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## The Normal Ones Take Time': Civil Commitment and Sexual Assault in *R. v. Alsadi*

Isabel Grant

*Allard School of Law at the University of British Columbia, grant@allard.ubc.ca*

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## *Commentaries/Commentaires*

# **“The Normal Ones Take Time”: Civil Commitment and Sexual Assault in *R. v Alsadi***

Isabel Grant

“Power and its use or abuse are pivotal issues in both sexual assault and institutionalization.”<sup>1</sup>

### *Introduction*

Women with mental disabilities are subject to sexual assault at a significantly higher rate than other women.<sup>2</sup> Yet there is a surprising paucity of case law involving

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The author would like to thank Laura DeVries and Brendan Ward for their research assistance on this comment. Thanks also to Janine Benedet, Joanna Birenbaum, and Sonia Lawrence for their helpful comments. Special thanks to Laura Johnston whose research assistance and thoughtful insights about this project have enriched my understanding and improved this comment. The title’s quotation comes from the accused’s response when asked whether he often had sex with women he had known for only fifteen minutes. Cited in *R v Alsadi*, 2012 BCCA 183, [2012] BCJ No 826 at para 37 (xiv) (Factum of the Appellant).

1. Maureen Crossmaker, “Behind Locked Doors: Institutional Sexual Abuse” (1991) 9 *Sexuality and Disability* 201 at 201.
2. I use the term “mental disability” in this paper to include psychiatric, developmental, neurological, and other related disabilities that impair cognitive, emotional, or perceptual functioning. This term is used in the equality guarantees of section 15 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, and various human rights statutes. The most often cited data on the incidence of sexual assault against women with mental disabilities is primarily from the 1990s. See, for example, Roeher Institute, *No More Victims: A Manual to Guide Counselors and Social Workers in Addressing the Sexual Abuse of People with a Mental Handicap* (North York: Roeher Institute, 1992) at 25; Roeher Institute, *Harm’s Way: The Many Faces of Violence and Abuse against Persons with Disabilities* (North York: Roeher Institute, 1995) at 9; Dick Sobsey, *Violence and Abuse in the Lives of People with Disabilities: The End of Silent Acceptance?* (Baltimore, MD: Paul H Brookes, 1994) at 69; Michelle McCarthy, *Sexuality and Women with Learning Disabilities* (London: Jessica Kingsley, 1999) at 29-30. More recent data often fails to distinguish between mental and physical disability. See, for example, Douglas A Brownridge, “Partner Violence against Women with Disabilities: Prevalence, Risk, and Explanations” (2006) 12 *Violence against Women* 805; but see Sandra L Martin et al, “Physical and Sexual Assault of Women

women with mental disabilities as complainants. One can only assume that women with mental disabilities are sexually assaulted much more often than their assailants are prosecuted.<sup>3</sup> While the subject of this comment, *R. v Alsadi*, presents an unusual fact situation, the issues that it raises go to the core of our understanding of what it means to “voluntarily agree” to engage in sexual activity with another person when there is a profound imbalance of power between the two individuals.<sup>4</sup>

The doctrine of consent has been at the centre of sexual assault law for many decades. Yet there was no statutory definition until 1992 when section 273.1(1) of the *Criminal Code* was enacted, defining consent as the “voluntary agreement to engage in the sexual activity in question.”<sup>5</sup> It was not until 1999 that a focus on the complainant’s perspective of whether she wanted the sexual activity to take place was integrated into the fabric of our law.<sup>6</sup> Janine Benedet and I have argued elsewhere that the current understanding of consent and the focus on what the complainant was thinking at the time, while positive for many women, has been problematic for some women with mental disabilities, in part because it fails to incorporate into the definition of consent the factors of sexual exploitation and coercion that are so pervasive in these women’s lives.<sup>7</sup> No case demonstrates this better than *Alsadi*.

The *Criminal Code* has at least two provisions that are particularly relevant for sexual assaults involving complainants with mental disabilities. Section 153.1 of the *Criminal Code* creates an offence of sexual exploitation of a person with a disability when the accused is in a position of trust or authority with respect to the person with a disability and he counsels or incites that person into sexual touching without consent.<sup>8</sup> Section 273.1(2)(c) provides that no consent is obtained where the complainant was induced to engage in the activity by abuse of a relationship of trust, power, or authority.<sup>9</sup> This provision is general and not limited to persons

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with Disabilities” (2006) 12 Violence against Women 823, which does address the increased incidence of sexual assault against women with cognitive disabilities in North Carolina.

3. One study showed that only half of women who experienced sexual assault in a psychiatric facility reported that assault. D Hawthorne, A McKenzie and J Dawson, *Critical Admissions: A Study of Family Violence, Physical and Sexual Abuse in a Psychiatric Inpatient Population* (Melbourne, Australia: Institute of Psychiatric Nursing Research, Royal Park Hospital, 1996), as cited in Haley Clark and Bianca Fileborn, “Responding to Women’s Experiences of Sexual Assault in Institutional and Care Settings” (2011) 10 Australian Centre for the Study of Sexual Assault Wrap, online: Australian Institute of Family Studies <<http://www.aifs.gov.au/acssa/pubs/wrap/wrap10/w10.pdf>> at 6 .
4. *R v Alsadi* (27 July 2011), Case no 213734-2-C, Vancouver (BC Prov Ct) [*Alsadi* trial judgment]. *R v Alsadi*, 2012 BCCA 183, [2012] BCJ no 826 at para 2 [*Alsadi* Court of Appeal].
5. *Criminal Code*, RSC 1985, c C-46, s 273.1(2)(b), as amended by *An Act to Amend the Criminal Code (Sexual Assault)*, SC 1992, c 38, s 1 [*Criminal Code*].
6. *R v Ewanchuk*, [1999] 1 SCR 330 [*Ewanchuk*].
7. See Janine Benedet and Isabel Grant, “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief” (2007) 52 McGill Law Journal 243; and Janine Benedet and Isabel Grant, “A Situational Approach to Incapacity and Mental Disability in Sexual Assault Law” (2012) 43(1) Ottawa Law Review [forthcoming].
8. *Criminal Code*, *supra* note 5 at s 153.1.
9. *Ibid* at s 271(1).

with disabilities. Both of these sections were at issue in *Alsadi*. The accused was charged under section 153.1, but this charge was virtually subsumed by the sexual assault charge and will not be the subject of this comment.<sup>10</sup> The focus in this comment will be on the approach taken to section 273.1(2)(c) and its relationship to the doctrine of voluntariness. This comment will demonstrate that, in *Alsadi*, section 273.1(2)(c) was applied in a manner that has the potential to exclude many women with mental disabilities from its protection.

The comment argues that, in general, many courts are not taking the correct approach to the relationship between consent and section 273.1(2)(c) and, more specifically, that even if the accused's evidence was accepted in its entirety in *Alsadi*, there were no factual findings that could have led to a finding of voluntary consent and thus an acquittal. While the easiest way to reach this result would have been through the proper application of section 273.1(2)(c), the same result could have been reached through an analysis of voluntariness. The abuse of "trust, power or authority" is one specific way in which an agreement to engage in sexual activity is not voluntary. Where there is a significant power imbalance, it is essential that courts go beyond whether there was a simple "yes" to sexual activity and consider whether that yes was free from coercion.

In *Alsadi*, the accused was charged with sexual assault and sexual exploitation of a person with a disability.<sup>11</sup> The complainant was a forty-nine-year-old woman who was hospitalized in the psychiatric ward at Vancouver General Hospital. The British Columbia Court of Appeal described her as having had schizophrenia for almost thirty years, although the evidence at trial was that she had schizoaffective disorder and bipolar disorder.<sup>12</sup> She had been hospitalized over twenty times throughout her adult life<sup>13</sup> and had been labelled as one of the "highest needs individuals" within the health region.<sup>14</sup> On this admission to hospital, she had been involuntarily committed under the British Columbia *Mental Health Act*.<sup>15</sup> Mr. Alsadi was a uniformed security guard on duty in the hospital. The complainant met the accused

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10. *Alsadi* trial judgment, *supra* note 4, is a reminder that section 153.1 of the *Criminal Code*, which was enacted to provide additional protection from sexual abuse for persons with disabilities by persons in positions of trust or authority, is essentially worthless. Since the section has a non-consent requirement, in order to prosecute successfully the Crown must prove the crime of sexual assault plus the additional elements that the complainant had a disability and that the accused was in a position of trust or authority. In other words, the section provides no additional protection over the broader crime of sexual assault and, given that section 153.1 has a lower penalty, its usefulness is doubtful. It could be argued, in fact, that this section portrays persons with disabilities as "others" rather than as very frequent victims of sexual assault. See Benedet and Grant, "Consent, Capacity, and Mistaken Belief," *supra* note 7, where the authors demonstrate that there have been very few successful prosecutions under this section.

11. *Alsadi* trial judgment, *supra* note 4. *Criminal Code*, *supra* note 5, ss 153.1, 271(1).

12. *Alsadi* Court of Appeal, *supra* note 4 at para 2. For the evidence at trial, see *R v Alsadi*, 2012 BCCA 183, [2012] BCJ No 826 (Factum of the Appellant) at para 14 [*Alsadi* Crown appellant factum].

13. *Alsadi* Crown appellant factum, *supra* note 12 at para 2.

14. *Ibid* at para 4.

15. *Mental Health Act*, RSBC 1996, c 288.

when she was off the ward having a cigarette. He approached her, they talked, and then they kissed. He persuaded her to go into a day room, which he accessed using his keys and/or knowledge of the alarm system. Over the next ten to twelve minutes, sexual activity, including oral sex, took place.

The complainant testified in detail how the accused forced her to engage in oral sex with him. She made it clear that she had not wanted the sexual activity to take place and that she wanted to return to the ward.<sup>16</sup> The accused, by contrast, painted her as the sexual aggressor. He admitted that he was aware at the time that she was a psychiatric patient, but he claimed that she was not “jumping around and acting crazy.”<sup>17</sup> He did not think he needed to make any inquiries about why she was hospitalized or whether she was on medication because she looked normal. However, he conceded that he had been trained that psychiatric patients were likely to be on medication and may well appear “normal.”<sup>18</sup> He was also a former nurse and thus would have known that anti-psychotic medication is more likely to induce sedation than to make someone “jump around.” He admitted that the complainant did not want to go into the day room with him but that he persuaded her to do so because he was concerned about being seen. He also admitted knowing that he was risking his job by engaging in sexual activity with the complainant.<sup>19</sup>

### *The Trial Judgment: Reinvigorating Stereotypes*

The trial judge found that the complainant was the sexual aggressor and, therefore, that the Crown had failed to prove non-consent. He then went on to conclude that the accused was not in a position of trust, power, or authority with respect to the complainant. The trial judge relied on numerous myths and stereotypes about women with mental disabilities and sexual assault generally in arriving at his findings of fact.<sup>20</sup> We are told in the second paragraph of the judgment that the complainant had “impulsive sexual encounters,”<sup>21</sup> a characterization that is commonly made about women with mental disabilities, impermissibly bringing in sexual history evidence contrary to section 276 of the *Criminal Code*.<sup>22</sup> The trial judge

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16. Whether the complainant wanted the sexual activity to take place is the test for the *actus reus* of non-consent set out in *Ewanchuk*, *supra* note 6 at paras 24-7.

17. *Alsadi* trial judgment, *supra* note 4 at para 28.

18. *Ibid* at para 29.

19. *Ibid* at para 30.

20. For a discussion of the history of stereotyping in sexual assault prosecutions, see Emma Cunliffe, “Sexual Assault Cases in the SCC: Losing Sight of Substantive Equality?” (2012) *Supreme Court Law Review* [forthcoming]. Cunliffe persuasively argues that “substantive equality reasoning has not yet infused judicial approaches to fact determination in sexual assault cases, and that individual complainants are not yet fully protected against the operation of myths and stereotypes when consent or credibility are at stake.”

21. *Alsadi* trial judgment, *supra* note 4 at para 2.

22. See, for example, *R v Harper*, 2002 YKSC 18, [2002] YJ No 38 [*Harper*]; and *R v BM*, [1994] OJ No 2242 (Ct J (Prov Div)). For a discussion of the misuse of sexual history evidence, see Janine

expressed concern that there was no evidence to corroborate her claim that she was forced to go into the day room and made note of the fact that the nurse who examined her found no physical evidence of injuries to her breasts.<sup>23</sup> This reasoning seems to reinvent a corroboration requirement to sexual assault that has been statutorily abandoned.<sup>24</sup>

Similarly, the judge expressed concern that she did not report the assault to a group of security guards she met shortly after the sexual activity, and, in fact, those guards indicated that she seemed to be calm. This comment relies on the discarded notion that women who are sexually assaulted must immediately raise a hue and cry to the first people they encounter.<sup>25</sup> There was no discussion of the impact of anti-psychotic medication on the complainant's mood or appearance nor of whether a woman would feel safe reporting an assault to the colleagues of her alleged assailant. The trial judge ultimately accepted the accused's evidence in full, concluding that the complainant was a willing participant and, in fact, the aggressor throughout all of the sexual activity.

While the complainant's sexual history was open for consideration, the trial judge gave little weight to the fact that the accused had been warned about "inappropriate conduct" with patients in the past while on duty and that he had been fired from his position as a nurse for having a sexual relationship with a visitor to the hospital.<sup>26</sup> In fact, the trial judge's reasons give the impression that the accused was the victim of a sexually aggressive woman and that the allegations devastated the life of a young security guard, husband, and father.<sup>27</sup>

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Benedet and Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues" (2007) 52 McGill Law Journal 515 at 532-7.

23. *Alsadi* trial judgment, *supra* note 4 at para 38.
24. Historically, the testimony of victims of sexual assault (especially women with mental disabilities) was considered untrustworthy and required corroboration. The mandatory corroboration rule required a jury to disregard the evidence of certain witnesses (for example, "children of tender years" and "female idiots") in sexual assault cases without further corroborating evidence. See Jeffrey G Hoskins, "The Rise and Fall of the Corroboration Rule in Sexual Offence Cases" (1983-5) 4 Canadian Journal of Family Law 173. Mandatory corroboration for incest, gross indecency, sexual assault, sexual assault with a weapon, and aggravated sexual assault was repealed by *An Act to Amend the Criminal Code in Relation to Sexual Offences and Other Offences against the Person and to Amend Certain Other Acts in Relation thereto or in Consequence thereof*, SC 1980-81-82-83, c 125 [*Sexual Offences Act*]. See *Criminal Code*, *supra* note 5 at s 274.
25. It was a well-established common law notion that a woman was expected to complain about sexual assault at the earliest possible opportunity and a lack of such complaint was taken as a self-contradiction of her story. See, for instance, *R v Kribs*, [1960] SCR 400; *R v Timms*, [1981] 2 SCR 315. This rule was abrogated by *Sexual Offences Act*, *supra* note 24. See *Criminal Code*, *supra* note 5 at s 275.
26. *Alsadi* trial judgment, *supra* note 4 at para 65. *Alsadi* Crown appellant factum, *supra* note 12 at para 37 (xiii) (involving evidence and cross-examination of the respondent).
27. For example, the trial judge stated, in the *Alsadi* trial judgment, *supra* note 4 at para 67: "There is no question in my mind he had [sic] paid dearly already, not just financially, psychologically, emotionally, but socially as well, as a result of his extremely foolish actions on the day in question."

After finding consent, the trial judge went on to consider whether her consent was induced by the accused “abusing a position of trust, power or authority.”<sup>28</sup> Here, the trial judgment becomes unclear. The judge focused almost entirely on the scope of the accused’s legal authority as a security guard. He acknowledged that the accused was in a position of authority in that he had the power to “enforce obedience” or “influence the conduct and actions” of those using the hospital.<sup>29</sup> However, he found that when he met the complainant, the accused was conducting a routine patrol of the hospital and, at that particular time, he would not have had the authority to restrain the activities of the complainant.<sup>30</sup> This finding seems to contradict his earlier acknowledgement that, at the request of nursing staff, security guards do get involved in restraining patients and in taking action if a patient leaves the hospital.<sup>31</sup>

The trial judge’s analysis of whether Alsadi was in a position of trust, power, or authority was also marred by consideration of factors not relevant to the case. For example, he noted that the complainant was older than the accused, as if this fact reduced his power over her.<sup>32</sup> More problematically, the trial judge noted that the relationship between the complainant and the accused only lasted fifteen minutes and that “[g]iven that short period of time, it appears improbable that any sort of trust, authority or relationship dependency to be developed [sic] between the parties.”<sup>33</sup> One can infer from this statement that the more quickly Alsadi acted, and the less time he took to get to know the complainant before having sex with her, the more likely her apparent agreement would be upheld as consent.

The trial judge went on to conclude that the purpose of section 273.1(2)(c) is to deal with situations where the complainant does not know she has a right to refuse or fears reprisal if she does. In this case, he found that the evidence was that the complainant knew she had a right to refuse. His finding that she was the sexual aggressor permeated the entire judgment. He concluded that her participation had nothing to do with the security guard/patient relationship, and, therefore, there was no evidence that an abuse of trust, power, or authority had induced consent. The clear implication was that the complainant would have been willing to have sex with anyone she met on the grounds.

The relationship of trust, power, or authority in this case comes from the imbalance of power that existed between the accused and the complainant because of her vulnerable position as a woman who was civilly committed in a psychiatric facility

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28. *Criminal Code*, *supra* note 5 at s 273.1(2)(c).

29. *Alsadi* trial judgment, *supra* note 4 at para 50.

30. This is a puzzling finding of fact. If Alsadi had been asked for help restraining the patient at that time, or asked to call police if a civilly committed patient left the hospital, it is unlikely that he would have said: “I can’t do that, I am on a routine patrol.”

31. Whether the complainant was aware of these distinctions in a security guard’s power based on the particular activity in which he is engaged was not addressed by the trial judge.

32. The trial judge was led to this conclusion based on cases dealing with the abuse of power between the teacher and a student where the age differential is part of the imbalance of power. See *R v Audet*, [1996] 2 SCR 171.

33. *Alsadi* trial judgment, *supra* note 4 at para 54.

and his powerful position as a uniformed security guard on duty in that hospital. The fact that he abused her quickly does not negate this power but, rather, only highlights its force. When asked in cross-examination whether he often had oral sex with women whom he had known for fifteen minutes, the accused responded, “[t]he normal ones take time,” revealing the extent to which he sought out a vulnerable victim for quick, easy sexual activity for which he would not be held accountable.<sup>34</sup>

### ***The British Columbia Court of Appeal: A Step Forward but a Step Short***

The Crown appealed this decision to the British Columbia Court of Appeal, which quashed the acquittal and ordered a new trial.<sup>35</sup> The court held that the trial judge had misdirected himself in assessing whether the accused was in a position of trust, power, or authority. The court found that the trial judge erred in focusing on the scope of the accused’s authority and the fact that the complainant was a willing participant, rather than examining whether he induced consent through an abuse of a position of trust, power, or authority over the complainant.

There is much to praise in the Court of Appeal’s judgment. It held that no coercion is necessary under this section and that “the use of the word ‘induces’ introduces a more subtle form of pressure that can be inferred from the circumstances of the exercise of the power or authority.”<sup>36</sup> The court explicitly disagreed with the trial judge that the fact that the accused could not have restrained the activities of the complainant at that particular time was relevant. It also rejected the suggestion that the fact the complainant was older than the accused was relevant. Its response to this assertion was simply put: “The complainant was a psychiatric patient.”<sup>37</sup>

Finally, the court rejected the idea that the short nature of their relationship was relevant to whether he was in a position of trust, power, or authority over the complainant, instead concluding that “such a relationship would be inherent and not dependent on the length of contact between the parties.”<sup>38</sup> The court further clarified that the issue was not whether the complainant misapprehended her right to refuse the sexual advances or did not understand that she could say no but, rather, whether the accused induced the complainant to participate by abusing a position of trust, power, or authority.

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34. *Alsadi* Crown appellant factum, *supra* note 12 at para 37 (xiv) (involving evidence and cross-examination of the respondent). Even acknowledging that English was a second language for the accused, this response in cross-examination still reveals a disturbing attitude towards women. All women are reduced to how much effort it takes to persuade them to engage in sexual activity. One can speculate that the accused targeted the complainant as a woman with an easily exploitable disability.

35. *Alsadi* Court of Appeal, *supra* note 4 at para 36.

36. *Ibid* at para 19, citing *R v Makayak*, 2004 NUCJ 5 (available on CanLII) at para 70 [*Makayak*].

37. *Ibid* at para 22.

38. *Ibid*.

The court also noted that the trial judge should have made a finding on the position of trust and on the position of power, which are each distinct from the inquiry into authority.<sup>39</sup> However, the court refused the Crown's request to enter a conviction and chose to send the case back for a new trial to determine whether the accused induced consent by abusing his position of trust, power, or authority. This decision means that the Crown must prove that the complainant only agreed to sex because of the abuse of trust, power, or authority. In other words, the court held that a finding of consent was open to the trial judge, separate and apart from the accused's position of trust, power, or authority over the complainant. In my view, this was the critical error in the case. Even on the facts most favourable to the accused, conviction was the only appropriate outcome.

## *Analysis*

### *The Context of Civil Commitment*

In *Alsadi*, the trial judge did not mention that the complainant was civilly committed and the Court of Appeal mentioned it only once in passing. While the record was unclear as to whether the accused knew the complainant's status, as a security guard he would have known that some psychiatric patients are involuntarily detained, as one of his duties was to contact police if a patient left the hospital without permission. There was no suggestion that he made any inquiries in this regard. The legal issues in this case should not have been addressed in the absence of a consideration of this context.

One of the tragedies of mental illness is that sexual abuse is both a contributing cause and a result of being labelled mentally ill.<sup>40</sup> Maureen Crossmaker explains the powerlessness that contributes to both mental illness and sexual assault:

For many people, living with the label of . . . [mental illness] means economic deprivation; little credibility, powerlessness, and being reinforced for compliant behavior; dependence on others for the meeting of basic needs, others making decisions in their "best interests"; lack of access to resources and information more readily available to the general public; all are factors with the potential to increase the risk of sexual victimization.<sup>41</sup>

These issues are particularly problematic for women in an institutional setting.<sup>42</sup> A strange paradox is presented. On the one hand, women in institutions are

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39. *Ibid* at paras 29-34.

40. "Not only have women with prior sexual abuse histories tended to find themselves in institutions, they have also frequently been sexually abused while housed within institutions." Clark and Fileborn, *supra* note 3 at 4.

41. Crossmaker, *supra* note 1 at 204 [citations omitted].

42. It is very difficult to get clear evidence on the incidence of sexual assault in institutions. The General Social Survey on Victimization conducted by Statistics Canada, for example, excludes

expected to be asexual, and, thus, any expression of sexuality is often labelled as inappropriate.<sup>43</sup> At the same time, women in institutions are in danger of sexual assault from other residents,<sup>44</sup> staff members,<sup>45</sup> and visitors.<sup>46</sup> They are sexually assaulted in part because they have been labelled mentally ill, and their allegations of assault are not believed for the same reason:

The legacy of women's historical relationship with institutions, deviance and madness—and the power of institutional discourse to construct understandings of both deviance and madness—has been particularly problematic in relation to women's experiences of sexual abuse. Being constructed as prone to mental disorder has played a significant role in allowing women's disclosures of sexual assault to be dismissed or disbelieved, or viewed as a symptom of one's "disorder" to be responded to with medical intervention. Psychiatric discourses have at times explicitly labelled women's disclosures of sexual abuse to be the product of their disordered mind, most infamously promoted through the work of Freud.<sup>47</sup>

It takes enormous courage for a woman in a psychiatric ward to complain of sexual assault, particularly when the alleged assailant is a hospital employee. A culture of silence, power, and fear make it particularly difficult to report.<sup>48</sup> Compliance, rather than resistance, is rewarded in this institutional context. As Crossmaker notes,

the people on the lowest rung of the institutional ladder—the residents—are reinforced for compliant behavior, economically, physically and psychologically dependent, isolated and lacking in credibility; all factors increasing vulnerability to sexual assault.<sup>49</sup>

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respondents living in institutions. See Samuel Perreault and Shannon Brennan, "Criminal Victimization in Canada, 2009" (2010) 30:2 *Juristat*, online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-002-x/2010002/article/11340-eng.pdf>>. As Clark and Fileborn explain, *supra* note 3 at 5, in the Australian context, "[t]here are significant barriers to measuring the extent of sexual assault histories within institutions ... [W]omen face myriad obstacles to recognising and disclosing sexual assault, and sexual offences are not always systematically recorded. Institutional populations are generally excluded from major data collections, such as ABS household surveys, while the International Violence Against Women Survey (IVAWS) specifically excluded women with an illness or disability from the survey sample. Surveys often do not include questions that systematically address sexual assault that occurs in institutions. Despite constraints on identifying and measuring the full extent of sexual assault among institutional populations, research from a number of sources indicates that victimisation is widespread" [citations omitted].

43. See, for example, *Harper*, *supra* note 22; and Clark and Fileborn, *supra* note 3.

44. Clark and Fileborn, *supra* note 3.

45. *People v Thompson*, 142 Cal App (4th) 1426, 48 Cal Rptr 3d 803 (Cal App 2006).

46. *Harper*, *supra* note 22.

47. Clark and Fileborn, *supra* note 3 at 4 [citations omitted].

48. Crossmaker, *supra* note 1.

49. *Ibid* at 205.

In fact, it is likely that after the complainant in *Alsadi* reported the alleged assault, she was confined to the ward and her privileges reduced, albeit under the guise of her own protection.

There is no exercise of state authority more extraordinary and complete than that of civil commitment. This is particularly true in a province such as British Columbia, where civil commitment carries with it a near certainty of forced psychiatric treatment with powerful medications that can profoundly alter one's experience of the world.<sup>50</sup> A civilly committed woman's relationship to her caregivers and those responsible for her custody is characterized by a profound imbalance of power. She has lost all control over her liberty and over the security of her person. She is not free to leave the hospital and could be apprehended by police if she tried to leave.<sup>51</sup> She cannot leave the ward, use the telephone, wear her own clothes, or go for a cigarette without the permission of her medical team. Security guards play a role in enforcing these rules. After twenty hospitalizations, the complainant in *Alsadi* would have been well aware of this fact.

The most immediate analogy that comes to mind is that of a prisoner and her jailer.<sup>52</sup> However, even the prisoner has significantly more rights than the individual who has been civilly committed. The prisoner has a right to be brought before a judge within twenty-four hours and the right to be released on bail in most circumstances.<sup>53</sup> The prisoner has the right to legal representation and access to legal aid if she cannot afford it. If convicted, the prisoner will almost certainly face a determinant sentence that will have a clear end based on the nature of the crime she has committed.

In contrast, the civilly committed psychiatric patient in British Columbia can be detained for up to a month on the word of two doctors, neither of whom must be a psychiatrist and only one of whom must have examined her.<sup>54</sup> She will have a right to have her detention reviewed by an administrative tribunal at some point within the first thirty days, although legal aid will not cover the cost of a lawyer. If she is fortunate, she will have a paralegal providing assistance, although she may

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50. *Mental Health Act*, *supra* note 15 at s 31.

51. *Ibid* at s 41.

52. Canadian courts have had no difficulty finding an abuse of power or authority in the prison context. See *R v Greenhalgh*, 2011 BCSC 511, [2011] BCJ No 745, where the accused was a border services officer who strip-searched several women (with their apparent permission) but was found guilty of sexual assault on the basis that the consent was invalid because the accused abused a position of trust. See also *Makayak*, *supra* note 36, where the complainant was detained in a jail cell being guarded by the accused. The court held that even if consent to sexual activity were established, it would have been negated by his abuse of power and authority. See also Katherine C Parker, "Female Inmates Living in Fear: Sexual Abuse by Correctional Officers in the District Of Columbia" (2002) 10 *American University Journal of Gender, Social Policy and the Law* 443.

53. *Criminal Code*, *supra* note 5 at s 503(1) and s 515(1)(a). Where a justice is not available within twenty-four hours, the individual must be taken before a justice as soon as possible.

54. See *Mental Health Act*, *supra* note 15 at ss 22, 23. See *Mullins v Levy*, 2009 BCCA 6.

have to delay her hearing to get that help.<sup>55</sup> Subject to her right to an administrative hearing, a person who is civilly committed can be held indefinitely if her detention is renewed periodically by her physician.<sup>56</sup> The civilly committed individual will almost certainly be medicated, regardless of her wishes, which leaves her particularly vulnerable to sexual assault. My point is not to contrast the powerlessness of prisoners and civilly committed individuals but, rather, to suggest that the coercion in the prison context is more explicit and, thus, more easily recognizable than in the civil commitment context where the state coercion is masked by concerns about the “best interests” of the patient. The relative absence of legal rights in the civil commitment context highlights this obfuscation of the exercise of state coercion.

It is within this context that the following legal analysis of voluntariness and abuse of “trust, power, and authority” must be considered. This comment does not purport to present a comprehensive analysis of these issues for sexual assault law generally but, rather, argues that their interpretation must be assessed in the context of a woman with a significant psychiatric disability who is detained and medicated without her consent.

### ***Section 273.1(1): The Meaning of Voluntary Agreement***

Section 273.1(1) of the *Criminal Code* defines consent for the purposes of sexual assault as the “voluntary agreement” of the complainant to engage in the sexual activity in question. There are remarkably few cases on the meaning of voluntariness, perhaps because many of them get subsumed by the more specific provisions in section 273.1(2). The leading voluntariness case is *R. v Stender*, where the accused threatened that he would circulate nude photographs of the complainant (his former girlfriend) engaged in sex acts if she did not have sex with him.<sup>57</sup> She submitted to his threats, and he was charged with sexual assault. The Crown argued that the accused abused a position of power and, therefore, that consent was vitiated. The trial judge found that, while the accused abused his power, it was not the kind of relationship Parliament intended to criminalize, and thus the accused was acquitted. The Ontario Court of Appeal, in quashing the acquittal, held that it was not necessary to get to the abuse of power issue

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55. *Ibid* ss 24, 25.

56. *Ibid* s 24. Section 33 of the *Mental Health Act* provides for a rarely used and even more rarely successful avenue of judicial review of detention. See section 33(5)(b), which provides that evidence that the patient may fail to follow the treatment plan of her physicians may in itself be sufficient to deny a remedy even where the statutory criteria for commitment cannot be established.

57. *R v Stender*, [2005] 1 SCR 914, 2005 SCC 36; *R v DS*, [2004] OJ No 3440 (*sub nom R v S(DG)*), 72 OR (3d) 223 (CA) [*Stender CA*]. Voluntariness is also discussed in *R v Matheson*, [1999] OJ No 1320, 44 OR (3d)557 (CA), in the context of a psychologist who had sex with two of his patients.

because the trial judge did not make a finding that the complainant's agreement to participate in sex was voluntary. In going straight to the issue of power and authority, the trial judge "misconceived the threshold question for determination, namely, whether [the complainant] consented to sexual intercourse with the respondent at all."<sup>58</sup> *Stender* demonstrates that mere agreement is not enough and that the agreement has to be the result of a free choice. It also extends the potential for involuntariness beyond situations involving a threat of physical force.

Phyllis Coleman suggests a power imbalance in a relationship has the potential to negate voluntariness:

The . . . reason that consent is suspect is that it may be the result of an implicit or explicit threat creating an apparent inability to reject the sexual advances of the powerful person. In these situations, the ostensible consent is involuntary and should be legally ineffective.<sup>59</sup>

Voluntariness was not addressed by either the trial judge or the Court of Appeal in *Alsadi*. The trial judge's finding that the complainant was the sexual aggressor and an active participant throughout all stages of the sexual activity involved a virtual presumption of voluntariness. The findings of fact in *Stender* were more conducive to a conclusion that the agreement to have sex was involuntary. There was no doubt that the complainant did not want to have sex with the accused, and the accused's threats in *Stender* were explicit. In *Alsadi*, the complainant's claim that she did not want sex to take place was disbelieved and any threat unspoken. Nonetheless, the trial judge should have addressed whether her apparent agreement (which she denied) was free from coercion.

*Stender* demonstrates how the relationship between the parties and the power the accused has over the complainant is central to the voluntariness analysis and that a finding of involuntariness can still be made if the relationship in question does not fall within section 273.1(2)(c).<sup>60</sup> In explaining a lack of voluntariness, the Ontario Court of Appeal in *Stender* cites from cases dealing specifically with an abuse of power, trust, or authority. There is thus a clear connection between the doctrine of voluntariness and the *Criminal Code* provision negating consent where there has been an abuse of trust, power, or authority, to which I now turn.

### ***Section 273.1(2): Trust, Power, and Authority***

While section 273.1(1) defines consent as voluntary agreement, section 273.1(2) sets out a number of specific ways in which the requirement of voluntary

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58. *Stender* CA, *supra* note 57 at para 47.

59. Phyllis Coleman, "Sex in Power Dependency Relationships: Taking Unfair Advantage of the 'Fair' Sex" (1988-9) 53 *Albany Law Review* 95 at 97.

60. *Stender* CA, *supra* note 57 at para 58.

agreement is not met. There are different kinds of factors listed in subsections (a)-(e) such as incapacity to consent (subsection (b)) and where the complainant expresses non-consent (subsection (d)). According to section 273.1(2)(c) of the *Criminal Code*, no consent is obtained if the accused induced the complainant to engage in the sexual activity through the abuse of a relationship of trust, power, or authority. The Québec Court of Appeal has provided one of the leading statements of the impact of authority on consent in a case involving a psychiatrist charged with sexual assault after having sex with two of his patients:

[C]onsent implies a reasonably informed choice, freely exercised. No such choice has been exercised where a person engages in sexual activity as a result of fraud, force, fear, or violence. Nor is the consent requirement satisfied if, because of his or her mental state, one of the parties is incapable of understanding the sexual nature of the act, or of realizing that he or she may choose to decline participation. “Consent” is thus stripped of its defining characteristics when it is applied to the submission, non-resistance, non-objection, or even the apparent agreement, of a deceived, unconscious or compelled will.<sup>61</sup>

This passage demonstrates the close relationship between voluntariness and a violation of a position of trust or authority. Section 273.1(2)(c) can be seen as one specific example of circumstances in which an agreement is not voluntary.

The case law on this section is not entirely clear on its requirements. Some courts have held that the mere fact of the relationship itself is not sufficient to trigger the section and that there must be an abuse<sup>62</sup> or misuse<sup>63</sup> of that relationship. Yet other cases imply that the abuse may be inherent in some relationships and, thus, that sexual activity may be in itself abusive. In *R. v Hogg*, the accused was a drug dealer who allegedly gave a drug-addicted woman drugs in exchange for sex. The Ontario Court of Appeal stated:

I have no doubt that . . . [section 273.1(c)] could have application to the relationship between a drug dealer and an addicted client. However, the relationship is not one of an imbalance of power *per se*. This is not a case of a position of authority or trust, such as in the prototypic doctor/patient, teacher/student relationship, where vulnerability is inherent to the relationship itself.<sup>64</sup>

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61. *R v St-Laurent*, [1994] RJQ 69, 90 CCC (3d) 291 at 311, leave to appeal to SCC refused, 23982 (4 February 1994).

62. *R v FL*, 2009 ONCA 813, [2009] OJ No 4839.

63. *R v Lutoslawski*, 2010 ONCA 207, [2010] OJ No 1094, aff'd 2010 SCC 49, [2010] 3 SCR 60 [*Lutoslawski*].

64. *R v Hogg*, 148 CCC (3d) 86 (*sub nom R v AH*), [2000] OJ No 3258 (ONCA) at para 17.

The Court of Appeal in *Alsadi* hinted at this notion when it noted that the trust, power, or authority was “inherent” and did not depend on the length of the relationship. However, the Court of Appeal went on to require evidence that consent was induced through abuse of that relationship, which suggests that more was needed than mere proof of the trust/authority relationship and the use by the accused of his employment position to facilitate the sexual activity. The problem with the inducement requirement in this context is that it suggests that her consent can be abstracted from his position of power—that is, that we can separate instances where his power induced her consent from those where it did not. In the context of an institutionalized psychiatric patient and an accused who has power over her liberty, such a separation is not possible. This causal requirement is also problematic if it requires the complainant to testify explicitly that she agreed to sex only because of his position of authority. The complainant may well have thought she did not want the sexual activity to take place at all, as in *Alsadi*, or may not be able to express the precise impact of his authority on her actions, particularly in cases where she has learned that compliance with persons in positions of power or authority is expected of her.

In my view, the key doctrinal mistake in the approach taken by *Alsadi* was the two-step analysis of consent. The trial judge found that consent was present on the facts and only then went on to determine whether that consent was vitiated by an abuse of trust, power, or authority. The two-step approach has been applied in many cases without a discussion of whether it is appropriate.<sup>65</sup> This is contrary to the plain language of the *Criminal Code*, which provides that “no consent is obtained” where she was induced to engage in the activity by the abuse in question. Both courts in *Alsadi* applied the section as if it reads “once a finding of consent is made it can be vitiated where it is induced by the abuse of trust, power or authority.”

One cannot answer the question of whether the complainant consented without considering the dynamics of trust, power, and authority that bring into doubt a voluntary agreement to engage in sexual activity. Where there is apparent agreement, actual consent must be assessed in light of all of the circumstances. It is simply not possible to make an initial determination of consent without weighing the impact of the abuse of power, trust, or authority on that determination. Mere agreement by the complainant to engage in sexual activity is not legal consent.

The two-step approach to consent also puts undue focus on the complainant’s behaviour in making the initial assessment of consent without considering the exploitative behaviour of the accused. Did she resist adequately? Did she complain immediately after the assault? Was there other corroborating physical evidence? All of these inquiries used by the trial judge to make a determination about consent were based on stereotypical beliefs about how a complainant should

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65. The Court of Appeal in *Stender*, for example, explicitly recognizes that no consent is present without voluntariness but still engages in a two-step analysis in parts of the decision.

respond to sexual assault and failed to consider the accused's abuse of his position of power.<sup>66</sup>

A two-step approach to consent is not used when applying the other criteria in section 273.1(2). For example, if the issue were whether the complainant was incapable of consent under section 273.1(2)(b), we would not first inquire whether there was consent and then go on to assess capacity. Similarly, in section 273.1(2)(d), which states that no consent is present if the complainant expresses a lack of agreement to engage in the sexual activity, we do not ask first whether she consented and then go on to examine whether she expressed a lack of agreement. Section 273.1(2)(e) is a bit different because it deals with situations where there was consent to some sexual activity but that consent is revoked before the sexual activity in question. Even with this subsection, the inquiry into whether there was voluntary agreement to the sexual activity in question should not first be assessed in isolation before considering the evidence of revocation. All of the factors in section 273.1(2) reflect different ways in which no voluntary agreement is present for the sexual activity in question.

The Ontario Court of Appeal in *R. v Lutoslawski* makes clear that any apparent agreement induced by an abuse of trust, power, or authority is not consent:

Section 273.1(2)(c) speaks not only to the abuse of a position of authority but also to the misuse of a position of power or trust. The section addresses the kinds of relationships in which *an apparent consent to sexual activity is rendered illusory* by the dynamics of the relationship between the accused and the complainant, and by the misuse of the influence vested in the accused by virtue of that relationship.<sup>67</sup>

The Ontario Court of Appeal in *Lutoslawski* also noted that “an individual who is in a position of trust over another may use the personal feelings and confidence engendered by that relationship to secure an *apparent consent* to sexual activity.”<sup>68</sup>

This same two-step approach to consent used by the *Alsadi* trial judge was taken by the trial judge in a recent Ontario case, *R. v D.T.*<sup>69</sup> The complainant in *D.T.* was a thirty-three-year-old woman with cerebral palsy who had multiple physical and mental disabilities. She alleged that she was sexually assaulted over a period of time by her “favorite uncle” who would visit the complainant when her mother was out. She testified in direct examination that she said “no,” “stop it,” and

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66. The two-step approach is equally inappropriate in the context of section 265(3), which provides that no consent is obtained where the complainant submits, or does not resist, by reason of the exercise of authority. Consent cannot be assessed without considering the exercise of authority.

67. *Lutoslawski*, *supra* note 63 at para 12 [emphasis added].

68. *Ibid* [emphasis added].

69. *R v DT*, 2012 ONSC 2166, [2012] OJ No 1720 (SCJ), rev'g (*sub nom R v T(D)*) 2011 ONCJ 213 (available on CanLII) [DT ONSC].

“don’t touch” on a number of occasions and that she did not want the sexual activity to take place. She got confused in cross-examination and appeared to contradict herself about one particular incident.<sup>70</sup> As a result of this contradiction, the trial judge had a reasonable doubt about non-consent and only then moved on to assess whether the accused had abused a position of trust or authority over the complainant. He concluded that the accused had violated a position of trust and that the accused had “preyed” on the complainant and pressured her to keep all of the events secret.

The summary conviction appeal court overturned the finding that the accused had abused a position of trust, power, or authority and acquitted the accused.<sup>71</sup> The importance of the two-step approach was evident:

The analysis only needs to involve a consideration of s. 273.1(2) if the trial judge has decided there was *true consent* or has a reasonable doubt as to true consent after all considerations mentioned above.<sup>72</sup>

This statement reveals the fallacy of the two-step approach: one cannot determine “true consent” without looking at trust, power, and authority. The *D.T.* summary conviction appeal court relied on the following passage from *R. v Ewanchuk* to reach this conclusion:

Section 265(3) identifies an additional set of circumstances in which the accused’s conduct will be culpable. The trial judge only has to consult s. 265(3) in those cases where the complainant has actually chosen to participate in sexual activity, or her ambiguous conduct or submission has given rise to doubt as to the absence of consent. If, as in this case, the complainant’s testimony establishes the absence of consent beyond a reasonable doubt, the *actus reus* analysis is complete, and the trial judge should have turned his attention to the accused’s perception of the encounter and the question of whether the accused possessed the requisite *mens rea*.<sup>73</sup>

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70. Janine Benedet and I have written about the problems with cross-examination in this case and others in Janine Benedet and Isabel Grant, “Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases” (2013) *Osgoode Hall Law Journal* [forthcoming].

71. *DT* ONSC, *supra* note 69.

72. *Ibid* at para 22 [emphasis added].

73. *Ibid*, citing *Ewanchuk*, *supra* note 6 at para 40. Section 265 (3) is a narrower abuse of trust provision before section 273.1, which applies to all assault offences not just sexual assault. My argument against a two-step approach to consent applies equally to this section, which makes clear that “*no consent is obtained*” if the complainant submits or does not resist due to the exercise of authority.

In this passage from *Ewanchuk*, the Supreme Court of Canada does not say that there must be a finding of consent before assessing the power relationship. It clearly uses language other than consent and refers to the complainant choosing to participate or submit to the sexual activity. This is very different from a finding that there has been voluntary consent. The Court in *Ewanchuk* was recognizing that even where there is an abuse of trust, power, or authority, a woman may still have said no and it is then not necessary to consider section 273.1(2)(c). While the Court in *Ewanchuk* occasionally falls into the language of a two-step approach, it quickly makes clear that any “consent” is only apparent:

To be legally effective, consent must be freely given. Therefore, even if the complainant consented, or her conduct raises a reasonable doubt about her non-consent, circumstances may arise which call into question what factors prompted her *apparent consent*. The *Code* defines a series of conditions under which the law will deem an absence of consent in cases of assault, notwithstanding the complainant’s *ostensible consent or participation*.<sup>74</sup>

The summary conviction appeal judge in *D.T.* found that, objectively, there was no position of authority present in the case and that, subjectively, it was not established that any position of trust led the complainant to submit to the sexual activity: “Once a reasonable doubt on [non-consent] was created, the record did not disclose any effect of D.T.’s position upon the response of the complainant to his advances.”<sup>75</sup>

There is no question that the two-step inquiry into consent has an impact on the outcome. The finding of consent shapes how the trust, power, and authority relationship is construed. In *D.T.*, for example, the appeal judge specifically stated that it was necessary to explore how the trust relationship impacted the complainant especially because of the reasonable doubt about non-consent.<sup>76</sup> The finding that the woman consented is used as evidence to prove that she was not responding to an abuse of trust, power, or authority. The correct inquiry uses trust, power, and authority to inform an assessment of whether or not there was consent, not vice versa.

Neither the complainant in *Alsadi* nor in *D.T.* was questioned on whether they felt compelled to submit because of the power the accused had over them, because they both testified emphatically that they had said no to the sexual activity and that they did not want it to take place. Yet where do these two cases leave a complainant who denies consent? Must a woman testify that, yes, she agreed to sex but only because of the power and authority? A woman who claims she did not want to have sex at all will have a much harder time establishing an abuse of

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74. *Ewanchuk*, *supra* note 6 at para 36 [emphasis added].

75. *DT* ONSC, *supra* note 69 at para 35.

76. *Ibid* at para 33.

trust, power, or authority. It is difficult for a complainant to testify: “I didn’t want the sexual activity to take place at all but if I did agree I only did so because of the abuse of trust, power or authority.” It is therefore essential to answer the consent question only once and to answer it fully informed about the trust, power, or authority relationship that exists. Of course, if there is adequate other evidence of non-consent, that evidence should be determinative. However, where there is an apparent agreement to engage in sexual activity, no finding of consent should be made without considering trust, power, and authority.<sup>77</sup>

### *Conclusion*

It is time for the law to recognize that some relationships are so inherently coercive that a voluntary consent to sexual activity cannot be obtained. I am not suggesting that women who are civilly committed lose all autonomy over their sexuality. Rather, I am suggesting that true sexual autonomy cannot exist in the legal environment of coercion and powerlessness created by civil commitment and forced treatment. Prohibiting such activity could be done legislatively, but it also could be developed by the courts. Just because Parliament has not legislated that civilly committed patients cannot have sex with their caregivers and those guarding them, it does not mean that there is a parliamentary intention that these sexual relationships are acceptable. In fact, Parliament has given the courts the tools they need, through voluntariness and trust, power, and authority to accomplish this objective.

The obvious criticism of the position taken in this article is that it limits the sexual autonomy of women who are civilly committed. Why would one want to further limit the sexual choices of a group of women who have already lost decision-making autonomy over many aspects of their lives? My response to this criticism is that real sexual autonomy is promoted by preventing exploitation. Women cannot make autonomous sexual decisions in an environment where they are constantly at risk of sexual assault and exploitation. As Janine Benedet and I have argued elsewhere, protecting women from abuse and exploitation is essential to, rather than in tension with, promoting women’s sexual autonomy.<sup>78</sup> This is not to suggest that women who are civilly committed cannot consent to sexual activity

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77. There is a third way this case could have been argued to reach the same result. Section 273.1(2)(b) provides that no consent is obtained where the complainant is “incapable of consenting to the activity.” Janine Benedet and I have argued elsewhere that capacity to consent should be assessed contextually and should focus not only on the limitations of the complainant but also on any power imbalance between the complainant and the accused in the particular context of the case. Benedet and Grant, “A Situational Approach to Incapacity,” *supra* note 7. The Crown in *Alsadi* conceded that the complainant had the capacity to consent to sexual activity because she had a boyfriend. Such a concession assumes that being capable of consenting to one person means one is capable of consenting to everyone. In fact, capacity to consent is person, time, and relationship specific. See, for example, *R v C*, [2009] UKHL 42, [2009] 1 WLR 1786.

78. Benedet and Grant, “Consent, Capacity, and Mistaken Belief,” *supra* note 7.

with anyone. My argument is simply that people who control the liberty and security of others through the coercive power of the state should not be able to use that advantage to seek out powerless women for sex. When they do so, it is impossible to separate such coercive power from any agreement conveyed by the complainant. To the extent that this position may limit a woman's freedom to choose sexual activity with those responsible for controlling her liberty and security, I argue that it is worth this potential cost if it prevents sexual exploitation and facilitates women in institutions making safe and non-coerced decisions about whether and with whom to engage in sexual activity.

This case demonstrates an alarming disregard of context in a case where context was crucial. No finding of consent can be made without addressing the fact that the complainant was detained under the force of law and that the accused was employed to help restrain her liberty and, ostensibly, to protect her. A two-step approach that asks whether consent is present and only then examines the context of trust, power, and authority is an impoverished version of consent. We must be vigilant against allowing the reintroduction of stereotypes about "over-sexed" women with psychiatric disabilities that mask the profound abuse of power that is evident in these sexual relationships. As long as society continues to detain people against their will, the law must recognize that the sexual exploitation of detained individuals by those charged with their care and protection is sexual assault. Failure to do so sends the message to those in positions of power that they can have sexual access to these women with impunity.