*], is said to be the first case to introduce the fault element by holding that a defendant should be relieved of liability for trespass if the interference resulted without fault on the part of the defendant. Thus, a defendant could be relieved of liability where interference resulted from an inevitable accident. The idea of not imposing liability without fault was fully entrenched in English law by *Stanley v. Powell*, [1891] 1 Q.B. 86, [1886-90] All E.R. 314, where Denman J. held that proof that a defendant had interfered with the plaintiff's person was no longer sufficient to sustain a trespass action. A defendant could escape liability by proving lack of intent or negligence in causing the interference in question. This development culminated in the current English position in *Fowler v. Lanning*, [1959] 1 Q.B. 426, 2 W.L.R. 241, where the court reiterated that there should be no liability without fault and cast the onus of establishing a defendant's fault on the plaintiff even in cases of direct infliction of harm. See Glanville Williams & B.A. Hepple, *Foundations of the Law of Tort*, 2d ed.

consideration for determining liability. This position is still reflected in Canadian tort law on trespass to the person.[66] A cause of action arises where a defendant intends the outcome that results from his or her conduct—that is, interference with the plaintiff's bodily integrity. However, unlike current Anglo-American law, Canadian law does not require a plaintiff to establish the defendant's fault in asserting their claim. A complainant is only required to prove direct physical contact with their person by the defendant. The onus is then on the defendant to disprove fault. Subjective blameworthiness is not required for liability; thus, it is irrelevant that the defendant did not subjectively intend to commit a trespass, and in fact may have made an honest mistake about the identity of the plaintiff and/or the lawfulness of the impugned conduct.[67] Though this emphasis on protection of personal autonomy as the essence of battery seems to support a strict liability regime, the Supreme Court of Canada has conceded that fault is still a requirement for battery. A presumption of fault arises against the defendant upon proof of interference with the plaintiff's bodily autonomy. The defendant can only escape liability by disproving fault—that is, a lack of intent and negligence, or by establishing a valid defence.[68]

The fault principle is consistent with morality and justifies why an actor should be required to compensate a sufferer.[69] The fault principle is premised on the idea that tort law is not solely about the rights and interests of the immediate litigants. Rather, it is an attempt to decide seemingly private disputes in accordance with societal interests, and to serve social ends. Entitlement to a remedy is not determined exclusively by interference with the plaintiff's rights, but also by whether it is fair to hold the defendant liable in the circumstances.[70] In furtherance of perceiving tort law as serving the

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(London: Butterworths, 1984) at 52-54; James Barr Ames, "Law and Morals" (1908) 22 Harv. L. Rev. 97 at 97-99.

[66] The Supreme Court of Canada emphasized in *Scalera* that the rationale for the tort of battery is to protect the personal autonomy of individuals. Thus, the need for compensation arises not from the defendant's fault but from violation of the sacrosanct right of an individual to bodily integrity. See *Scalera*, *supra* note 4 at para. 15.

[67] See David Baker, *Introduction to Torts* (North Ryde, N.S.W.: Law Book, 1985) at 24-25.

[68] *Scalera*, *supra* note 4 at 563-64; *Goshen v. Larin* (1975), 10 N.S.R. (2d) 66, 56 D.L.R. (3d) 719 (C.A.).

[69] For instance, see Williams & Hepple, *supra* note 65 at 90. See especially, Ames, *supra* note 65 at 99, 100; Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little Brown and Company, 1881) at 79-80.

[70] George Fletcher, "Fairness and Utility in Tort Theory" (1972) 85 Harv. L. Rev. 537 at 540-41. See also John G. Fleming, *The Law of Torts*, 9th ed. (Sydney: Law Book, 1998) at 26-27.

interests of the community as a whole, Anglo-American jurisprudence does not provide a remedy for unauthorized interferences unless the plaintiff proves that trespass resulted from the defendant's intentional or negligent conduct. The "no liability without fault" principle is perceived to be utilitarian, socially responsible, and as serving the interests of the community as a whole. The right to personal autonomy is therefore made secondary to fairness to defendants and to community welfare as a whole. Canadian courts balance the competing interests of a plaintiff's personal autonomy and fairness to defendants and/or community interests through the presumption of fault.

Non-consensual sexual contact constitutes a serious violation of personal autonomy and should be distinguishable from other forms of trespass to the person. The right to make decisions about sexual partners is central to the personal autonomy and dignity of individuals.[71] This, coupled with the inherent and enduring nature of harm from sexual abuse supports the view that those who decide to engage in sexual activities with others without seeking their affirmative consent do so at their own risk. Where a court decides that the risk was unreasonable in particular circumstances, it would not be unfair to impose strict liability on the defendant. Liability without fault is justified for exposing others to unreasonable risks.[72] As between a person who intentionally interferes with another's autonomy interests and an innocent victim, the former should bear the burden of any mistake on the issue of consent. Risk should be considered unreasonable where the defendant engages in non-consensual sexual activity because it exposes the plaintiff to disproportionate and non-reciprocal risks. Non-reciprocity in this context is not simply a matter of degree, that the defendant exposes the plaintiff to greater risks than the plaintiff does in the circumstances. Rather, the plaintiff does not expose the defendant to any risk at all. In fact, non-consensual sexual activity is an act of aggression, oppressive, an exercise of ultimate power and control by the defendant over the plaintiff, dehumanizing, robs the claimant of their dignity and personhood, and is a denial of the right to sexual autonomy.[73] Since the interaction constitutes a "negative-sum transaction" for the plaintiff, the imposition of liability, as well as the need to compensate without reference to the defendant's fault or state of mind in these circumstances, is morally

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[71] In *R. v. Osolin*, [1994] 4 S.C.R. 595 at 669, 109 D.L.R. (4th) 478 [*Osolin* cited to S.C.R.], Mr. Justice Cory noted that sexual assault "is an assault upon human dignity and constitutes a denial of any concept of equality for women." For a discussion of the nature of harm caused by sexual abuse, see BCLI, *supra* note 6 at 13-16.

[72] See Fletcher, *supra* note 70 at 544-51.

[73] See *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 O.R. (3d) 487, 160 D.L.R. (4th) 697 at 702 (Gen. Div.) [*Jane Doe* cited to D.L.R.]. See also West, *supra* note 1, at 103-04.

justified and necessary to maintain personal autonomy.[74] Liability is also justified because the risk in question does not promote community welfare.[75] Harm resulting from sexual wrongdoing not only violates personal autonomy but it also yields a net social loss or disutility for the community in terms of its effects on individuals and cost to society (for example, leading to the inability of individuals to lead productive lives as a consequence of sexual abuse, and costs to society in the form of health care costs, lost productivity, and reliance on the social safety net).[76] Thus, to use Fletcher's terminology, sexual abuse should be considered unexcused "non-reciprocal risk-taking".[77] Risk of injury to plaintiffs is so great that the law should not permit a defendant to escape liability even based on constructive consent.

Fletcher has observed that the principle of not imposing liability without fault as articulated in *Weaver*[78] does not conceive of a broad basis for excusing interference with another's rights. Rather, it was intended to excuse liability for interference resulting from compulsion or non-volitional conduct, as well as unavoidable ignorance. He further notes that compulsion and unavoidable ignorance should excuse liability even in situations of nonreciprocal risk of harm.[79] This is consistent with the idea that tort liability arises only in respect of volitional conduct. Sexual contact does not fall within the category of non-volitional conduct. As Justice McLachlin pointed out in *Scalera*, "[s]exual contact ... is not a casual, accidental or inevitable consequence of general human activity and interaction. It involves singling out another person's body in a deliberate, targeted act."[80] Those who engage in sexual contact do so

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[74] See Christopher H. Schroeder, "Causation, Compensation and Moral Responsibility" in David G. Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995) 347 at 348-49.

[75] See Fletcher, *supra* note 70 at 542-43.

[76] For evidence of some of the long-term effects of sexual abuse, see T. Kue Young & Alan Katz, "Survivors of Sexual Abuse: Clinical, Lifestyle and Reproductive Consequences" (1998) 159:4 Canadian Medical Association Journal 329; Ontario, Ontario Women's Directorate, *Sexual Assault: The Impact on Health*, online: <http://www.citizenship.gov.on.ca/citizenship/owd/english/publications/sexual-assault/health.htm>; Statistics Canada, "The Violence Against Women Survey" *The Daily* (Ottawa: Ministry of Industry, 1993).

[77] Fletcher, *supra* note 70 at 547.

[78] *Supra* note 65.

[79] Fletcher, *supra* note 70 at 554.

[80] *Scalera*, *supra* note 4 at para. 21. Réaume, *supra* note 3, notes that since sexual battery is governed by the same rules as traditional battery, there is the possibility of negligent sexual battery in Canada. She also notes that claims for negligent sexual battery should not be excluded from insurance coverage on the basis of the intentional injury exclusion clause. The aim of Réaume's critique is to ensure that a plaintiff can access insurance funds where contact

voluntarily and often with knowledge of the associated risks. Persons who knowingly engage in conduct devoid of any social utility and contrary to civilized standards of behaviour should be judged more harshly than those involved in negligent behaviour.[81] Since sexual contact is often deliberate and targeted, it is not unreasonable to make those who engage in such activity bear the consequences of their conduct without having the benefit of escaping liability based on constructive consent. This position preserves the paramountcy of the right to personal autonomy in making decisions about sexual partners. The law will not interfere with an individual's right to freely consent to sexual contact, thus, it should further refrain from making 'reasonable' inferences about a person's consent to sexual contact to relieve a defendant of liability.[82]

Resorting to constructive consent to excuse non-consensual sexual contact introduces a concept of reasonableness into the determination of when a complainant is entitled to a remedy for sexual wrongdoing. Ostensibly, this was intended to be part of the complainant-favourable approach to sexual battery that upholds women's autonomy and equality rights, based on a presumption of fault or lack of consent once interference with bodily integrity is proven. The propriety of interference is not contingent upon the perpetrator's subjective perceptions.[83] In support of protecting women's autonomy rights, Justice McLachlin maintained in *Scalera* that plaintiffs in sexual wrongdoing claims should equally benefit from the rights-based approach to traditional battery as well as the presumption of fault.[84] Consent may be actual or constructive. Using objective criteria to determine consent ensures that the defence of constructive consent could fail in spite of the fact that the defendant had no actual knowledge of lack of consent, thereby resulting in liability. However, a defendant who was honestly mistaken about the plaintiff's consent to contact could be relieved of liability on the basis of

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has resulted from the defendant's negligence. However, given the nature of sexual battery, it is highly unlikely that it would be committed negligently. Though the need for compensation is an important one, the focus on compensation can distort the analysis about the nature of sexual wrongdoing as opposed to other interferences with the person of another.

[81] See Jerome J. Atrens, "Intentional Interference with the Person" in Allen M. Linden, ed., *Studies in Canadian Tort Law* (Toronto: Butterworths, 1968) 378 at 406.

[82] Fletcher supports strict liability for voluntary conduct undertaken with knowledge of the risks inherent in that activity. He notes that given the voluntary nature of such conduct, the excuses of compulsion and unavoidable ignorance do not arise: Fletcher, *supra* note 70 at 554.

[83] *Scalera*, *supra* note 4 at 560.

[84] McLachlin J. rejected Justice Iacobucci's position requiring plaintiffs in sexual battery cases to prove lack of consent. She maintained that like traditional battery, consent to sexual battery should remain a defence to be pleaded and proved by the defendant: *Scalera*, *supra* note 4 at 567, 572-76. See also Fleming, *supra* note 70 at 86, who sees this as a principled approach.

constructive consent, provided a reasonable person in similar circumstances would have thought the plaintiff consented regardless of the complainant's subjective belief that contact was unwelcome. However, not all honest beliefs are morally innocent. Some commonly held beliefs could be based on assumptions and stereotypes that are harmful to particular groups or individuals.[85] The objective ascertainment of consent relies on the perspective of the 'mythical reasonable person' as opposed to the complainant's actual state of mind to determine whether the perpetrator engaged in offensive contact.[86]

Is it appropriate to allow defendants who have deliberately and knowingly interfered with another's right to sexual autonomy to escape liability because their conduct was 'morally blameless' and accorded with what a reasonable person would have inferred from the circumstances? In order to answer this question we must first determine the circumstances in which the reasonableness standard can and should excuse liability. The reasonableness standard as a basis for imposing or excusing liability reflects utilitarian goals requiring individual interests to be sacrificed where they run counter to reasonable community interests and expectations.[87] It pits public interests against individual autonomy. The reasonableness standard justifies a risk while excluding the victim's right to redress. Whether the victim is entitled to recover then becomes an assessment about risks, and objective fault becomes the criterion for recognizing a right to redress.[88] In the context of sexual wrongdoing, a defendant could therefore be excused for failure to ascertain the complainant's consent because to do so was not unreasonable by objective standards. Since constructive consent is objectively assessed without reference to the defendant's actual state of mind, it is possible that a defendant who subjectively knew the plaintiff did not consent could be relieved of liability

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[85] See Mayo Moran, *Rethinking the Reasonable Person: an Egalitarian Reconstruction of the Objective Standard* (New York: Oxford University Press, 2003) at 253-57.

[86] See Chamallas, "Legal Control", *supra* note 12 at 805-06.

[87] This public policy rationale has been used to partly justify vicarious liability by which an employer who has exercised the greatest precaution in the selection and instruction of his employees can be held liable for even the intentional wrongdoing of his employees completely at odds with the purpose of their assigned duties. As Ames points out, notwithstanding that the employer was morally blameless, it is thought to be better that he, rather than the innocent victim, should bear the risk of the employee's misconduct: Ames, *supra* note 65 at 109; Fleming, *supra* note 70 at 411; Paul Cane, ed., *Atiyah's Accidents, Compensation and the Law*, 4th ed. (London: Weidenfeld & Nicolson, 1987) at 218; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.* [1992], 3 S.C.R. 299, 97 D.L.R. (4th) 261 at 334-43 [*London Drugs* cited to D.L.R.].

[88] See Fletcher, *supra* note 70 at 559-60.

because his conduct was not unreasonable when looking at the circumstances objectively.[89]

Within the reasonableness paradigm, societal interests can trump individual autonomy, but only where it promotes the general welfare of the community.[90] Even in those circumstances, Fletcher argues that it is unfair to impose the costs of socially useful activities on innocent victims. He thus argues that the costs should be borne by the entire community through loss shifting mechanisms.[91] This approach upholds the primacy of personal autonomy in civilized societies. Absent overriding public policy considerations, it would be unfair to allow a complainant's right to a remedy to be subordinated to a mythical standard of reasonable behaviour, where the defendant has acted intentionally to produce the interference in question. There is no public policy for protecting perpetrators of sexual wrongdoing on some objective ground of moral non-culpability. In fact, the weight of public policy and the demands of social utility favour sanctioning perpetrators of sexual misconduct as the risks and costs of such a defence to individual victims specifically and society generally far outweigh protecting those who have willfully engaged in sexual contact without explicit consent. Ames observed that while it may be acceptable to hold persons who are morally blameless liable in some circumstances, it is unfair that "innocent victims of the unrighteous are allowed no remedy ... unless exempted from liability by considerations of enlightened public policy. [There is] ... no reason why a person who has wilfully caused damage to another should not in all cases make either specific reparation or pecuniary compensation to his victim."[92]

Constructive consent would tend to blame victims for having behaved in ways that induced defendants into believing consent was present, or for failing to resist in circumstances where a reasonable person would have protested.[93] For example, Fleming notes that, "[a] girl, silent to an amorous proposal,

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[89] See *Ibid* at 563-64.

[90] *Ibid.* at 567.

[91] *Ibid.* at 568-69.

[92] Ames, *supra* note 65 at 109, 110.

[93] See observations in Andy S.J. Ong & Colleen A. Ward, "The Effects of Sex and Power Schemas: Attitudes Towards Women, and Victim Resistance on Rape Attributions" (1999) 29 J. Applied Social Psychology 363 at 366-67. See also Hannah S. Scott & Rebecca L. Beaman, "Sexual Assault among Aboriginal and non-Aboriginal peoples in a Western Canadian City: A Case for including Race when Collecting Crime Data" (2003) 1:1 Online Journal of Justice Studies 1 at 4-5, online: International Consortium for the Advancement of Academic Publication <http://ojjs.icaap.org/issues/1.1/scott-beaman.html>; Aiken, *supra* note 32 at 629.

cannot afterwards capriciously complain of assault."[94] Sexual abuse is perceived primarily in sexual terms rather than as an act of control and domination over vulnerable individuals. The former engenders higher expectations of resistance from complainants, but such expectations diminish when the abuse is contextualized and the elements of power and domination that usually underlie such conduct are recognized.[95] In any event, not all acts of resistance are considered genuine indicators of an unwillingness to engage in sexual contact because of the perception that women sometimes engage in token resistance, which ought to be ignored.[96]

Further, constructive consent is premised on common sense ideas about 'normal' or 'reasonable' behaviour or responses to unwanted sexual advances. It presupposes the existence of normal and acceptable reactions or a range of responses to sexual overtures that are objectively ascertainable.[97] Yet the perceptual gap about consent to sexual interactions between victims and perpetrators, and more generally between women and men, shows the contested nature of what can be taken to signal consent. What is considered a common sense or reasonable reaction is often constructed from a male-dominated perspective, and is influenced by discriminatory ideological representations about 'others'.[98]

There is also the additional danger of holding women to an ideal standard of reasonable resistance—ultimately a male standard, even though few men have been faced with having to ward off unwanted sexual advances.[99] As Moran[100] notes, the social understanding of normal or ordinary behaviour in the construction of the allegedly objective reasonable person standard is not neutral. Rather, the assessment is influenced by discriminatory social understandings and expectations of particular groups based on ideological

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[94] Fleming, *supra* note 70 at 87. See also Keeton, *supra* note 25 at 113; McGregor, *supra* note 1 at 243-44; Bettina Frese, Miguel Moya & Jesús Megías, "Social Perception of Rape: How Rape Myth Acceptance Modulates the Influence of Situational Factors" (2004) 19:2 J. Interpersonal Violence 143 at 144.

[95] See Ong & Ward, *supra* note 93 at 364, 367, 369-70; Chamallas, "Legal Control", *supra* note 12 at 814.

[96] See generally Suzanne Osman, "Predicting Men's Rape Perceptions Based on the Belief that 'No' really Means 'Yes'" (2003) 33 J. Applied Psychology 683.

[97] See Chamallas, "Legal Control", *supra* note 12 at 777; Martha Chamallas, "Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation" (1992) 1 Tex. J. Women & L. 95 at 132-33 [Chamallas, "Feminist Constructions"].

[98] Marlee Kline, "The Colour of Law: Ideological Representations of First Nations in Legal Discourse" (1994) 3 Social & Leg. Stud. 451 at 452.

[99] See Chamallas, "Legal Control", *supra* note 12 at 805.

[100] *Supra* note 85.

representations of such persons in wider society. This process reinforces and perpetuates systemic inequalities against marginalized groups, while cloaking it with legal status. Law thus becomes a site for the production and reproduction of inequalities in society, which then undermine the rule of law.[101] Not only is the determination of constructive consent likely to be influenced by majoritarian expectations and beliefs, it is also likely to be gendered. In the context of sexual wrongdoing, Hengehold has stated:

> ... by ... allowing certain things to count as reasonable and certain things to count as unjust, [the] law functions as a form of power/knowledge ... . Disqualified stories include those of many black women raped by black men or white men; women raped by acquaintances, husbands, or lovers, rapes involving no obvious violence ... . The legal process structures the violence of rape not only by retrospectively identifying certain acts as violent and others as normal; it also forces many women to redefine what was "significant" about their experience in order to testify successfully, and often enhances the sense of violation and self-doubt begun by the physical rape.[102]

These subjective perceptions often operate against the backdrop of widespread myths about women in relation to sexual wrongdoing—that their complaints of abuse are not to be believed—resulting in high rates of 'unfounded' claims. Complainants are portrayed "as the irrational, incredible, and hysterical other of the rational [male] legal subject."[103] The result is to blame complainants for their victimization, and to deny and/or minimize injuries resulting from sexual wrongdoing. Victim-blaming negatively impacts women's rates of recovery, exacerbates psychological injuries from sexual wrongdoing, and worsens vulnerability to violence.[104] Myths also serve to silence survivors and relieve perpetrators from liability for their conduct. For example, these myths inform aggressive defence tactics aimed at discrediting complainants, such as disclosure of private records, and the admissibility of past sexual history requests, based on allegations that the complainant

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[101] *Ibid.* at 164-65. See also Lucinda Finley, "A Break in the Silence: Including Women's Issues in a Torts Course" (1989) 1 Yale J.L. & Feminism 41 at 57-65.

[102] Hengehold, *supra* note 56 at 95.

[103] Gotell, "Implications of the *Charter*", *supra* note 16 at 257; see also Denike, *supra* note 16 at 83; Janice Du Mont & Deborah Parnis, "Judging Women: The Pernicious Effects of Rape Mythology" (1999) 19:1&2 Can. Woman's Stud. 102 at 103.

[104] Diane Cyr Carmody & Lekeshia M. Washington, "Rape Myth Acceptance Among College Women: The Impact of Race and Prior Victimization" (2001) 16:5 J. Interpersonal Violence 424; Frese *et al.*, *supra* note 94 at 144; Amnesty International, "Stolen Sisters: Discrimination and Violence against Indigenous Women in Canada" (AI Index 20/003/2004, October 2004) at 26-27, online: Amnesty International <http://www.amnesty.ca/stolensisters/amr2000304.pdf>.

purportedly suffers from false memory syndrome, which incidentally, only happens in sexual wrongdoing cases.[105]

Such strategies also help to construct the image of the ideal rape victim, because marginalized complainants are more vulnerable to attacks on their credibility, including disclosure of records applications. Those particularly at risk are complainants who have been extensively documented and monitored by the state, for instance, through having children in care, social welfare records, physical disability, a history of mental illness, and/or being of Aboriginal descent or a member of a visible minority.[106] All of this can exacerbate the perception among women, and in particular marginalized women, that their sexual victimization is not likely to be believed or found wrongful in an objective sense, and that they risk re-victimization by both the legal system and society.[107] As has been observed in the criminal context, these perceptions and attitudes towards rape victims give rise to self-blame and a fear of not being believed, causing most survivors not to report incidences of sexual abuse to avoid possible humiliation and re-victimization by the legal system.[108] Under-reporting of sexual abuse is even more prevalent among women of colour and Aboriginal women, because of, among other things, experiences of racism in terms of how they experience violence, including the attitudes and responses to their complaints.[109] This undermines society's interest in exposing and punishing perpetrators of sexual abuse and is a gendered problem because of its prejudicial effect on women.[110] Objective

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[105] See Lise Gotell, "Colonization through Disclosure: Confidential Records, Sexual Assault Complaints and Canadian Law" (2001) 10:3 Social & Leg. Stud. 315 at 319-20, 328 [Gotell, "Colonization"]; Comack & Balfour, *supra* note 16 at 113-14; Denike, *supra* note 16 at 83. White and Kurpius have observed that men, including professional men who work with rape victims, are more likely than women to be influenced by rape myths in dealing with complaints of sexual wrongdoing. See Bradley H. White & Sharon E. Robinson Kurpius, "Attitudes Toward Rape Victims: Effects of Gender and Professional Status" (1999) 14:9 J. Interpersonal Violence 989 at 993-94.

[106] Gotell, "Implications of the *Charter*", *supra* note 16 at 275.

[107] *Jane Doe*, *supra* note 73 at 702-03. See also Chamallas "Feminist Constructions", *supra* note 97 at 130.

[108] Janice Du Mont, Karen Lee Miller & Terri L. Myhr, "The Role of 'Real Rape' and 'Real Victim' Stereotypes in the Police Reporting Practices of Sexually Assaulted Women" (2003) 9:4 Violence Against Women 466 at 468-69.

[109] Canada, Federal-Provincial-Territorial Ministers Responsible for the Status of Women, *Assessing Violence Against Women: A Statistical Profile* (Catalogue no. SW21-101/2002E/IN) (Ottawa, National Library of Canada, 2002) at 19; Ontario Women's Directorate, *supra* note 76; CRIAW, *supra* note 17.

[110] See *Osolin*, *supra* note 71 at 628; Comack & Balfour, *supra* note 16 at 118; Denike, *supra* note 16 at 14.

ascertainment of consent from the perspective of a reasonable person in the defendant's circumstances is likely to result in similar under-reporting or unwillingness to pursue civil claims for sexual wrongdoing. Unwillingness to initiate or continue suits for sexual wrongdoing because of the defence or the possibility of a successful plea of constructive consent constitutes sex discrimination because it exposes complainants to further re-victimization and threatens the autonomy, dignity, and equality rights of women.

Reliance on reasonableness, judged by 'accepted community standards', entails the danger of elevating ideological representations founded on discriminatory assumptions about women's sexual behaviour generally, and minority or poor women in particular, to objective truth that would form the backdrop for evaluating their accounts of sexual violation. The process of determining reasonableness based on 'objective' indicators also entails a risk of making value judgments about the conduct of the parties, which are often based on stereotypes.[111] In the process, stereotypical and discriminatory representations of women, and in particular marginalized women, that are operative in wider society become reinforced, legitimized, and incorporated into law while obscuring the oppression of women.[112] As well, this process helps to construct the official category of 'ideal sexual assault victims' and those who cannot be violated based on expectations of 'appropriate' conduct and behaviour for women. It also privileges the interests of defendants at the expense of plaintiffs whose personal autonomy rights are violated by broadening the possibilities for indicating consent while restricting what constitutes sexual wrongdoing. Introducing reasonableness in determining liability for sexual battery in effect favours 'legal objectivity' as 'truth' and is intended to accord with 'justice', but in reality legitimizes oppression against women while rendering the power that enables their marginalization invisible.[113] It is this kind of abstraction that facilitates the importation of gendered, raced, and classed presuppositions that officially have no place in legal discourse, into legal reasoning, and the legal process generally. Constructive consent therefore introduces a defence of honest mistake into the tort of battery contrary to established principles that, with few exceptions,[114] a

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[111] See Chamallas, "Legal Control", *supra* note 12 at 795.

[112] See Kline, *supra* note 98 at 453-54.

[113] See Mari J. Matsuda, "Pragmatism Modified and the False Consciousness Problem" (1990) 63 S. Cal. L. Rev. 1763 at 1765, who notes: "Power at its peak is so quiet and obvious in its place of seized truth that it becomes, simply, truth rather than power." She blames this on liberalism with its claim to objectivity and abstraction.

[114] Mistake may excuse tort liability in limited cases as when a police officer reasonably but erroneously believes a crime has been committed and arrests the person he reasonably believes is the offender. As well, mistake may excuse tort liability where a person honestly

defendant's honest but mistaken belief in the propriety of an unlawful act is no excuse to tort liability, unless the mistake has been induced by the plaintiff's own conduct.[115] In such cases the defendant intended the consequences of his act but was mistaken in believing that it did not violate the plaintiff's legally protected rights. Fleming has noted that where the consequences of one's act are "intended under the erroneous notion that [they] would not violate another's rights ... [s]uch a mistake, even if one which a reasonable person might have made, is not as a general rule admitted as an excuse to civil liability."[116]

There is no moral blameworthiness in relation to both accidental and mistaken conduct. Recognizing accidental conduct as a valid defence while rejecting the defence of mistake creates an anomaly in the law, but this has been defended as good public policy. [117] A person who intentionally and with full knowledge interferes with the rights of others does so at her or his own peril and does not deserve society's sympathy if it turns out that he or she was mistaken about the propriety of the contact. Also, rejection of the defence of mistake has been justified as necessary to balance the competing interests of two innocent parties while encouraging individuals to exercise caution before deliberately interfering with the interests of others.[118] As Prosser and Keeton have observed, "... the defendant may be free from moral blame but the rights of others are protected at his expense because there was an intention to interfere with a legally protected interest."[119] This is consistent with the

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believes she or he or a third person is about to be attacked and strikes in self-defence or defence of the third party so long as the force used is reasonable in the circumstances. See Keeton, *supra* note 25 at 111; Allen Linden, *Canadian Tort Law*, 7th ed. (Toronto: Butterworths, 2001) at 81-82; Fleming, *supra* note 70 at 86; G.H.L. Fridman, *The Law of Torts in Canada*, 2d ed. (Toronto: Carswell, 2002) at 95-96; Baker, *supra* note 67 at 67, 76; Atrens, *supra* note 81 at 385; Tony Weir, "The Staggering March of Negligence" in Peter Cane & Jane Stapleton, eds., *The Law of Obligations Essays in Celebration of John Fleming* (Oxford: Oxford University Press, 1998) 97 at 110-13; *Slauenwhite v. Walker* (2000), 99 A.C.W.S. (3d) 407, 186 N.S.R. (2d) 324 at paras. 22-23 (S.C.).

[115] See *Hodgkinson v. Martin*, [1929] 1 D.L.R. 367 at para. 3, [1928] 3 W.W.R. 763 (B.C.C.A.) [*Hodgkinson* cited to D.L.R.]; Atrens, *supra* note 81 at 383; Baker, *supra* note 67 at 24-25, 63.

[116] Fleming, *supra* note 70 at 84; see also Klar, "Trespass", *supra* note 62 at 430.

[117] See Fridman, *supra* note 114 at 88-89. The fault principle requires that there be no tort liability without fault. Emphasis is on the defendant's state of mind at the time of the impugned conduct. Failure to recognize mistake as a valid defence disregards the defendant's state of mind, and hence is inconsistent with the fault principle.

[118] For example, see Fleming, *supra* note 70 at 85; Keeton, *supra* note 25 at 110; Atrens, *supra* note 81 at 387; Philip Osborne, *The Law of Torts*, 2d ed. (Toronto: Irwin Law, 2003) at 262-63.

[119] Keeton, *ibid.* at 111.

protection of individual autonomy that underlies the tort of battery and casts doubts on the availability of a defence of constructive consent that seeks to relieve defendants of liability on the basis of mistaken belief in the complainant's consent.

Given the centrality of protecting personal autonomy, the defence of mistake should rarely be allowed,[120] and it should only be permitted if it is supported by public policy. Examples of such public policy exceptions include situations where it appears necessary for the defendant to take quick action to protect what she or he mistakenly perceived to be a threat to a legally protected right, such as self-defence or defence of a third party. Similarly, mistake may be permitted where the defendant is obligated to act for the protection of the public interest.[121] The situations that may justify excusing a defendant's conduct on the basis of mistake are consistent with Fletcher's[122] excusing categories of compulsion and unavoidable ignorance already referred to. Since sexual contact is often a deliberate and targeted conduct, it can never be justified on the basis of necessity to protect a legal right or in furtherance of the public interest. By its very nature, sexual wrongdoing is antithetical to the basis of the excusing categories. The defence does not serve social ends, especially in light of the centrality of sexual domination as a tool for the oppression of women, and the necessity of challenging myths about women's sexuality as part of securing equality rights for women. Seen in this light, the defence of constructive consent threatens women's personal and bodily integrity because of the potential to excuse sexual wrongdoing on the basis of mistaken belief about the complainant's intentions. Not only is this inconsistent with the primacy of plaintiff's rights underlying Canadian tort law, but it would also be an unfortunate outcome.

Mistaken belief has been a mitigating factor in the assessment of damages in cases of trivial or technical wrongdoing where interference did not cause any injury to the plaintiff's person, property, or reputation.[123] However, even in such cases the 'innocent' defendant is not excused from liability for the consequences of his voluntary and deliberate conduct. Given the nature of the harm caused by sexual wrongdoing as well as the centrality of sexual wrongdoing to the domination of women and their sexual subordination in particular, mistaken belief about the complainant's consent, however reasonable, should not be considered in the computation of damages whether the complainant proves material injury or not. This is particularly important,

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[120] Atrens, *supra* note 81 at 387.

[121] Keeton, *supra* note 25 at 111; Fleming, *supra* note 70 at 86.

[122] *Supra* note 70.

[123] *Hodgkinson*, *supra* note 115 at para. 3.

as the harm from sexual wrongdoing tends to be emotional rather than physical, and is often difficult to assess.[124]

Constructive consent could also have the tendency of putting the plaintiff's conduct and sometimes their reputation under scrutiny, rather than focusing on the defendant's reprehensible conduct. Even when found liable, the fact that the defendant's culpability stems from objective as opposed to subjective blameworthiness could diminish the extent of its perceived impact or damage. This could in turn affect the quantum of damages, since courts are sometimes motivated by defendants' culpability in assessing damages, rather than focusing on the effect of the wrongdoing on the plaintiff.[125] It would also affect the availability of punitive damages as they are rarely awarded for negligent conduct. Stereotypes about sexual behaviour are bound to creep into such determinations. As a rights-based tort, the primary purpose of battery is for the protection of personal autonomy and inviolability of the person. Battery actions are therefore intended to be a declaration of the plaintiff's rights against wrongful interference. The right to compensation that arises after a successful claim is subsidiary, and not the essence of the plaintiff's claim. This further justifies rejection of the defence of constructive consent. In support of this view, Fletcher has noted that where compensation is not the primary purpose of a tort, the law should not permit excuses such as unavoidable ignorance to absolve a defendant of liability.[126]

Weir rightly points out that the reasonableness standard for determining liability is inconsistent with the justificatory purpose of the tort of trespass. He blames the infusion of reasonableness into trespass on the growing dominance of negligence in tort law. His solution is to reserve trespass for purely vindicatory claims where the plaintiff has suffered no material injury but only seeks a vindication of a legally protected or dignitary interest that has been interfered with by the defendant. He argues that a claim in negligence should be the appropriate cause of action where the plaintiff has suffered injury.[127] Weir is correct that reasonableness should have no place in trespass actions, but his argument that plaintiffs' ability to seek redress in negligence should be limited to cases where they have suffered actual harm is less compelling. While this might be tenable in English law,[128] it is not so in Canada where the

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[124] See BCLI, *supra* note 6 at 13.

[125] See generally Sutherland, *supra* note 50.

[126] Fletcher, *supra* note 70 at 555.

[127] Weir, *supra* note 114 at 112.

[128] Under English law, the cause of action depends on defendant's state of mind, whether intentional or negligent, and not the manner of interference: *Letang v. Cooper*, [1965] 1 Q.B. 232 at 240, [1964] 2 All E.R. 929; W.V.A. Rogers, ed., *Winfield and Jolowicz on Tort*, 16th ed. (London: Sweet & Maxwell, 2002) at 95-96.

manner of interference, whether direct or indirect, continues to determine the appropriate cause of action open to the plaintiff.[129]

Central to the defence of constructive consent is whether a reasonable person would have inferred consent from the circumstances. Yet the reasonable person standard is a vague concept amenable to distortions by one's particular position in the social order.[130] As is often the case, members of dominant groups are in the position of articulating reasonableness from their perspective for 'others' whose viewpoints are unfortunately not reflected in the construction of a particular social reality. This will undoubtedly be prejudicial to complainants, and in particular, to minority women's need for justice. Justice will be elusive when minority perceptions about reasonable mistakes as to consent are not likely to be shared by the predominantly white, male, and middle-upper class judiciary that has the power to decide whether there was reasonable belief in the complainant's consent in particular circumstances or not.[131]

In addition to the experiential gap between men and women regarding sexual interaction, women also face particular obstacles in light of the perception in popular and legal culture that mistaken belief in the existence of consent is widespread, even if unfounded. Added to this difficulty for women is the fact that perpetrators often argue mistaken belief in consent as a defence, and unfortunately, experience from criminal prosecutions for sexual assault indicates that this may not be easily refuted.[132] As well, mistrust of women's accounts of sexual interaction coupled with the perception that women often exaggerate such events,[133] or are out to seek vengeance, renders women vulnerable.

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[129] See *Cook*, *supra* note 57 at 839, affirmed in *Scalera*, *supra* note 4 at 560-61; Ruth Sullivan, "Trespass to the Person in Canada: A Defence of the Traditional Approach" (1987) 19 Ottawa L. Rev. 533.

[130] Although construction of the reasonable person who becomes the yardstick for assessing the credibility of witnesses is supposed to incorporate social context, it remains uncertain how judges can and should do that. This would require judges to go beyond their particular comfort zone and adopt multiple consciousnesses, as well as make a conscious effort to see the world from the perspective of marginalized people. See The Honourable Claire L'Heureux-Dube, "Making a Difference: The Pursuit of Compassionate Justice" (1997) 31 U.B.C. Law Rev. 1 at 10.

[131] Scheppele has observed that different perceptions about fault and harm often "occur at the boundaries between social groups; between whites and people of colour, between the privileged and the poor, between men and women ...": Kim L. Scheppele, "Foreword: Telling Stories" (1989) 87 Mich. L. Rev. 2073 at 2083.

[132] See Réaume, *supra* note 3 at 91-92. See also Jane Doe, *supra* note 14.

[133] See Constance Backhouse, "The Doctrine of Corroboration in Sexual Assault Trials in Early Twentieth-Century Canada and Australia" (2001) 26 Queen's L.J. 297.

In sum, the defence of constructive consent with its reliance on reasonableness is not only inconsistent with general tort principles, but also threatens women's autonomy, dignity, and bodily security. Responsibility for mistake in gauging a complainant's consent to sexual contact, however innocent, should be borne by the defendant who has engaged in an intentional act. The case for not recognizing an objective ascertainment of fault is even more compelling in light of its potential discriminatory effect on women generally and marginalized women in particular.

V. RE-VICTIMIZING MINORITY WOMEN THROUGH CONSTRUCTIVE CONSENT

Constructive consent is likely to be interpreted based on dominant notions of sexual behaviour, relationships between men and women, and responses to sexual overtures. Given the absence of minority voices and experiences in constructing legal principles and standards, the conceptual basis of the 'reasonable person' standard remains biased and reinforces the privileged position of dominant groups. Although the reasonable person standard is supposedly neutral and objective, it has been, and continues to be, informed by white, middle-class, male, heterosexual standards—notwithstanding the change of terminology from the historical reasonable 'man' to the present reasonable 'person.'[134] The social location of judges, who remain mostly white middle-class men, provides a limited lens for evaluating the reasonableness standard to the detriment of persons and interests outside the mainstream.[135] Even when attempts are made to contextualize the reasonable person standard by adopting a victim-specific standard, for example a reasonable woman standard, the analysis tends to be essentialist, and universalizes women's experiences—often by reference to white middle class women. [136] As well, the

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[134] See Finley, *supra* note 101 at 57-58.

[135] Margo L. Nightingale, "Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases" (1991) 23 Ottawa L. Rev. 71 at 80.

[136] In the context of sexual harassment under Title VII in the United States, Peifer argues in favour of a reasonable woman standard for determining whether there is a hostile work environment, among other things, to counter prevailing discriminatory practices and stereotypes about women's sexual behaviour and to allow the inquiry to be based on what a reasonable woman would see as objectionable: Piefer, *supra* note 32 at 99, 105. Piefer seems to suggest a common woman's viewpoint on conduct that would poison one's work environment without recognizing that the offensiveness of the conduct in question would often depend not only on the victim's gender but also on other marginalizing factors such as race, sexual orientation, and class. Chamallas notes that attempts to adopt a victim-specific standard, for example, one based on race, could entail the danger of victim blaming in the sense that the complainant could be blamed for failure to adopt the 'white' or dominant view of certain behaviours: Chamallas, "Feminist Constructions" *supra* note 97 at 123.

inquiry tends not to be sufficiently attentive to the effects of interlocking discrimination (for example on the basis of race, material condition, sexual orientation, and so on—in addition to gender) on a woman's life, and how that might influence her reaction to unwanted sexual overtures.[137] Thus, attempts to construct a reasonable person standard are often fraught with the danger of marginalizing 'others'.[138]

This is not to suggest deliberate bias on the part of the judiciary but rather, to recognize the agency of legal actors in shaping the law: The likelihood of evidence being evaluated through the lens of the decision-maker's own perspectives, lived experiences, or widespread stereotypes about 'others', thus reinforcing majoritarian values and interests.[139] Writing about the influence of racist ideology on judicial decision-making, Kline noted:

> ... judges as individuals are not necessarily racist. Judges, like other members of the dominant society, operate within discursive fields in which racist ideology helps to constitute what is and is not to be taken for granted as 'just the way things are'. The appearance of racist ideological representations within judicial discourse may be more a reflection of the power and pervasiveness of such dominant

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[137] See MacDonald, *supra* note 5 at 62-64; Chamallas, "Feminist Constructions" *supra* note 97 at 99.

[138] There is usually no consensus among reasonable people on what constitutes reasonable conduct or an appropriate response to unwanted sexual advances in particular circumstances. For example, the range of opinions expressed in *Norberg*, *supra* note 10, is an indication that whether consent can reasonably be inferred from a particular situation may be influenced by the decision-maker's subjective perceptions or ideologies of female sexuality, and in particular, of how the plaintiff ought to have communicated her protest to the defendant or behaved in the circumstances. In *Norberg*, both the British Columbia Supreme Court and the Court of Appeal failed to find that a drug-addicted patient who had complied with a doctor's proposal for a sex-for-drugs-arrangement could sustain a claim of battery against the doctor. The Supreme Court of Canada was divided on whether a battery claim was sustainable under those circumstances. Mr. Justice La Forest held that given the marked power imbalance between the parties and the defendant's exploitation of that inequality for his own benefit, consent was vitiated in the circumstances, making the battery action sustainable. Madam Justice McLachlin found otherwise on the issue of battery, holding that the sexual contacts were consensual although she found the defendant liable on the basis of the broader concept of breach of fiduciary duty in the doctor-patient relationship. Sopinka J. dismissed the battery claim and refused to impose liability for breach of fiduciary duty although he found the defendant liable for failure to treat his patient with due competence.

[139] See Comack & Balfour, *supra* note 16 at 45-46, who note that the construction of objective standards of reasonableness is often an opportunity for legal actors—lawyers and judges—to fall on their own common sense, culture, class, race, and gender-based stereotypes in interpreting reasonableness. See generally Steven L. Winter, "Foreword: On Building Houses" (1991) 69 Tex. L. Rev. 1595.

> ideology in the wider society and the particular susceptibility of legal discourse to it, than individual racial prejudice on the part of judges.[140]

The decision making process can therefore be a site for reinforcing and reproducing dominant ideologies about others, including racially constructed ideologies of sexuality. These can have a discriminatory effect on marginalized groups or 'others' as they are assessed against the backdrop of dominant values, perceptions about reasonable behaviour, or responses to sexual advances that remain unarticulated and hence not scrutinized.[141] These stereotypes may be operative even when a judge is determined to be fair to the complainant.[142] As Justice Omatsu points out:

> ... not all bias is deliberate and based on prejudice. The more systemic biases of the bench are unconscious and derive from the paucity of relevant life experiences on the part of judges ... not that middle-and upper-class judges set out to twist laws and misrepresent facts prejudicially to advantage institutions and individuals with whom they identify on class (though this may sometimes happen). Rather their lack of experience of the daily lives of working-class people ... deprives them of potentially relevant information on which to make impartial judgments.[143]

Similar observations have been made in respect of jurors, that while they may not deliberately be partial, their assessment of victims, witnesses, and accused persons could be influenced by "generic prejudice"[144]—that is, stereotypical myths and attitudes about the person in question based on presumed group characteristics. A right to challenge for cause therefore arises whenever there is widespread prejudice against the victim or complainant on the basis of presumed group characteristics giving rise to a realistic potential of partiality. The challenge for cause is intended to eliminate from the jury panel jurors who are unlikely to be able to assess the evidence impartially, however well intentioned they may be. As the reference by Justice Omatsu indicates, judges are also not immune from the possibility of being influenced by generic prejudice about individuals before them, whether as complainants

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[140] Kline, *supra* note 98 at 454.

[141] See John Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971) at 235 who notes that subtle prejudices and bias on the part of judges and others in authority effectively discriminate against certain groups in the administration of justice.

[142] See Sheehy, *supra* note 14 at 219; Martha Minow, "Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors" (1992) 33 Wm & Mary L. Rev. 1201 at 1206-07. For a discussion of the correlation between gender and rape myth acceptance, see Frese *et al.*, *supra* note 94 at 145.

[143] The Honourable Maryka Omatsu, "The Fiction of Judicial Impartiality" (1997) 9 Can. J. of Women and the Law 1 at 6-7.

[144] See *R. v. Williams*, [1998] 1 S.C.R. 1128 at para. 10, 159 D.L.R. (4th) 493 [*Williams* cited to S.C.R.].

or defendants, especially because the effects of prejudice on the assessment of credibility is often unconscious. The possibility of being influenced by prejudice is real, notwithstanding the judiciary's commitment to impartiality. In *R. v. Williams* Justice McLachlin (as she then was) acknowledged the possibility of racial prejudice tainting juror deliberations:

> To suggest that all persons who possess racial prejudices will erase those prejudices from the mind when serving as jurors is to underestimate the insidious nature of racial prejudice and the stereotyping that underlies it ... racial prejudice interfering with jurors' impartiality is a form of discrimination. It involves making distinctions on the basis of class or category without regard to individual merit. It rests on preconceptions and unchallenged assumptions that unconsciously shape the daily behaviour of individuals. Buried deep in the human psyche, these preconceptions cannot be easily and effectively identified and set aside, even if one wishes to do so ... . Racial prejudice and its effect are as invasive and elusive as they are corrosive. We should not assume that instructions ... or other safeguards will eliminate biases that may be deeply ingrained in the subconscious psyches ... .[145]

It would be hypocritical to assume that judges are free from the influences of prejudice because they have taken oaths of impartiality. Even members of minority groups who have dedicated their lives to fighting racism and its harmful effects can be affected by prejudice, however transitory.[146] This shows the vulnerability of every member of society to the subtle effects of racism.[147]

Victim characteristics and activities at the relevant time often influence the determination of whether a particular sexual contact was wrongful or non-consensual, as well as considerations about who bears responsibility for the encounter.[148] In addition, complainants who are perceived to be violating socially constructed gender roles at the time of the alleged abuse are more likely to be found to have consented to sexual contact without clear articulation of the moral judgments implicit in that conclusion.[149] The potential

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[145] *Ibid.* at paras. 21-22.

[146] See Marie J. Matsuda, "Public Responses to Racist Speech: Considering the Victim Story" in Marie J. Matsuda *et al.*, eds., *Words that Wound* (Boulder, Colorado: Westview Press Inc., 1993) 17 at 25-26.

[147] Sanjeev S. Anand, "Expressions of Racial Hatred and Racism in Canada: An Historical Perspective" (1998) 77 Can. Bar Rev. 181 at 197.

[148] See Ong & Ward, *supra* note 93 at 363-64. For example, see "Maya's story" in Jane Doe, *supra* note 14 at 135-37; see also Denike, *supra* note 16 at 83.

[149] See generally G. Tendayi Viki & Dominic Abrams, "But she was Unfaithful: Benevolent Sexism and Reactions to Rape Victims who Violate Traditional Gender Expectations" (2002) 47 Sex Roles 289; Marianne Wesson, "Mysteries of Violence and Self

for the assessment of constructive consent to be influenced by myths and stereotypical assumptions about individuals and groups is further heightened by the very nature of sexual activity. As Justice L'Heureux-Dubé notes in *R. v. Seaboyer*,[150] unlike the prosecution of any other crime, sexual assault trials are particularly susceptible to being informed by myths about 'ideal' rape victims and 'typical' rape assailants. This is partly due to the difficulty in obtaining corroborative evidence in cases of sexual wrongdoing, as it often occurs in private without witnesses. There is therefore a real possibility that the assessment of whether constructive consent to sexual contact can reasonably be inferred will turn on the credibility of the parties (and witnesses if possible).

The assessment is also likely to be influenced by preconceptions and assumptions about group characteristics, including the presumed sexual behaviour of members of a particular group. This is worrisome in relation to minority women who are often defined not only by their gender, but also by factors such race, ethnicity, class, and sexuality as interlocking systems of oppression.[151] Myths that support victim blaming tend to play a particularly important role in cases of ambiguity, especially those involving acquaintances, as well as in deciding whether there was reasonable basis in a perpetrator's belief in consent or not.[152] As Delgado and Stefanic note:

> In legal discourse, preconceptions and myths ... shape mindset—the bundle of received wisdoms, stories, and suppositions that allocate suspicion ... and tell us in cases of divided evidence what probably happened. These cultural influences are probably at least as determinative of outcomes as the formal laws, since they supply the background against which the latter are interpreted and applied. [153]

Notwithstanding the danger of prejudice against women generally and members of minority groups in particular, there is no opportunity to challenge generic prejudice and stereotypes that affect judges similar to challenging jurors for cause. The effects of generic prejudice in determining whether there was constructive consent in particular fact situations may be difficult to avoid.

Defense: Myths or Men, Cautionary Tales for Women" (1992) 1 Tex. J. Women & L. 1 at 17-21; Chamallas, "Legal Control", *supra* note 12.

[150] [1991] 2 S.C.R. 577 at 649, 83 D.L.R. (4th) 193 [*Seaboyer* cited to S.C.R.]. See also Lucinda Vandervort, "Sexual Assault: Availability of the Defence of Belief in Consent" (2005) 84:1 Can. Bar. Rev. 89 at 105; Lynne Henderson, "Getting to Know: Honoring Women in Law and Fact" (1993) 2 Tex. J. Women & L. 41 at 49.

[151] See Stasiulis, *supra* note 7 at 350, 358.

[152] See Frese *et al.*, *supra* note 94 at 145-45, 155-56.

[153] R. Delgado & J. Stefanic, *Critical Race Theory* (New York: New York University Press, 2001) at 42-43.

for the assessment of constructive consent to be influenced by myths and stereotypical assumptions about individuals and groups is further heightened by the very nature of sexual activity. As Justice L'Heureux-Dubé notes in *R. v. Seaboyer*,[150] unlike the prosecution of any other crime, sexual assault trials are particularly susceptible to being informed by myths about 'ideal' rape victims and 'typical' rape assailants. This is partly due to the difficulty in obtaining corroborative evidence in cases of sexual wrongdoing, as it often occurs in private without witnesses. There is therefore a real possibility that the assessment of whether constructive consent to sexual contact can reasonably be inferred will turn on the credibility of the parties (and witnesses if possible).

The assessment is also likely to be influenced by preconceptions and assumptions about group characteristics, including the presumed sexual behaviour of members of a particular group. This is worrisome in relation to minority women who are often defined not only by their gender, but also by factors such race, ethnicity, class, and sexuality as interlocking systems of oppression.[151] Myths that support victim blaming tend to play a particularly important role in cases of ambiguity, especially those involving acquaintances, as well as in deciding whether there was reasonable basis in a perpetrator's belief in consent or not.[152] As Delgado and Stefanic note:

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[152] See Frese *et al.*, *supra* note 94 at 145-45, 155-56.

[153] R. Delgado & J. Stefanic, *Critical Race Theory* (New York: New York University Press, 2001) at 42-43.

Yet such unconscious prejudice may not easily be challenged given the high threshold for finding reasonable apprehension of bias.[154] In the context of juries, Roach has observed that stereotypes, such as complainants being promiscuous because of their membership in a particular group, are likely to influence juror deliberation even in cases where the accused is a member of the same minority group.[155] Using what a reasonable person in the defendant's position would infer from a particular situation as the basis for the defence of constructive consent can thus be detrimental to security and autonomy interests of victims of sexual assault generally, and women in particular, because they are predominantly affected by sexual violence.[156] This undermines the alleged rights focus and the vindicatory purpose underlying the *Scalera*[157] decision vis-à-vis sexual battery. It also constitutes gender discrimination.

The defence of constructive consent can exacerbate minority women's vulnerability to sexual violence and subordination. Marginalization status, whether on the basis of race, ethnicity, physical or mental ability, sexual orientation, or socio-economic status, tends to be a significant predictor of vulnerability to sexual abuse.[158] Yet the victimization of marginalized women is often trivialized, or at least not given the same attention as that of those perceived to be 'genuine victims'. Sexual stereotypes about others tend to determine responses to their complaints of sexual violation. Specifically, sexism, racism, ableism, classism, and homophobia intersect to perpetuate and reinforce the subordination of marginalized women.[159] The 'ideal' victim is

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[154] See *R.D.S. v. The Queen*, [1997] 3 S.C.R. 484, 151 DLR (4th) 193 at paras. 58, 117 [*R.D.S.* cited to D.L.R.].

[155] Kent Roach, "Using the Williams Question to Ensure Equal Protection for Aboriginal Crime Victims" (2001) 38:5 C.R. 335 at 336.

[156] For statistical evidence of the fact that the vast majority of sexual wrongdoing is committed against women, see *e.g.* Statistics Canada, *Women in Canada, 2000: A Gender-Based Statistical Report*, 180 (Ottawa: Statistics Canada, 2000); Statistics Canada, *Family Violence*, *supra* note 6.

[157] *Supra* note 4.

[158] See *e.g.* "Women's Experience of Racism: How Race and Gender Interact: Sexualized Racism" (2002), online: Canadian Research Institute for the Advancement of Women <http://www.criaw-icref.ca/factSheets/racegender_e.htm>.

[159] See Holly Johnson, *Dangerous Domains: Violence against Women in Canada* (Toronto: Nelson, 1996) at 108-09; Amnesty International, *supra* note 104 at 28; Yasmin Jiwani, "Mapping Violence: A Work in Progress" (2000), online: Simon Fraser University <http://www.harbour.sfu.ca/freda/articles/fvpi.htm>; "Restorative Justice in Nova Scotia: Women's Experiences and Recommendations for Positive Policy Development and Implementation Report and Recommendations" (2003) at 8-9, online: National Association for Women and the Law <http://www.nawl.ca/brief-ns-restprative.html>; Law Society of British Columbia, *supra* note 13 at 7-114—7-120. See also Kimberle Crenshaw, "Mapping the

perceived to be "a morally upright [w]hite woman [non-disabled] who is physically injured while resisting ... . [T]raditional notions of chastity and respectability have been seen as effectively disqualifying the 'experienced' and 'misbehaved' from claiming or achieving real victim status."[160] This reflects a differential valuation of female bodies based on one's race, sexual orientation, socio-economic status, ability, or sexual history as illustrated, for example, in the Lady/Jezebel dichotomy, and forms the basis of a hierarchy among women.[161] The tendency to universalize the experiences of women (often based on the experiences of dominant groups) confers advantages on some women in law at the expense of others. This has the 'unintended' consequence of sorting women into different groups: those who are rapeable and those who are not. Categorizing women in this manner, whether explicit or implicit, is divisive, pits women against each other, and is inherently discriminatory.[162] As Razack points out "... the status of women who are seen to say no [rapeable] depends on its opposite, women who are seen to say yes [unrapeable] ... those categories only have meaning in relation [to each other]."[163]

Attitudes about the relative values of female bodies are already prevalent in the criminal justice system.[164] Minority women may risk further re-victimization in the tort system by not being perceived as credible witnesses, and/or because of stereotypes about their sexual behaviour or about the

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Margins: Intersectionality, Identity Politics and Violence against Women of Color" (1991) 43 Stanford L. Rev. 1241 at 1267-68.

[160] Janice Du Mont, Karen-Lee Miller & Terri L. Myher, "The Role of Real Rape and Real Victim Stereotypes in the Police Reporting Practices of Sexually Assaulted Women" (2003) 9:4 Violence Against Women 466 at 469. See also "Alice's Story", in Jane Doe, *supra* note 14 at 81-83; BCLI, *supra* note 6 at 48.

[161] See generally bell hooks, *Ain't I a Woman: Black Women and Feminism* (Boston, MA.: South End Press, 1981) at 32-33, 85; Joan R. Tarpley, "Blackwomen, Sexual Myth, and Jurisprudence" (1996) 69 Temp. L. Rev. 1343; Razack, "Subtexts", *supra* note 6.

[162] See generally Regina Austin, "Black Women, Sisterhood, and the Difference/Deviance Divide" (1992) 26 New Eng. L. Rev. 877; Mary Joe Frug, "Difference, Community, and Sexual Politics: A Comment on Regina Austin's Black Women, Sisterhood, and the Difference/Deviance Divide" (1992) 26 New Eng. L. Rev. 889.

[163] Razack, "Subtexts", *supra* note 6 at 896.

[164] For example, there is evidence that individual or group characteristics of rape victims and/or perpetrators sometimes inform decisions to prosecute, prosecutors' attitudes, conviction rates, and sentencing in rape cases. Specifically, black women rape victims are often not taken seriously. Their rapists, regardless of their racial backgrounds, are often not charged with rape or receive significantly less jail time compared to those who rape white women. See Crenshaw, *supra* note 159 at 1268-69; Razack, "Subtexts", *ibid.* at 904-09.

complainant's character.[165] Given the perception of some racial minority groups as sexual deviants, they are more likely to be perceived as having signalled consent in particular circumstances.[166] For example the myth about black women as being excessively sexual, available, or sexual primitives has sometimes led to their categorization as 'unrapeable' in criminal cases. In contrast, idealizing white female bodies, sexual morality, and womanhood, heightens that group's vulnerability to sexual abuse.[167] Crenshaw has observed:

> Blacks have long been portrayed as more sexual, more earthy, more gratification-oriented. These sexualized images of race intersect with norms of women's sexuality, norms that are used to distinguish good women from bad, the madonnas from the whores ... . Black women are essentially prepackaged as bad women within cultural narratives about good women who can be raped and bad women who cannot. If these sexual images form even part of the cultural imagery of Black women, then the very representation of a Black female body at least suggests certain narratives that may make Black women's rape either less believable or less important. These narratives may explain why rapes of Black women are less likely to result in convictions and long prison terms than rapes of white women.[168]

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[165] Comack & Balfour note in the criminal context that notwithstanding recent reforms designed to remedy the traditional tendency of focusing on the behaviour of the complainant and instead to emphasize that of the perpetrator, sexual assault victims continue to be doubted as credible witnesses and are often criticized for their dressing, behaviour, and character based on "gendered, racialized and class-based stereotypes" that normalize male sexual aggression against women, which in turn reinforce class privilege: Comack & Balfour, *supra* note 16 at 118-37, 144-45. See also Crenshaw, *supra* note 159 at 1269–70; Jane Doe, *supra* note 14 at 81-82.

[166] For a discussion of how race, specifically blackness, is perceived as a marker of female sexuality and hence the dichotomization of black and white sexuality and sexual morality, see Charmaine A. Nelson, "The 'Hottentot Venus' in Canada: Modernism, Censorship and the Racial Limits of Female Sexuality" in Camille A. Nelson & Charmaine A. Nelson, eds., *Racism Eh? A Critical Inter-Disciplinary Anthology of Race and Racism in Canada* (Concord, Ont.: Captus Press, 2004) at 366; Dionne Brand, *Bread out of Stone: Recollections, Sex, Recognitions, Race, Dreaming, Politics* (Toronto: Coach House Press, 1994) at 27, 126-130; Jennifer Wiggins, "Rape, Racism, and the Law" (1983) 6 Harv. Women's L.J. 103. See also Carol Smart, "Disruptive Bodies and Unruly Sex: The Regulation of Reproduction and Sexuality in the Nineteenth Century", in Carol Smart, ed., *Regulating Womanhood: Historical Essays on Marriage, Motherhood and Sexuality* (London: Routledge, 1992) 6 at 25-30 [Smart, "Disruptive Bodies"].

[167] See CRIAW, *supra* note 17.

[168] Crenshaw, *supra* note 159 at 1271. See also Lori A. Tribbett-Williams, "Saying Nothing, Talking Loud: Lil' Kim and Foxy Brown, Caricatures of African-American Womanhood" (2000) 10 S. Cal. R.L. & Women 167 at 168-69; Stasiulis, *supra* note 7 at 355.

Since these myths continue to influence the construction of minority women in popular culture,[169] and ideological representations influence construction of legal subjects, myths can easily impact decisions about reasonable inferences of consent in particular interactions.[170] They can also lead to a successful defence of constructive consent in a sexual wrongdoing claim even if the complainant's sexual history is not admitted in evidence. As Tarpley notes, myths inform our beliefs and values, consequently becoming inscribed into law.[171]

The bodies of Aboriginal women have also been marked as depraved to justify policing their bodies and the spaces they inhabit.[172] Amnesty International has denounced discrimination against Aboriginal women victims of sexual assault in the justice system because of their perceived promiscuity, as a racist and sexist violation of their fundamental human rights.[173] Such discrimination allows the victimization of Aboriginal women to become normalized, leaving them vulnerable to further sexual violence.[174] Trivializing violence against Aboriginal women is attributable partly to indifference to their lives and Aboriginal people generally by the police, media, and the general public, compared to the lives of white women.[175] Judges routinely

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[169] See hooks, *supra* note 161, at 65-67, 85-86; Tarpley, *supra* note 161 at 1347.

[170] Similar observations have been made in the child welfare system where ideologies of 'good' and 'bad' mothers are informed by social location. Women living on the margins of society, such as black women, Aboriginal women, lesbian mothers, sole-support mothers, poor women, etc., have been characterized as 'unfit' or 'bad' mothers to justify their social and legal regulation. See Marlee Kline, "Complicating the Ideology of Motherhood: Child Welfare and First Nation Women" (1993) 18 Queen's L.J. 306.

[171] Tarpley, *supra* note 161 at 1351.

[172] See generally Renisa Mawani, "'The Iniquitous Practice of Women': Prostitution and the Making of White Spaces in British Columbia, 1898-1905" in Cynthia Levine-Rasky, ed., *Working through Whiteness: International Perspectives* (Albany: SUNY Press, 2002) 43; Sherene Razack, "Race, Space and Prostitution: The Making of Bourgeois Subject" (1998) 10 Can. J. Women & L. 338; Manitoba, Report of the Aboriginal Justice Inquiry of Manitoba, *The Justice System and Aboriginal People*, vol. 1, by A.C. Sinclair Hamilton, (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991) at 479-80; Kim Anderson, *A Recognition of Being: Reconstructing Native Womanhood* (Toronto: Second Story Press, 2000) at chapter six.

[173] Amnesty International, *supra* note 104 at 5.

[174] See *Ibid.* at 11, 28-29; Anderson, *supra* note 172 at 110-11.

[175] See Manitoba, Aboriginal Justice Inquiry of Manitoba, *The Deaths of Helen Betty Osborne and John Joseph Harper*, vol. 2, by A.C. Sinclair Hamilton, (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991) at 3, 52; Amnesty International, *supra* note 104 at 28-30, 33-63; Anderson, *ibid.* at 109. See especially Warren Goulding, "Introduction" and "Chapter 17: Did Anybody Notice" in Goulding, *supra* note 6 at xiii-xvii and 209-219, respectively; Chris Purdey, "Serial Killer who roamed Saskatoon met

minimize the harm done to First Nations women in criminal cases, and blame them for the assault, for example, in situations where the complainant was intoxicated at the time of the sexual wrongdoing.[176] Also, judges tend to rely on the fact that sexual abuse in First Nations communities is usually not accompanied by physical violence to downplay the nature and extent of harm to the victim—particularly when she was asleep or had 'passed out' at the time of assault.[177] Absence of physical violence or scars has also been taken as indication of either the absence of or diminished psychological injury from sexual wrongdoing in Inuit communities. Such factors are routinely used as mitigating factors in sentencing and have not always been condemned as inappropriate, or as giving rise to a reasonable apprehension of bias.[178]

The power of ideological representations and myths about others to influence what is perceived as credible makes it likely that the determination of constructive consent will have nothing to do with the victim's actual state of mind. Rather, it will be a judgment about how 'normal' or 'reasonable' people would have behaved, and what 'reasonable' inferences are to be drawn

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with indifference by police, media: Journalist-author accepts award for Book about Slain Aboriginal Women" The *Edmonton Journal* (29 November 2003), online: Vancouver Eastside Missing Women <http://www.missingpeople.net/serial_killer_who_roamed_saskato.htm>.

[176] See Nightingale, *supra* note 135 at 87-90.

[177] See *Ibid.*; Teressa Nahanee, "Sexual Assault of Inuit Females: A Comment on Cultural Bias" in Julian V. Roberts & Renate M. Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 192: Harm in this context is perceived as physical. However, emphasis on evidence of physical harm to determine the extent of injury arising from sexual wrongdoing is misguided. Harms arising from sexual wrongdoing tend to be emotional or psychological and long lasting. Yet, courts have failed to fully appreciate the extent of injury from sexual wrongdoing, and thus tend to award depressed damages compared to cases of physical injuries. In the absence of evidence of tangible financial losses, compensation for emotional injury is considered part of non-pecuniary losses, which has traditionally been low in Canada in light of the cap on non-pecuniary damages imposed by the Supreme Court of Canada in the 1978 trilogy: *Andrews v. Grand & Toy Alberta*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452; *Teno v. Arnold*, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609; and *Thornton v. Prince George School District No. 57*, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480. Although the British Columbia Court of Appeal has said the cap on non-pecuniary damages should not be applicable in cases of sexual wrongdoing, other courts have doubted whether there is a sound policy rationale for not applying the cap in such cases: for example: see *Ms. R. v. Mr. W.*, [2004] 2 W.W.R. 302 at paras. 110-25 (Alta. Q.B.). Notwithstanding the British Columbia Court of Appeal position of not capping non-pecuniary damages in sexual wrongdoing, some courts have nevertheless used the cap as the upper limit of non-pecuniary damages and improperly limit awards accordingly. See admission of this practice in *Blackwater v. Plint* (2004), 21 B.C.L.R. (4th) 1 at 53, 235 D.L.R. (4th) 60, 2003 BCCA 671, rev'd on other grounds (2005), 339 N.R. 355, 258 D.L.R. (4th) 275, 2005 SCC 58.

[178] See Nahanee, *ibid.* at 194-95.

from the circumstances.[179] This is intended to promote fairness to defendants who might have been led to believe consent was present. Objective ascertainment of consent could therefore shift the focus of inquiry in tort cases away from the defendant's reprehensible conduct to the victim's behaviour at the material time, contrary to the current direction of the criminal law.[180] It will thus be easy to lose sight of the importance of the victim's autonomy and personal security interests, as well as the elements of control and domination that underlie sexual wrongdoing, when focusing on indicators of consent objectively determined from a predominantly male viewpoint.

Privileging objective accounts of events as representing legal truth silences women's subjective experiences of sexual violations, while normalizing male sexual aggression and leaving unexamined the social milieu that renders women vulnerable to sexual violence. Discounting victims' subjective experiences of sexual violation discourages reporting and generates feelings of victim responsibility, leaving victims vulnerable to re-victimization by the same person or others.[181] It also creates a hegemonic and liberal legalistic understanding of what constitutes sexual violation by concretizing this normalizing discourse into law, and prevents social and legal condemnation of sexual abuse. Law then becomes part of gendering and sexualizing female and male bodies rather than protecting bodily autonomy and integrity.[182] Using objectivity to construct sexual violation based on dominant values, specifically from masculine and mainstream perspectives, marginalizes women's experiences as well as their voices in favour of rational male legal subjects. This reinforces a hierarchy of knowledge in which 'objective legal truth' reigns supreme. It also feeds into the gendered duality between men and women (rational/irrational) and "implies superiority of the ungendered"—that is, a male perception of women's sexuality or complaints of sexual violation.[183] Subjective accounts of sexual violation could therefore be deemed irrational, constituting what Gotell refers to as "colonization by law."[184]

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[179] For a similar observation in the context of inferred consent, see Peter Cane, "*Mens Rea* in Tort Law" (2000) 20:4 Oxford J. Leg. Stud. 533 at 542.

[180] See Gotell, "Colonization", *supra* note 105 at 319. See also Razack, "Subtexts", *supra* note 6 at 901.

[181] See West, *supra* note 1 at 104-05; MacDonald, *supra* note 5 at 52; Catharine A. MacKinnon, "Pornography, Civil Rights and Speech" (1985) 20 Harv. C.R-C.L. L. Rev. 1 at 3-4; Razack, "Subtexts", *supra* note 6 at 895.

[182] See Carol Smart, *Law, Crime and Sexuality: Essays in Feminism* (London, England: Sage, 1995) at 49-50, 52 [Smart, *Essays in Feminism*].

[183] Smart, "Disruptive Bodies", *supra* note 166 at 32. See also Smart, *Essays in Feminism*, *ibid.* at 72-74.

[184] Gotell, "Colonization", *supra* note 105 at 341.

Minority women are particularly at risk of this colonizing experience,[185] and in general, women will be expected to behave in certain prescribed ways to signal absence of consent.[186] Victims may be thus abstracted from their social context, and viewed as rational, liberal subjects capable of making rational decisions, and of abiding by societal norms. The result is a source of injustice for complainants, and the reinforcement of masculine domination, exploitation of women, and marginalization of minority women through sexual subordination. As Crenshaw notes:

> ... racial identification may itself serve as a proxy for non-traditional behaviour. Rape law ... not only serves to penalize actual behaviour but also to diminish the value of women who belong to groups in which non-traditional behaviour is perceived as common. For the Black rape victim, the disposition of her case may often turn less on her behaviour than on her identity ... although all white and Black women have shared interests in resisting the maddona/whore dichotomy altogether, they nevertheless experience its oppressive power differently. Black women continue to be judged by who they are, not by what they do.[187]

It remains to be seen whether defence counsel would be permitted to access a complainant's personal records or to introduce evidence of past sexual activity in an attempt to discredit a claim of sexual violation. Although evidence of a complainant's sexual history is generally not admissible in criminal cases to support an inference of consent or discredit the complainant, judges retain the

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[185] See Donald Nicolson, "Criminal law and Feminism" in Donald Nicolson & Lois Bibbings, eds., *Feminist Perspectives on Criminal Law* (London: Cavendish Publishing Limited, 2000) 1 at 14-15. See also Nightingale, *supra* note 135 at 80.

[186] Temkin notes that the alleged code of conduct may not necessarily reflect the realities of life in modern society:

> ... the tactic of maligning the complainant's behaviour ... relies on the 'sealed world of the courtroom' to 'filter out some of the surrounding reality' and to provide a skewed impression of cultural and social mores ... . In rape trials codes of behaviour, which have lost their force, are presented as taken-for-granted norms so that women, who will frequently fall foul of them, are condemned ... . The tactic of maligning the complainant's clothes gives a skewed impression of clothing norms so that what may be regulation attire at, say a teenagers' disco is portrayed as outlandish and unusually inviting. The clothing of the complainant is silently juxtaposed to that of the lawyers, particularly female lawyers, in the courtroom, whose bodies are chastely concealed in long robes. Barristers become figures of virtue, complainants figures of vice.

Jennifer Temkin, "Prosecuting and Defending Rape: Perspectives From the Bar" (2000) 27:2 J. Law & Society 219 at 244.

[187] Crenshaw, *supra* note 159 at 1280.

discretion to determine the relevancy of evidence to the case at bar.[188] Courts retain similar discretion in relation to the disclosure of complainants' private records, although the determination of relevancy is seriously circumscribed in favour of protecting complainants.[189] The Supreme Court of Canada upheld the constitutionality of these provisions in *R. v. Mills*,[190] but Gotell argues that the interpretation of those provisions in the decision eroded the legislative protection accorded complainants.[191] Absent specific safeguards in the determination of constructive consent, complainants risk the admission of evidence of sexual history or private records in claims of sexual wrongdoing.

Objective assessment of consent to sexual activity also threatens to pit groups of women against each other. Recognition of multiple realities and experiences continues to be a challenge for dominant groups and the legal system in particular.[192] For example, in spite of efforts to recognize that the female experience is not homogeneous, the reality for most marginalized women is that the predominant methods of legal and social analysis continue to rely on "a white imperialist hegemonic discourse" that favours the experiences of white middle-class women.[193] Thus, even if we can objectively assess the existence of consent from a female perspective, the normative standard would inevitably be that of privileged women and would not reflect the realities of marginalized women who are more often the victims of sexual wrongdoing.[194] Hence, the defence of constructive consent will perpetuate racial, ethnic, and class stratification. As well, it will heighten the other differences among women, and the marginalization of minority women in particular. In addition, the devaluation of minority women reinforces the race/sex hierarchy and patterns of oppressive social relations. Individuals from marginalized groups are likely to be affected the most from the possibility of stereotypes about their sexual behaviour.[195] Thus, findings of constructive

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[188] *Criminal Code*, *supra* note 9, s. 276(1)-(3).

[189] *Ibid.*, ss. 278.1–278.91.

[190] [1999] 3 S.C.R. 668, 180 D.L.R. (4th) 1.

[191] Gotell, "Colonization" *supra* note 105 at 336-40.

[192] See Sherene H. Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) at 58 [Razack, *Courtrooms and Classrooms*].

[193] Himani Bannerji, *Thinking Through: Essays on Feminism, Marxism and Anti-Racism* (Toronto: Women's Press, 1995) at 48.

[194] See *supra* notes 136-138 and accompanying text.

[195] In the context of challenging jurors for cause in criminal trials, Roach notes that racial prejudice can result in stereotypes that devalue and discriminate against victims and complainants. By way of illustration, he notes that stereotypes about the promiscuity of a

consent could be determined by what Stuart Hall has referred to as the politics of guarantee,[196] depending on the parties' social location. Furthermore, these "politics" might be the subtext of decisions, making them difficult to challenge on appeal.[197]

Assumptions about the sexual behaviour of marginalized groups serve to reinforce the myth of their difference from the dominant group and hence their inferiority, which in turn serves as a justification for their subordination and oppression. These myths also become the basis for determining whose body can be violated as groups are sorted, not just based on race or skin colour, but also on sexuality.[198] Commenting on the relationship between myth and law, Smith and Weisstub note that although the word myth has a pejorative connotation in contemporary legal systems, it is a fact that the genesis of law was influenced by mythology and that myth is no more than a human effort to organize stories in non-threatening ways. When transformed into law, myth becomes a powerful expression of social values, and indeed, is "the most conservative statement of these values" because of its close relationship with the existing power structure.[199]

Black women have been perceived as sexually aggressive and promiscuous compared to white women, which makes the former 'unrapeable,' and undeserving of legal protection from unwanted sexual contact.[200] As Tarpley observes, "sexual myth envelops the cause of the [b]lackwoman before she walks into the courtroom."[201] This is part of the externally imposed sexual personae of black women,[202] and is consistent with Schlag's observation that

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minority group could distort juror deliberation in sexual assault cases involving a member of that group as a complainant. See Roach, *supra* note 155 at 336.

[196] That is, where personal factors such as racial background are perceived to predetermine particular outcomes: Sut Jhally, "Race, the Floating Signifier", DVD (Northampton, MA: Media Education Foundation, 1996).

[197] See generally Razack, *supra* note 6 at 904-12, 912-17.

[198] See Tarpley, *supra* note 161 at 1351.

[199] J.C. Smith & David N. Weisstub, *The Western Idea of Law* (London: Butterworths, 1983) at 119–20.

[200] For example, see CRIAW, *supra* note 17. For a historical discussion of the image of the black female as sexualized, see generally Sander L. Gilman, "Black Bodies, White Bodies: Toward an Iconography of Female Sexuality in Late Nineteenth-Century Art, Medicine and Literature" in Henry Louis Gates, Jr., ed., *"Race", Writing, and Difference* (Chicago: University of Chicago Press, 1986) at 223. Gilman notes at 256 that miscegenation laws, for example, were partly intended to prevent moral decline among interracial children.

[201] Tarpley, *supra* note 161 at 1366.

[202] *Ibid.* at 1353-54.

"the law arrives on the scene of contemporary legal thought already normatively charged and already inherently meaningful."[203] Black rape victims are routinely blamed for their rape, more so than white victims. As well, Aboriginal women are perceived to be more willing to engage in sexual activities, and are often asked for sex even when they are not working in the sex trade.[204] Such stereotypes are likely to support a finding of constructive consent in situations that might not readily lead to such an inference had the complainant been white. Since judges are not immune from being influenced by social attitudes and stereotypes,[205] preconceived notions about the sexual behaviour of members of certain racial, ethnic, or lower socio-economic groups are likely to support constructive consent in response to their claims of sexual violation. Similarly, perceptions about members of some groups, for instance, black men as sexual aggressors—the myth of the black rapist—makes it more likely for them to be found as having ignored a complainant's refusal to their sexual advances, especially in inter-racial cases.

These concerns are further heightened by how some courts have approached culture in assigning responsibility or determining the appropriate punishment for sexual wrongdoing. Although the cultural defence is not recognized in Canadian criminal law, cultural relativism or bias (in the form of a tacit cultural defence) has sometimes been invoked to the detriment of Aboriginal and other racialized women. For example, some Canadian judges, in the exercise of their judicial discretion, have adopted a 'race and/or religion before gender' approach to minimize the seriousness of sexual wrongdoing, where both the complainant and accused are members of cultural minority groups. Such judges do so without an appreciation of the intersection of culture, gender, race, and other hierarchies of oppression.[206] This may result in the imposition of lighter sentences. Cultural bias is also evident in the context of First Nations women victims when judges, for example, try to bring Inuit traditions and values into sentencing.[207] Cultural bias arises out of racial or

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[203] Pierre Schlag, "The Problem of the Subject" (1991) 69 Tex. L. Rev. 1627 at 1658.

[204] See Kari Fedec, "Women and Children in Canada's Sex Trade: The Discriminatory Policing of the Marginalized" in Bernard Schissel & Carolyn Brooks, eds., *Marginality and Condemnation: An Introduction to Critical Criminology* (Halifax: Fernwood Publishing, 2002) 253 at 257.

[205] See Nightingale, *supra* note 135; Tarpley, *supra* note 161 at 1366-80; Vandervort, *supra* note 150 at 105.

[206] See Razack, *Courtrooms and Classrooms*, *supra* note 192 at 57; Stasiulis, *supra* note 7 at 377-78.

[207] See *R. v. Curley, Nagmalik and Issigaitok*, [1984] N.W.T.R. 263, [1984] 4 C.N.L.R. 65 (Terr. Ct). Three accused persons pled guilty to having intercourse with a female under fourteen years old. Bourassa J. noted that in Inuit culture, young women are considered ready for intercourse when they begin to menstruate. Justice Bourassa used this to impose a very light

religious essentialism wherein the wrongfulness of the minority accused person's behaviour is mitigated by the cultural context, as is the harm to the minority woman victim.[208] As a result, violence against women is perceived to be inherent in the culture of some racialized groups. Hence, perpetrators not yet fully assimilated into the norms of mainstream society are excused.[209] Rationalizing violence against minority women as a defensible cultural practice exacerbates their oppression while negatively stereotyping racialized communities as inferior to further justify their marginalization.[210]

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sentence: one week in prison (in addition to the three already served) and 8 months probation. The decision was appealed on the ground that the sentence was insufficient. However, the Court of Appeal seemed to have affirmed the general approach taken by the Trial Court, increasing the sentence to four months in prison: [1984] N.W.T.R. 281, [1984] 4 C.N.L.R. 72 (C.A.). The Crown failed to raise absence of consent as an issue—the complainant was characterized as 'slow' and it appears that consent may never even have been sought. Neither court dealt with this fact (Nightingale, supra note 135: see text following note 105.). Women's groups have expressed concern that section 718.2(e) of the *Code*, *supra* note 9, that directs sentencing judges to consider the unique factors affecting Aboriginal offenders in determining an appropriate punishment might have a detrimental effect on women because of the possibility of imposing lighter and/or non-custodial sentences for sexual and/or physical abuse. For a discussion of the requirements section 718.2(e), see *R. v. Gladue*, [1999] 1 S.C.R. 688, 182 D.L.R. (4th) 257 and *R. v. Wells*, [2000] 1 S.C.R. 207, 182 D.L.R. (4th) 257, 2000 SCC 10. Some of the concerns about 'preferential' treatment of Aboriginal accused became evident in *R. v. Morris*, 2004 BCPC 43 when the trial court imposed a suspended sentence for a violent domestic assault involving a beating and sexual assault that caused the complainant to be hospitalized for three days. The sentence was overturned on appeal. The British Columbia Court of Appeal noted that given the severity of the assaults, a custodial sentence was appropriate. Further, there was no evidence of systemic factors relating to his Aboriginal status that may have contributed to his commission of such a heinous crime. The court recognized that factors not present in that case, such as alcohol or substance abuse and family breakdown, which are commonplace in Aboriginal communities, could justify non-custodial sentences: *R. v. Morris*, [2004] 3 C.N.L.R. 295, 62 W.C.B. (2d) 226, 2004 BCCA 305.

[208] For example, see Nightingale, *supra* note 135 at 84-85, who observes that there is a disturbing trend of judicial bias in sexual assault cases involving Aboriginal women where judges routinely fail to recognize any injury to the complainant or minimize harms that cannot be avoided. See also *R. v. Lucien* (1998) A.Q. No. 8 [*Lucien*]; *R. v. Ammar Nouasria* (1994), 500-01-003139-927 (Qc. Sup. Ct.) [*Ammar Nouasria*]; *R. v. Curley, Nagmalik and Issigaitok*, [1984] N.W.T. R. 262 (T.C.). Although the minimum sentence for a "major sexual assault" is three years, Northern judges generally impose sentences not exceeding two years for Inuit men convicted of sexual wrongdoing to avoid having to send them to a penitentiary in the south. However, this concern disappears in cases involving non-Inuit complainants, suggesting that non-Inuit victims suffer more harm or deserve more protection than Inuit women.

[209] For example, see Shauna Van Praagh, "Faith, Belonging and the Protection of 'Our' Children" (1999) 17 Windsor Y.B. of Access to Just. 154 at 198; Leti Volpp, "(Mis)Identifying Culture: Asian Women and the Cultural Defence" (1994) 17 Harv. Women's L.J. 57 at 61.

[210] See Pascale Fournier, "The Ghettoisation of Difference in Canada: 'Rape by Culture' and the Danger of a Cultural Defence' in Criminal Law Trials" (2002) 29 Man. L.J. 81 at 86-114; Razack, *Courtrooms and Classrooms*, *supra* note 192 at 57-58. Bannerji has criticized the

In cases where both the complainant and the accused are Aboriginal, bias is most apparent when alcohol is involved. Significant emphasis may be placed on the role of alcohol where either or both parties had consumed it prior to the sexual wrongdoing. Such factors are usually not considered in cases of non-Aboriginal offenders. Focusing on alcohol as the root cause of sexual victimization in Aboriginal communities diminishes perpetrators' degree of culpability or responsibility, and correspondingly minimizes harm to complainants. Sexual subordination of women in these communities is constructed as a manifestation of discrimination against men.[211] Aboriginal men are perceived to be criminal alcoholics and intoxicated Aboriginal women are perceived as somehow 'looser' and less worthy of protection than other women. The judicial perception is that women who drink are like women who hitchhike—they should know better. The portrayal of First Nations women as not deserving of legal protection from sexual wrongdoing because of the prevalence of chronic alcohol abuse in Aboriginal communities reinforces and perpetuates stereotypes of First Nations people as 'primitive' and 'culturally inferior'. Such 'cultural' markings become ideological underpinnings for constructing First Nations identity in relation to the hegemonic group. As a result, they determine relations with the marginalized group without recognizing the historical and social relations of power that have helped to produce that particular identity. As Nightingale observes:

> Regardless of what assumptions affect judges and lawyers' understanding of alcohol and crime, their continued emphasis of the presence of intoxication in Native persons appearing before the court acts only to reinforce pre-existing stereotypes of the "drunken Indian". Courts, in fact, appear predisposed to finding and perpetuating this stereotype ... . [J]udges often do not define drunkenness as a characteristic particular to an accused, but more generally and incorrectly, as constituting a cultural attribute of Native society.[212]

Essentializing cultural differences creates an unofficial cultural apartheid. In addition, it reinforces and perpetuates myths of the inferiority of minority communities under the guise of cultural relativism or diversity within the multicultural mosaic. This is used to justify patriarchy, racism, ethnicization,

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perception of cultural or ethnic communities as socially and politically constructed through hegemonic processes, yet presented as natural organizations, to conceal discrimination inherent in that process as well as the binary thinking that underlies it: Bannerji, *supra* note 193 at 154-55, 159.

[211] See Crenshaw, *supra* note 159 at 1257.

[212] Nightingale, *supra* note 135 at 84. For a similar attempt to rationalize sexual wrongdoing on the basis of cultural difference, see the trial decisions in *Lucien*, *supra* note 208 and *Ammar Nouasria*, *supra* note 208. See also Fournier, *supra* note 210 at para. 37.

re-colonization, and oppression of women in cultural communities.[213] Minority women are denied legal protection against the violation of their personal security and autonomy.[214] As Bannerji has observed in the context of South Asian communities,

> ... the notion of traditional communities rests explicitly on patriarchy and on severely gendered social organizations and ideology. These are legitimated as an essence of the identity of these communities. This traditional (patriarchal) identity, then is equally the result of an othering from powerful outside forces and an internalized Orientalism and a gendered class organization.[215]

Aboriginal women are particularly likely to experience differential treatment when they are perceived as being less advantaged (sympathetic) than the man who assaults them. Whether elements of race, gender, or class are the cause of this difference will likely depend on the facts of each case. A clear articulation of the distinctions may, however, be impossible given the subtle intersection of these factors on Aboriginal women's lives.[216] As Patricia Monture has said:

> I do not know, when something like this happens to me, when it is happening to me because I am a woman, when it is happening to me because I am Indian, or when it is happening to me because I am an Indian woman. [217]

Even when courts are not explicitly relying on a cultural defence there is still a tendency to impose lighter sentences on accused persons where the complainant is a minority woman. If cultural or racial biases infect judicial reasoning, and if cultural context is used as a mitigating factor to reduce sentences, then *a fortiori*, there is a clear risk in the context of the tort of battery that the same bias could creep in to posit constructive consent. This would be oppressive to minority women; harm would be trivialized and rendered invisible on the basis of their culture, especially where the perpetrator is also of a racial or cultural minority. This reflects a normalization of violence against women especially in "racialized spaces".[218]

Minority women are further marginalized due to judicial perceptions regarding the severity of injuries in cases of inter-racial sexual wrongdoing. Some women experience sexual abuse and the resulting harm not only

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[213] Bannerji, *supra* note 193 at 162.

[214] *Ibid.* at 166-67.

[215] *Ibid.* at 155.

[216] See Comack & Balfour, *supra* note 16 at 122-24.

[217] Patricia A. Monture, "Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah" (1986) 2 C.J.W.L. 159 at 167. See generally Devon W. Carbado & Mitu Gulati, "The Fifth Black Woman" (2000-2001) 11 J. Contemp. Leg. Issues 701.

[218] See Comack & Balfour, *supra* note 16 at 37.

because of their gender, but also because of their vulnerability as a member of a racial, ethnic, or cultural minority group.[219] Courts do not always appreciate or give sufficient attention to the intersection of race, gender, and other personal characteristics that can be the basis of sexual abuse, and that should justify the imposition of stiffer penalties or higher damages.[220] Courts are beginning to appreciate these inherent harms to victims of sexual abuse, especially children, but there is still room for improvement; damage awards continue to be far less than in other personal injury cases.[221]

Although this is a problem affecting all victims of sexual wrongdoing, minority women are particularly affected by the devaluation of harm resulting from sexual victimization. The extent of injury from the abuse seems to be constructed at least partly based on the woman's minority racial status. Harm to minority women is often minimized or trivialized, thereby resulting in lighter sentences and depressed damages compared to cases where non-minority complainants may have suffered comparable harm.[222] In commenting on *Myers v. Haroldson*,[223] a case involving an Aboriginal complainant who was brutally raped and consequently suffered psychological damage, Sheehy points out that the judge failed to comment on the racist dimension of the attack, when in fact there was every indication that the plaintiff's Aboriginal

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[219] For example, see BCLI, *supra* note 6 at 38, 47.

[220] *Ibid.* at 47.

[221] *Ibid.* at 44-45, 50-52; *Doe v. O'Dell*, [2003] O.T.C. 821, 230 D.L.R. (4th) 383 (Sup. Ct. J.); *C.R. v. P.R.* (2002), 116 A.C.W.S. (3d) 301, 2002 BCSC 1275; *L.M.N. v. Munday* (1998), 83 A.C.W.S. (3d) 606 (B.C.S.C.).

[222] Similar trends are apparent in the criminal context where it has been observed that race is an important predictor of the outcome of sexual abuse cases. Specifically, inter-racial rapes of white women are treated more seriously than intra-racial assaults within minority racial groups. Minority women victims do not fare any better in inter-racial rapes however, as regardless, their rapes are trivialized, their credibility is frequently doubted, and they are perceived to have been more likely to have consented. In addition, their rapists are less likely to be charged and convicted, or receive significantly less jail time than those who rape white women. See Crenshaw, *supra* note 159 at 1275-77, 1279; Lois Bibbings, "Boys will be Boys: Masculinity and Offences Against the Person" in Donald Nicolson & Lois Bibbings, eds., *Feminist Perspectives on Criminal Law* (London: Cavendish Publishing Limited, 2002) 231 at 239. See further references in Valerie Smith, "Split Affinities: The Case of Interracial Rape" in Marianne Hirsch & Evelyn Fox Keller, eds., *Conflicts in Feminism* (New York: Routledge, 1990) 271. Razack makes similar observations regarding sexual violence against persons with developmental disabilities, where failure to appreciate the intersection of their gender and disability status, as well as their vulnerability to sexual violence, results in minimization of their harms: Razack, *supra* note 6 at 915-16, 919.

[223] [1989] 3 W.W.R. 604, 48 C.C.L.T. 93, 76 Sask. R. 27 (Q.B.) [*Myers*].

status, in addition to her gender, was very much a reason for the attack.[224] Interestingly enough, *Myers*[225] caught Sutherland's attention as a case in which the plaintiff received a depressed award for general damages ($10,000), while the court imposed punitive damages four times that award ($40,000), although she does not comment on her Aboriginal status. However, Sutherland notes that the trivialization of the plaintiff's harm in that case stemmed from the trial judge's "paternalistic outrage at the defendant's behaviour", not from an appreciation of the effect of the attack on the plaintiff personally. Thus, while Osborn J. considered the defendant's conduct to be reprehensible, he did not see it as that harmful for the plaintiff.[226] Sutherland also observes that the trial judge in *Myers* perceived the plaintiff's injury from the rape to be less serious than those suffered by other plaintiffs, presumably white women, in similar circumstances.[227] Again, this is likely to be a problem in assessing damages for sexual battery based on objective as opposed to subjective fault.

Courts often allege difficulties in ascertaining the actual effect of sexual abuse on complainants, sometimes focusing on a paucity of evidence of past and long-term effects on the victim as a reason for awarding lower damages. Yet, even when evidence about the effects of sexual abuse on a complainant is not in doubt, courts can still minimize the harm to the plaintiff. *Glendale v. Drozdzik*[228] is one such case, where the trial judge did recognize the effect of sexual abuse on the plaintiff but blamed her for the prolonged effects because of her failure to seek professional help earlier. Mackoff J. was convinced those effects would be short-lived, thereby not warranting substantial damages.[229] Once again, there is no mention of the plaintiff's Aboriginal status in this case, but it may have been a subtext in the quantification of harm from the rape. The only hint one gets about her racial status is from the fact that her teacher called Aboriginal counsellors upon learning about the abuse. Sutherland finds the award of damages in this case shocking in comparison to another case, *C. (M.) v. M. (F.)*,[230] where Keenan J. emphasized the nature of the plaintiff's injury,

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[224] There was evidence that the defendant ridiculed the complainant's Aboriginal status in the course of the sexual attack: Sheehy, *supra* note 14 at 218.

[225] *Supra* note 223.

[226] Sutherland, *supra* note 50 at 216-19.

[227] This observation is consistent with comments in cases where judges have expressed that sexual assault in northern (Aboriginal) communities is less serious than those in the south.

[228] *Glendale v. Drozdik*, [1990] B.C.J. No. 1489 (S.C.) (QL) [*Glendale*].

[229] See (1993), 77 B.C.L.R. (2d) 106 at 112-113, 101 D.L.R. (4th) 101 (C.A.) [*Glendale 2* cited to B.C.L.R.]. The plaintiff was awarded $15,000 for non-pecuniary damages, which was increased to $25,000 on appeal.

[230] *C. (M.) v. M. (F.)* (1990), 46 C.P.C. (2d) 254, 74 D.L.R. (4th) 129 (Ont. Gen. Div.).

noting that a rape victim can never be over-compensated—demonstrating his determination to do his best to assess the effect of the abuse on the plaintiff, notwithstanding the lack of evidence before the court.[231]

Racial identity tends to be erased or trivialized when it matters (for example, in identifying the intersection of race, gender and class on the victimization of a particular complainant to highlight the seriousness of the incident), and emphasized when it should not be—both to the detriment of marginalized women victims. A complainant's status may influence determinations of credibility and whether they are 'rapeable'. Even when culpability is not in issue, the seriousness or extent of one's injury or violation may be influenced by minority status, resulting in the differential valuation of bodies depending on racial, ethnic, cultural, or class status. Although sexual wrongdoing is a gendered harm affecting all women, some victims, by virtue of their social location, receive more attention and sympathy than others. The case law to date shows a privileging of the stories, pain, and suffering of white women over others. There is, therefore, ample evidence to substantiate concerns that minority status can influence the determination of constructive consent. This will further marginalize minority women, and should be avoided.

VI. SHOULD THE LAW RECOGNISE AN INDEPENDENT TORT OF SEXUAL BATTERY?

While not advocating that implied or constructive consent be precluded entirely as a defence to a trespass action, there is sufficient cause for concern in allowing the defence in cases of sexual wrongdoing, especially when the case involves both claimants and perpetrators from marginalized groups. The possibility of constructive consent negating culpability for sexual battery is especially troubling. Although in *Scalera*,[232] Justice McLachlin was opposed to recognizing a separate tort of sexual battery with distinct requirements, her concern was to prevent the imposition of additional burdens on complainants

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[231] Sutherland, *supra* note 50 at 222-24. The British Columbia Law Institute Report also finds the award in *Glendale*, *supra* note 228, measly in light of *Y.(S.) v. C.(F.G.)*, (1996) 26 B.C.L.R. (3d) 155, [1997] 1 W.W.R. 229 (C.A.) [*Yeo*], and notes that it should not be a benchmark for subsequent cases: BCLI, *supra* note 6 at 50. The Report attempts to rationalize the quantum of damages in that case, for example that the court relied on problematic precedent, that the award was made at a time when courts applied the cap on non-pecuniary damages in sexual assault cases, and finally that the court failed to consider relevant factors in determining non-pecuniary damages for adult survivors of sexual assault. The amount in *Glendale*, $15,000, was nowhere close to the cap, $204,858 in 1990. *Yeo* has been considered a benchmark for damages in childhood sexual assault cases: See the cases cited in BCLI, *supra* note 6 at 45.

[232] *Supra* note 4.

in sexual battery not shared by plaintiffs in traditional battery.[233] Specifically, she was opposed to a regime that would impose on the plaintiff the onus of disproving consent, as that would be inconsistent with traditional principles, not to mention manifestly unfair. She, however, clearly stated that she did not wish to foreclose the possibility of future growth in this area.[234] Her comments can be taken to indicate that the courts might require complainants to prove harm in future cases—a defendant-favourable development. However, it was unnecessary to decide this issue in *Scalera*[235] because the complainant had alleged both physical and psychological injuries. In addition, Justice McLachlin's comments could also be interpreted to mean that there is a possibility of recognizing an independent tort of sexual battery with distinct requirements. In light of her underlying concern in *Scalera* to protect the vulnerable, any future developments must reflect broader protection for complainants. Not admitting constructive consent as a valid defence to a claim of sexual battery would be consistent with this plaintiff-favourable rationale. Excluding constructive consent as a defence, or at least circumscribing its use in claims for sexual battery, would both further the rights-affirming purpose of battery and be consistent with public policy. Courts and legislatures have not hesitated to create exceptions that protect sexual abuse victims and reflect the public policy in favour of broader protection for survivors. Examples include the generous interpretation of the start of limitation periods, and in some cases, their elimination in claims of sexual wrongdoing altogether.[236] In addition, it has been held that it would be contrary to public policy to permit a defence of consent in incest cases.[237]

The defence of constructive consent, which is analogous to implied consent, is inconsistent with recent jurisprudence in criminal law. In an effort to protect vulnerable persons victimized through sexual assault, the Supreme Court of Canada, in *Ewanchuk*,[238] unequivocally held that Canadian law does not recognize a defence of implied consent to sexual assault. A complainant's testimony that contact was non-consensual cannot be contradicted by evidence

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[233] See also Réaume, *supra* note 3 at 86, n. 27, who expresses concern about the recognition of a separate tort of sexual battery because it would be prejudicial to women's interests given the law's historical bias in responding to women's claims of sexual violence.

[234] *Scalera*, *supra* note 4 at 566.

[235] *Ibid.*

[236] See *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289; BC *Limitation Act*, R.S.B.C 1996, c. 266, s. 3(4)(k)(I); Saskatchewan *Limitations Act*, S.S. c. L–16.1, s. 16(1)(a)(2); Manitoba *Limitation of Actions Act*, s. 2.1(2)(a), C.C.S.M. c. L150.

[237] *M. (M.) v. K. (K.)* (1989), 38 B.C.L.R. (2d) 273, 61 D.L.R. (4th) 392 (C.A.).

[238] *Supra* note 43.

of conduct that may have indicated consent, so long as the court finds the complainant credible. Determination of whether contact was consensual or not is to be subjective; that is, it is to be determined by reference to the complainant's state of mind at the time of contact. The Supreme Court of Canada recognized the possibility of guilty verdicts where the accused may have thought the complainant was consenting, but held that the protection of the complainant's rights to personal inviolability, human dignity, and autonomy should trump the rights of 'morally innocent' accused persons. The accused's perception of the complainant's state of mind was considered not relevant to assessing consent to the physical contact (*actus reus*).

Ewanchuk[239] severely limits situations where an accused person can claim an honest but mistaken belief in consent to sexual contact. Mistaken belief in consent can only operate to negate the *mens rea* required for sexual assault where the accused can show that they believed the complainant communicated consent to the sexual contact in question. The accused must believe that the complainant effectively agreed to contact through their words and/or conduct. However, the accused person's belief that the complainant subjectively welcomed contact but did not express that desire is no defence. According to Justice L'Heureux-Dubé, an accused cannot rely on the defence of honest but mistaken belief in consent unless he took reasonable steps to ensure that the complainant was actually consenting.[240] Thus, a complainant cannot rely on constructive consent that may be objectively discerned from the complainant's conduct absent actual evidence of consent.[241]

Ewanchuk also broadens the scope of culpability in sexual assault cases in favour of protecting a complainant's right to bodily security and dignity, as well as promoting women's equality. Constructive consent in civil cases may be doing the opposite by broadening the scope of defence available in sexual battery cases. The threshold for liability in civil cases thus may be much higher than in criminal law, with the possibility that a person convicted or who could have been convicted of sexual assault might successfully defend a claim of sexual battery. For example, although the complainant must have indicated "no" through her words or deeds, a reasonable person could have nevertheless thought she was consenting to sexual contact in her own mind. Such a possibility is not only unfortunate but it could also resurrect myths and stereotypes about the sexual behaviour of women. For example, pretending to say no when they may in fact be consenting, or that silence or passivity may

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[239] *Supra* note 43.

[240] *Ibid.* at paras. 98-99.

[241] *Ibid.* at paras. 46-47. See also Renu Mandhane, "Efficiency or Autonomy?: Economic and Feminist Legal Theory in the Context of Sexual Assault" (2001) 59 U.T. Fac. L. Rev. 173 at para. 33.

be an indication of consent, where a woman continues to remain in the company of the perpetrator even after initial, seemingly unwanted, advances.

Whether constructive consent can be inferred from a particular circumstance will partly depend on the testimony of the parties regarding their perception of events. Sexual abuse often shatters a woman's self esteem, confidence, and feelings of control over her own body, making her vulnerable. Requiring survivors to recount their experiences of personal violation in court often exacerbates their vulnerability and reinforces their victim status.[242] It is not uncommon for sexual abuse victims to experience difficulties reliving their experiences while testifying. This often leads to ambiguities in a woman's version of events, which can easily lead to a conclusion of reasonable belief in consent. This will make it easy for defendants to prove a reasonable belief in consent on a balance of probabilities, and lead to the conclusion that it was not unreasonable for the defendant to have believed the victim consented. Unlike criminal trials where proceeding with sexual contact after the complainant has indicated lack of consent is considered reckless and therefore inexcusable, such testimony may not be conclusive of the issue of consent in tort cases no matter how credible the complainant may be.

The possibility of constructive consent may have nothing to do with the credibility of the complainant. It depends on how reasonable people would have construed a victim's conduct regardless of their stated intentions. There does not appear to be an expectation that the defendant should have made appropriate inquiries about consent unless it would be considered a reasonable course of action in the circumstances. This is a dangerous development given the perceptual gap that often exists between victims and perpetrators, usually based on social location.[243] This can lead to a successful defence of constructive consent where the perpetrator's perception of events is found to be reasonable in the circumstances. This unfortunate outcome will be inconsistent with the civil standard that, among other things, focuses on compensating victims. The subjective inquiry into consent and the limited scope of the defence of implied consent to sexual assault in the criminal law is justified on the basis of the centrality of personal autonomy and human dignity.[244] The Supreme Court of Canada has endorsed a victim-focused approach in cases of sexual assault notwithstanding the predominant view in criminal law that the accused should be protected from the powers of the state through increased procedural safeguards and a high threshold for culpability. It is therefore ironic for defendants in civil actions to be accorded a level of

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[242] See Hengehold, *supra* note 56 at 89; Gotell, "Implications of the *Charter*", *supra* note 16 at 259.

[243] See West, *supra* note 1 at 116.

[244] *Ewanchuk*, *supra* note 43 at para. 28.

protection enjoyed through a defence of constructive consent that can ignore victims' testimony regarding non-consent. It can also privilege perpetrators' false claims about mistaken belief in consent and accord moral innocence to otherwise reprehensible conduct.

The majority's decision in *Scalera*[245] not to recognize an independent tort of sexual battery was partly to maintain coherent principles of liability in relation to all direct and unauthorized interferences with the personal security and bodily integrity of others. But this systematizing of the law on battery may be achieved at the expense of victims of sexual wrongdoing. As Englard cautions, we need to accept the fact that tort law does not readily lend itself to internal coherence.[246] As well, the traditional classifications within tort law do not necessarily reflect current social realities. There is therefore a growing need to expand the scope of tort law to encompass the lived realities and interests of persons not envisioned as legal subjects, or situations not imagined when these categories were developed.[247]

Commitment to universality, internal coherence, and tradition in the face of new social realities promotes formal rather than substantive equality and an injustice to those whose interests are at stake. In particular, the failure to appreciate the subtleties of sexual wrongdoing compared to traditional battery situations, for example stabbing or shooting another person, compromises women's autonomy and dignity interests. It also de-contextualizes the role of non-consensual sexual contact in women's oppression. It obscures the power dynamic that underlies sexual abuse and promotes the production of a sexual hierarchy.[248] There is therefore the need to allow differential treatment of the issue of consent, and in particular, constructive consent, in traditional battery and sexual battery in ways that would be fair to both claimants and alleged perpetrators, especially members of marginalized groups. The possibility of excusing a defendant on the basis of constructive consent is intended to infuse fairness into the law by giving effect to reasonable expectations. However, the pursuit of fairness may be achieved at the expense of personal autonomy and dignity interests. Non-consensual sexual contact goes to the heart of a person's control over her body, and hence deserves stricter judicial scrutiny than traditional battery.

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[245] *Supra* note 4.

[246] Englard, *supra* note 64 at 22.

[247] See Joanne Conaghan, "Tort Law and Feminist Critique" (2003) 56 Curr. Legal Probs. 175 at 209.

[248] See generally Ann J. Cahill, "Foucault, Rape and the Construction of the Feminine Body" (2000) 15:1 Hypatia 43, online: Project MUSE: Scholarly Journals Online <http://muse.jhu.edu/journals/hypatia>.

An independent tort of sexual battery is warranted given its unique nature and the effects of sexual wrongdoing as compared to other violations of bodily autonomy. Sexual abuse is qualitatively different from other invasions of bodily security. In addition, sexual wrongdoing also violates the victim's rights to sexual self-determination, privacy, and mental security.[249] Sexual wrongdoing is often deliberate, targeted, gendered, and an act of control intended to humiliate and dehumanize women.[250] As Justice MacFarland stated in *Jane Doe*:

> Rape is unlike any other sort of injury incurred by accident or neglect. Survivors of rape must bear social stigmatization which accident victims do not. Rape is not about sex; it is about anger, it is about power and it is about control. It is ... 'an overwhelming life event'. It is a form of violence intended to create terror, to dominate, to control and to humiliate. It is an act of hostility and aggression. Forced sexual intercourse is inherently violent and profoundly degrading.[251]

The effects of sexual wrongdoing go beyond physical injuries, and can have profound effects on a woman's health and wellbeing. In addition to physical marks, sexual abuse often leaves long-term emotional and psychological scars, self-esteem problems, breach of confidence (especially where perpetrator was a trusted person), and can lead to difficulties forming intimate relationships.[252] As already noted, it is often difficult to obtain corroborative evidence for non-consensual sexual contact than for other violations of bodily security, which contributes to low conviction rates. Unlike other violations of bodily security and dignity, consent and credibility of the parties tend to be the central issues in most sexual abuse cases, especially where the woman is perceived to have a questionable lifestyle and the perpetrator is deemed a 'good man'.[253] A

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[249] See McGregor, *supra* note 1 at 235-36, 241; Klar, "Trespass", *supra* note 62 at 429-30.

[250] Although men can also be sexually abused, this is not as widespread as sexual abuse of women. Men as a group do not live in constant fear of their bodies being sexually violated. Sexual abuse victims continue to be disproportionately female. Even in the context of rape by a person of the same sex, an element of social sexing occurs whereby the aggressor becomes a social man (in woman on woman rape), and the victim, who is placed in a sexually submissive position in man on man rape, becomes a social woman for that moment: See Jane Doe, *supra* note 14 at 112. This has led Cahill to conclude that rape reinforces a systemic and sexualized oppression of women: Cahill, *supra* note 248 at 45. See also Hengehold, *supra* note 56 at 93; Gotell, "Implications of the *Charter*", *supra* note 16 at 274.

[251] *Supra* note 73 at 746.

[252] See *supra* note 56. In *C. (M.) v. M (F.)* (1990), 23 A.C.W.S. (3d) 307, 74 D.L.R. (4th) 129 at 138 (Ont. Gen. Div.) [cited to D.L.R.]: Keenan J. noted, "[t]here is no question ... that rape is an extreme violation of the intimate privacy of the victim and it involves serious and long-term injury." See also Jane Doe, *supra* note 14 at 280-82; Hengehold, *supra* note 56 at 90-91.

[253] See Jane Doe, *supra* note 14 at 81-83, 135-37, 155-59.

woman's prior history or involvement with state authorities may be invoked to undermine her credibility in sexual assault cases in ways not experienced by victims of traditional battery. There is no realistic comparison between traditional battery and sexual wrongdoing. This distinction has been recognized in the criminal context where assault is considered distinct from sexual assault. As Justice Cory stated in *R. v. Osolin*:

> It cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all the other forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women. [254]

Unlike plaintiffs in traditional battery cases, claimants in sexual battery risk more than simply fear of losing or even incurring financial costs. As Justice MacFarland noted in *Jane Doe*,[255] sexual assault complainants are often constructed as 'others', sometimes blamed for their plight, and sometimes pitied.[256] Sex continues to be sensationalized in the media and in society generally. Unlike traditional battery, claims for sexual abuse take a great deal of courage to prosecute. Prosecution entails emotional difficulties for plaintiffs, their friends, and families for having to relive events they would rather not want to remember. Plaintiffs might experience further emotional trauma from the assailant's insistence on the propriety of his conduct. As well, plaintiffs in sexual abuse cases sometimes have to deal with sensationalism and media and public scrutiny; the victim's humiliating and painful experience could become the subject of public debate. To avoid the possible stigma from being a sexual assault victim, it is not uncommon for complainants to use pseudonyms or initials, and for courts to impose media bans to protect their identities. None of these measures are necessary in traditional battery actions, and support the need for a separate regime that addresses the specific concerns of sexual battery. Recognizing a separate tort of sexual abuse that aims at preventing the re-victimization of women affirms the importance of sexual autonomy, sends a stronger message about society's disapproval of sexual domination of women, and helps to deconstruct the image of women as victims of male sexual violence. This would also make civil suits more meaningful for victims while challenging the sociological framework within which sexual abuse has traditionally flourished. It will also be consistent with

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[254] *Osolin*, *supra* note 71 at 669. A similar distinction is recognised in relation to harassment and sexual harassment.

[255] *Supra* note 73.

[256] See *Jane Doe*, *ibid.* at 118-21.

the protection of dignity interests that is supposed to underlie modern tort law, especially in cases of intentional wrongdoing.[257]

VII. CONCLUSION

Though well intended, the availability of the defence of constructive consent in response to claims of sexual violation could negatively impact the predominantly female victims, especially women living on the margins of society. Sexual behaviour tends to be constructed by reference to factors such as racial and social location: The pervasiveness of negative ideological representations and myths about the sexual behaviour of 'others' can and does influence perceptions and responses to sexual victimization. These factors are likely to influence the allegedly objective determination of constructive consent in ways that ignore women's subjective experiences of sexual violation where they do not fit the mould of 'typical' sexual abuse victims. The defence hinges on honest mistake in gauging a victim's consent to sexual interaction. The objective ascertainment of consent shifts the focus in trials from women's experience of sexual violation to the reasonableness of inferring consent in the particular circumstances. Yet the basis of such a defendant-favourable position cannot be justified in relation to interferences that threaten women's fundamental right to bodily security, integrity, autonomy, dignity, and sexual autonomy.

Sexual battery is not simply a species of traditional battery, but is qualitatively different from the latter with respect to who is targeted, the decision to prosecute, credibility issues, and the effect on victims. Objective ascertainment of consent not only undermines the efficacy of the civil process to remedy sexual abuse and its aftereffects, but also will inadvertently perpetuate stereotypes about 'others'. By not recognizing the defence of constructive consent, 'normal' and 'reasonable' male behaviour during sexual interaction will be excluded as a defence. This might appear harsh on alleged perpetrators, but we need to keep in mind that the purpose of the tort of sexual battery is to protect women's autonomy and security interests—important social interests that should trump any potential unfairness to those who deliberately engage in sexual activities with others without unequivocally obtaining the other's consent. It will also empower women while promoting effective communication in relation to sexual encounters.

Unauthorized sexual contact is undoubtedly a fundamental violation of personal dignity and bodily security/integrity, and deserves to be treated differently from other torts. Given the seriousness of unwanted sexual contact and its repercussions for those affected, a separate tort of sexual battery should

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[257] See Denise Réaume, "Indignities: Making a Place for Dignity in Modern Legal Thought" (2002-2003) 28 Queen's L.J. 61.

be recognized. Any change in the law on sexual wrongdoing should generally benefit victims and not perpetrators. The regime should also be mindful of power relations and majority–minority status between parties, and avoid stereotypes that might uncritically point to the culpability of the victim or perpetrator. Personal autonomy entitles individuals to determine their sexual partners, and when and how to interact with those partners; such choices must be respected, provided they were explicit. The possibility of constructive consent is problematic because when it successfully negates an alleged sexual wrongdoing, it subordinates a complainant's autonomy rights to the defendant's reasonable belief in consent, and this must be avoided.