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A NEW CONCEPTION OF WILFUL BLINDNESS: THE SUPREME COURT OF CANADA'S DECISION IN *R.* v. *SANSREGRET*

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During the early morning hours of October 15th, 1982, John Henry Sansregret broke into the home of his former girlfriend. He threatened her with a butcher's knife and struck her in the face, drawing blood. He forced her to undress in order to prevent her from leaving the house. During this terrifying situation his ex-girlfriend, in an attempt to prevent the hostilities from escalating, pretended she was interested in reconciling with Sansregret. She told him that they could be lovers again and initiated sexual intercourse. Later that morning, after Sansregret was safely out of the house, the girlfriend called the police and filed a complaint. Soon after, Sansregret was arrested and charged with sexual assault, among other offences.[1]

At trial, the only significant issue with respect to the sexual assault charge was whether the Crown could prove that Sansregret had known that the complainant's consent had been extorted by threat or fear of bodily harm.[2] Sansregret asserted the defence of honest mistaken belief in consent. In a strange twist, this assertion was given credence by the evidence of the complainant. She testified that she knew the accused very well and that she was quite certain he had believed, at the time of the incident, that her consent was been genuine.

The trial judge found that there had been no real consent to the sexual activity, and that "no one in their right mind" would have believed consent existed. Despite this, and relying almost exclusively on the testimony of the complainant, the judge found that Sansregret had been under an honest mistaken belief in consent. Given this finding of fact, the judge directed herself to follow the rule set out in *R. v. Pappajohn*;[3] that an honest mistaken belief in consent negates proof of *mens rea*. She acquitted on the charge of sexual assault.

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[1] The facts here are taken from *R. v. Sansregret*, [1985] 1 S.C.R. 570, 45 C.R. (3rd) 193 (S.C.C.).

[2] (1983) 34 C.R. (3d) 162 (Man. Co. Ct.).

[3] [1980] 2 S.C.R. 120.

The Crown appealed the decision to the Manitoba Court of Appeal, where the acquittal was overturned and a conviction entered.[4] This result produced tension in the Court, with each judge writing a separate decision. Matas J.A. held that the accused was barred from raising the defence of mistake by the evidentiary ruling in *Pappajohn*, which requires the assertion of mistaken belief in consent to have an "air of reality". He stated:

> ...it is not open to Mr. Sansregret to terrorize his victim, to follow up the terror with sexual intercourse, and to end up by innocently claiming he had an honest belief in his victim's consent. I have concluded that the defence of mistake of fact does not arise in this case.[5]

This finding may seem strange given that the complainant's testimony had established the factual finding which led to the success of the defence at trial. Her credibility in asserting his mistaken belief in consent can hardly be doubted. This was essentially the position taken by Philp J.A. in his dissenting opinion. He accepted the findings of fact at trial and concluded that the defence of mistaken belief in consent had been successfully established. Like the trial judge, he based his judgement on the testimony of the complainant and would have upheld the acquittal and dismissed the Crown's appeal.

Sansregret appealed his conviction, as of right, to the Supreme Court of Canada. The Court, in a unanimous decision, upheld his conviction. Writing for the Court, McIntyre J. chose not to disturb the finding at trial that Sansregret had acted under an honest mistaken belief in consent. However, he held that the trial judge had erred in allowing the defence of mistake of fact given her finding that Sansregret had been willfully blind to the complainant's lack of consent:

> In my view, it was error on the part of the trial judge to give effect to the "mistake of fact" defence in these circumstances where she had found that the complainant consented out of fear and the appellant was willfully blind to the existing circumstances, seeing only what he wished to see. Where the accused is deliberately ignorant as a result of blinding himself to reality the law presumes knowledge, in this case knowledge of the nature of the consent. There was therefore no room for the operation of this defence.

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[4] (1984) 10 C.C.C (3d) 164, 37 C.R. (3d) 45 (Man. C.A.).

[5] 10 C.C.C (3d) 164 at 171-2.

> This is not to be taken as a retreat from the position taken in *Pappajohn* that the honest belief in consent need not be reasonable. It is not to be thought that any time an accused forms an honest though unreasonable belief he will be deprived of the defence of mistake of fact. This case rests on a different proposition. Having willfully blinded himself to the facts before him, the fact that an accused may be able to preserve what could be called an honest belief, in the sense that he has no specific knowledge to the contrary, will not afford a defence because, where the accused becomes deliberately blind to the existing facts, he is fixed by law with actual knowledge and his belief in another state of facts is irrelevant.[6]

This decision has stirred much controversy, due in large part to the intricacy of the conceptual analysis.[7] The concept of "mistake of fact" is forced into competition with the rival concept of "willful blindness" such that the Court is forced to define the boundaries between the two. The Court's final conceptualization is clear: willful blindness negates mistaken belief as a defence in sexual assault. Less explicit is exactly how and why this is so.

Much of the confusion and controversy in this area of the law can be rectified by employing an explicit analysis of the objects of the debate: the competing mental states of mistaken belief and willful blindness. The Supreme Court made it clear in *Sansregret* that any overlap between the categories will be subsumed into the latter. However, the fundamental question regarding the conditions under which mistaken belief amounts to willful blindness remains unanswered. The analysis which will be applied to this problem is epistemological. Epistemology (the theory of knowledge) is a central discipline in philosophy that is concerned with the interaction between belief, truth, justification, and knowledge. Central questions in this field concern how individuals respond to their environment though the formation of belief, and the conditions under which those beliefs can be said to constitute knowledge. The approach to be applied to the problem is intuitive, using hypothetical examples to generate basic instincts about culpability. Intuitions regarding culpability are then subjected to epistemological analysis in the hope of generating a new doctrinal model of criminal fault.

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[6] *Supra* note 1 at 587-8.

[7] D. Stuart, *Canadian Criminal Law: A Treatise*, 3rd ed. (Toronto: Carswell, 1995) at 212.

An epistemological analysis is warranted on three grounds. First, whenever the law sees fit to make "knowledge of a circumstance" an element of a criminal offense, it has inherently embarked on an epistemological inquiry. This is similar to the way in which courts are forced to consider empirical science when causation is incorporated as an element of an offence. The question "Did the stab wound kill the victim?" is a matter of medical science. Similarly, the question "Did the accused *know* that the goods in his possession were stolen?" is a matter of epistemology. Being explicit about epistemology and its place in the criminal law may allow for a more productive conceptual analysis. Second, epistemology concerns itself with questions of objectivity (truth) and subjectivity (belief). In this sense, epistemology is a blended inquiry, partly concerned with beliefs actually held by a subject, and partly concerned with the objective truth of that which is believed. This blending of objective and subjective considerations may allow for the development of a principled compromise between the current polarization of subjectivist and objectivist orthodoxies. Each orthodoxy is based on rival intuitions regarding the conditions under which criminal punishment may be imposed. Given the theoretical standstill between the positions, perhaps it is time to generate new intuitions. Lastly, this analysis is justified on the basis that individuals are, by nature, epistemological agents. They are accustomed to succeeding or failing on the basis of their ability to form accurate beliefs about their environments. Holdings of legal accountability on the basis of epistemological ideals are, therefore, well fitted into a pre-existing scheme. This has the advantage of not forcing upon people a normative regime with which they are unfamiliar, as is often the case in the imposition of the brute force of law.[8]

This paper will proceed in four parts. Part I will consist of a brief summary of current jurisprudence surrounding the doctrine of *mens rea*, focussing on the debate concerning whether the imposition of criminal liability requires a subjective or objective model of fault. Part II will present the basic epistemological ideals that will form the basis of subsequent analysis. Part III will bring into focus the epistemological

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[8] For instance, the criminal justice system could assume that individuals are informed of the necessity of careful belief formation and would not have to exercise a Section 19 *proviso* deeming them to be so informed.

elements of the offence of sexual assault. Part IV will demonstrate how a new doctrine of willful blindness might be employed by the courts, in cases of sexual assault.

PART I

The doctrine of *mens rea* has spawned more jurisprudencial commentary than any other substantive subject in the criminal law.[9] Its basic feature is the notion that no act is guilty unless it is accompanied by a guilty mind. The constitutional dimensions of the doctrine are developed in *R. v. Creighton*[10] and *R. v. Hundal,*[11] which serve to highlight and distinguish subjective and objective models of criminal fault. In *Hundal*, Cory J. stated:

> Depending on the provisions of the particular section and the context in which it appears, the constitutional requirement of *mens rea* may be satisfied in different ways. The offense can require proof of a positive state of mind such as intent, recklessness or willful blindness. Alternatively, the *mens rea* or element of fault can be satisfied by proof of negligence whereby the conduct of the accused is measured on the basis of an objective standard without establishing the subjective mental state of the particular accused.[12]

Justice Cory went on to distinguish the tests proposed by each model:

> A truly subjective test seeks to determine what was actually in the mind of the particular accused at the moment the offence is alleged to have been committed.

In his very useful text, Professor Stuart puts it this way in *Canadian Criminal Law, supra,* at pp. 123-124 and 125:

> What is vital is that this accused given his personality, situation and circumstances, actually intended, knew or foresaw the consequence and/or circumstance as the case may be, whether he "could", "ought" or "should" have foreseen or whether a reasonable person would have foreseen is not the relevant criterion of liability.

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[9] *Supra* note 7 at 139.
[10] (1993) 23 C.R. (4th) 189 (S.C.C.).
[11] [1993] 1 S.C.R. 867, 79 C.C.C. (3d) 97, 19 C.R. (4th) 169.
[12] [1993] 1 S.C.R. 867 at 882.

...

> In trying to ascertain what was going on in the accused's mind, as the subjective approach demands, the trier of fact may draw reasonable inferences from the accused's actions or words at the time of his act or in the witness box. The accused may or may not be believed. To conclude that, considering all the evidence, the Crown has proved beyond a reasonable doubt that the accused "must" have thought in the penalized way is no departure from the subjective standard. Resort to an objective would only occur if the reasoning became that the accused "must have realized it if he had thought about it". [Emphasis in original.]
>
> On the other hand, the test for negligence is an objective one requiring a marked departure from the standard of care of a reasonable person. There is no need to establish the intention of the particular accused. The question to be answered under the objective test concerns what the accused "should" have known.... [T]here should be a clear distinction in the law between one who was aware (pure subjective intent) and one who should have taken care irrespective of awareness (pure objective intent).[13]

The implications of the subjective model of liability are most striking when viewed from the perspective afforded by the defence of mistake of fact. This defence was established in Canada through the cases of *R. v. Rees*[14] and *R. v. Beaver.*[15] These cases developed the legal rule that, where subjective knowledge of a circumstance forms the *mens rea* of an offence, an honest mistaken belief regarding the circumstance negates proof of the required fault element. Thus, in *Beaver* the accused was acquitted on a charge of possession of a narcotic because he honestly believed the white powder found in his possession was sugar-of-milk. His honest belief to that effect prevented the Crown from discharging its burden of proving that he had known that the powder was a narcotic.

The defence of honest mistake of fact was explicitly held to apply to the offence of sexual assault in *R. v. Pappajohn.*[16] This case followed the reasoning in the controversial British case *Director of Public*

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[13] *Ibid* at 882-3.
[14] [1956] S.C.R. 640, 24 C.R. 1, 115 C.C.C. 1, 4 D.L.R. (2d) 406.
[15] [1957] S.C.R. 531, 26 C.R. 193, 118 C.C.C. 129.
[16] *Supra* note 3.

Prosecutions v. Morgan.[17] In each case it was held that an honest though mistaken belief in consent exculpates the accused on a charge of sexual assault, irrespective of whether the mistake was unreasonable. In *Pappajohn*, Dickson J. laid out the defence as it pertains to sexual assault:

> It is not clear how one can properly relate reasonableness (an element in offences of negligence) to rape (a "true crime" and not an offence of negligence). To do so, one must, I think take the view that the *mens rea* goes only to the physical act of intercourse and not to non-consent, and acquittal comes only if the mistake is reasonable. This, upon the authorities, is not a correct view, the intent in rape being not merely to have intercourse, but to have it with a non-consenting woman. If the jury finds that mistake, whether reasonable or unreasonable, there should be no conviction. If, upon the entire record, there is evidence of mistake to cast a reasonable doubt upon the existence of a criminal mind, then the prosecution has failed to make its case.[18]

The idea that an unreasonable mistake as to consent is exculpatory is surprising, but the doctrine is simply a logical consequence of the subjectivist model.

The doctrine of willful blindness fits into the subjectivist scheme in a rather tenuous way. The uneasy fit is particularly surprising given that a single theorist, Glanville Williams, has played a significant role in the entrenchment of both doctrines. Of willful blindness, Williams states:

> A court can properly find willful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is willful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice. Any wider definition would make the doctrine of willful blindness indistinguishable from the civil doctrine of negligence in not obtaining knowledge.[19]

Thus, willful blindness seems to be a type of virtual knowledge the courts will find when they feel an accused became aware of the need for further inquiry but declined to make that inquiry because he did not wish to know the truth. In a sense, the accused has constructed a situation in

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[17] [1976] A.C.182, [1975] 2 All E.R. 347 (H.L.).

[18] *Supra* note 3 at 152.

[19] G.L. Williams, *Criminal Law; The General Part*, 2d ed. (London: Stevens, 1961) at 159.

which knowledge can technically be denied because he chose to remain ignorant. This doctrine has an uneasy feel: the only motive to engage in this type of cognitive risk management resides in an implicit acknowledgement that a risk is present. An acknowledgement to this effect already satisfies the requirements for a finding of recklessness, which is also a guilty mental state under the subjectivist model of culpability. On this account, it seems that wilful blindness may simply be a convoluted form of recklessness. If wilful blindness is to stand alone as a distinct form of *mens rea*, then it should be differentiated, conceptually, from recklessness. A more productive conception of wilful blindness is one that focuses, not on a *deliberate* suppression of risk awareness, but rather on an *active* suppression.

The subjectivist/objectivist doctrinal debate has taken on political dimensions in recent years. The political debate over the doctrines is especially acute in respect of their application to the offence of sexual assault. As evidenced by *Pappajohn*, the courts have elected to employ the subjective model to this offence. Liberals defend this on the grounds that the imposition of criminal punishment requires justification. Liberal theorists maintain that punishment for sexual assault can only be justified when there exists an element of subjective fault on the part of the accused. It is the guilty activity of the accused, both mental and physical, which justifies punishment. It is not the hypothetical activities of the "reasonable person" which should be the criterion for fault.
Feminist theorists have taken exception to this structuring of fault in sexual assault.[20] Placing the crucial factor for the determination of guilt in the minds of accused (typically men) sacrifices women's interest in the security of their bodies to the liberty interests of male accused. Many feminists believe the appropriate balance here is to be reached through the careful employment of the objective model of fault.[21] It is only through the imposition of a legal duty to act reasonably that women can be satisfactorily protected from sexual interference. This, however, raises the liberal critique that individuals should not be punished as an

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[20] See T. Pickard, "Culpable Mistakes and Rape: Relating *Mens Rea* to the Crime" (1980), 30 U.T.L.J. 75; and T. Pickard, "Culpable Mistakes and Rape: Harsh Words on *Pappajohn*" (1980), 30 U.T.L.J. 415.

[21] *Ibid.*

instrument of public policy. To do so denies the Kantian ethic that individuals are never to be treated as the means to an end.[22]

Thus we have a true dilemma: the premise of the liberal argument for subjective fault denies the premise of the feminist argument for objective fault. This amounts to an incommensurability between the two doctrinal orthodoxies. This incommensurability rests on the liberal/subjectivist's insistence that the individual must play an active part in his mental guilt. Liberals have insisted that the required activity is only found in the subjective awareness of a risk, or the deliberate suppression thereof, and a decision to proceed despite that risk. There is, however, an alternate form of cognitive activity which justifies the imposition of punishment. This activity can be demonstrated via the conception of willful blindness which is already being employed by Canadian courts, such as in *Sansregret.*

This alternative analysis of willful blindness attempts to establish a middle ground between the subjectivist's assertion that an honest mistake as to consent is exculpatory and the objectivist's assertion that only reasonable mistakes are exculpatory. The analysis employs an intuitive approach to hypothetical examples, drawing explicit attention to the manner in which beliefs are formed and held. The use of "active suppression" of risk awareness may generate a new conception of willful blindness, and it is hoped that the subjective activity of this new conception will be sufficient to meet liberal concerns regarding the justification of punishment while, at the same time, satisfying feminist demands for greater protection of women from sexual assault.

PART II

The basic aim of epistemology is to determine the conditions under which an individual can be said to have knowledge in respect of some fact. Traditionally, this has been determined using a tripartite analysis; knowledge is obtained when one has a justified, true belief. Thus, one has knowledge in respect of some fact if, and only if one believes the fact to be true, one is justified in believing it to be true, and the fact is, indeed,

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[22] B. Rolfes, "The Golden Thread of the Criminal Law – Moral Culpability and Sexual Assault" (1998), 61 Sask. L. Rev. 87.

true.[23] This analysis employs both objective and subjective elements. The subjective element is the belief actually held by the individual. The objective element is the truth of that which is believed. The subjective fact of the belief is linked to the objective fact of truth via the hybrid condition of justification. The justification condition is hybrid to the extent that it must be actually held in the mind of the believer (subjective) and it must also be objectively capable of supporting the inference that the fact believed is probable.[24]

This tripartite analysis of knowledge (justified true belief) is not employed in the legal analysis of subjective guilt. This is likely due to the fact that talk of "justification" sounds like a resort to the objective model. When subjective knowledge of circumstance forms an element of an offence, the law employs what might be called a bipartite analysis: a purely objective inquiry (a determination as to the presence of the *actus reus*) and a purely subjective inquiry (determination as to the presence of *mens rea*). The trier of fact is to determine whether the prescribed condition actually existed at the time of the alleged offence, and whether the particular accused believed the condition to exist. On an epistemological account this arrangement is too simplistic and is bound to result in error.

For instance, consider the following hypothetical example. Imagine that Mark lives next to a pawnshop. Mark believes the owner of

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[23] For instance, I know that the computer I am currently working on is a MacIntosh if, and only if; I believe it is a Mac, I am justified in holding this belief, and it is in fact true that the computer is a Mac.

[24] Thus, I know that the computer I am currently using is a Macintosh if, and only if: I believe it is a Mac, it is in fact a Mac, and I believe in some condition which makes it objectively probable that it is a Mac. For instance, this justification could follow from the fact that I have observed a small apple-like logo on the computer's exterior. In this case the justification would be founded on a perception combined with a belief that Macintosh computers carry such a logo. Alternatively, my justification could reside in a belief that the computer's owner is a die-hard Macintosh enthusiast who would not likely consider purchasing anything but that particular brand of computer. In this case, my belief is justified on the basis of other beliefs. In the first instance, where my belief is generated though observation, an epistemologist would say that my belief is founded on perception. It is a perceived condition of the computer that makes it likely to be a Mac. In the second instance, it is not a condition about the computer itself that makes it likely to be a Mac, but rather a belief about its owner, specifically that she bought it and that she would likely only buy a Mac. An epistemologist would label this belief as justified by coherence with other beliefs. The only information I have about the computer is its owner, yet my belief's about the owner can justify beliefs about the computer itself.

the pawnshop is a crook and that his entire inventory consists of stolen goods. Mark therefore avoids dealings with the shop owner, despite the availability of some good deals. One day Mark walks by the shop and notices a saxophone for sale in the window. Mark has always wanted to play the saxophone, but has never been able to afford one at retail prices.

Despite the fact that he believes the saxophone to be stolen, Mark can not pass up the opportunity to realize his dream. He buys the instrument, takes it home, and begins to learn how to play. After a while, however, Mark becomes consumed by guilt over his actions and every note reminds him of his misdeed. He decides to turn himself in to the police and take responsibility.

The police are baffled by all of this as they know the pawnshop owner and hold him in the highest regard. The owner routinely calls police regarding suspicious goods and his reputation in the community is beyond reproach. Despite this, the police check the serial number on the sax and discover that it was in fact stolen in a break-and-enter some years ago.

This raises the question of Mark's guilt or innocence. He believed the saxophone to be stolen at the time he purchased it, and it was in fact stolen. Thus, it seems that both the *actus reus* and *mens rea* of the offence of possession of stolen goods are present and readily provable. On the bipartite analysis this would indicate Mark's guilt. However, if Mark's belief that the shop owner is a crook is not justified, then the co-incidence of *actus reus* and *mens rea* is merely that, coincidence. In the absence of any justification for believing the shop owner to be a crook, Mark's belief is mere folly. It would be equally capricious for the criminal justice system to compound the folly of Mark's belief by attaching criminal liability to it. One might choose to exculpate Mark on the basis that he did not know the sax was stolen; he merely believed it to be stolen and his belief happened to be true. Mark made a mistake in believing the sax to be stolen, not because it was untrue, but because he had no justification for his belief.

Thus, the bipartite analysis of fault must be complimented by a doctrine of mistake if it is to avoid, on principled grounds, the imposition of punishment in absurd ways. This raises a question as to the conditions under which mistaken belief should exculpate an accused. Current doctrine places only one condition on mistaken belief: honesty. Honesty, in this doctrinal account, is synonymous with

"actually held". Thus, under the doctrine, a mistaken belief actually held is exculpatory. However, this can also lead to absurdities. Consider the following hypothetical examples of two individuals who come into possession of cocaine.

Mr. Jones has a rather strange hobby: he collects small items he finds on the streets of Halifax. He believes his collection will serve as a valuable historic account of ordinary life in the late 20th century. One day Jones is walking down the sidewalk when he sees a small glass vial, apparently discarded, on the side of the street. He picks up the vial and notices it has a label on which is written the word "cocaine". This alarms Jones as he would really like to add the item to his collection, but he does not wish to run afoul of the law. His anxiety is put to rest, however, when he notices the vial contains a pure white powder. Believing that cocaine is deep blue in colour, Jones reasons that even heavily diluted cocaine could never be so white. Having settled his mind that the powder is not cocaine (or any other narcotic) he places the vial in his pocket and continues down the street.

Prof. Smith is a prominent biochemist and ecologist. He is notorious for asserting a rather strange theory that cocaine does not exist. Smith has written extensively on the non-existence of cocaine, his theory being that the coca plant is long extinct and that drug dealers are exploiting a psychosomatic effect by passing off benign white powder as a drug. On this basis he has advocated that the narcotic control law be amended, removing "cocaine" as a prohibited substance. Smith's theory has met with much resistance in the scientific field. This has only strengthened his resolve to prove his theory.

Smith decides to prove his theory by running an experiment. He has found twenty graduate students in the biology department who have agreed to volunteer as subjects, but they have not been told the exact nature of the experiment which is to take place. Smith has purchased a quantity of white powder from a local drug dealer. He has tested the chemical composition of the powder and has found it to match the composition of so-called "cocaine". He mixes the powder into ten glasses of orange juice and pours another ten glasses of unadulterated juice. The glasses of juice are then distributed to the volunteers and their behaviour is observed and recorded.

Is either Jones or Smith guilty of any crime? One may intuit that Mr. Jones is not guilty of possession of a narcotic and that Prof. Smith is

guilty of both possession and trafficking. This intuition is difficult to explain given conventional legal doctrine. It seems that both men were under an honest mistaken belief that the powder in their possession was not cocaine. Mr. Jones honestly believed that it was not cocaine because it was not blue. Prof. Smith believed that the powder was not cocaine because he believes that nothing is "cocaine". As well, each man's belief in respect of the powder was unreasonable. Reasonable people know that when they find a strange vial of white powder labeled "cocaine", there is a very real risk that the contents are actually cocaine. Reasonable people also know that when one approaches a drug dealer, asks for cocaine, and is given a quantity of white powder, the powder is probably cocaine. Furthermore, it seems that Jones (the innocent party) will have a difficult time establishing the defence of mistake. His subjective belief that cocaine is blue is so objectively unreasonable that it is unlikely that any trier of fact would view it as credible. Smith, on the other hand, will be able to advance a great deal of evidence tending to establish his honest belief that the powder was not cocaine (i.e. his previous writings describing his theory, conversations with colleagues, etc.).

If one is correct in the intuition that Jones has acted innocently and that Smith has not, then the difference cannot be accounted for on any of the following bases: *honesty of belief* (each man, by hypothesis, actually held a belief that the powder was not cocaine); *reasonableness of belief* (each belief was unreasonable); or *evidentiary considerations* (the guilty man will have no trouble forwarding credible evidence while the innocent man will only have his word). This leaves one with the task of explaining intuitions about the innocence of Mr. Jones and the guilt of Prof. Smith on grounds not mentioned above.[25]

The difference might be explained by considering three separate factors. First, Smith's belief about the non-existence of cocaine is what epistemologists would call recalcitrant. This means that the structure of his belief system is unresponsive to change, due to a high degree of internal coherence. Smith's beliefs about cocaine have formed an interconnected web such that perceptual indications inconsistent with the cohered system are discarded as unworthy of consideration or belief.

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[25] Perhaps the best explanation is that my intuitions are simply incorrect. I think they are correct, but there is room for reasonable disagreement on the matter.

There is an active suppression of true belief inherent in the way Smith interacts with his environment.[26]

Compare this to Jones. The belief that led him awry was not recalcitrant; it was an isolated mistake regarding a feature indicative of cocaine, namely its colour. This single belief does not cohere into a system. Jones continued to inspect objects in his possession and attempted to determine the presence of cocaine. To this extent he is still responsive to his environment. He failed in his attempt to determine whether the powder was cocaine, but only because of a simple mistake. Moreover, Smith's recalcitrant web of belief regarding the non-existence of cocaine is inconsistent with the criminal law. The law asserts, as one of its premises, that cocaine exists. Smith's belief structure denies this assumption. In respect of cocaine, Smith's belief structure has become a law unto itself. Jones' beliefs, on the other hand, do not deny any fundamental assumptions of the criminal law. His mistake is consistent with the law, but has led him astray in his attempt to obey it.

The last salient feature of the difference between the two men is that Smith's beliefs cause him to act in a way that puts others at a risk of harm. Smith does not realize this, but it is true nonetheless. Jones' beliefs, and the actions motivated by them, do not place others at a direct risk of harm.

Smith might, therefore, be justifiably punished on the grounds that he unreasonably believed what might be called a "myth" about cocaine. He believed in this myth so strongly that it led him to reject any perceptions inconsistent with it. The myth, in a sense, distorted his perception of reality and actively suppressed the formation of true belief. While the reasonable person's beliefs reflect reality, Smith's reality became a reflection of his beliefs. What's more, the myth itself is both inconsistent with the law and likely to subject people to the type of harm contemplated by the law.

Given this, a case can be made that Smith's beliefs about cocaine come extremely close to the current legal doctrine of willful blindness. While there is no deliberate suppression of knowledge, there is an active

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[26] This is comparable to a situation where someone believes so strongly that a computer is a MacIntosh (because of the fidelity of its Mac-loyal owner) that he begins to reject observations to the contrary (the IBM logo was painted on as a joke, the IBM warranty card attached to the back belongs to another computer, etc.).

suppression of knowledge by the workings of the mind. Furthermore, the current insistence on deliberate suppression is problematic in two ways. First, in so far as the process of suppression is supposed to be deliberate, it is indistinguishable from recklessness. One would only be motivated to act deliberately if one were aware of the potential presence of risk. Once the mind has averted to a risk, recklessness attaches to any actions until concerns about the risk have passed. This can only happen by giving the risk further consideration and not by deliberately ignoring it. Second, the process of belief formation is automatic and not subject to influences of the will. Individuals acquire beliefs regarding risks as soon as they evaluate some justification for believing risk is present. Once this happens, the belief in the risk remains until such time as it ceases to be justified. For instance, one might notice that one is showing the symptoms of a disease. As soon as this happens, one will automatically form a belief regarding the risk of actually having the disease. As long as the symptoms remain and are not explained as being caused by some other factor, belief in the risk will remain. The belief in the risk will not always be at the fore of the mind and the individual may even attempt to ignore it by thinking about other things, but the belief in the risk will continue so long as its justification continues.

Given these two considerations, it seems that a doctrine of willful blindness which focuses on an active suppression of true belief is a better epistemological model than one based on deliberate suppression of true belief. A new concept of willful blindness based on active suppression seems to capture the intent of the old doctrine while avoiding two of its problematic features. An "active suppression" model of willful blindness is distinct from recklessness and not founded on shaky epistemological grounds.

Part III

In order to examine how a new conception of willful blindness may relate to sexual assault offences, it is necessary to begin by looking at the structure of the offence and examining the elements the Crown is required to prove. Section 265 of the *Criminal Code* defines sexual assault:

> 265. (1) Assault – A person commits an "assault" when
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> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly.[27]

The recent case of *R. v. Ewanchuk*[28] provides a comprehensive judicial interpretation of sexual assault. In *Ewanchuk* the Supreme Court held that the *actus reus* of "without consent" is determined through a subjective inquiry into the attitude of the complainant. To establish the *actus reus*, the Crown must prove that the complainant did not want to engage in the sexual activity. The *mens rea* of this element is established upon proof that the accused had subjective knowledge that the complainant did not communicate consent. If the defence can raise a reasonable doubt as to either of these issues, an acquittal should follow. However, if the prosecution has a strong case with respect to these issues, a tactical shift occurs. In this event, the defence will likely want to raise a reasonable doubt as to the fact that the accused believed consent was communicated. If the trier of fact is satisfied, on the criminal standard, that consent was not communicated, then defence arguments about the accused's subjective belief that consent was communicated will amount to the defence of honest mistaken belief in consent. This "failure of proof" defence is the topic with which the rest of the paper will be concerned.

The first feature to note is the explicit holding in *Ewanchuk* that the defence of mistaken belief in consent relates only to the accused's beliefs regarding communication of consent. A mistake to the effect that the accused believed the complainant desired the sexual activity is irrelevant. The desires of the complainant are only relevant to the establishment of the *actus reus*. The defence of mistake pertains only to the *mens rea* element, and the only material issue here is the accused's beliefs regarding any communication which occurred prior to the sexual touching.

This legal distinction between *actus reus* "consent" (the subjective attitude of the complainant) and *mens rea* "consent" (the beliefs of the accused regarding communication of permission to touch) is

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[27] R.S.C. 1985, c. C-46.

[28] [1999] 1 S.C.R. 330.

problematic both conceptually and pragmatically.[29] The first problem is that the trier of fact may confuse the two types of "consent". This has been ameliorated to a large extent by the explicit instructions in *Ewanchuk*. The second problem is not quite so easily dealt with. It involves the way in which an accused's beliefs about the desires (attitude) of the complainant are likely to influence his interpretation of any communication arising between himself and the complainant.

A belief on the part of an accused that the complainant wanted to engage in sexual touching is not relevant to any formal element of the offense of sexual assault. However, this belief will likely have a great influence on the accused's interpretation of communication, which is a material element. If an accused's belief that the complainant desired the sexual touching causes him to interpret communication in such a way that he believed consent was granted, then an irrelevant belief forms the basis for his holding a relevant belief (i.e. a belief which establishes the defence of mistake of fact). This, in effect, would allow an accused to take indirect advantage of a belief which is not directly relevant.

For this reason, it is submitted that a novel doctrine of willful blindness is necessary in order to determine guilt in sexual assault cases where mistaken belief in consent is raised. The doctrine will closely resemble that described in Part II of this paper. If the accused's beliefs about the attitude of the complainant actively suppressed a correct interpretation of her communications, then the accused should be barred from asserting his mistaken belief that consent was communicated. The justification for this is supplied by the same intuitions that justified finding Prof. Smith guilty. First, a mistaken belief that a complainant wanted to engage in sexual activity is likely to be recalcitrant to the extent that it will colour the accused's interpretation of communication. If an accused honestly believed that a complainant wanted to engage in sexual activity, then he is likely to have interpreted indications of "no" as indications of "yes". His beliefs are likely to cohere into a myth about the meaning of the particular communication that took place. A belief in a myth that actively suppresses the correct interpretation of communication must not form the basis for exculpating an accused. To

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[29] An excellent discussion of the problems here is found in N. Brett, "Sexual Offenses and Consent" (1998), 11 Can. J.L. & Juris. 69. I would also like to thank Prof. Brett for his commentary on the ideas in this paper.

do so would simply foster the holding of myths about women and when they consent to sex. Second, a mistaken belief that a complainant wanted to engage in sexual activity denies a premise of the criminal law: it is the complainant's attitude which is determinative of her desires, including the desire not to be interfered with. This is a basic tenet of autonomy, and autonomy must be a central concern of sexual assault law if women's interests are to be adequately protected. Allowing an accused's belief about the complainant's desires to determine (even if only indirectly) whether he has broken the law would distort the autonomy interests involved. Third, an accused's incorrect belief that a complainant desired sexual activity is likely to place women directly at risk of the very harm contemplated by sexual assault law. To allow these types of mistaken beliefs to form part of an exculpatory mechanism would significantly erode the protection the law is supposed to provide.

A new doctrine of willful blindness based on a model of active suppression would affect a true separation of the two types of consent contemplated in the *Ewanchuk* decision. Given that this separation played a significant role in the decision, adoption of the new model seems justified.

Part IV

The employment of this novel doctrine of willful blindness, based on active suppression, would result in a number of procedural changes in the way sexual assaults are tried. In order to establish this type of willful blindness, the Crown would have to prove, beyond a reasonable doubt, that the accused intentionally touched the complainant in a sexual manner, the complainant did not want the touching to occur, and the complainant did not communicate permission to be touched. Proof of these elements could result in a finding of willful blindness if the trier of fact is satisfied that the accused's mistaken belief in consent was both unreasonable and caused by an active suppression of a correct interpretation of the complainant's non-communication of consent.

An accused could defend against a finding of willful blindness by establishing evidence tending to show that his unreasonable belief in communication of consent was not due to active suppression of the

correct interpretation. He could do this by showing that his mistaken belief was based on something other than his belief about the complainant's desires (or the desires of women in general). His mistaken belief would not have to be reasonable, just founded on something other than myth. Consider the following example.

Imagine that Adam and Beth are intimate sexual partners. They have been seeing each other for a while and are looking to "spice up" their sexual relationship. Each is interested in acting out a particular sexual fantasy. They agree that Adam will come to Beth's apartment on a given night at precisely 9:00 p.m. He will pretend to break into the apartment and force himself on Beth, who will pretend to resist his advances. Beth gives Adam the key to her apartment for this purpose.

Imagine that two separate incidents occur, causing these plans to go horribly awry. First, on the night in question Beth is held up by an emergency at work and is unable to return to her apartment by 9:00 p.m. or to inform Adam of this fact. Second, Beth's identical twin sister, Carla, has arrived in town for a surprise visit with Beth. Carla has let herself into Beth's apartment with a spare key. She waits there in anticipation of Beth's return from work. Adam has never met Carla and does not even know that Beth has a sister. At 9:00 p.m., Adam arrives at Beth's apartment and the inevitable ensues.

If Adam is charged with sexually assaulting Carla, the Crown will likely be able to prove that intentional sexual activity took place, that Carla did not desire the touching, and that her protests communicated her non-consent. If we assume that Adam's actions were unreasonable (a reasonable person would not have accepted the risk inherent in this sort of plan or, alternatively, would have asked for further explicit agreement just prior to the activity), then Adam's mistaken belief in communication of consent is either a result of willful blindness or exculpatory as negating *mens rea.*

In this situation, it appears that Adam's mistake was an isolated mistake about the identity of the woman in Beth's apartment. His mistaken belief was not of such a nature that it suppressed true knowledge; had Adam realized, through perception, that it was not Beth in the apartment, he would not have proceeded with his actions. Adam proceeded in ignorance of Carla's identity, but not through an active suppression of the truth.

Contrast the above hypothetical situation with the actual incident involving Sansregret described at the beginning of this paper. Sansregret intentionally caused the fear that induced his former girlfriend's pretence of consent. Therefore, he must have been aware of her fear. For Sansregret to be ignorant of this fact, he must have been relying on a belief that his ex-girlfriend actually desired the sexual interaction. When it was found, as a matter of fact, that she did not desire the activity, there was no basis for thinking that Sansregret's mistake had been based on anything except an active suppression of the truth. Having no foundation for his unreasonable belief in genuine consent, Sanregret's conviction on the basis of willful blindness seems appropriate.

Conclusion

It bears pointing out that a new conception of willful blindness based on active suppression of truth helps to rectify the standoff between feminists and liberals. A new notion of willful blindness accomplishes two objectives which correspond with feminist ideals. First, it may help to convict men who subject women to violence. Second, it takes the crime of rape out of the minds of men (subjective mistaken belief in consent) and places an appropriate focus on actual female communications and the meaning of consent. In effect, this would deny accused men the ability to rely on recalcitrant myths about women, female consent, and sexual assault. This legal denial may eventually erode such myths in society and actually make women more safe and secure in their bodies.

Furthermore, the inclusion of female interests would not come at the expense of imprisoning men solely as an implementation of public policy. Men convicted under an active suppression model of willful blindness would be the agents of their own punishment. This is due to the level of activity involved in the way they disregard communications of non-consent. A man who receives an indication that a woman does not give permission to be touched sexually, disregards the communication on the basis that it is inconsistent with his interpretation of the situation, and then proceeds with sexual activity, cannot claim innocence. He has acted, both mentally and physically, and he has acted culpably in each sense. Guilt attaches to both his act and his mind, each of which conspired to cause harm.