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**RETHINKING AFFIRMATIVE CONSENT IN CANADIAN
SEXUAL ASSAULT LAW: NEOLIBERAL SEXUAL
SUBJECTS AND RISKY WOMEN**

*Lise Gotell**

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I. INTRODUCTION

Three white men in rural Saskatchewan pick up a twelve-year-old aboriginal girl. After giving her four drinks, all three men attempt to have intercourse with her. Only one of the men is convicted of sexual assault and he is given a two-year sentence to be served in the community. The Saskatchewan Court of Appeal upholds both the conviction and the sentence.¹ In Calgary, a homeless and drug-addicted woman blacks out, awakening in an inner city park to find a man beating and raping her. She yells “I’m being raped” and is heard by a passerby. The man is acquitted.² In inner city Edmonton, a passing driver notices an unconscious woman on the sidewalk. Two men are in the process of

* Associate Professor, Women’s Studies, University of Alberta, Canada. Email: lise.gotell@ualberta.ca. I am grateful to colleagues involved in the LSA Berlin 2007 panel “The Epistemology of Consent in Rape Law,” where the ideas developed in this article were first presented. Emma Cunliffe, the discussant on this panel, provided invaluable comments on the Berlin paper. I am also grateful to Jane Campbell Moriarty for the invitation to contribute to this important symposium issue.

1. R. v. Edmondson, 257 Sask. R. 270 (Sask. C.A. 2005).
2. R. v. M.S., [2003] A.J. No. 1516, (Alta. Prov. Ct. Nov. 27, 2003).

fondling her breasts. The men are first convicted of sexual assault, and then acquitted on summary appeal.³ The Alberta Court of Appeal later restores the initial convictions.⁴

These cases deal with different questions within sexual assault law: age of consent and the adequacy of a sentence; findings of fact and questions of credibility; and the validity of the defense of prior consent when a victim loses consciousness. While I offer insights on these issues, my intent is not to analyze the status of Canadian doctrine in any single area. Instead, I use these cases to critically interrogate new standards for consent and the construction of victims who occupy and inhabit spaces of risk.

To further provide a foundation for this analysis, I first trace the development of an affirmative consent standard in Canadian law. While the struggle for affirmative consent is typically framed as a feminist law reform project,⁵ I contend that we need to understand the legal elaboration of a positive and explicit consent standard in relation to wider shifts in governance. The second section of this article explores how the legal elaboration of affirmative consent in Canadian law might be seen as a specific expression of neoliberal governmentality, forging new normative sexual subjects who interact within a transactional sexual economy. In section three, I demonstrate how discourses of responsabilization and risk management inform recent Canadian sexual assault decisions, constituting the ideal victim as the rape-preventing subject who exercises appropriate caution (yet fails) and the normative masculine sexual subject as he who avoids the risk of criminalization through securing consent. Just as new consent norms prescribe privileged sexual subjectivities and new conceptions of good/credible victims, so too do they produce new mechanisms for discrediting claims of sexual assault. In the final section of this article, I interrogate the reconstruction of the good victim/bad complainant dichotomy in Canadian judicial discourses. As I suggest, the opposite of the rape-

3. R. v. Ashlee, [2005] A.J. No. 1952, (ABQB June 9, 2005).

4. R. v. Ashlee, [2006] A.J. No. 1040, (Alta. C.A. Aug. 23, 2006).

5. See, for example, Dan Subotnik's critique where he characterizes affirmative consent as a feminist imposition on criminal law. Dan Subotnik, "Hands Off": *Sex, Feminism, Affirmative Consent, and the Law of Foreplay*, 16 S. CAL. REV. L. & SOC. JUST. 249, 293-97 (2007). Those who build a reform case for affirmative consent from a specifically feminist stance include, but are not limited to: Lois Pineau, *A Response to My Critics*, in DATE RAPE 63, 63 (Leslie Francis ed., Pennsylvania State University Press 1996); Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GEN. 381, 437-39 (2005); Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1421 (2005); Katherine K. Baker, *Gender and Emotion in Criminal Law*, 28 HARV. J.L. & GEN. 447, 453-54 (2005).

preventing subject is the “risky woman” who avoids personal responsibility for sexual safety and who “chooses” to engage in a “high-risk lifestyle.” The sharp descent into the space of risk is a feature in cases involving aboriginal women, women with addictions, and homeless women. By considering three illustrative cases in some depth, I demonstrate how such “risky women” appear to surrender their status as legal subjects capable of having their refusals recognized in law. Under the shadow of affirmative consent, standards of good victimhood are currently being revised. Now less tied to chastity and sexual propriety, constructions of good/credible victims are nonetheless built upon exclusions that draw upon persistent race and class-based ideologies, reconstructing vulnerability as responsibility.

II. AFFIRMATIVE CONSENT IN CANADIAN LAW

Canadian law regarding nonconsensual sexual interaction has changed dramatically in the past several years, mostly due to statutory amendments and to changes in the common law. In 1992, after the Supreme Court of Canada struck down restrictions on sexual history evidence as a violation of constitutional legal rights,⁶ Parliament re-enacted a weakened form of “rape shield provisions” that complied with the Court’s insistence on scope for judicial discretion.⁷ Largely due to feminist lobbying,⁸ this reform initiative also clarified the law of consent in a manner intended to reduce the possible uses of sexual history evidence. For the first time, a statutory definition of consent as a voluntary agreement was embedded in the *Criminal Code*.⁹ The Code

6. *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (Can.).

7. An Act to amend the Criminal Code (sexual assault), 1992 S.C., ch. 38 (Can.); Criminal Code, R.S.C., ch. C 46 (1985) [hereinafter *CC*]. The admission of sexual history evidence solely to show that the complainant was more likely to have consented or is less worthy of belief was prohibited. *Id.* S. 276 requires that, to be admitted, evidence must be relevant to an issue at trial, and that it must have significant probative value that is not “substantially outweighed by the danger of prejudice to the proper administration of justice.” *Id.* In determining relevance and probative value, the judge must consider such factors as the right to make full answer and defense, society’s interest in reporting, the importance of eliminating any discriminatory beliefs from the fact finding process, the risk that the evidence will arouse prejudice, the prejudice to the complainant’s privacy and dignity, and the right to personal security and protection of the law. *Id.*

8. A broad-based consultation with feminist anti-violence activists preceded the 1992 sexual assault law reform. For discussion of the consultations that shaped this reform, see Sheila McIntyre, *Redefining Reformism: The Consultations that Shaped C-49*, in *CONFRONTING SEXUAL ASSAULT: A DECADE OF SOCIAL AND LEGAL CHANGE* 293, 293-310 (Julian Robers & Renate Mohr eds., University of Toronto Press 1994).

9. Consent is defined as “the voluntary agreement of the complainant to engage in the sexual activity in question.” *CC* § 273(1)(2). It is also important to note that there is no longer a crime of

enumerated situations of forced submission that do not constitute consent (including when agreement is expressed by another person, when the complainant is “incapable of consenting,” when the accused abuses a position of power, trust, or authority, and when the complainant expresses a lack of agreement to engage or continue to engage in the sexual activity).¹⁰ Finally, the defense of mistaken belief was limited by a new requirement that the accused must have taken “reasonable steps” to ensure consent and by specifying that there can be no such defense when this belief arises through “recklessness” or “willful blindness.”¹¹ By distinguishing consent from forced submission, this revised statutory language gestured towards a contextual analysis of the power relations within which sexual interactions unfold. The positive definition of consent as a voluntary agreement, as well as limitations on the defense of mistaken belief, challenged a version of normative heterosexuality founded on feminine acquiescence to seduction, moving Canadian law towards an affirmative consent standard.

*R. v. Ewanchuk*¹² has become the leading authority for trial and appellate judges as they attempt to apply these revised statutory provisions. In this important decision, the Supreme Court of Canada articulated a standard for sexual consent that approaches “only yes

rape in Canadian law. In 1983, Parliament replaced the rape provision with the current three-tier structure of gender-neutral sexual assault offenses, criminalizing all forms of non-consensual sexual touching and no longer specifically designating an offense defined by penetration. The existing sexual assault provisions distinguish between varying degrees of violence used in commission of the crime. Thus, there is a general sexual assault provision, as well as provisions relating to sexual assault with a weapon, threats to a third party and causing bodily harm, and aggravated sexual assault. *CC* §§ 271(1), 272(1), and 273, respectively.

10. *CC* § 273.1 (3) provides that:

[n]o consent is obtained, for the purposes of [this section], where (a) the agreement is expressed by the words or conduct of a person other than the complainant; (b) the complainant is incapable of consenting to the activity; (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority; (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

Id.

11. *CC* § 273.2 provides that:

[i]t is not a defence . . . that the accused believed that the complainant consented . . . where (a) the accused's belief arose from the accused's: (i) self-induced intoxication, or (ii) recklessness or willful blindness; or (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

Id.

12. [1999] 1 S.C.R. 330.

means yes.”¹³ The Court unanimously found that there is no defense of “implied consent” in Canadian law, defining the *actus reus* of sexual assault as non-consensual sexual touching where consent is determined from the subjective position of the complainant.¹⁴ While insisting that intent is a crucial element of the crime of sexual assault, the decision emphasized that the defense of mistaken belief is not available when tainted by recklessness or willful blindness.¹⁵ Moreover, gesturing towards the “reasonable steps” requirement, the Court emphasized that triers of fact must consider whether the accused took active steps to both establish and reestablish consent.¹⁶ The Court also embraced a specific consent standard, wherein clear agreement to continue to engage in sexual contact must be obtained after someone has said no: “[t]he accused cannot rely on the mere lapse of time or the complainant’s silence or equivocal conduct to indicate that . . . consent now exists, nor can he engage in further sexual touching to ‘test the waters.’”¹⁷ Finally, the Court conceptualized consent as positive consent, arguing that “the *mens rea* of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying “no,” but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying “yes.”¹⁸ In effect, *Ewanchuk* stands for the proposition that silence and ambiguous conduct do not constitute consent and it directs attention to defendants’ actions in seeking agreement.¹⁹

Decisions since *Ewanchuk* have continued to consolidate an affirmative consent standard in Canadian law by giving teeth to the requirements that consent must be active and can be withdrawn and holding that consent-seeking must be comprised of positive steps to

13. Rakhi Ruparelia, *Does No Mean “No” Mean Reasonable Doubt? Assessing the Impact of Ewanchuk on Determinations of Consent*, 25 CAN. WOMAN STUD. 167, 167 (2006); Lise Gotell, *The Discursive Disappearance of Sexualized Violence: Feminist Law Reform, Judicial Resistance and Neo-liberal Sexual Citizenship*, in REACTION AND RESISTANCE: FEMINISM, LAW AND SOCIAL CHANGE 127, 144-46 (Dorothy E. Chunn, Susan B. Boyd & Hester Lessard eds., University of British Columbia Press 2007); Renu Mandhane, *Efficiency or Autonomy? Economic and Feminist Legal Theory in the Context of Sexual Assault* 59 U. TORONTO FAC. L. REV. 173, 188 (2001).

14. *Ewanchuk*, 1 S.C.R. 330 at ¶ 30-31, 34-35.

15. *Id.* at ¶ 42 & 52.

16. *Id.* at ¶ 58, 60. While the majority did not directly apply § 273.2, the concurring decision by L’Heureux-Dubé J. stated that, “unless and until an accused first takes reasonable steps to assure that there is consent, the defense of honest but mistaken belief does not arise” *Id.* at ¶ 99 (L’Heureux-Dubé, concurring).

17. *Id.* at ¶ 52.

18. *Id.* at ¶ 45 (quoting *R. v. Park*, [1995] 2 S.C.R. 836, ¶ 39 (Can.)).

19. Ruparelia, *supra* note 13, at 171; Gotell, *supra* note 13; Mandhane, *supra* note 13.

secure agreement.²⁰ Some rulings have emphasized that consent must be “freely given” with awareness of the proposed actions and their consequences, raising the definition of consent to a standard of “informed consent.”²¹ In a significant decision clarifying the defense of mistaken belief, the Manitoba Court of Appeal determined that active steps to secure agreement are required when circumstances exist that would cause a “reasonable man to inquire further,” raising the *mens rea* standard in Canadian law close to an objective standard.²² Some circumstances, such as entering a complainant’s bedroom while she was sleeping after a night of drinking or knowing that she was married to a close friend, the Court argued, require conversation and verbal consent, rather than a mere reliance on physical responses.²³ And even in situations where complainants are intoxicated, drug affected and/or unconscious, Canadian courts are increasingly convicting, finding that proceeding with sex in these situations constitutes recklessness or willful blindness.²⁴ Clearly, cases involving intoxication continue to be contentious as complainants are often unable to provide a complete account of what happened. Yet, in some key decisions, judges have

20. For an analysis of reported post-*Ewanchuk* decisions 1999-2004, see Gotell, *supra* note 13, at 146-153.

21. *R. v. Stender* [2005] 1 S.C.R. 914; *R. v. R.R.*, [2001] O.J. No. 4254, ¶ 44 (Ont. C.A. Nov. 5, 2001).

22. *R. v. Malcolm*, 148 Man. R. (2d) 143, ¶ 21 (Man. C.A. 2000). It is important to note that the “reasonable steps” requirement modified the common law *mens rea* standard, shifting this standard from what had been a purely subjective standard, towards a quasi-objective standard. Thus, it is not required that belief in consent be “reasonable” (that is, assessed from the standpoint of the reasonable person). Instead, the accused cannot present a defence that the accused believed the complainant consented to the activity if “the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.” *CC* § 273.2(b). Despite this, some trial and appellate courts have begun to interpret this provision as requiring a “reasonable” belief in consent. Some feminist commentators have been critical of this interpretation. As Lucinda Vandervort has written for example,

I suggest that adoption of an “objective” standard to assess culpability would invite dispositions that reflect community prejudices and practices. To use the very social norms of sexual conduct that result in the commission of sexual offences to determine whether an exculpatory defense is available, would, in the vast majority of cases, only serve to approve those norms and the conduct based on them. That approach would permit the effective legal norm to be determined by reference to the “ordinary” conduct of the “ordinarily” sexually aggressive individual, rather than by a positive standard pursuant to the rule of law.

Lucinda Vandervort, *Honest Beliefs, Credible Lies, and Culpable Awareness: Rhetoric, Inequality, and Mens Rea*, 42 OSGOODE HALL L. J. 625, 659 (2004).

23. *Malcolm*, 148 Man. R. (2d) 143, at ¶ 36; *see also* *R. v. Cornejo*, 68 O.R. (3d) 117 (Ont. C.A. 2003); *R. v. Rodas*, [1999] O.J. No. 4503 QUICKLAW (Ont. Sup. Ct. J. Oct. 27, 1999) (*Rodas*).

24. *R. v. J.A.*, [2003] O.J. No. 2803, ¶ 127 (Ont. Ct. J. June 24, 2003).

relied on indirect evidence (for example that the complainant would not have had unprotected intercourse with two men) to find a lack of consent against defendants' claims to the contrary.²⁵ Moreover, in an important and recent decision (discussed below), the Alberta Court of Appeal found that there is no defense of "prior consent," because consent must be operative at the time sexual contact takes place.²⁶

Together, legislative provisions and doctrine have moved Canadian law firmly in the direction of realizing affirmative consent. In comparative terms, Canada appears to have moved much closer to this standard than most other Anglo-American jurisdictions.²⁷ I do not mean to suggest that a specific and positive consent standard is by now firmly entrenched within Canadian law. Indeed as Rakhi Ruparelia has demonstrated, the *Ewanchuk* rules have been inconsistently applied by trial judges and many sexual assault decisions are infused by myths and stereotypes that continue to prevent legal recognition of unwanted sexual intrusions.²⁸ In fact, the thrust of this article is to explore the limits of a specific and affirmative consent standard and the manner in which complainants' claims continue to be discounted and disqualified. But in order to explore these limits and clarify these mechanisms of disqualification, it is necessary to disentangle the meaning of the legal embrace of "only yes means yes" in the context of the present.

III. AFFIRMATIVE CONSENT AND NEOLIBERAL GOVERNMENTALITY

What does it mean when legal standards for sexual consent shift

25. *R. v. J.R.*, [2006] O.J. No. 2698, ¶ 59 (Ont. Sup. Ct. J. June 30, 2006). For a discussion of post-*Ewanchuk* cases involving intoxicated complainants, see Gotell, *supra* note 13, at 146-47.

26. *R. v. Ashlee*, [2006] A.J. No. 1040 (Alta. C.A. Aug. 23, 2006).

27. Reforms in England and Wales have also moved towards affirmative consent, especially in modifying the *mens rea* element of the offense by inserting a reasonableness standard; the reasonableness of belief in consent is to be assessed contextually, in light of the surrounding circumstances, including the steps taken to ascertain whether the complainant was consenting. See Vanessa E. Munro, *Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy*, 41 AKRON L. REV. 923 (2008). Yet there are two reasons why I would argue that Canadian law has moved more firmly in the direction of affirmative consent. First, in English/Welsh law, new statutory definitions of consent and of mistaken belief relate to rape, defined by a penetrative standard. In Canadian sexual assault law, by contrast, all forms of non-consensual sexual touching are criminalized. Statutory provisions, combined with *Ewanchuk* rules, have established that consent must be ongoing throughout a sexual encounter, requiring the affirmative expression of consent and active steps to ensure agreement, when activities shift from one form of activity to another. This comes close to a communicative standard. Second, reforms in England and Wales are in their earliest stage of interpretation. In Canada, by contrast, doctrine surrounding consent has developed and accumulated to the extent that interpretive tests and standards have begun to "settle."

28. Ruparelia, *supra* note 13.

from “no means no” to “only yes means yes”? Is this an indication of the successes of feminist legal reform? While recognizing how affirmative consent standards are capable of providing enhanced legal recognition of women’s sexual autonomy, we must at the same time interrogate the legal embrace of “yes means yes” in relation to broader shifts in governance and the new privileged forms of citizenship they produce.

To be sure, the elaboration of a positive and explicit consent standard in Canadian law means that a concept of sexual autonomy is given increased weight and that it is now far less likely that acquiescence will be transformed into consent. What Carol Smart has labelled the “pleasurable phallogentric pastime” of pressing a woman until she submits is disrupted through emerging legal standards.²⁹ Clear words and actions signalling consent are required and judges are placing onus on those who initiate sexual contact to secure agreement. As this occurs, the masculine gaze that has long defined the consent/coercion dichotomy is surely diluted. The judicial articulation of an affirmative consent standard challenges a dominant (hetero)sexual script built upon forceful seduction.³⁰ Yet at the same time, this shift in judicial approaches and standards requires careful and critical analysis, using new critical tools. In the past, feminist legal theorists have deployed metaphors of disqualification and silencing to account for legal responses to sexual violation.³¹ In the current context, we must pay more careful attention to the manner in which stories of sexual violation are being both produced and heard, and to how, in the long shadow of these legitimized stories, constructions of normative heterosexuality are being transformed.

In one of the first extensive commentaries on the *Ewanchuk* decision, Renu Mandhane considered the standard for consent that the decision established using “law and economics” approaches and feminist theory.³² Mandhane contends that the *Ewanchuk* rules can indeed be justified through criteria such as economic efficiency; but feminist arguments, she insists, are more appropriate as a theoretical justification

29. CAROL SMART, *FEMINISM AND THE POWER OF LAW* 45 (Routledge 1989).

30. Joanne Wright, *Consent and Sexual Violence in Canadian Public Discourse: Reflections on Ewanchuk*, 16 CAN. J. L. & SOC’Y. 173, 184-91 (2001).

31. CAROL SMART, *Law’s power, the sexed body, feminist discourse*, in *LAW, CRIME AND SEXUALITY: ESSAYS IN FEMINISM* 83-84 (Sage 1995) (arguing, for example, that “[t]he process of the rape trial can be described as a specific mode of sexualization of a woman’s body” with the precise and intended effect of disqualifying her testimony and experience of sexual assault).

32. Mandhane, *supra* note 13.

because they “more adequately account for the paramount interests of women in the realm of sexual assault.”³³ Mandhane is critical of the recent imperialism of the “law and economics” paradigm because of the inappropriateness of using economic approaches and concepts to understand “non-economic” problems such as sexual coercion.

What if we consider economic logic, cost and benefit calculations, and rules imposed to reduce inefficiencies less as modes of theoretical justification for the *Ewanchuk* consent rules and more as expressions of the imperialism of economic rationalities in the context of neoliberal governmentality? Here Mandhane’s analysis becomes both prescient and suggestive. While reiterating compelling feminist critiques of his work, in particular its moral neutrality, Mandhane draws on Richard Posner to elaborate on how stringent consent standards operate to increase the “price” of coercive sex, inducing “individuals” to refrain from rape and substitute consensual sex.³⁴ In Mandhane’s view, however, Posner’s analysis is incomplete because it fails to consider the social costs of rape (its harmful effects for women).³⁵ From a normative economic perspective, the *Ewanchuk* rules are efficient because they compel individuals to take into account the negative externalities (social costs) of sexually coercive actions. As Mandhane writes:

[T]he consent rules articulated in *Ewanchuk* represent a Pareto improvement in the allocation of sexual conduct. First, a rule that requires positive conduct indicating consent, in order to establish an air of reality to the defence of mistake of fact, may make it easier to determine whether or not the transaction in question is a product of the voluntary agreement of all parties. Requiring an affirmative indication of consent reduces the ambiguity present in sexual encounters. Indeed, some economic theorists have suggested that the whole purpose of criminal law is to force people to bargain within the confines of the market - which requires agreement - in situations where they might not otherwise do so³⁶

When considered through the lens of economics, normalized sexual

33. *Id.* at 227.

34. RICHARD A. POSNER, *SEX AND REASON* (Harvard University Press 1993); Mandhane, *supra* note 13, at 192-95. For feminist critiques of Posner, see Martha A. Fineman, *The Hermeneutics of Reason: A Commentary on Sex and Reason* 25 CONN. L.R. 503 (1993); Robin West, *Sex, Reason and a Taste for the Absurd*, 81 GEO. L.J. 2413 (1993); Gillian K. Hadfield, *Flirting with Science: Richard Posner on the Bioeconomics of Sexual Man*, 106 HARVARD L.R. 479 (1992); Katherine T. Bartlett, *Rumpelstiltskin*, 25 CONN. L.R. 473 (1993).

35. Mandhane, *supra* note 13, at 195.

36. *Id.* at 200.

interaction becomes understood as being like a market transaction. Affirmative consent standards and limitations on the defense of mistaken belief operate as inducements for revealing preferences and for ensuring that others' preferences be respected. Stringent *mens rea* requirements mean that the negative externalities of individual transactions must be taken into account, thereby reducing the inefficiencies of coercive heterosexuality.

Mandhane's analysis alerts us to the manner in which reformulated legal standards for sexual consent might be seen as an active reconfiguration of sexual interactions in a manner that infuses normative sexuality with an entrepreneurial logic. It forces us to consider how law, in and through criminal legal adjudication, could be seen as expressing and enacting a neoliberal rationality of governance. As described by Wendy Brown, neoliberal rationality is not primarily focused on the market.³⁷ Instead neoliberal governmentality represents the extension and dissemination of market values to all institutions and social action, with all dimensions of human life cast in terms of market rationality.³⁸ Contesting the principles of public provision and rule associated with the Keynesian state, neoliberal governmentality interpellates individuals as rational and fully responsible entrepreneurial actors. As Brown emphasizes, this strategy of governing does not assume economic rationality as ontological. Instead neoliberal governmentality is a constructivist project, a technique of governing, which through policy, law, and discourse, seeks to develop and diffuse a market rationality.³⁹ This governing technology relies on the active production of new forms of privileged subjectivity, constructing and forming individuals as rational calculating creatures, defined by their capacity for self-care and bearing full responsibility for the consequences of their actions.⁴⁰

What would it mean to think about revised consent standards, enacted in and through judicial decision-making, in relation to these emerging methods of governance and control? Some scholars attempting to construct a more robust Foucaultian analysis of law have argued that we must be attentive to how law, including criminal law, has become captured by modern techniques of power: governmentality and

37. WENDY BROWN, *Neoliberalism and the end of Liberal Democracy*, in EDGEWORKS: CRITICAL ESSAYS ON KNOWLEDGE AND POLITICS 39-40 (Princeton University Press 2005).

38. *Id.* at 40.

39. *Id.*

40. *Id.* at 42-43.

discipline.⁴¹ In this view, law must no longer be viewed primarily as a mechanism for preventing harmful transgressions through punishment. Instead, law is a site for disposing more efficiently of relationships between members of the population. Law exerts power by engaging in the conduct of conduct. Legal decisions on sexual assault do not simply fix the line between rape and normal heterosexuality; these discourses prescribe normative heterosexuality, and privileged forms of masculinity and femininity.⁴² Judicial decisions enact a performative repetition of normative heterosexuality, shifting and adjusting relations between members of the population. Scholars working in the field of critical criminology have elaborated on how new technologies of governance rely on responsibilization and risk management as strategies of crime control;⁴³ but there has been too little attention to how judicial decisions may play a role in the governance of crime “at a distance.” In this case, law at its most “lawlike,” produces idealized subjects who actively manage the risk of sexual assault and criminalization. The new and privileged forms of sexual citizenship constructed through the judicial elaboration of affirmative consent also create new forms of exclusion and disqualification.

IV. RISK MANAGEMENT AND SEXUAL SUBJECTIVITY

Anchoring post-*Ewanchuk* sexual assault decisions are reconstructions of good victimhood and idealized masculine sexual subjects. New consent standards, alongside restrictions on sexual history evidence, have meant that traditional means of discrediting complainants have lost purchase. When standards for consent are raised to “only yes means yes,” consent is understood as an active and ongoing process that can be withdrawn at any time. When responsibility is placed on those initiating sex to take steps to ensure agreement, chastity and sexual virtue are eroded as the essential prerequisites of good victimhood. Moreover, when masculine sexual behavior is reconstructed according to a norm of active consent seeking, the line between normative heterosexuality and sexual assault shifts. Interrogating these shifting lines demands a careful scrutiny of judicial

41. Vanessa E. Munro, *Legal Feminism and Foucault – A Critique of the Expulsion of Law* 28 J. L. & SOC’Y. 546 (2001); Victor Tadros, *Between Governance and Discipline – The Law and Michel Foucault*, 18 OXFORD J. LEGAL STUD. 75 (1998).

42. Gotell, *supra* note 13, at 134-35.

43. David Garland, *Governmentality and the Problem of Crime*, 1 THEORETICAL CRIMINOLOGY 173 (1997).

discourses with attention to the ways in which legal decisions prescribe and actively form new sexual subjectivities.

Animating the judicial elaboration of a positive consent standard is an ideal masculine sexual subject constituted through the transactional logic of new consent norms. He is a subject who embraces sexual responsibility and assumes the risk of criminalization when he fails to take active steps to ensure consent. He is rational, subjecting his sexual actions to the calculus of risk avoidance. He asks, rather than takes, and those who fail to ask are constructed as failed risk managers. The discourse of risk and risk calculation pervades judicial descriptions of departures from standards of rational masculine sexual subjectivity:

The evidence of Rodas was that . . . her response was non-verbal and was to the effect that she kept kissing him . . . non-verbal behaviours, when relied upon as expression of consent, must be unequivocal . . . avoidance of serious risk-taking . . . demands that reasonable steps be taken, not themselves involving sexually assaultive activity, to clarify the limits of any agreement to sexual touching.⁴⁴

Someone in [the defendant's] circumstances takes a serious risk by founding an assumption of consent on passivity and non-verbal responses as justification for assuming that consent exists.⁴⁵

He has spoken about receiving counseling with respect to how to recognize and deal with high-risk situations. He has testified at various points that he recognized that the situation he found himself in . . . was a high-risk situation.⁴⁶

The person who assaults an unconscious woman cannot know whether, were she conscious, she would revoke the earlier consent. He therefore takes the risk that she may later claim she was assaulted without consent.⁴⁷

Here risk becomes a mechanism for manipulating sexual behavior and for promoting self-regulation. It is the risk of criminalization, rather than insistence on respect for sexual autonomy or recognition of the harmful consequence of coerced sex, that functions as the main inducement to comply with a specific consent standard. This point must

44. R v. Rodas, [1999] O.J. No. 4503 QUICKLAW, ¶ 89 (Ont. Sup. Ct. Oct. 27, 1999).

45. R v. Cornejo, 68 O.R. (3d) 117, ¶ 21 (Ont. C.A. 2003).

46. R. v. Patrick, [2002] B.C.J. No. 2261 QUICKLAW, ¶ 19 (B.C. Prov. Ct. Sept. 10, 2002).

47. R. v. Ashlee, [2006] A.J. No. 1040, ¶ 28 (Alta. C.A. Aug 23, 2006) (quoting *R. v. Esau*, [1997] 2 S.C.R. 777, ¶ 73 (Can.)).

be underlined. Indeed, as many scholars have noted, despite the clear influence of feminist law reformers on the 1992 *Criminal Code* amendments, the application of these provisions appears to have proceeded without any significant reliance on feminist principles. While the objectives of promoting sexual equality, reducing the widespread problem of sexual violence against women and children, and enhancing women's sexual autonomy were clearly articulated by legislators, rarely are these rationales for avoiding sexual assault relied on in the reported case law.⁴⁸

The active production of a risk-averse rational sexual subject is evident in judicial decisions. In fact, the constructivist and pedagogic nature of judicial discourses of affirmative consent becomes strikingly explicit at points. In a decision convicting four young teenage boys for repetitively groping the buttocks and breasts of a twelve-year-old girl in the hallways of a public school, the deciding judge concludes by recommending that the *Ewanchuk* decision should be "compulsory reading" in schools.⁴⁹ Affirmative consent standards built upon risk and responsibility demonstrate the normalizing and disciplinary impetus of sexual assault decisions.

The idealized sexual subjects produced through a judicial pedagogy of responsabilization are, of course, gendered. The liberal legal discourse of consent is itself gendered, reinforcing an active masculine sexuality and a reactive and passive feminine sexuality and identifying the measure of sexual violence as not whether a woman desires sex, but instead whether she accedes.⁵⁰ As Wendy Brown has argued, consent is

48. For an analysis of pre-*Ewanchuk* decisions and the argument that the judicial interpretation and application of the consent provisions has excluded feminist and equality principles, see John McInnes and Christine Boyle, *Judging Sexual Assault Law Against a Standard of Equality* 29 U.B.C. L. REV. 341 (1995). For an analysis of post-*Ewanchuk* decisions, see Gotell, *supra* note 13, at 146-53; Ruparelia, *supra* note 13, at 168-71.

49. R. v. M.A., [2005] O.J. No. 4766 QUICKLAW, ¶ 77 (Ont. Ct. J.).

50. Kevin Bonnycastle, *Rape Uncodified: Reconsidering Bill C-49 Amendments to Canadian Sexual Assault Laws*, in *LAW AS A GENDERING PRACTICE* 60, 73-74 (Dorothy Chunn & Dany Lacombe eds., Oxford University Press 2000). Catherine MacKinnon makes a similar point when she writes:

[W]hen the law of rape finds consent to sex, it does not look to see whether the parties were social equals in any sense, nor does it require mutuality or positive choice in sex, far less simultaneity of desire. The doctrine of consent in the law of forcible rape envisions instead unilateral initiation (the stereotyped acted/acted-upon model of male-dominant sex) followed by accession or not by persons tacitly presumed equal.

Catherine MacKinnon, *A Sexual Equality Approach to Sexual Assault*, 989 ANNALS N.Y. ACAD. SCI. 265, 267 (2003) (footnotes omitted).

both a sign of subordination and the means of its legitimation.⁵¹ Yet as discourses of consent become infused with the logic of risk and actively disseminate new forms of rational sexual subjectivity, the gendered nature of consent is both reinforced and reframed. The *mens rea* of sexual assault becomes increasingly tied to, and measured by, what a “reasonable man” would do in the circumstances. Likewise, a specifically feminine rationality is disseminated, which shifts the fulcrum of the dichotomy between a legally valorized victim and an unworthy, incredible complainant. Privileged masculine and feminine sexual subjectivities, both measured against a criterion of reasonableness, are both responsabilized through a calculus of risk, though in distinctly gendered ways.

Risk as a technology of governing is intrinsically gendered.⁵² Critical criminologists such as Pat O’Malley and David Garland argue that a central feature of new crime prevention strategies is “self-discipline;” the promotion of safe-keeping and private prudentialism are mechanisms for individualizing and privatizing crime control, shifting the problem of crime away from the state and onto would-be victims.⁵³ As Elizabeth Stanko emphasizes, however, for women, safekeeping is a “technology of the soul,” with the appreciation of risk of male violence long constitutive of feminine identity.⁵⁴ While not “new,” women’s fear of male violence and the accompanying demands of risk avoidance are intensified in the present and constituted as performative of respectable femininity.⁵⁵ As Rachel Hall contends, contemporary rape prevention discourses infused with a logic of risk management must be seen as revised versions of older understandings about the role of fear in women’s lives.⁵⁶ Rape prevention discourses increasingly treat rape as a virtual and ever-present possibility and danger in women’s lives, offering agency only through avoidance. Within a universe of rape management constituted in and through discourses of risk, the performance of diligent and cautious femininity grants some women

51. WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 163 (Princeton University Press 1995).

52. Elizabeth Stanko, *Safety Talk: Conceptualizing Women’s Safekeeping as a Technology of Risk*, 1 *THEORETICAL CRIMINOLOGY* 479 (1997); Sandra Walklate, *Risk and Criminal Victimization: A Modernist Dilemma?*, 37 *BRIT. J. OF CRIMINOLOGY* 35 (1997).

53. Pat O’Malley, *Risk, Power and Crime Prevention*, 21 *ECON. & SOC’Y* 252; Garland, *supra* note 43.

54. Stanko, *supra* note 52.

55. *Id.* at 489.

56. Rachel Hall, *It Can Happen to You: Rape Prevention in the Age of Risk Management* 19(3) *HYPATIA* 2, 3 (2004).

access to good citizenship, while women who fail to follow the rules of safekeeping can be denied recognition.⁵⁷

The prudent and responsibilized feminine sexual subject weaves through judicial discourses of affirmative consent. Concepts of risk are deployed to construct and demarcate revised boundaries of good and bad victimhood. While the idealized masculine sexual citizen, constituted in and through an affirmative consent standard, is he who rationally responds to the risks of criminalization through consent seeking, the idealized feminine sexual subject is she who actively manages her behavior to avoid the ever-present risk of sexual violence. The new “ideal” and valorized victim is a responsible, security conscious, crime-preventing subject who acts to minimize her own sexual risk. She is a “(re)action hero” with “expert awareness of her own vulnerabilities.”⁵⁸ Victim-blaming constructions emerge repeatedly in judicial discourses when complainants fail to behave as responsible risk managers:

Her apparent maturity and intelligence make it puzzling why at 16 years of age she elected to accompany her friend to C.R.N.’s By my count there were five young men living at the smallish residence, two of whom had their girlfriends staying over. Almost all, including the complainant, were drinking Her parents were out of town. It is not unfair, I think to say, putting herself in this setting was of questionable judgment, questionable maturity, careless and without much concern for her personal security.⁵⁹

Her youthful naivety dulled her natural defences. P.B. got into their car firmly believing that they were “cool” guys, going to drive her back to the orchard.⁶⁰

No doubt, Mr. C., even at the age of 19 years, was naïve in the extreme.⁶¹

Here, even as judges convict, complainants are depicted as behaving carelessly for failing to recognize the sexual risks inherent in perfectly normal social interactions (including, as in the above cases respectively, attending a party, accepting a ride from or visiting prospective employers). Failing to display appropriate caution is often excused as youthful ignorance, a situational and temporal deviation from

57. *Id.* at 10; Stanko, *supra* note 52, at 486.

58. This is Hall’s concept. Hall, *supra* note 56, at 6.

59. *R. v. C.R.N.*, [1999] O. J. No. 3918 QUICKLAW, ¶ 14 (Ont. Sup. Ct. J.).

60. *R. v. Cheema*, [2003] B.C.J. No. 262 QUICKLAW, ¶ 98 (B.C. Prov. Ct. Jan. 30, 2003).

61. *R. v. Cooper*, [2002] O.J. No. 4992, ¶ 50 (Ont. Ct. J. Dec. 6, 2002).

the norms of a mature and cautious femininity. Nonetheless, careless disregard for personal safety becomes a site for an altered form of victim-blaming, as complainants are constructed as flirting with risk. In a decision (described above) convicting four young teenage boys of sexual assault for the repeated sexual touching of a schoolmate, the judge engages in overt victim-blaming by arguing that the complainant is responsible for letting the situation go unchecked:

I find that she was a non-assertive 12-year old who to some extent showed signs of weakness and unfortunately allowed herself to be taken advantage of. In her own immature mind she hoped that this would simply stop and go away One gets the sense from [sic] the complainant not doing much to stop the grabbing and to continue giving hugs to some of the accused is that she was stuck in a situation not really knowing how to get out of it and through immaturity, innocence, ignorance and fear of not wanting to rock the boat.⁶²

Not only are good feminine sexual subjects expected to avoid risky situations, they are also expected to respond assertively and decisively in the face of sexual threats and to seek immediate protection.

Positioned paradoxically an actively diligent “victim in waiting,” the idealized feminine subject produces new axes of victim-blaming and also functions as a standard for assessing the credibility of actual complainants. Complainants’ behaviors are explicitly measured against the normalized risk-avoiding behaviors of the “reasonable woman.” The Manitoba Court of Appeal’s decision in *A. v. A.J.S.*⁶³ is illustrative. The thrust of the appeal was that the complainant’s reactions during the period in question were unexpected or unusual, thereby rendering her testimony unbelievable and the jury conviction unreasonable. The much older defendant was married to the complainant’s sister and the complainant alleged that he had repeatedly raped her between 1976 and 2002. Her “unusual” behaviors included “voluntarily living with the accused”⁶⁴ and being alone with him in her own basement;⁶⁵ but the appellate bench seemed most puzzled by the fact that the complainant had borrowed a lawnmower from a man who had by this point assaulted her on many occasions:

Some of the complainant’s own conduct seems bizarre. For example, in her examination-in-chief, the complainant related how for more than

62. *R. v. M.A.*, [2005] O.J. No. 4766 QUICKLAW, ¶ 69-70 (Ont. Ct. J.).

63. *R. v. A.J.S.*, [2005] M.J. No. 1 (Man. C.A. Jan. 10, 2005).

64. *Id.* at ¶ 13.

65. *Id.* at ¶ 22.

a single summer, she would arrange to borrow the accused's lawnmower in order to cut the grass on her property. This was not an ordinary lawnmower, but one on which the operator could ride, intended for large properties. To obtain the lawnmower meant requesting that the accused transport it to the complainant's house by truck on numerous occasions during the spring and summer months. On these occasions, the accused allegedly seized the opportunity to rape the complainant in her house. On some occasions, the complainant made sure that one of her sons was present when the lawnmower was delivered and/or when the accused returned to reclaim it. On other occasions, when no one was around, as noted earlier, she tried to lock herself in the house, or, if he gained entry, then in the bathroom, to escape his unwanted advances. Her testimony begs the question raised on cross-examination: Why would she put herself at risk of being raped for the sole reason of borrowing a lawnmower to cut the grass?⁶⁶

The Court's characterization of the complainant's actions as bizarre, unexpected and unusual rests on a decontextualized view of risk avoidance, ignoring how a woman living in poverty, in a remote northern community, might need to continue to interact with a sexually abusive man. In this decision, the Court of Appeal ultimately finds that the jury verdict was not unreasonable and that the defense of mistaken belief lacked an "air of reality," principally on the basis that the accused had not testified.⁶⁷ Nonetheless, the Court's explicit emphasis on how credibility is undermined by "abnormal" risk-taking behaviors operates as a powerful demonstration of transformed contours of the ideal victimhood and the ties between risk-taking and incredibility.

As Wendy Larcombe emphasizes, the line between the ideal victim and incredible complainant is neither fixed nor eternal.⁶⁸ As she too has argued, the discursively produced ideal victim is no longer defined exclusively nor primarily by traditional qualities of sexual morality and chastity. Instead, consistency, rationality, and risk-avoidance constitute new markers of normative conduct against which the behaviors and credibility of actual complainants are measured and assessed.⁶⁹ Within recent Canadian sexual assault decisions, good sexual citizens are reconfigured as being like rational economic actors, assuming

66. *Id.* at ¶ 17.

67. *Id.* at ¶ 39.

68. Wendy Larcombe, *The 'Ideal' Victim V Successful Rape Complainants: Not What You Might Expect* 10 FEMINIST LEGAL STUD. 131 (2002).

69. *Id.* at 145.

responsibility for their actions and the risks that they take. Under the standard of explicit consent, what is bad and untrustworthy is being redefined. As normalized sexual subjects are increasingly reconfigured through concepts of responsibility and risk, so too is the untrustworthy complainant reconstituted. The inverse opposite of the rape-preventing subject is the risky woman, the woman who avoids personal responsibility for sexual safety, the woman who places herself within and occupies a space of risk. The risky woman slides into the traditional place of the promiscuous woman under new logics of consent.

V. RISKY WOMEN AS OTHER AND OUTSIDE THE TRANSACTIONAL SEXUAL ECONOMY

In *R. v. M.S.*,⁷⁰ *R. v. Ashlee*⁷¹ and *R. v. Edmondson*,⁷² the complainants share marginalized social locations that render them highly vulnerable to sexual violence. The complainants in both *M.S.* and *Ashlee* are drug-addicted and living on the streets, while the twelve-year old complainant in *Edmondson* is an aboriginal girl who is running away from home. Systemic relations of race, class, and gender, silenced in judicial discourses of positive consent, interact to construct some women's bodies as violable. The Native Women's Association of Canada (NWAC) estimates that hundreds of aboriginal women and girls have gone missing in the last 20 years in circumstances involving violence.⁷³ While there has been no systematic study of sexual violence endured by aboriginal women, statistical research on reported sexual assaults suggests that aboriginal women face rates that are many times higher than other Canadian women.⁷⁴ Sherene Razack highlights the centrality of sexual violence in ongoing relations of colonization.⁷⁵ As she has argued, colonization has marked the social geography of Western Canada, creating boundaries between white middle class spaces, ruled by norms of universal justice, and the racialized spaces of

70. [2003] A.J. No. 1516, (Alta. Prov. Ct. Nov. 27, 2003).

71. 391 A.R. 62 (ABCA 2006).

72. 257 Sask. R. 270 (Sask. C.A. 2005).

73. Amnesty International (Canada), *Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Aboriginal Women in Canada* (Ottawa: Amnesty International Canada, 2004) at 24.

74. Holly Johnson, *Measuring Violence Against Women: Statistical Trends* STATISTICS CANADA CATALOGUE NO. 85-570-XIE, 64-69 (2006), available at <http://www.statcan.ca/english/research/85-570-XIE/85-570-XIE2006001.pdf>.

75. Sherene H. Razack, *Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George*, 15 CAN. J. L. & SOC'Y. 91 (2000).

the inner city and reserve, constructed as zones of violence. In her brilliant analysis of the trial of two white university students accused of sexually assaulting and murdering an aboriginal woman, Razack demonstrates how “bodies in degenerate spaces lose their entitlement to personhood through a complex process in which the violence that is enacted is naturalized.”⁷⁶ Through such spatial divisions and as an effect of colonial relations, aboriginal women and girls become legitimate targets of violence, particularly violence enacted by white men.

Homeless and addicted women living in what Razack has described as the “degenerate spaces” where violence is normalized occupy social positions that are analogous to aboriginal women. Marked increases in homeless populations on the streets of Calgary and Edmonton are classed effects of the booming Alberta oil economy, accompanying housing shortages and the evisceration of social entitlements enacted by neoliberal provincial governments since the 1990s.⁷⁷ Homeless women experience extremely high rates of sexual violence and research suggests that familial abuse and sexual violence are major factors contributing to the homelessness of young women.⁷⁸ Many people living on the streets of Alberta’s cities are of aboriginal descent.⁷⁹ That the decisions in *Ashlee* and *M.S.* do not identify the complainants as aboriginal does not mean that they are not; in the decontextualized discursive economy of judicial decisions, the race of complainants and defendants is rarely specified.

When filtered through norms of risk-management and sexual safekeeping, however, the gendered, racialized and classed power relations producing and constructing vulnerabilities disappear. In and

76. *Id.* at 129.

77. DIANA GIBSON, *TAMING THE TEMPEST: AN ALTERNATIVE DEVELOPMENT STRATEGY FOR ALBERTA* iv (Parkland Institute 2007).

78. Suzanne L. Wenzel et al., *Toward a More Comprehensive Understanding of Violence Against Impoverished Women*, 21 J. OF INTERPERSONAL VIOLENCE 820, 829 (2006); RUSTY NEAL, *VOICES: WOMEN, POVERTY AND HOMELESSNESS IN CANADA*, 10 (National Anti-Poverty Organization 2004); MICHAEL SHAPCOTT, *WELLESLEY INSTITUTE BACKGROUNDER: PHYSICAL AND SEXUAL VIOLENCE RATES FOR HOMELESS MANY TIMES HIGHER THAN HOUSED* (Wellesley Institute 2007), available at http://wellesleyinstitute.com/files/violence_backgrounder.pdf.

79. The most recent counts of homeless populations in Edmonton and Calgary found that 38% of all homeless people in Edmonton are aboriginal and that 38% of homeless women in Calgary are aboriginal: EDMONTON JOINT PLANNING COMMITTEE ON HOUSING, *OUT IN THE COLD: A COUNT OF HOMELESS PERSONS IN EDMONTON* 5 (Edmonton Joint Planning Committee on Housing 2006); CITY OF CALGARY, *COMMUNITY AND NEIGHBORHOOD SERVICES POLICY AND PLANNING DIVISION. RESULTS OF THE 2006 COUNT OF HOMELESS PERSONS IN CALGARY* 17 (City of Calgary 2006). The Edmonton count did not calculate the racial composition of the homeless women population.

through the responsabilized logic of neoliberal discourse, vulnerability is reconstructed as an individual problem and an effect of risk-taking. Just as neoliberal discourse pathologizes welfare recipients and constructs the poor as individually blameworthy for their poverty, so too is the violence enacted on the bodies of vulnerable women personalized and individualized.⁸⁰ The discourse of “high risk lifestyle” has framed criminal justice and investigatory responses to missing and murdered women in Western Canada.⁸¹ Echoing, yet hyperbolizing the safety pedagogies described by Stanko and Hall,⁸² the rapes, murders, and disappearances of women in the sex trade and aboriginal women and girls are framed as problems to be addressed through strategies of risk avoidance and self-management. Women are counseled to avoid taking risky actions and placing themselves vulnerable situations; and extremely marginalized women who are victimized become defined by and reduced to their “high risk lifestyles.” A Royal Canadian Mounted Police (RCMP) website providing a list of “safety tips” for women “at risk,” emphasizes that the “most important tip is not to be involved in a high risk profession, lifestyle or activity such as prostitution or hitchhiking.”⁸³ “These activities,” according to the RCMP, “make you very vulnerable to becoming a victim.”⁸⁴

What happens in law when complainants behave in ways that can be viewed as exemplifying defiant disregard for their own sexual safety? As described above, judges often characterize risk-taking behaviors as temporary departures from the norms of responsabilized feminine sexual subjectivity. Yet there is a distinction between this state of temporary deviation and women and girls who by their “high risk lifestyles” can be seen as literally occupying spaces of risk. An examination of the decisions in *M.S., Edmondson*, and *Ashlee* reveals how risky behaviors, especially when risk becomes inscribed on the very identities of

80. See Janet Mosher, *Welfare Reform and the Re-Making of the Model Citizen*, in *POVERTY: RIGHTS, SOCIAL CITIZENSHIP, LEGAL ACTIVISM* 119 (Margot Young et al., eds., UBC Press 2007) for a discussion of the pathologization of welfare dependency. I am making an analogous argument.

81. The mandate of Project Kare, a Royal Canadian Mounted Police (RCMP) taskforce investigating more than 80 cases of missing and murdered women in Alberta, is as follows: “The ‘Project KARE’ Task Force will pursue strategies to minimize the risk of having additional HIGH RISK MISSING PERSONS (HRMP) murdered within the Provincial Capital Region. Furthermore, investigational strategies have been developed to investigate all leads, capture and prosecute the offender(s) responsible for these murders.” RCMP, PROJECT KARE, *Project Mandate*, (emphasis in original), available at <http://www.kare.ca/content/view/8/19/> (last visited January 27, 2008).

82. Stanko, *supra* note 52; Hall, *supra* note 56.

83. RCMP, PROJECT KARE, *Safety Tips*, available at <http://www.kare.ca/content/view/14/24/>.

84. *Id.*

complainants, can result in legal disqualification. In cases where sexual assault complainants are intoxicated, hitchhiking runaways, or drug-addicted women living on the street, riskiness becomes perpetual and ever-present. I do not mean to suggest that the claims of such risky women or girls are routinely discounted. Indeed, the outcomes in these cases are distinct. Yet, when read together, they demonstrate how riskiness becomes tied to incredibility under norms of risk-avoidance and rational sexual behavior. Moreover, when complainants' behaviors appear as irrational under norms of risk avoidance, the legal standards of affirmative and explicit consent can be weakened or even disregarded. As I have argued, the application of new consent standards involves the "objective" measuring of defendants' actions against the idealized behaviors of the responsabilized masculine subject (he who takes steps to ensure consent). When complainant actions are constituted as risky and irrational, however, deviations from the standard of responsabilized masculine sexuality can be, and often are, excused and normalized.

In *M.S.*, the alleged assault occurred after the complainant had gone to an inner city park with a man she had met only that day and after she blacked out from consuming painkillers and alcohol.⁸⁵ By her testimony, when A.R. awoke, she was being brutally sexually attacked by the defendant: "she was screaming and that the more she screamed, the more she got hurt."⁸⁶ The complainant claimed that the defendant forced his penis into her vagina, anus and mouth and that he had beaten her and dragged her across the grass when she tried to run away.⁸⁷ A passerby heard the complainant say, "with some desperation," three separate times, "can you help me, I'm being raped."⁸⁸ This witness found the accused on top of the A.R. having sexual intercourse.⁸⁹ He loudly ordered the accused to "get off her" and waited "approximately thirty seconds" for him to comply.⁹⁰ The doctor who performed the sexual assault exam testified that the complainant had several scratches and scrapes, vaginal and anal tearing and that this constellation of injuries "was consistent with sexual assault."⁹¹

How it is possible that A.R.'s strongly corroborated allegation of having been violently sexually assaulted was discounted and the accused

85. *R. v. M.S.*, [2003] A.J.No. 1516, ¶ 4 (Alta. Prov. Ct. Nov. 27, 2003).

86. *Id.* at ¶ 5.

87. *Id.* at ¶ 6-8 (complainant's testimony).

88. *Id.* at ¶ 20.

89. *Id.* at 20-21.

90. *Id.* at ¶ 22; *but see id.* at ¶ 21.

91. *Id.* at ¶ 28. Doctor's testimony is described at ¶ 26-28.

acquitted? Sexual assaults most often occur in private without direct witnesses, and convictions are entered based upon the uncorroborated evidence of complainants. In this respect, *M.S.* is an unusual case. On the strength of witness testimony and medical evidence, it would seem that a conviction in this case should have been likely. As I have shown, the affirmative consent standards established in *Ewanchuk* require active, ongoing consent, and when a complainant says “no,” the accused is required to take steps to reestablish willingness to continue. In this case, A.R. was heard calling for help three times and there was testimony that even after being confronted by the passer-by, the accused stayed on top of her for at least thirty seconds.⁹² It would appear that he took no steps to ensure or reestablish consent. This is a decision in which the “reasonable steps” requirement is actively ignored and in which the complainant’s repeated sexual refusals are silenced because of her multiple departures from the idealized norms of sexual safekeeping.

Intoxication marks a critical deviation from the rationalized and responsabilized norms of the explicit consent standard. Intoxicated complainants can be constructed as defying standards of sexual safekeeping by placing themselves at risk;⁹³ they also frequently do not remember their sexual assaults, thereby undermining the credibility of their claims. Yet, as I have argued above, the consolidation of a positive and specific consent standard has meant that Canadian courts are increasingly convicting in such cases, finding that to proceed with sex in circumstances where complainants are very intoxicated or passed out, without active steps to ensure unequivocal consent, constitutes recklessness and wilful blindness.⁹⁴ In addition, in cases where complainants are rendered silent as witnesses through their lack of memory, some judges have relied on indirect evidence to find non-consent. In *R. v. J.R.*,⁹⁵ the complainant, like A.R., was drunk and had taken drugs, causing her to black out. The deciding judge found that she

92. *Id.* at ¶ 21; *but see id.* at ¶ 56-57.

93. Vanessa E. Munro and Emily Finch have demonstrated through mock jury studies how third party observers often hold intoxicated complainants at least partially responsible for their victimization. As they found, “the tendency to focus on the complainant’s behaviour and to attribute responsibility accordingly was more tenacious than had been anticipated, remaining constant even in situations in which the defendant spiked the complainant’s drink with alcohol.” Vanessa E. Munro & Emily Finch, *The Demon Drink and the Demonized Woman: Socio-sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants*, 16 *SOC. & L. STUD.* 592, 607 (2007).

94. Gotell, *supra* note 13, at 146-47. *See, e.g.*, *R. v. J.A.*, [2003] O.J. No. 2803, ¶ 128 (Ont. Ct. J. June 24, 2003); *R. v. Cornejo*, 68 O.R. (3d) 117, ¶ 18-19 (Ont. C.A. 2003).

95. [2006] O.J. No. 2698, ¶ 59 (Ont. Sup. Ct. J. June 20, 2006).

had not consented by drawing inferences from her usual sexual behaviors and by her claims that she would not have had unprotected sex with two men, shortly after an abortion, and after being warned by her doctor to abstain from sexual intercourse.⁹⁶ In decisions like *J.R.*, intoxication is treated as a temporary deviation from a rational norm, just as consent is judged based upon an implicit standard of reasonable sexual behaviors.

In *M.S.*, however, the complainant's intoxication is transformed from a temporary deviation into a state of being, cemented by the decision's repeated references to A.R. having several beers outside on the day of the attack and to her addiction to painkillers. In this way, the risky behaviors of drinking and drug use slide into the permanent markers of a "high risk lifestyle." A.R.'s intoxication at the time of the assault becomes firmly located in a pathological discourse; she is framed as a drunken transient, incapable of responsible neo-liberal citizenship or self-management. She is represented by the defense as untrustworthy on this basis and her frequent claims that she does not remember are transformed into lies.⁹⁷ In turn, A.R.'s addiction combines with her homelessness to remove any necessity of assessing consent based upon what she would not normally do. The decision makes reference to testimony by A.R.'s common law husband that they had sexual intercourse twice outside on the day of the attack.⁹⁸ Having sex in a park might be viewed, in other circumstances, as indicating a departure from what a reasonable woman might do, perhaps providing indirect evidence of non-consent. Here, however, sex outside, sex that is risky, sex that defies standards of responsibility, respectability and sexual safekeeping, marks the complainant herself as a deviant. While she is assaulted in an inner city park, the dominant image in the judge's recounting is of having sex "in the bushes," a phrase that is repeated twelve times in the decision. This repetition consolidates A.R.'s association with a space of degeneracy and wildness, a space where normal rules do not apply, a space mapped as being outside of the transactional norms of responsibilized sexual citizenship.

While the transactional requirements of affirmative consent are displaced in this decision, an economic framework is nonetheless maintained, giving credence to an alternate account that, in the judge's

96. *Id.* at ¶ 38.

97. In recounting her testimony and cross-examination, the decision frequently refers to the complainant's inability to remember as "lying." *R. v. M.S.*, [2003] A.J.No. 1516, ¶ 13-15..

98. *Id.* at ¶ 18.

assessment, raises reasonable doubt. A well-corroborated claim of violent sexual assault is transformed into a story of a sexual bargain gone wrong through extortion:

[t]he defence says that the complainant actively and expressly consented to sexual intercourse as part of a bargain to secure a leather jacket. The defence also argues that the complainant undertook to change the terms of that bargain during the act of sexual intercourse by requesting an additional piece of property from the accused, failing which the complainant would maintain that she had been “raped”. [sic] In other words, the defence does not argue consent by virtue of silence, passivity, or ambiguous conduct rather, the defence argues that the complainant actively consented to sexual intercourse and then endeavoured to secure additional items of property from the accused by suggesting that she would allege “rape” unless he gave her the property in question.⁹⁹

A transactional conception of normative heterosexuality, as I have suggested, is built upon the rationality of actors in a sexual marketplace. What happens, then, if participants in a sexual transaction defy the rules of the market by altering the terms of the bargain, by renegeing on a sexual agreement? In this case, the claim of extortion becomes both a plausible alternative explanation and also a justification for refusing to apply the legal standard of affirmative and explicit consent. Must a responsible man still be required to ensure consent when the other participant in a sexual bargain uses threats and extortion to change its terms?

Even if the defendant’s account is taken as a true description of events, the *Ewanchuk* consent rules clearly require that he have taken steps to reestablish agreement. Rather than evaluating what steps, if any, the accused took, the decision highlights his claim that he did not force A.R. to engage in sexual intercourse¹⁰⁰ and witness testimony that the defendant had gotten off A.R. when asked.¹⁰¹ This represents a complete denial of the *Ewanchuk* standards, focusing on force, rather than on the existence of affirmative consent, and erasing the requirement that consent must be determined from the subjective position of the complainant, not a passerby. In this displacement of the positive and explicit consent rules, the complainant’s subjectivity is erased. And by giving credence to the defendant’s story of extortion, A.R. becomes

99. *Id.* at ¶ 47.

100. *Id.* at ¶ 36.

101. *Id.* at ¶ 21.

understood as a threat to the responsible masculine sexual subject.

In *Edmondson*,¹⁰² a high profile Saskatchewan case, a similar form of disqualification and victim-blaming occurs. In the legal narrative of this case, the young complainant's actions and behavior are also constituted as risky, "irrational," and outside the logic of a rational sexual economy. While the accused was convicted in a jury trial, the complainant's "unpredictability" was used as a mitigating factor in sentencing. Both the conviction and sentence were upheld on appeal, though the charge was reduced from being a party to the offense of sexual assault with two other men, contrary to the "gang rape" provisions of the *Criminal Code*,¹⁰³ to simple sexual assault.¹⁰⁴

The twelve-year-old Yellow Quill First Nation girl was running away from home.¹⁰⁵ At the time that she was assaulted, she was less than five feet tall and weighed eighty-seven pounds.¹⁰⁶ It is possible that she was running away because her father had sexually abused her. She was sitting on the steps of a small town bar. She accepted a ride from three white men who were leaving the bar. She supplied them with a false name and told them she was fourteen and from Saskatoon. None of the men inquired any further about her age. She accepted their offer of beer, drinking four in less than thirty minutes, leaving her so intoxicated that she could not stand up. She claimed that she then passed out. The men drove her to an isolated area. Edmondson tried to have intercourse with her on the hood of the truck. He continued to hold her while the two other men attempted intercourse. According to Rosalind Prober, "[t]he victim's story never changed during countless police and crown attorney interviews, at the preliminary hearing and two trials, in media interviews, to doctors and to her parents and friends."¹⁰⁷ As in *M.S.*, her claim was also corroborated. As the Court of Appeal found, "the complainant's testimony found confirmation in the accused's statement to police, and in the testimony of one of the other men involved in the occurrence . . ."¹⁰⁸

How is it possible that such a vicious act of sexual assault against a vulnerable child could result in a conditional sentence of only two years

102. 257 Sask. R. 270 (Sask. C.A. 2005).

103. CC § 272(1)(d).

104. *Edmondson*, 257 Sask. R. 270, at ¶ 109.

105. *Id.* at ¶ 54.

106. Rosalind Prober, *What No Child Should Endure: R. v. Edmondson, Kindrat and Brown*, 3 BEYOND BORDERS NEWSLETTER 1 (Beyond Borders Inc., Winnipeg, MB, 2003) Fall 2003, at 1.

107. *Id.*

108. *Edmondson*, 257 Sask. R. 270 at ¶ 48.

to be served in the community? How is it possible that culpability was shifted from the accused to the complainant through a judicial narrative framing her as the “sexual aggressor”? This case has been held up as an egregious example of racism within the Canadian legal system.¹⁰⁹ The trial judge’s remarks during trial, the inadequate sentence, and the Court of Appeal decision have all been condemned by Canadian aboriginal organizations.¹¹⁰ NWAC intervened on appeal to underscore the importance of sentences that would denounce the sexual violation of aboriginal girls in a context of pervasive and systemic gendered, racialized violence.¹¹¹ *Edmondson* can be understood as exemplifying Razack’s argument that the violation of aboriginal women and girls is an ongoing repetition of the colonial encounter that is sanctioned by law.¹¹² Drawing on Razack, Nicholas Bonokoski has argued that the complainant was “criminalized . . . using all possible colonial constructions to frame her as a sexual threat to Dead [sic] Edmondson, the normative white male colonial subject.”¹¹³ As he demonstrates, the complainant in this case becomes located in a space beyond law, marked as a “squaw,” and her life only enters the legal process in ways that sanction the violence done to her.

It is clear that racist and sexualized discourses are mobilized in *Edmondson* to erase the complainant’s vulnerability and to excuse the predatory behavior of the accused. Yet, we must also be attentive to how and under what terms these processes of disqualification occur. Under the contractual logic of affirmative consent, colonial constructions are both mobilized and reconfigured. In this case, as in *M.S.*, the complainant’s conduct places her outside normative standards of feminine diligence and sexual caution. And, as with the complainant in *M.S.*, riskiness is not simply signified by her conduct; it becomes inscribed upon her identity. She becomes an irrational and “unpredictable” element in a transactional sexual economy.

109. Norma Buydens, *The “Melfort” Rape and Children’s Rights: Why R. v. Edmondson Matters to All Canadian Kids*, 4 SASKATCHEWAN NOTES 1 (Canadian Centre for Policy Alternatives, Regina SK 2005); Nicholas Bonokoski, *Colonial Constructs and Legally Sanctioned Sexually violence Consequences in R. V Edmondson*, 7 RECONSTRUCTION: STUDIES IN CONTEMPORARY CULTURE, available at <http://reconstruction.eserver.org/071/bonokoski.shtml>.

110. Darren Bernhardt, *Not Guilty Verdict in Rape Trial Stirs Protests*, CANWEST NEWS SERVICE, March 21, 2007, available at <http://www.canada.com/topics/news/story.html?id=e93d8ab5-84b3-4bcc-9f78-b2907541755d>.

111. Native Women’s Association of Canada, *Factum of the Intervenor, R. v. Edmondson*, (2005) [hereinafter NWAC] (copy on file with author).

112. Razack, *supra* note 75.

113. Bonokoski, *supra* note 109, at ¶ 15.

As I have emphasized, discourses of risk-taking and “living a high-risk lifestyle” function to reconstruct vulnerability as an individual failing and an effect of risk taking. This reconstruction marks the judicial narrative in *Edmondson*, emerging most clearly in the trial judge’s sentencing report in which the complainant is firmly depicted as being responsible for her own violation. As NWAC argued in its intervention at the Saskatchewan Court of Appeal, the jury’s verdict in this case rested on one of three alternate findings of fact with respect to consent: that “the complainant was incapable of giving consent because she was 12 years old, and Edmondson had not taken all reasonable steps to ascertain her age”;¹¹⁴ that she “was incapable of giving consent because she was too intoxicated”;¹¹⁵ or that “the complainant simply did not consent.”¹¹⁶ Yet, Judge Kovatch seemed to base his sentence on the first scenario, proceeding on the basis of “the possibility of willing participation by [the] complainant . . . in the context of a situation where a complainant cannot legally consent due to his or her age.”¹¹⁷ In his sentencing report, the trial judge drew attention to the fact that she had lied about her age and had “deliberately” tried to appear older than she actually was.¹¹⁸ He highlighted the fact that she had voluntarily chosen to drink and that she had previously consumed alcohol.¹¹⁹ In this manner, attention is deflected away from the fact that the adult defendant had provided her with so much alcohol that she could not stand up. In the same way that the complainant in *M.S.* is identified as a “drunken transient,” the racist myth of the “drunken Indian” is here mobilized to locate the complainant in a space of degeneracy and to consolidate a victim-blaming narrative.¹²⁰ That she had experience drinking marks her as deviant and not like other twelve-year old girls.

114. In Canadian law, there is a three tier-age and capacity based regime for the control of sex offenses against children focused on sexual exploitation and capacity to consent. Children under 12 are a prohibited category, based on empirical evidence that young children cannot evaluate the dimensions of consent to sexual activity and are particularly vulnerable to adult control. A partial prohibition exists for children between 12 and 14 who can consent to sexual activity with a person within two years of their age, if both are over 12. Children between 14 and 16 cannot consent to sexual activity with anyone in a position of trust or authority over them, but after age 16 children can freely consent. *CC* §§ 150-153; Jeremy Patrick, *Sexual Exploitation and the Criminal Code* 43 ALTA. L. REV. 1057 (2006).

115. See *Edmondson*, 257 Sask. R. 270, at ¶ 90.

116. NWAC, *supra* note 111, at ¶ 8.

117. *Id.* at ¶ 9. (quoting Transcript of Sentencing Report).

118. *R. v. Edmondson*, 257 Sask. R. 270, ¶ 54 (Sask. C.A. 2005) (quoting the sentencing report).

119. NWAC, *supra* note 111, at ¶ 10 (quoting Transcript of Sentencing Report).

120. In a study of 67 cases in which aboriginal women were sexual assaulted, Margo

It is clear from the evidence that the complainant was left extremely intoxicated, slipping in and out of consciousness. Her lack of conscious memory about what happened preceding the sexual assault, as Norma Buydens suggests, is consistent with a memory black-out.¹²¹ Under an affirmative consent standard, extreme intoxication has led to judicial findings that to proceed with sex when one is not sure if the complainant knew what she was doing constitutes recklessness or willful blindness.¹²² Yet, this young girl's status as a runaway and an experienced drinker are used to shift attention away from her state of vulnerability. She is blamed for her own intoxication; drinking is framed as being part of her normal behavior, rather than simply a risky and temporary deviation. And in Judge Kovatch's sentencing report, the complainant's lack of memory becomes a blank space through which, using the testimony of the accused, the complainant comes to be understood as a willing participant and a sexual threat.

Emphasizing the complainant's complicity, the sentencing report called attention to evidence suggesting that she had entered the defendant's truck "willingly," that she had shown no signs of concern at the bar prior to the assault and that there was no suggestion that she had been restrained or held against her will.¹²³ In the most contentious part of this report, Judge Kovatch explicitly framed the complainant as "the aggressor."¹²⁴ How is it possible to construct an intoxicated twelve-year old girl as the sexual aggressor in an encounter with three adult men on an isolated rural side road? At trial, the defense had presented evidence to allege that the complainant was being sexually abused by her father and that he had vaginal intercourse with her on the day of the attack.¹²⁵ The defense had called a local pediatrician as an expert witness who testified that sexually abused children could behave in "sexually unpredictable" ways.¹²⁶ In his sentencing report, Judge Kovatch

Nightingale demonstrated the ongoing influence of the racist stereotype of the "drunken Indian," both on case outcomes and on sentencing. Margo Nightingale, *Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases*, 23 OTTAWA L. REV. 71, 87-90. As she shows, for aboriginal women who are raped, intoxication becomes a form of victim-blaming. *Id.* Moreover, aboriginal women who are assaulted when passed out are often considered by judges to have suffered less of a violation. *Id.*; see also Sherene H. Razack, "What is to be Gained by Looking White People in the Eye? Culture, Race and Gender in Cases of Sexual Assault," 19 SIGNS 894, 901 (1994).

121. Buydens, *supra* note 109, at 2.

122. R. v. J.A., [2003] O.J. No. 2803, ¶ 128 (Ont. Ct. J. June 24, 2003).

123. NWAC, *supra* note 111, at ¶ 12 (quoting Transcript of Sentencing Report).

124. *Id.* at ¶ 12.

125. See R. v. Edmondson, 257 Sask. R. 270, ¶ 47 (Sask. C.A. 2005).

126. *Id.* at ¶ 56.

characterized this testimony as “very troublesome” and framed it as support for Edmondson’s position that the complainant “was not only a willing participant, but indeed, the aggressor.”¹²⁷ As he insisted, “there is certainly a doubt in my mind. . . as a result of that evidence,” and that this fact, “should, in fairness, be taken into account for sentencing purposes.”¹²⁸

As NWAC strongly argued in its intervention on appeal, to reduce the culpability of offenders who assault abused children on the basis that many act out is “tantamount to making the Court complicit in the repeat abuse of children” and is especially worrying “because of the prevalence of sexual abuse against Aboriginal children.”¹²⁹ As Bonokoski contends, the portrayal of this young complainant as the sexual aggressor reinforces the racist construction of aboriginal women and girls as promiscuous, sexually available, and unrapeable.¹³⁰ This framing also responsabilizes the complainant, revealing how, under the logics of contractual consent, vulnerabilities are erased and victim-blaming constructions are mobilized. In this case, the complainant’s risky behaviors (her drinking, her “lying,” her “hitchhiking”) are transformed into complicity. Her past sexual victimization results in her pathologization and sexual unpredictability becomes inscribed upon her identity. Her victimization is erased in a judicial narrative that reframes her as a sexual threat.

“Sexual unpredictability” operates here in much the same way that “sexual extortion” functions in *M.S.* Sexual unpredictability becomes a justification for deviations from the consent-seeking standards of normative masculinity. It is as if the sexual subject positions, produced through the transactional logics of affirmative consent, exist in a relation of necessary complimentary. The “unpredictable” behaviors of a young girl who accepts a ride, drinks beer, and acts in ways that so exceeds the norms of sexual safekeeping results in a corresponding relaxation of the requirements of active consent seeking. The complainant becomes, in effect, a risky woman by virtue of the risk she poses to the masculine sexual subject.

The defendant, by contrast, is represented as posing no risk at all. His sexual aggression is constructed as an “isolated criminal act, fuelled in very significant part by excessive alcohol consumption all round.”¹³¹

127. NWAC, *supra* note 111, at ¶ 12 (quoting Transcript of Sentencing Report).

128. *Id.*

129. *Id.* at ¶ 63.

130. Bonokoski, *supra* note 109, at ¶ 19, 21.

131. *R. v. Edmondson*, 257 Sask. R. 270, ¶ 114 (Sask. C.A. 2005) (noting Judge Kovatch’s

While drinking operates to undermine the complainant's credibility and to consign her to a space of degeneracy, alcohol abuse becomes an excuse for the defendant's bad behavior.¹³² According to the Court of Appeal, Judge Kovatch characterized the defendant as "a first time offender," "gainfully employed, with a very supportive family."¹³³ The defendant's deviations from the responsabilized norms of masculine sexual subjectivity are represented as temporary and inconsistent with his overall adherence to the requirements of neoliberal citizenship. He is depicted as a white citizen subject, tied to his family and to the community. In Judge Kovatch's assessment, serving a community-based sentence would not, therefore, "endanger the safety of the community."¹³⁴ This portrayal of the defendant as "risk-free" necessarily depends upon on a colonial construction of "community" that excludes aboriginal women and girls and that views them as the source of the violence that is inflicted upon them.¹³⁵

A separation is enacted between this exclusionary community and those gendered, classed, and racialized bodies occupying spaces of risk. In the judicial narratives woven in *M.S.* and in *Edmondson*, responsabilization takes a highly accentuated form, not only blaming vulnerable women and girls for the risks that they take, but also reconstructing these risky subjects as sexual threats. In this process, as I have argued, these complainants are placed outside the logic of the transactional sexual economy, their subjectivity is siphoned, and deviations from the active consent-seeking requirements of affirmative consent are legitimized and excused. The Alberta Court of Appeal decision in *R. v. Ashlee*¹³⁶ stands in stark contrast to *M.S.* and *Edmondson*. In *Ashlee*, the defendants are convicted for sexually touching a woman who, like the complainant in *A.R.*, is both homeless and intoxicated. More than this, *Ashlee* is a doctrinally significant case

"account of the personal circumstances" of the defendant, as paraphrased by the Court of Appeal).

132. Razack notes a similar double-standard in her analysis of the trial of an aboriginal woman beaten to death by two white university students. Their acts of violence were referred to at trial both by the defense and by the deciding judge as "bad behaviour" due to excessive alcohol consumption. As she writes, "Alcohol abuse and its accompanying racial and sexual violence were described as temporary aberrant behaviour, while Pamela George's "lifestyle" [her work as a prostitute] remained a permanent personal characteristic." Razack, *supra* note 75, at 127. Interestingly, Kovatch, the trial judge in *Edmondson*, acted as one of the defense counsel in this trial.

133. *Edmondson*, 257 Sask. R. 270, at ¶ 114 (noting Judge Kovatch's "account of the personal circumstances" of the defendant, as paraphrased by the Court of Appeal).

134. *Id.* at ¶ 20 (quoting sentencing report).

135. Bonokoski, *supra* note 109, at ¶ 46.

136. [2006] A.J. No. 1040 (Alta. C.A. Aug. 23, 2006).

that not only applies the affirmative consent standard, but also considerably elevates the requirements of masculine sexual responsibility. What is it that allows for the violation of this risky woman to be recognized in law?

In *Ashlee*, the complainant was observed lying unconscious on an inner city sidewalk with two men fondling her breasts.¹³⁷ A witness called the police and when they arrived five minutes later, they found the woman in the same position, her breasts exposed, and each of the men with a hand on one of her breasts.¹³⁸ She was taken to the hospital and was still unconscious thirty minutes after she arrived.¹³⁹ The trial judge found the defendants guilty on the basis that the complainant was unconscious and, therefore, incapable of consenting.¹⁴⁰ On summary appeal, the convictions were reversed.¹⁴¹ The deciding judge determined that the possibility of “prior consent” raised sufficient reasonable doubt: “. . . there is absolutely nothing to suggest that she did not consent to the activity at a time when she was still conscious and capable of giving her consent.”¹⁴²

At issue in the Court of Appeal was the validity of the defense of prior consent in a situation where a complainant is unconscious.¹⁴³ In a stunning decision that will be widely cited in future case law, the Court drew upon and elaborated the *Ewanchuk* standards, unequivocally affirming that consent must be ongoing and active at the time of sexual contact.¹⁴⁴ This decision stands as a firm rejection of the defense of prior consent and one of the first clear appellate court rulings defining unconsciousness as incapacity.¹⁴⁵ As the majority stated, “[c]onsent to sexual activity does not remain operative after the person consenting becomes unconscious. Consent is an ongoing state of mind, and therefore ends as soon as the complainant falls unconscious and is incapable of consenting. Prior consent is therefore ineffective at law. . . .”¹⁴⁶ In this unambiguous equation of unconsciousness and incapacity, *Ashlee* consolidates the affirmative and specific consent

137. *Id.* at ¶ 3.

138. *Id.* at ¶ 4.

139. *Id.*

140. *Id.* at ¶ 2.

141. *Ashlee*, [2006] A.J. No. 1040, at ¶ 2.

142. *R. v. Ashlee*, [2005] A.J. No. 1952, ¶ 16 (ABQB June 9, 2005).

143. *Ashlee*, [2006] A.J. No. 1040, at ¶ 2.

144. *Id.* at ¶ 25.

145. *CC* § 273.1(2)(b) states that “no consent is obtained, for the purposes of [this section], where the complainant is incapable of consenting to the activity.”

146. *Ashlee*, [2006] A.J. No. 1040, at ¶ 27.

standard and elevates the requirements of responsabilized masculine sexual subjectivity. By recognizing that consent is impossible without consciousness, it alters the calculus of risk in a transactional sexual economy. The responsabilized masculine subject must actively seek consent and must accept that women who become unconscious lack the rational capacity to consent. As the Court states, “[u]nconsciousness is the antithesis of an operating state of mind.”¹⁴⁷

The unconscious complainant in *Ashlee* is thus constituted as being inside, rather than external to a normative community of rational and responsabilized sexual subjects. She is distinguished from the complainants in *M.S.* and *Ashlee*, who, as I have argued, are “Othered” and relegated to a space outside of this responsabilized community. In *M.S.*, the complainant’s status as a homeless woman, an addict, the occupant of a degenerate space, makes it possible for the deciding judge to imagine that she consented to violent sex in a park in a plot to obtain a jacket.¹⁴⁸ In *Edmondson*, the child complainant, intoxicated to the point of passing out and falling down, was depicted as initiating sex with three adult men on the hood of a truck.¹⁴⁹ In fact, she was defined as the “sexual aggressor.” Yet in *Ashlee*, the complainant appears to escape the disqualifications experienced by the complainants in *M.S.* and *Edmondson* and what happened to her is understood as violating and exceeding the normative standards of contractual consent.¹⁵⁰ In this important decision, the majority explicitly measures her experience against a “reasonableness” standard, arguing that, “[i]t is highly unlikely, bordering on absurd, that a woman would consent, in anticipation of her impending unconsciousness, to two men exposing and fondling her breast on a public street in broad daylight in downtown Edmonton.”¹⁵¹ In this way, the complainant in *Ashlee* becomes aligned with the “reasonable woman” and her violation is legally recognized.

What allows for the complainant in *Ashlee* to be recognized in law as a “victim,” when her risky sisters are relegated to a space of “exception” and defined as “risks” to the normative masculine subject? The complainant in *Ashlee* can be recognized as a “victim” only because she has disappeared. The decision in *Ashlee* is extraordinary because the defendants are convicted and these convictions are upheld on appeal

147. *Id.* at ¶ 20.

148. *M.S.*, [2003] A.J. No. 1952, at ¶ 57-59.

149. *Edmondson*, 257 Sask. R. 270, at ¶ 54.

150. *See Ashlee*, [2006] A.J. No. 1040, at ¶ 42.

151. *Id.* at ¶ 38.

without testimony from the complainant.¹⁵² In fact, the complainant did not even make a police statement.¹⁵³ There was, therefore, no opportunity to attack her credibility. The complainant could not be constructed as being responsible for her own victimization because she was rendered an object. She becomes reduced to a legal hypothetical. It is this hypothetical state that allows for her to be imagined in relation to a community of responsible sexual subjects. It is this that allows the Court of Appeal to draw analogies between her violation and the violation of other women. What *Ashlee* suggests, especially when read together with *M.S.* and *Edmondson*, is that extremely vulnerable women may have the best chance of having their sexual violation recognized in law when they simply disappear.

VI. CONCLUSION

Canadian socio-legal scholars deploying governmentality theory have drawn attention to how law, in and through such practices as the enforcement of punitive welfare regimes, actively produces distinctions between good neoliberal subjects and “non-citizens,” pathologized by their “refusal” to bear responsibility for their own lives.¹⁵⁴ As I have argued here, the judicial elaboration of affirmative consent standards, when read as a technology of neoliberal governmentality, enacts similar distinctions. As judges move towards the embrace of a communicative model of consent, the individualizing frame of criminal law is reinforced and sexual subjects are responsabilized. Through responsabilization, criminal law engages in a “governmental” project, exercising power as much through normalization and the “conduct of conduct” as through coercion and punishment. Within recent judicial discourses, normative sexual interaction is reconstructed as being like an economic transaction, and privileged actors within a sexual marketplace display behaviors that mimic the market citizen of neo-liberalism. Motivated by a calculus of risk, responsabilized masculine sexual subjects are redefined as active consent-seekers, while normative feminine sexual subjects are constituted as individualized agents of sexual assault prevention, diligently self-policing their behaviors to avoid sexual dangers.

We must be attentive to how this reformulation of normative sexual subjects enacts new patterns of exclusion and disqualification. When the idealized rape victim is no longer defined by sexual propriety but by

152. *Id.* at ¶ 51.

153. *Id.*

154. See, e.g., Mosher, *supra* note 80.

prudence, the defining characteristics of the unworthy complainant must also be rethought. As I have suggested, women who defy the responsabilized standards of feminine safe-keeping are constituted as outside of the transactional logics of affirmative consent. While mechanisms of disqualifying “risky women” in law continue to draw upon sexualized and racialized constructions, I have drawn attention to how these constructions are reframed in and through discourses of responsibility and risk. The legal discourse of affirmative consent enacts a separation between discrete events and the power relations constructing vulnerabilities. The latter are silenced, and the constraints on action that arise in situations of social marginalization are erased. In this manner, sexual assault is individualized, depoliticized, and reconstructed as a failure of responsabilization, while the power relations that define sexual violence are obscured. Vulnerability is reconstructed as a failure of responsibility and women who occupy spaces of risk become reframed as sexual threats, thereby legitimizing and normalizing deviations from responsabilized masculine sexual subjectivity. As Stanko has written, “[w]omen who do not follow the rules for prudent behaviour, it is presumed, deserve to be excluded from any benefits of public provision of safety. . . .”¹⁵⁵ Risky women both fall through the cracks of affirmative consent and ground the new negative pole of the good victim/bad complainant dichotomy.

155. Stanko, *supra* note 52, at 486.