Dalhousie University Schulich School of Law

From the Selected Works of Elaine Craig

2014

Capacity to Consent to Sexual Risk

Elaine Craig

Available at: https://works.bepress.com/elaine_craig/21/

Capacity to Consent to Sexual Risk

by

Elaine Craig^{*}

In delineating the legal boundaries of capacity to consent to sexual touching law makers and jurists must grapple with tensions between sexual liberty, morality, sexual minority equality interests, and public safety. Legal rules that stipulate that an individual cannot consent in advance to unconscious sexual activity, or that an individual under a certain age or with a particular intellectual capacity cannot consent to sexual touching have an impact on sexual liberty and should be justified. In this sense defining legal capacity to consent to sex throws into relief the tensions between sexual liberty and the protection of sexual integrity. This is true across jurisdictions, regardless of the substantive definition of consent adopted by a particular legal system. This paper argues that establishing these limits based on normative assessments about specific sexual acts poses too great a threat to the liberty interests of women and sexual minorities. A better approach is to accept that in sex, as is probably true of all complex human interactions, an accurate application of the definitional turns on the particular. Context is everything. No sexual act, including one that objectifies, is inherently harmful. The paper offers an alternative approach by suggesting that laws defining capacity to consent should be justified on the basis of assessments of risk rather than moral assessments about sex. This stands to circumscribe law's limits on sexual liberty in ways that are better for women and sexual minorities. What this approach does not resolve is the paradox presented by the reality that while sex is inherently contextual criminal laws prohibiting violations of sexual integrity cannot be applied contextually. The paper explores how a recent legal ruling in Canada denying the capacity to provide advance consent to unconscious sex reveals this paradox. The discussion concludes by asserting, through the lens of queer theory, that the failure of law to exclude morally inculpable unconscious sex between ongoing sexual partners reveals the limits of law and in doing so suggests the need to re-evaluate the law's conception of the relationship between sexual liberty and sexual integrity.

^{*} Assistant Professor, Schulich School of Law at Dalhousie University. Professor Craig's research interests include feminist and queer legal theory, evidence law, and constitutional law. Much of her work focuses on the regulation of sexuality across legal contexts.

The criminal law regulates sexuality in a variety of ways. The most obvious and important of which is its prohibition of sexual touching that is experienced by one of the participants as unwanted. But the criminal law draws a number of other lines delineating both the boundaries of acceptable sex and the rules of sexual engagement. One example regulating what might be described as otherwise consensual sex involves legal rules that deny capacity to consent either to particular sexual activities or in particular types of circumstances. The law typically denies capacity to consent to sex in certain circumstances. In Canada capacity to consent to sex is determined on the basis of age, level of consciousness, cognitive ability, the social utility of the sex act, and degree of consanguinity.¹ While the thresholds set by these factors vary, across most jurisdictions capacity to consent to sexual contact is dictated by some or all of these same variables.²

Changing social contexts, competing political and religious interests, and the diversity of sexual desires in any given community mean that the parameters of legal capacity to consent to sexual contact continue to be tested and are ever shifting. In the United States one of the more recent contexts in which this is occurring involves the capacity of elderly individuals in residential facilities to consent to sexual contact.³ In the United Kingdom the now infamous decision in *R v Brown* denying gay men the capacity to consent to sex combined with violence ignited scholarly and public debate.⁴ In many jurisdictions courts continue to struggle with

¹ In the Canadian context see *Criminal Code*, RSC 1985, c C-46, s 150.1 (age of consent), *R v JA*, 2011 SCC 28, [2011] 2 SCR 440 (consciousness); *Criminal Code*, RSC 1985, c C-46, s 153.1(1) (mental capacity); *R v Jobidon*, [1991] 2 SCR 714, 128 NR 231; *R v Welch*, [1995] 25 OR (3d) 665; 101 CCC (3d) 216 (social utility).

² Consider for example age of consent laws: *Sexual Offences Act 2003* c 42 s 9 (UK age of consent is 16); *Crimes Act 1900* s 66D (Australia New South Wales age of consent is 16); NY Penal Law § 130 (age of consent in the State of New York is 17).

³ J Richard Lindsay, “The Need for More Specific Legislation in Sexual Consent Capacity Assessments for Nursing Home Residents: How Grandpa Got His Groove Back” (2010) 31 J Legal Med 303; see also Martin Lyden, “Assessment of Sexual Consent Capacity” (2007) 25 Sexuality & Disability 3.

⁴ [1994] 1 AC 212; [1992] QB 491 (Eng).

developing an approach to addressing incapacity among mentally disabled women that appropriately protects both their sexual autonomy and their safety from sexual violation.⁵ The discussion in this paper is developed in part by examining a legal ruling in Canada that denies capacity to consent in advance to unconscious sex. There are countless other examples. The law's relationship to each of these sexual contexts presents similar challenges. In delineating the legal boundaries of capacity to consent to sexual touching law makers and jurists in every jurisdiction grapple with the tensions between sexual liberty, morality, sexual minority equality interests, and public safety. While much of the focus of this discussion is on capacity to consent in advance to unconscious sex, its insights pertain to the legal regulation (through capacity to consent rules) of any sex at the fringes.

Unavoidably a law that denies capacity to legally consent to a particular sexual act also impacts individual liberty. A legal rule that denies capacity to consent to a particular sexual act circumscribes sexual liberty by depriving individuals of the ability to legally engage in sex that they might desire. Legal rules that stipulate that an individual cannot consent in advance to unconscious sexual activity, or that an individual under a certain age, or with a particular intellectual capacity cannot consent to sexual touching have an impact on sexual liberty. They remove the ability of sexual actors to engage in certain types of otherwise consensual sexual activity without some risk of criminal liability. This is true regardless of the substantive definition of consent operative in any particular jurisdiction. Any legal rule that impacts on the liberty interests of individuals is significant and its implications should be examined. It is important to pay attention to how these rules are rationalized.

⁵ See for example Janine Benedet & Isabel Grant, "A Situational Approach to Incapacity and Mental Disability in Sexual Assault Law" (2011-2012) 43 Ottawa L Rev 1 (discussing British, American and Canadian approaches).

The justifications for imposing legal rules that limit capacity to consent to sexual touching are often different than is the justification for the legal rule prohibiting unwanted sexual touching. The rationale for legal rules criminalizing unwanted sexual contact involves a (relatively) straight forward relationship between the rule defining consent and the objective of protecting autonomy.⁶ Laws limiting capacity to consent have a more complicated relationship to the protection of sexual liberty than do laws establishing the definition of consent. To be clear, all legal rules delineating consent to sexual contact are underpinned by an interest in protecting some concept of autonomy.⁷ However, an autonomy based rationale for such rules can be analyzed in different ways. The basic prohibition on unwanted sexual touching as articulated by the definition of consent to sexual touching is justified on the basis that forced sexual contact – as with any interference of one’s bodily and sexual integrity – is a violation of autonomy.⁸ One approach to justifying a law that denies capacity to consent to a particular sex act is on the basis that the sex it prohibits is non-autonomous. A drawback to this approach is that it requires demarcating between autonomous and non-autonomous sex. This is a requirement that tends to engender normative claims about particular sexual acts and relationships. Justifications premised on normative assertions about sex itself are not as compelling for those that do not accept that certain types of sexual acts or relationships are inherently harmful or immoral. Moreover, the manner of justification can have implications for other legal denials of capacity to consent to sexual acts. One alternative conceptual framework through which to analyze and justify rules

⁶ The rationale for the rule is straightforward. The application of the rule delineating between wanted and unwanted sex is complicated and contested.

⁷ See Robin West, “Sex, Law and Consent” in Alan Wertheimer & William Miller, eds, *The Ethics of Consent: Theory and Practice* (New York: Oxford University Press, 2010).

⁸ This may not have always been the rationale for this legal rule. Feminists have argued that historically the law of rape protected male interests in the sexual propriety of their wives and daughters. See for example Constance Backhouse, “Nineteenth-Century Canadian Rape Law 1800-92” in David Flaherty, ed, *Essays in the History of Canadian Law* (Toronto: The Osgoode Society, 1983) at 200; Christine Boyle, *Sexual Assault* (Toronto: Carswell Company, 1984). Certainly today in Canada the accepted justification for this law is the protection of sexual integrity (*R v Chase*, [1987] 2 SCR 293, 45 DLR (4th) 98).

that prohibit otherwise consensual sex is rooted in the concept of risk. That is to say, instead of asserting that legal rules denying capacity protect autonomy by prohibiting non-autonomous sex one might argue that these rules aim to protect autonomy by prohibiting a certain level of risk of non-autonomous sex.

The decision to deny capacity to consent in advance to unconscious sex was a controversial one in Canada.⁹ This is unsurprising. The case would surely also have been controversial in the United States, the United Kingdom, or Australia¹⁰ - all countries that share with Canada a legal heritage and some similarities in terms of their consent laws.¹¹ For some, the denial of capacity in this context placed too great a limit on sexual liberty.¹² Despite the compelling position of those who critiqued the decision's impingement on sexual liberty, the argument developed below supports the conclusion that, at law, an individual cannot consent in advance to unconscious sex. The paper also suggests that it is better to understand this limit on sexual liberty as a rule aimed at regulating risky sex not as a rule aimed at prohibiting exploitative sex. (The distinction between risk of exploitation and exploitation itself will be addressed in Part II). The discussion concludes by asserting that the failure of law to exclude morally inculpable unconscious sex

⁹ Karen Busby provides a detailed review of all of the contemporaneous media on the case in "Every Breath You Take: Erotic Asphyxiation, Vengeful Wives and Other Enduring Myths in Spousal Sexual Assault Prosecutions" (2012) 24 CJWL 328 at 336.

¹⁰ Consider the recent age of consent debate in the United Kingdom arising in the aftermath of revelations about the sexual conduct of Jimmy Savile. Ellie Crumbo, "Reacting to Child Abuse by Lowering the Age of Consent Would Be Cruel" *The Guardian* (10 May 2013), online: Guardian News & Media <<http://www.guardian.co.uk/commentisfree/2013/may/10/child-abuse-age-of-consent>>; Consider a recent UK case involving the definition of consent in a case in which consent to intercourse was given but consent to ejaculation was not given. BBC News UK, *Sex consent could still lead to rape charge judges say*, online: British Broadcasting Corporation <<http://www.bbc.co.uk/news/uk-22281457>>; Consider recent debate in Queensland, Australia regarding a higher age of consent for gay men than for heterosexuals (Queensland *Criminal Code Act 1899*, s 215 – age of consent is 16), Bridie Jabour, "Queensland out of step on age of consent laws" *North West Star* (16 May 2013), online: Fairfax Regional Media <<http://www.northweststar.com.au/story/1505045/queensland-out-of-step-on-age-of-consent-laws/?cs=12>>.

¹¹ See for example Constance Backhouse & Lorna Shoenroth, "A Comparative Study of Canadian and American Rape Law" (1984) 7 Canada-US Law Journal 173.

¹² See for example Brenda Cossman, "Sex and the Unconscious (No, We Aren't Speaking of Freud)" *University of Toronto* online: Mark S. Bonham Centre for Sexual Diversity Studies <<http://www.uc.utoronto.ca/content/view/1114/2666/>> .

between ongoing sexual partners reveals the limits of law and in doing so suggests the need to re-evaluate the law's conception of sexual integrity.

The paper is divided into three parts. Part I examines the difficulties with justifying legal rules denying capacity to consent to sex on the basis that they prohibit exploitative sex. Drawing on a discussion of the legal response to other types of consensual "rough sex" – what is sometimes described as consensual sadomasochism – Part I suggests that the way in which a legal denial of capacity to consent to sex is justified has important implications for minority sexual liberty interests. Part II explores a justification for legally denying capacity to consent to sex in some circumstances that is centered on the concept of risk. This approach avoids making universal normative assessments about sex itself. However, as discussed in Part III, it does not provide a solution to the problem of capturing through capacity to consent rules some sex that is non-exploitative, mutually desired, and potentially consistent with human flourishing. Part III considers the implications of a failure to exclude from the criminal law's purview mutually desired unconscious sex between ongoing sexual partners. Relying on queer and feminist theories, Part III argues that this failure should be understood as an opportunity to re-think the relationship between sexual liberty and the law's role in protecting sexual integrity.

I. Avoiding Normative Assessments of Sex Itself Better Serves Women and Sexual Minorities

In *R. v. J.A.* the Supreme Court of Canada concluded that one cannot consent in advance to sexual contact while unconscious.¹³ J.A. was charged with sexual assault, among other offences, after his long-term partner K.D. reported to the police that during the course of sexual

¹³*Supra* note 1.

relations, he choked her into unconsciousness and then while she was unconscious bound her hands and penetrated her anally with a dildo. J.A. was convicted of sexual assault at trial despite K.D. recanting her testimony.¹⁴ This conviction was overturned by a majority of the Ontario Court of Appeal.¹⁵ The question before the Supreme Court of Canada was whether, under the definition of consent for the purposes of sexual assault law, a conscious individual can consent in advance to sexual activity to occur while the individual is unconscious. Due to evidentiary and procedural issues, this was the only question before the Supreme Court of Canada in *J.A.*¹⁶

The majority decision, authored by Chief Justice McLachlin, determined that the proper interpretation of the definition of consent under the *Criminal Code* provisions enacted by the Parliament of Canada “does not extend to advance consent to sexual acts committed while the complainant is unconscious. [The definition] requires ongoing, conscious consent to ensure that women and men are not the victims of sexual exploitation.”¹⁷ Consent to sexual touching must include capacity to revoke that consent: “when the complainant loses consciousness, she loses the ability to either oppose or consent to the sexual activity that occurs. Finding that such a

¹⁴ *R v JA*, 2008 ONCJ 195 at 1, 77 WCB (2d) 274. The trial judge convicted despite her recant on the basis that “her evidence that she consented to it, or was okay with it, when she regained consciousness has no bearing.” If the legal conclusion is that “it is a criminal activity to engage in sexual activity with a person who is unconscious” then the complainant’s evidence with respect to consent has no bearing.

¹⁵ *R v JA*, 2010 ONCA 226, 100 OR (3d) 676.

¹⁶ The specific issue of capacity to consent to rough sex, discussed in Part II of this paper, was not actually before the Court in *J(A)*. For a helpful discussion regarding problematic aspects of the procedural and evidential conduct of this case see Karen Busby, *supra* note 9.

¹⁷ *R v JA*, *supra* note 1 Chief Justice McLachlin’s decision might fairly be characterized as quite narrow. While she does suggest that this definition of consent is in harmony with the policies underlying the consent provisions of the *Criminal Code*, for the most part, she anchors her analysis in the language of legislative intent and deference to Parliament. She also asserts that “in the absence of a constitutional challenge, the appropriate body to alter the law on consent in relation to sexual assault is Parliament, should it deem it necessary” (*ibid* at 65). Given how narrow the majority’s reasons are, one feminist critique of the decision in *J.A.* is that it did not fully address the context in this case, nor adequately incorporate a feminist perspective into its reasoning (see Busby, *supra* note 9; Lisa Gotell, “Governing Heterosexuality Through Specific Consent: Interrogating the Government Effects of *R v J*” (2012) 24:2 CJWL 359. This is particularly problematic in a case like *J.A.* in which the sexual interactions at issue occurred in the context of a violent and abusive relationship. This context of domestic violence was virtually ignored in the decisions of both the majority and dissent in *J.A.* The discussion in this paper uses the issue in *JA* to more broadly explore concepts of capacity to consent. For thorough and insightful analyses of the specifics of the Court’s reasoning in *J.A.* see Busby, *supra* note 9 and Gotell, *ibid*.

person is consenting would effectively negate the right of the complainant to change her mind at any point in the sexual encounter”.¹⁸ Consent, according to the majority of the Supreme Court of Canada in *J.A.*, requires contemporaneous capacity to revoke.¹⁹ That is to say, under the criminal law in Canada individuals do not have the capacity to consent to unconscious sex. As explained below, the legal conclusion that one cannot consent in advance to unconscious sex will better serve to protect the sexual integrity of women. The criminal law should deny capacity to consent to this type of sexual interaction. Nevertheless, in Canada the law post-*J.A.* circumscribes the ability of sexual actors to engage in certain types of otherwise consensual sexual activity without some risk of criminal liability. If one determines that unconscious sex is non-consensual sex then it is not only the kind of sexual activity occurring in *J.A.* that is captured, but all sex initiated while one partner lacks contemporaneous capacity to revoke.

The defence in *J.A.* argued that requiring conscious consent for every sexual interaction could result in the absurdity of a person who kisses his sleeping partner before heading off to work in the morning being guilty of sexual assault.²⁰ In fact, kissing one’s sleeping partner goodbye (ineloquently described as the “sleeping spouse” circumstance) is not the only unconscious sexual contact captured by the interpretation of consent adopted in *J.A.* Rejecting the possibility of advance consent to sexual contact means criminalizing any sexual activity initiated with one’s ongoing sexual partner while they are asleep. It also means that intoxicated sex between ongoing

¹⁸ R v *JA*, *supra* note 1 at 53.

¹⁹ *Ibid* at 43.

²⁰ *Ibid* at 58. Certainly the morning kiss goodbye is an activity that the justices of the Supreme Court were concerned about during oral submissions in *J.A.* – the Court asked a number of questions about this. Supreme Court of Canada (accessed 3 April 2011), online: <<http://www.scc-csc.gc.ca/case-dossier/cms-sgd/webcasts-webdiffusions-eng.aspx>>. See Gotell, *supra* note 17 for critique of the Court’s fixation on the sleeping spouse issue given that *J.A.* was a case involving a history of domestic violence perpetuated against the complainant by *J.A.* and given that *J.A.* involved choking this woman into unconsciousness – not initiating sex while one’s partner is drunk or asleep. Gotell’s critique is well founded. She is correct that both the majority and dissent obscured the context of violence in this case – exemplifying her argument about the decontextualized analysis that consent laws produce. Regardless, controversial cases raise and serve as incubators for issues that do demand further examination. While it may not have been desirable, from a feminist perspective, for the Court in *J.A.* to be overly distracted by other types of unconscious sex, it is appropriate to now consider the broader implications of this judicial outcome.

sexual partners will constitute sexual assault in those circumstances where the level of intoxication deprives contemporaneous capacity to revoke.

It is likely not an uncommon occurrence for people to sometimes initiate sex with a sleeping partner, nor uncommon for individuals to have quite drunken sex with an ongoing sexual partner. Nor, as discussed below, is it likely to be uncommon for these kinds of sexual interactions to be desired by both participants. This is not to overlook the alarming rate at which women are sexually assaulted while incapacitated by alcohol and drugs or within the context of ongoing sexual relationships.²¹ (Although virtually ignored by the Supreme Canada, it is important to note that the sexual interactions in *J.A.* transpired in a context of serious and ongoing violence perpetuated by J.A. against the complainant.²²) The suggestion made here is simply that not all unconscious or seriously intoxicated sex is unwanted. That is to say, the determination that one cannot consent in advance to sex while incapacitated results in a law of sexual assault that may capture a significant amount of desired sexual activity between ongoing sexual partners.²³

There are different ways to justify a legal rule that denies capacity to consent to sex that is experienced as desirable by all participants. One option is to argue that the sex it captures is

²¹ See Janine Benedet, “The Sexual Assault of Intoxicated Women” (2010) 22 CJWL 435 at 439. Drawing on research from other jurisdictions, Janine Benedet surmises that in Canada, “approximately 50,000 women each year are sexually assaulted while incapacitated by drugs or alcohol, whether through voluntary or involuntary consumption.” See Sharon Cowan, “The Trouble with Drink: Intoxication, (In)Capacity, and the Evaporation of Consent to Sex” (2008) 41:4 Akron L Rev 899. See also Jennifer Koshan, *The Legal Treatment of Marital Rape and Women’s Equality: An Analysis of the Canadian Experience*, online: The Equality Effect <theequalityeffect.org/pdfs/maritalrapecanadexperience.pdf> at 6. Written for equality effect (discussing the prevalence of sexual violence within intimate relationships).

²² *R v JA*, 2008 ONCJ 624 (sentencing decision); See also Busby’s discussion of this at *supra* note 8 at 4.

²³ Some readers may have difficulty with drawing a distinction between ongoing sexual partners and those whose initial sexual contact is while one of them is asleep or intoxicated. Again, it is important to be clear that unwanted sex - sexual violation- between ongoing sexual partners is both common and should not be distinguished from, or receive different legal treatment than, unwanted sex between strangers. The drunken and sleepy sex between partners referred to here is limited to sexual touching which is desired (but properly non-consensual under J.A.). The distinction between ongoing sexual partners and strangers is drawn because presumably desire for this type of sexual interaction more frequently occurs in the context of ongoing relationships. This is an unsupported empirical assumption. Moreover, there is no reason to assume that unconscious sex between new sexual partners could *never* be desired by all parties.

itself harmful in some respect. For the rule established in *J(A)* the argument would be that unconscious sex is by its very nature exploitative and therefore a violation of autonomy - that initiating sex while one's partner is asleep constitutes a violation of that individual's autonomy because it is exploitative. The law ought not to recognize consent to unconscious sex because "sexual activity is an activity where both parties are supposed to be physically present and feeling something that is mutually pleasurable or desired in some sense."²⁴ Both (or all) parties to a sexual encounter ought to be awake.²⁵ Proponents of this position would point to the fact that in a case like *J(A)* there was no indication that the complainant ever choked the accused into unconsciousness and then used his body to sexually gratify herself.²⁶ The argument is that to allow prior consent to sexual activity when a woman is unconscious perverts the concept of autonomy because it perpetuates the discriminatory belief that female sexuality exists solely for the pleasure of men²⁷ - to treat a woman as a sexual object is to violate her autonomy. In other words, sexual objectification is exploitative.

This reasoning relies on an assumption about the relationship between sex and mutuality. Under this account consensual sex is sex that involves simultaneous (and potentially parallel?²⁸) pleasure and desire. According to this analysis, sex with someone who is unconscious is exploitative because it lacks this kind of simultaneity.²⁹ The limits on sexual liberty imposed by a law that denies capacity to consent in advance to unconscious sex are justifiable if one accepts

²⁴ Janine Benedet & Isabel Grant, "*R v A(J)*: Confusing Unconsciousness with Autonomy" (2010) 74 CR (6th) 80. They argue that "[o]ne might expect that at the time intimate activity moves from mere physical proximity that comes with sharing a bed, to sexual contact, both parties ought to be awake."

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ For an argument that there is no possibility of true parallel mutuality of this type in sexual interactions see Donald Dripps, "Beyond Rape: An Essay On the Difference Between The Presence of Force and The Absence of Consent" (1992) 92 Colum L Rev 1780 (arguing that there is no possibility of true parallel mutuality of this type in sexual interactions).

²⁹ "*R v JA*, *supra* note 22.

that only sex involving this notion of mutuality is autonomous. That is to say, the rule can be justified in this way if one accepts that all unconscious sex is exploitative. The difficulty with this approach is that it requires making a particular normative assessment about the specific sexual activity at issue. This is not compelling for those who reject the assertion that all unconscious sex is exploitative.

i. Not All Sexual Objectification Is Exploitative

Autonomous sex likely does require some type of mutuality. But should we assume that autonomous sex necessitates simultaneously experienced pleasure, desire, or benefit? Is it necessary to equate mutuality with coextensive, contemporaneous, desire and pleasure? Is there any reason to assume that a submissive partner in a sadomasochistic context, or a sleeping spouse in the ongoing sexual partner context, is necessarily precluded from experiencing sexual pleasure or benefit in anticipation of, or reflection upon, unconscious sexual activity?³⁰ If one rejects the requirement of simultaneity then mutuality does not turn on whether an unconscious person can experience something as pleasurable. For some people the pleasure of sex is in the anticipation of, or reflective knowledge about, what a sexual partner will do (or has done) to them. Is it presumptively un-feminist to recognize and affirm this type of desire?³¹

The irreducibility of human sexual experience makes it very difficult to generalize about sexual reciprocity. While the doctrine of consent, for the pragmatic reasons discussed below,

³⁰ For a discussion in the S/M context see Patricia A Cross & Kim Matheson, "Understanding Sadomasochism: An Empirical Examination of Four Perspectives" (2006) 50 J Homosexuality 133 (suggesting that it is the power dynamics at play which produce sexual pleasure for both the dominant and subordinate participants).

³¹ For arguments asserting that eroticizing dominance, submission, pain and powerlessness (sex that is not parallel in its mutuality) is not necessarily incompatible with feminism see Nils-Hennes Stear, "Sadomasochism as Make-Believe" (2009) 24:2 Hypatia 21; Monica Pa, "Beyond The Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex" (2001) 11 Texas J Women & L 51 at 88; Brenda Cossman, "Sexuality, Queer Theory, and 'Feminism After': Reading and Rereading the Sexual Subject" (2004) 49 McGill LJ 847; Pat Califia, *Public Sex: The Culture of Radical Sex* (Pittsburgh: Cleis Press, 1994). For a discussion of the debate between feminists regarding sadomasochism see Maneesha Deckha, "Pain, Pleasure and Consenting Women: Exploring Feminist Responses to S/M and Its Legal Regulation in Canada Through Jelinek's *The Piano Teacher*" (2007) 30 Harv J L & Gender 425.

must not be applied relationally, the good of sex is nevertheless contextual. Arguably sexual activity, including sexual objectification, is not inherently harmful.³² Abhorrent conduct in one context may be a “wonderful part of sexual life” in another.³³ “In the matter of objectification, context is everything.”³⁴ Not every instance of sex or sexual desire that is solely self-regarding constitutes a violation of autonomy. It would be sophomoric to suggest that only sex and desire that is other regarding is autonomous. Why must one be someone to everyone rather than sometimes something to someone?³⁵

There is a second, perhaps more important, reason to be wary of legal regulation that is premised on normative assessments about sex itself. Legal rules justified on the basis of universal normative assessments about sex itself may be protective of majoritarian attitudes about sex in a way that is not good for women and sexual minorities.

ii. Universal Normative Claims About Sex Itself Reinforce Majoritarian Sexual Morality

Advance consent to unconscious sex is not the only sexual activity for which legal rules establishing the parameters of capacity are necessary. A consideration of the legal regulation of sadomasochistic sex (S/M) illustrates the disadvantages of conceptualizing and justifying legal rules denying capacity to consent to sexual touching on the basis of normative assessments about the specific sexual activity at issue.

³² See for example Cass R Sunstein, “Porn on the Fourth of July”, Book Review of *Defending Pornography: Free Speech, Sex, and the Fight for Women’s Rights* by Nadine Strossen, (1995) *The New Republic* 42; Patricia Marino, “The Ethics of Sexual Objectification: Autonomy and Consent” (2008) 51 *Inquiry* 345; Martha Nussbaum, *Sex and Social Justice* (New York: Oxford University Press, 1999).

³³ Martha Nussbaum, “Objectification” (1995) 24:4 *Phil & Pub Aff* 249 at 256.

³⁴ *Ibid* at 271. Nussbaum quotes from Cass Sunstein who suggests that sexual objectification in the context of a trusting relationship may not be problematic (at 280).

³⁵ This is a somewhat playful response to Andrea Dworkin’s assertion in *Woman Hating*, “[i]t is true, and very much to the point, that women are objects...but it is only by asserting one’s humanness every time, in all situations, that one becomes someone as opposed to something.” Andrea Dworkin, *Women Hating* (New York: Dutton, 1974) at 83.

While the jurisprudence in Canada on the legal regulation of sadomasochistic sex is sparse, courts have looked at this question in a few cases.³⁶ Most directly the Ontario Court of Appeal considered the issue in *R. v. Welch*.³⁷ Consent to “rough sex” was also indirectly considered by the Supreme Court of Canada in *R. v. Jobidon*.³⁸ In both *Welch* and *Jobidon* the conclusion was that an individual in Canada cannot consent to the infliction of bodily harm unless the individual is acting in the course of a generally approved social purpose, such as a rough sporting event. Sado-masochistic sex, unlike tattooing, ritual circumcision, ear piercing and violent sport, is not on the list of approved social purposes:

Although the law must recognize individual freedom and autonomy, when the activity in question involves pursuing sexual gratification by deliberately inflicting pain upon another that gives rise to bodily harm, then the personal interest of the individuals involved must yield to the more compelling societal interests which are challenged by such behavior.³⁹

Under leading precedent in Canada when the infliction of pain is in pursuit of sexual gratification the interests of the individual must yield. However, when the infliction of pain is in pursuit of a hockey puck the calculation is different. This is troubling not because of the discrepant value placed on individual liberty in the context of these two endeavours but because the discrepancy is premised on an assessment of the social worth of sex (and in particular a specific type of sex). Fortunately, in recent cases in which the issue of S/M is raised courts have avoided applying the social utility principle articulated in *Welch/Jobidon*. Karen Busby conducted an extensive review of Canadian case law since 2005 in which the issue of S/M was raised. She found that in

³⁶ The majority in *J.A.* does not address the issue of consensual sado-masochistic sex. However, the Court may have been attuned to the decision’s possible impact on the liberty interests of those engaged in types of sadomasochistic sex beyond unconscious sex. The Court stated, at 65, that: “In the absence of a constitutional challenge, the appropriate body to alter the law on consent in relation to sexual assault is Parliament, should it deem this necessary.” This may have been noted with a view to the issue of consensual sadomasochistic sex.

³⁷ *Supra* note 1.

³⁸ *R v Jobidon*, *supra* note 1.

³⁹ The Ontario Court of Appeal affirmed the trial judge’s charge to the jury in *Welch*, *supra* note 1 at 18, “Because it is not in the public interest that people should cause each other bodily harm for no good reason, consent is no answer to a charge of sexual assault causing bodily harm, when actual bodily harm is objectively foreseeable and caused....”

all of the cases, except two involving homicide, the issue was did the complainant consent to the sex at issue not can the complainant consent to the sex at issue.⁴⁰ It is difficult to understand why that wasn't the approach in *Welch*.

The complainant in *Welch* alleged that the sexual contact was non-consensual. She testified that she screamed and begged the accused to stop, that he pulled a knife on her, tied her down, and forced her to engage in the sexual activity at issue.⁴¹ The trial judge told the jury that consent was irrelevant in this case because under Canadian law individuals cannot consent to the types of activities engaged in by the accused and the complainant. He concluded that individuals cannot consent to these activities “because it is not in the public interest that people should cause each other bodily harm *for no good reason*.”⁴² The activities engaged in by the accused involved tying the complainant to the bed using a scarf and a tie; hitting the complainant's breasts three times with a belt; penetrating her vaginally with his penis; using baby oil to lubricate her and then penetrating her vaginally with his finger and anally with the handle of a spatula.⁴³ If engaged in without consent, as the complainant in *Welch* alleged was the case, this conduct amounts to a horrendous, violent sexual offence.⁴⁴ However, when engaged in with consent “the good reason” for tying one's sexual partner to the bed, spanking their breasts with a belt, pouring baby oil on them and penetrating them vaginally and anally with body parts and other objects shouldn't be categorically dismissed. Surely sexual pleasure is as important to the pursuit of self-fulfillment as is hockey? Even in Canada.

⁴⁰ Busby, *supra* note 9 at 346.

⁴¹ *Supra* note 1 at 6,7,8.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ This should have been a case about rape not sexual liberty. It is hard not to speculate on whether there were evidentiary or procedural issues in this case that made it impossible to make a finding of non-consent.

In addition to diminishing the importance and benefit of sexual pleasure, this approach privileges dominant cultural, social, and religious practices and norms. In turn, this reinforces the very social infrastructure that produces the “relations of force”⁴⁵ that oppress vulnerable individuals and groups through the perpetuation of sexual violence. Cheryl Hannah argues that the sports exception to the legal rule denying capacity to consent to bodily harm is “illustrative of the male heterosexual acceptance of violence in the context of competition.... Violence, competition, and the construction of manhood are intricately linked.”⁴⁶ A legal distinction premised on the celebration of heterosexual male aggression in one context should not be understood as a rejection of it another context. Simply put, the uneven application of the rule denying capacity to consent to bodily harm in a sexual context privileges dominant social, cultural and religious practices. It privileges the very social relations that perpetuate the use of sexual violence as a technology of power.

Consider another example. In sentencing an accused who pled guilty to assault after he and his girlfriend engaged in scratching and cutting designs (such as an inverted pentagon) on her back as part of their sexual relationship the British Columbia Provincial Court stated that “while body piercing and tattooing are accepted in this society, disfigurement by way of scarification has not gained approval in Canadian society, even though access to the practices of the subculture is readily available.”⁴⁷ Social approval is not an equitable basis upon which to

⁴⁵ Toni Williams, “Re-forming Women’s Truth: A Critique of the Report of the Royal Commission on The Status of Women in Canada” (1990) 22 Ottawa L Rev 725.

⁴⁶ Cheryl Hannah, “Sex Is Not a Sport: Consent and Violence in Criminal Law” (2000-2001) 42 BC L Rev 239 at 245.

⁴⁷ See for example *R v W(RD)*, 2006 BCPC 300, [2007] BCWLD 1131, in which the accused was charged with the sexual assault of his girlfriend (and pled guilty to assault) after they engaged in cutting as part of their sexual interactions. Both the accused and his girlfriend, sixteen at the time, were “fascinated by the subculture of sado-masochism.” (at 4). On one occasion, at her request, he cut her with a razor blade. On another he scratched his initials in her back and on a third encounter he cut a pentagram on her back. Charges were laid after the complainant’s mother observed a scar on her daughter’s back. The complainant refused to participate with the prosecution. In sentencing the accused the Court stated, at para 11 that “the plea to common assault presupposes

criminalize particular sexual activities, as queer men who were sexually active in Canada prior to 1968 would be apt to point out.⁴⁸

Women should be concerned about legal rules regulating sex that are based on whether the sexual activity promotes approved social purposes or produces socially desirable cultural products.⁴⁹ As with legal reasoning that characterizes some sexual acts as presumptively exploitative, the “approved social purposes approach” in *Welch* and *Jobidon* presents the problematic potential for reasoning based on conclusions about the sexual morality of particular sexual acts. The decision to criminalize a sexual activity should not be based on whether it has gained approval in Canadian society. A legal approach to capacity to consent that is premised on an assessment of whether the act is of social utility requires evaluating the inherent “good” of a particular sexual act. Moral assessments of sexual acts rather than sexual contexts and relationships tend to reinforce majoritarian sexual morality. Legal rules aimed at promoting or protecting dominant sexual morality lend themselves to discrimination against sexual minorities⁵⁰ and women.⁵¹ Women (a significant number of whom will experience forced sex at

and accepts that, at least where adolescents are concerned, consent cannot be given to this kind of assault, even though agreed to and encouraged by the complainant "victim". While body piercing and tattooing are accepted in this society, disfigurement by way of scarification has not gained approval in Canadian society, even though access to the practices of the subculture is readily available even to adolescents.” The Court granted a conditional discharge in this case in part on the basis that the accused (despite now being an adult) was no longer engaging in sadomasochistic activity.

⁴⁸ Prior to 1968 anal sex was criminalized in Canada. Consenting adults gained legal capacity to consent to sodomy in 1968. (*Criminal Law Amendment Act*, SC 1968-69, c 38, s 7)

⁴⁹ For a general discussion illuminating various feminist perspectives on the relationship between law and sado-masochistic sex see Maneesha Deckha, *supra* note 31.

⁵⁰ Cheryl Hannah, *supra* note 39 at 256, raises the suggestion that laws regulating private, consensual conduct (including sadomasochistic sex) are often used to persecute people considered to be sexual deviants and women. While acknowledging this effect on sexual minorities and women Hannah takes the position, at 256, that denying capacity to consent to sadomasochistic sex “is an effective shield, more often protecting, albeit at times punishing, those who have not yet been granted full sexual autonomy under the law.” See William Eskridge, *Gaylaw: Challenging the Apartheid of the Closet* (Cambridge, Mass: Harvard University Press, 1999) at 248, for the assertion that laws criminalizing consensual S/M are used to discriminate against gays and lesbians.

⁵¹ Cheryl Hannah, *ibid.*

least once during the course of their lifetime⁵²) should not want legal definitions premised on majoritarian attitudes about sex. In terms of either protecting sexual integrity or promoting women's sexual agency, majoritarian sexual morality should be low on the list of sources to turn to for guidance.⁵³ Identifying potential sexual harms by the context in which they could occur rather than drawing the conclusion that any particular sexual act is without social utility (or inherently exploitative) is more likely to protect sexual integrity without either adopting constructions of sex as presumptively dangerous or resorting to majoritarian morality.⁵⁴

This is not to suggest that if one can consent to a particular type of contact in other contexts (say a hockey arena, boxing ring or tattoo parlour) one should be able to consent to it in sex. In attempting to recognize vulnerability the analysis would need to incorporate recognition of the dynamics of oppression and their relationship to the context of sexual violence and abuse in which sexual engagements occur in this society.⁵⁵ This is particularly important in contexts like *J(A)* in which, as Karen Busby has noted, media, lawyers, and public discourse misrepresent sexual harm perpetuated in a relationship of gendered violence and abuse as the eroticization of power.⁵⁶ The argument developed here does not rely upon conclusions about the supposed subversive potential of S/M and its emancipatory promise for women. Nor does it ascribe to the

⁵² J Brickman & J Briere, "Incidence of Rape and Sexual Assault in an Urban Canadian Population" (1984) 7:3 Int'l J of Women's Studies 195. Between 80% and 85% of all victims of sexual assault are girls and women. A 1993 Statistics Canada survey found that one-half of all Canadian women have experienced at least one incident of sexual or physical violence. Almost 60% of these women were the targets of more than one such incident.

⁵³ I have made this same argument elsewhere. Elaine Craig, *Troubling Sex: Towards A Legal Theory of Sexuality*, (Vancouver: UBC Press, 2012).

⁵⁴ For feminist arguments that theorize sex without constructing it as presumptively dangerous see Katherine Franke, "Theorizing Desire: An Essay on Feminism, Law and Desire" (2001) 101 Colum L Rev 181; Brenda Cossman et al, *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision* (Toronto: University of Toronto Press, 1997); Carol Vance, ed, *Pleasure and Danger: Exploring Female Sexuality* (London: Pandora Press, 1989). See also David Tanovich, "Criminalizing Sex at the Margins" (2010) 74 CR (6th) 86.

⁵⁵ This is an important point. Some of those that defend the rule in *J(A)* on the basis that unconscious sex is exploitative might agree that it is because our social, political, and legal context is steeped in gendered inequality that it is inherently exploitative to treat women as sexual objects. In other words, they might agree that if the social context were different (more equitable) treating women as sexual objects would not always be exploitative.

⁵⁶ Busby, *supra* note 9.

converse suggestion that women who consent to S/M possess the type of “deformed desires” produced by socially entrenched gender hierarchies. This paper does not take a position on *where* the criminal law ought to draw the line with respect to S/M. Instead it makes a claim about *how* the law ought to draw that line. The point advanced here is modest and in fact is one that feminists on both sides of this debate now generally agree with: “[t]he focus of the feminist legal S/M debate has shifted. Currently, both sides affirm the pleasures of sexual experiences, the nuances of sexuality, and the problematic totalizing tendencies of dominance feminism as well as the naiveté in celebrating all forms of S/M as resistance or empowerment.”⁵⁷ While feminist debate on the legal regulation of S/M has progressed, in Canada the law has not caught up. Busby argues that judges are sympathetic to liberal arguments about S/M but that they have not yet developed a sophisticated understanding of minority sexual practices. This leaves too much latitude for defence counsel to use S/M simply to raise a reasonable doubt.⁵⁸

A legal approach not premised on normative assessments about the inherent value or harm of any sexual act is less susceptible to the types of social biases that discriminate against women and other disadvantaged groups - social biases such as those that produced different legal treatment for vaginal and anal sex,⁵⁹ marital rape immunity⁶⁰ and morally motivated legal prohibitions on the commodification of sex.⁶¹ A legal approach to S/M the objective of which is to assess and prohibit certain levels of risk avoids these difficulties.

If the law is to deny capacity to consent to a particular sexual act it should be because that act carries too great a risk of harm (to individuals, to disempowered groups, to the administration

⁵⁷ See Deckha, *supra* note 31; Hannah, *supra* note 46 at 246-47.

⁵⁸ Busby, *supra* note 9.

⁵⁹ *Criminal Code*, *supra* note 1 at s 159.

⁶⁰ *Criminal Code*, RSC 1970, c C-34, s 143.

⁶¹ See for example *Criminal Code*, *supra* note 1 at s 212. See *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123; *Bedford v Canada*, 2010 ONSC 4264 at para 239, 102 OR (3d) 321, noting that the legislative objective of the bawdy house prohibition was in part to protect public morality.

of justice...) not because it is a sexual act that has not achieved social approval and not because any particular sexual act is presumptively exploitative or immoral.

Assume it is the case that not all unconscious sex is exploitative - that for some sexual actors in some contexts sexual objectification of this kind is not exploitative. If the aim of a legal rule that denies capacity to consent to unconscious sex is to prohibit exploitative sex then one might argue that it should exclude mutually desired unconscious sex. Of course this argument must be rejected. In a social context and legal tradition steeped with discriminatory attitudes about women and mythical stereotypes about sexual violence a doctrine of consent to sexual touching that analyzes and applies consent differently depending on the type or nature of the relationship in which the sexual contact occurs will put the sexual integrity of wives and girlfriends in greater jeopardy.⁶² Consent should not be applied differently based on the nature or duration of the sexual relationship. Complaints between ongoing sexual partners should not be treated differently under sexual assault law than complaints between strangers. The persistence with which defence counsel continue to invoke (and judges continue to rely upon) social assumptions about the sexual accessibility of wives and girlfriends demonstrates that they cannot be relied upon to avoid reinvigorating arguments of implied consent in the context of ongoing sexual relationships.⁶³ Simply put a contextually contingent application of the doctrine of consent would lend itself to mistaken belief in consent arguments premised on problematic assumptions about the sexual accessibility of women in ongoing sexual relationships.⁶⁴ Changing the definition of consent and thus narrowing the scope of the mistaken belief in consent defence

⁶² See Melanie Randall, "Sexual Assault in Spousal Relationships, 'Continuous Consent', and the Law, Honest But Mistaken Judicial Beliefs" (2008) 32:2 Man LJ 144; Christine Boyle, "Sexual Assault as Foreplay: Does Ewanchuk Apply to Spouses?" (2004) 20 CR (6th) 359; Ruthy Lazar, "Negotiating Sex: The Legal Construct of Consent in Cases of Wife Rape in Ontario, Canada" (2010) 22 CJWL 329.

⁶³ *Ibid.*

⁶⁴ Women's Legal Education and Action Fund [LEAF], "Factum of An Intervener".

has had a discernible impact on the legal response to the violation of sexual integrity of, in particular, intoxicated complainants.⁶⁵ Removal of marital rape immunity for husbands⁶⁶ and adoption of the attitudinal definition of consent for the purposes of the *actus reus* of the offence promise better protection for the sexual integrity of wives and girlfriends.⁶⁷ These are legal developments that must be guarded rather than eroded. In Canada's legal context it is not possible to recognize a contextually contingent application of consent without eroding these safeguards against marital rape immunity and discriminatory applications of implied consent.⁶⁸ In this sense the risk to the administration of justice posed by a legal definition that would recognize advance consent between ongoing sexual partners in some contexts is too great. Risky sex carries more than one connotation. The risk assessment required should include risk to the individuals engaged, risk to other sexual actors and risk to broader shared interests such as the administration of justice.⁶⁹

In emphasizing the need to avoid a relational approach to consent, it is important to note the distinction between the *definition* of consent and the *application* of the definition of consent.

⁶⁵ I have supported this assertion in earlier work. Elaine Craig, "Ten Years After *Ewanchuk* The Art of Seduction is Alive and Well: An Examination of the Mistaken Belief in Consent Defence" (2009) 13 Can Crim L Rev 3.

⁶⁶ *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, s 6.

⁶⁷ Of course promises do not always deliver. A review of sexual assault case law suggests that courts still respond differently to allegations of sexual assault by wives and girlfriends than to those of strangers or acquaintances. See Lazar, *supra* note 62; see also Jennifer Koshan, *supra* note 21.

⁶⁸ See for example LEAF's argument in their factum before the Supreme Court of Canada in *J.A.* that recognition of advance consent to sexual touching risks reinstating the viability of defence arguments regarding the notion of implied consent. LEAF, *supra* note 64.

⁶⁹ This would not make the law's treatment of capacity to consent to sex different in principle than its regulation of other activities that impact individual interests and shared goods. Risk assessment, for example, is part of the law of negligence, mortgage and pension law, and other areas of criminal law. The factors that go into risk assessment in the context of capacity to consent involve both individual and shared interests – such as a shared interest in the protection of sexual integrity. Consider other types of risky sex. One example, credit for which should be attributed to the guest editors of this journal, involves adolescents in care facilities. Assume such individuals face a heightened risk of sexual violation both within and outside of the home. Based on the argument developed here and given this risk, should it not be made legally impossible for adolescents in care to give valid consent? The answer is no. There is no reason to assume that recognizing the capacity of adolescents in care to engage in consensual sex raises the likelihood that they will experience more non-consensual sex. Recognizing their capacity to consent to sex poses no obvious risk to the administration of justice and the legal protections in place to guard against the sexual violation of adolescents in care or others.

The doctrine of consent to sexual touching should not be applied in a relational or contextual manner. However, in Canada changes to the definition itself were quite informed by an understanding of the social context that produces sexual violence.⁷⁰ Indeed, amendments to the consent provisions of the *Criminal Code* and to the interpretation of those provisions by the Supreme Court of Canada reveal an attempt to incorporate a contextual approach into the substantive definition of consent.⁷¹ These developments to the definition of consent reflect an understanding that power dynamics, stereotypes, and other contextual factors inform both men and women's understandings, articulations and experiences of consent to sexual touching.⁷² Establishing a definition of consent that recognizes the social context in which sexual violence occurs is an important feminist development. Equally important is resisting legal analysis that applies that contextualized definition of consent in a contextual fashion. Criminal law protection of sexual integrity, as concluded by the majority in *J.(A.)*, requires a legal rule that ensures a contemporaneous, operative ability to revoke consent regardless of the nature or duration of the relationship between the participants.⁷³

The impossibility of denying capacity to consent in advance to unconscious sex without capturing *all* seriously drunken sex between partners or *all* sex initiated while one partner is asleep cannot be addressed through the concepts developed to respond to over breadth in law.

⁷⁰ See Sheila McIntyre, "Feminist Movement on Law: Beyond Privileged and Privileging Theory" in Radha Jhappan, ed, *Women's Legal Strategies in Canada* (Toronto: University of Toronto Press, 2002) at 42 (discussing the coalition of feminists involved in advocating for and achieving a contextualized approach to sexual assault law reforms in the mid 1990s).

⁷¹ *Ibid*; Gotell, *supra* note 17. *Ewanchuk* established that whether there is consent for a sexual interaction (the *actus reus*) is determined solely by the state of mind of the complainant at the time the sexual interaction occurred. *R v Ewanchuk*, [1999] 1 SCR 330 at 48, 6 WWR 333. Consent under the *mens rea* now refers to the accused's perception of the complainant's positive expression of consent rather than communication of non-consent or lack of any expression of consent *R v MLM*, [1994] 2 SCR 3, 131 NSR (2d) 79; *Ewanchuk*, *ibid*. Section 273.2(b) of the *Criminal Code* established that the mistaken belief in consent defence will not be available where the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain consent. *Criminal Code*, *supra* note 1 at s 273.2(b).

⁷² I defended this claim in earlier work. Elaine Craig, *Troubling Sex: Towards A Legal Theory of Sexual Integrity* (Vancouver: UBC Press, 2012) at ch 4.

⁷³ *R v JA*, *supra* note 1 at 105.

Overly broad laws or legal definitions can typically be addressed by what might be described as carve outs. With an overly broad law or legal definition, a line has been drawn by the law and there are certain circumstances or activities that are identified as falling on the wrong side of the line. Where a court or legislator concludes that the line has been drawn in a manner such that it captures activity that should not be captured its overreach can often be responded to through reading down or carving out an exception to the rule.⁷⁴ In other words, the line can be re-drawn.⁷⁵ There is no way to respond to the sleeping spouse issue by carving out an exception. If the line is drawn at unconscious sex, as it should be, then sex initiated with a sleeping partner and sex with a seriously drunk partner fall on the criminal side and it is impossible to re-draw the line without risking revival of the spousal rape exemption.

II. Denying Capacity to Consent to Sex that Is Too Risky

Assume you agree that the law should not recognize advance consent to unconscious sex – that sex with an unconscious person should be legally non-consensual. Assume it is also the case that in certain contexts, circumstances not possible of legal delineation, this unconscious sex is mutually desired and experienced as in some sense pleasurable by all participants – that it is non-exploitative and therefore consistent with the promotion of sexual integrity and human

⁷⁴ In the constitutional law context reading a law down is really just an interpretive exercise which aims to interpret laws consistent with the presumption of constitutionality (Peter Hogg, *Constitutional Law of Canada* (Scarborough: Thomson Carswell, 2004) at ch 15.7. See for example, *Derrickson v Derrickson*, [1986] 1 SCR 285, 65 NR 278, where the *Family Relations Act of British Columbia* was read down so as to exclude property on Indian reserves because such property is within federal power.

⁷⁵ For example, the Supreme Court of Canada concluded in *R v Sharpe* that the very broad definition of child pornography found in section 163.1(1) of the *Criminal Code* captured representations it ought not to and in doing so unjustifiably violated section 2(b) of the *Charter*. *R v Sharpe*, [2001] 1 SCR 45, 264 NR 201. Section 163.1(4) prohibits the possession of child pornography – that is any visual representations that show a person who is, or is depicted as, under the age of 18 years and is engaged in, or is depicted as engaged in, explicit sexual activity and visual representations the dominant characteristic of which is the depiction for a sexual purpose of a sexual organ or the anal region of a person who is under the age of 18 years. In response to what they concluded was an overly broad definition, the Court carved out exceptions. The Court found that the provision should be read so as not to cover written material or visual representations (i.e. drawings) created and held by the accused alone solely for his or her personal use nor should it be read so as to cover visual recordings created by or depicting the accused that do not depict the accused committing unlawful sexual acts and are held by the accused exclusively for private use.

flourishing more broadly. Is there a way to justify this legal rule denying capacity to give advance consent to unconscious sex without accepting that unconscious sex (or sexual objectification) is always exploitative?

One option is to conclude that the aim of this law is to allocate risk within a risky sexual context and that unconscious sex is sufficiently risky (to individuals and to our shared interest in sexual integrity) such that the rule is not overly broad. Defending the legal denial of capacity to consent on the basis that it is too risky avoids categorizing all unconscious sex as exploitative. A conceptual approach that justifies denying capacity on the basis of risk allocation avoids making universal normative claims about particular sexual acts. That is the difference between purporting to prohibit exploitative sex and placing limits on acceptable risk of exploitative sex. This, as discussed above, is better for women and queers. (However, as discussed in Part III, an approach that rationalizes the rule based on risk assessment does not avoid having to concede as unjust a legal moment of impossibility regarding an approach to consent that continues to be an important if modest victory for feminists.)

The majority reasoning in *J.A.* is consistent with this rendering of the legal rule denying capacity to consent in advance to unconscious sex. The majority's reasoning can be interpreted as follows: consent for the purposes of the *actus reus* of sexual assault means that the complainant subjectively experienced a decision to consent which was contemporaneous with the sexual touching. This is necessary because the possibility of unconscious sex, even if consented to in advance, creates unacceptable vulnerability to exploitation. Thus the concept of consent for the purposes of sexual assault law must include an ongoing and contemporaneous capacity to revoke.

Chief Justice McLachlin's main, and most compelling reason, for rejecting the defence's sleeping spouse argument centered on concerns regarding the sleeping spouse's vulnerability to exploitation. She concluded that there was a risk that the unconscious person's wishes would be innocently misinterpreted by his or her partner and thus unintentionally violated.⁷⁶ Chief Justice McLachlin determined that the sleeping spouse argument fails to recognize "the total vulnerability of the unconscious partner and the need to protect this person from exploitation".⁷⁷ She suggested that this also raises an evidentiary concern because the complainant will be unable to know for certain what precisely occurred while he or she was unconscious. "Only one person really knows what happened during the period of unconsciousness, leaving the unconscious party open for exploitation."⁷⁸ The concern articulated here is not that having sex with someone who is unconscious presumptively exploits them but rather that it exposes them to a legally unacceptable level of risk of exploitation. Following this reasoning, unconscious sex should be non-consensual at law not because it is itself exploitative, but because of the particular conditions of vulnerability it presents – conditions of vulnerability which necessitate legal protection of a contemporaneous ability to withdraw consent. Were it possible to remediate those conditions then unconscious sex and the potential objectification instigated by it should, from a legal perspective, be fine.

There are risk factors specific to the individual as well as broader social factors that support denying capacity to consent to this type of sexual activity. The individual conditions of vulnerability with respect to unconscious sex, unlike for example unconscious surgery,⁷⁹ stem

⁷⁶ *Supra* note 1 at 60.

⁷⁷ *Ibid.*

⁷⁸ *Ibid* at 61.

⁷⁹ This analogy between surgery (which one obviously can consent to in advance) and unconscious sex was drawn favorably by the majority of the Ontario Court of Appeal in its decision to recognize capacity to consent in advance to unconscious sex. See *R v JA*, *supra* note 15 at 63.

from the lack of administration or bureaucracy around consent to sex as well as the possibility that more so than with respect to surgery,⁸⁰ every sexual act is different depending on the precise context, at the precise moment it occurs, and the manner in which the touch is effected.⁸¹ It may be less possible to consent in advance to sex than to surgery because with respect to sex one cannot ever know in advance to what one is consenting. Consent to sexual touching is profoundly incremental. There is also the risk that consent will be exceeded either intentionally or unintentionally without the knowledge of the unconscious individual.⁸² Presumably, if there were some method by which the unconscious participant could revoke consent the unacceptable level of exposure to vulnerability would not be present and it would no longer be necessary to legally deny capacity to consent to this type of sex. That is to say, sex with an unconscious person, absent the conditions of vulnerability relating to inability to revoke, would not be problematic. The formality and administrative infrastructure for securing informed consent developed in the medical context is inapt in the sexual context. The justification for denying capacity to consent in advance to unconscious sex is that the level of exposure to vulnerability is too high and the mechanisms for alleviating these conditions of vulnerability are not readily available. As such, the legal rule denying capacity can be said to allocate some risk away from the unconscious participant.

⁸⁰ See Hilary Young, “*R. v. A. (J.)* and the Risks of Advance Consent to Unconscious Sex” (2010) 14 Can Crim L Rev 273 at 284, for a discussion regarding the distinctions between consent in the medical context and consent in the context of sexual touching.

⁸¹ The example Chief Justice McLachlin gave of this was as follows: “If the accused fails to perform the sexual acts precisely as the complainant would have wanted – by neglecting to wear a condom for instance – the unconscious party will be unintentionally violated” (*R v JA*, *supra* note 1 at 60). Arguably, the example of the decision to use or not use a condom fails to capture the level of nuance that is at issue regarding consent to sexual interactions where one party in an ongoing sexual relationship is asleep. That is to say, the distinction between consenting to protected and unprotected sex is fairly obvious. More nuanced are distinctions between the nature of the touch, the degree of pressure, etc.

⁸² “Hilary Young”, *supra* note 80 at 288. As Young notes, this is less of a risk with the sleeping spouse – who would presumably wake up – than with respect to intoxicated or unconscious individuals.

A theory of capacity to consent based on risk allocation should not be limited to considerations of risk in relation to individual sexual actors. The conditions of vulnerability that constitute risky sex are a function of a complex and imbricate web of systemic gendered inequities and social dynamics. In developing a theory of consent that relies on concepts of risk allocation this social reality must be taken into consideration. A failure to recognize sexual risk as a function of social conditions reinforces problematic neo-liberal trends in sexual assault law today.⁸³ Vulnerability to sexual violation should not be understood as a function of the particularized circumstances and choices of individual sexual actors.⁸⁴ Sexual risk should be allocated in a way that, at the very least, does not further the social conditions that make sexual violence a weapon of choice in the oppression of women. This means that in designing the rules of risky sexual engagement, sexual risk should be allocated in a way that protects those legal reforms that *are* in their design, if not their application, responsive to the social context and systemic inequities that produce sexual violence. Establishing a rule regarding unconscious sex that preserves the attitudinal definition of consent is consistent with this approach. Community based conditions of vulnerability include the entrenched social hierarchies that continue to privilege sex as a tool of gender based oppression, public attitudes about sexual violence, the social, political and economic status of women, the legacy of a legal process premised on stereotypes and myths about women and sex, the adversarial nature of the legal system, the individualized rather than systemic response structure of the criminal justice system, and dysfunctional and moralistic social attitudes about sex generally. Denial of capacity to consent to unconscious sex allocates risk away from the administration of justice. It avoids expansion of the mistaken belief in consent defence or reinvigoration of implied consent arguments. That is to

⁸³ Gotell, *supra* note 17; Nicola Lacey, "Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law" (1998) 47 CJLJ 6.

⁸⁴ Gotell, *ibid.*

say, denying legal capacity to consent to unconscious sex places risk of criminal liability on individuals rather than adopting a legal rule that would be vulnerable to misuse by defence lawyers in cases where the sexual contact was not mutually desired.

Rules of risky sexual engagement should always allocate risk in ways that recognize the impact of systemic inequities on individual sexual actors. For example, the legal rule regarding age of consent should continue to be a bright line rule. Inter-generational sex below a certain age should be prohibited, but not based on an assumption that it is always exploitative, or that the very act of it is always morally wrong. A bright line age of capacity to consent to sex should be enforced because the prolific mistreatment of children in this society, combined with the inability of legal and social systems of surveillance to offer adequate prevention, response and protection in circumstances of mistreatment, create conditions of vulnerability that make it too risky for children to have sex with adults. Any debate about the issue of inter-generational sex should be about what age to draw the line not whether to draw one. Conversely, under a conceptual framework that justifies denying capacity to consent on the basis of risk allocation, laws like the criminal prohibition on incestuous sexual intercourse should be re-considered. The rationale for these laws has been discredited by some feminist and queer legal scholars.⁸⁵ Given that other *Criminal Code* provisions protect against inter-generational sex, unwanted sex, and sexual exploitation it is not obvious what additional risks justify a legal denial of the capacity to consent to sexual intercourse with one's family members (that don't contravene one of these other criminal prohibitions)?⁸⁶

⁸⁵ See Ruthann Robson, "Assimilation, Marriage and Lesbian Liberation" (2002) 75:4 Temp L Rev 709 at 758 (noting that the same biblical passages relied on to support anti-sodomy laws are used to support incest prohibitions and that the genetic justification for these laws is scientifically suspect); Gayle Rubin, "The Traffic in Women: Notes on the Political Economy of Sex" in Rayna Reiter, ed, *Toward An Anthropology of Women* (New York: New York University Press, 1975) 157 at 176 (suggesting the incest taboo is the origin of gender and sex inequality).

⁸⁶ The only readily apparent risk appears to be grounded in genetic theory. See Robson, *ibid*, for a discussion of the scientific literature rejecting the legitimacy of these genetic arguments.

Sex involves vulnerability. It involves risk. Laws establishing rules of sexual engagement should be informed and even driven by a contextual and reflective awareness as to what level of risk to sexual integrity as a shared good is tolerable. Justifying the legal rule denying capacity to consent in advance to unconscious sex on the basis of risk allocation avoids making normative assessments about unconscious sex itself. However, it does not resolve the issue of a legal rule that creates an entire category of morally inculpable sexual assault – non-exploitative unconscious sex. To accept both that all unconscious sex should be criminalized and that not all unconscious sex is exploitative is to acknowledge a site in law where its limits are revealed.⁸⁷ This is unsurprising. Human experience, including sexual engagement, is not irreducible to finite and precise legal line drawing. “In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide.”⁸⁸ Age of consent laws, for example, have long reflected this imprecision.

So what does this particular example of irreducibility suggest about the conceptual limits of the law of consent? Derrida would perhaps characterize this circumstance as an example of the distinction between law and justice - justice being infinite and beyond rationality and law being bounded, immediate.⁸⁹ This impossibility is noteworthy. It represents one of the (many) moments where law fails to accommodate the irreducibility of human experience. It reveals the conceptual limits of the law of consent as traditionally conceived. It is important to note these

⁸⁷ At a practical level to accept both of these assumptions requires resorting to unprincipled arguments such as *de minimus* and prosecutorial discretion to respond to the “sleeping spouse” issue. The Crown in *J.A.* argued that the sleeping spouse issue could be resolved by reliance on prosecutorial discretion and the *de minimus* doctrine. *De minimis non curat lex* is a latin expression: The law does not concern itself with trifles. Both Chief Justice McLachlin for the majority and Justice Fish in dissent noted dissatisfaction with the Crown’s arguments in this regard. See *R v JA*, *supra* note 1 at 63, 161. There is something dissatisfying about making the assertion that yes, this is sexual assault but it is a meagre and inconsequential sexual violation and the law therefore ought not to concern itself with it. On the scale of moral approbation a stolen grape is not the same as a stolen kiss let alone any act of actual sexual exploitation

⁸⁸ HLA Hart, *The Concept Of Law*, 2d ed (Oxford: Clarendon Press, 1994) at 126.

⁸⁹ Jacques Derrida, “Force of Law” (1989) 11 Cardozo L Rev 919 at 927; Jacques Derrida, *Rogues: Two Essays on Reason* (Stanford: Stanford University Press, 2005).

moments of impossibility - moments that reveal the limits of a legal rule. Indeed, some have argued that such sites of ‘undecidability’ impose upon us infinite responsibility to take note.⁹⁰

But to take note of what?

Is it a responsibility to take note of sexual integrity as nuanced, contextual, and potentially fluid? Perhaps it is incumbent upon us to take note that in some circumstances what we would legally define as non-consensual sexual touching is not a violation of sexual integrity? Perhaps it demands that we take note of law’s violence, to borrow again from Derrida.⁹¹ But is there something mollifying about conceding that this particular limit creates a conceptual gap between law and justice? In a social context where sexual violence remains a preferred technology for the reification and perpetuation of systemic gender hierarchies⁹² we ought to remain unapologetic regarding the cost to sexual liberty incurred by a criminal law of consent that requires contemporaneous capacity to revoke. For those who maintain that unconscious sex is always exploitative such impenitence is not a challenge. For those who see little or no difference between protecting all children from risky sex and protecting all women from risky sex there is no difficulty. However, is there a way to respond to the post-*J.A.* issue of capturing as sexual assault potentially quite common and desired sexual practices between ongoing sexual partners without either: ascribing to the position that unconscious sex is always exploitative; accepting that the sexual agency of women should be no more protected than that of children; or contritely conceding in this rule a legal moment of limitability that gives rise to the possibility of injustice? With one important stipulation, the answer is likely no. The stipulation is that the concession

⁹⁰ See for example Drucilla Cornell, *Philosophy of the Limit* (New York: Routledge, 1992).

⁹¹ Jacques Derrida, “Force of Law”, *supra* note 89 at 927.

⁹² Feminists have made this observation for decades. See Christine Boyle, *Sexual Assault* (Toronto: Carswell, 1984); Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon and Schuster, 1975); Constance Backhouse, *supra* note 8 at 200; Catharine A MacKinnon, *Toward A Feminist Theory of the State* (Cambridge, Mass: Harvard University Press, 1989); Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass: Harvard University Press, 1987).

that this rule gives rise to the possibility of injustice should not be made with contrition. Nor should it be limited to the compelling and important assertion that this legal rule denying capacity is justified on the basis that it prohibits sex that is too risky. There is another way to think about this failure to tailor the law.

III. Sharing Sexual Integrity and Queering the Law's Failure

Failure, according to Judith Halberstam, can serve as a mechanism for “undoing the punishing norms that discipline behavior and manage human development with the goal of delivering us to orderly and predictable adulthoods.”⁹³ She argues that “failure is a way of refusing to acquiesce to dominant logics of power and discipline, and as a form of critique...that presents an opportunity rather than a dead end.”⁹⁴ This last section of the paper focuses on the failure of the law of consent to accurately account for the nuance of sexual engagement. It does so not in order to justify this failure but to acknowledge the opportunity it brings.

Feminists should be unapologetic about this moment of impossibility in law and instead seize upon the opportunity it offers to talk about consent and sexual integrity in a different way. This rule's failure to exclude from the scope of the criminal law a good deal of sex that is mutually desired and thus potentially consistent with human flourishing is also a failure to delineate obvious and tidy boundaries upon which male sexual aggression can confidently self-regulate. This is promisingly disruptive.

There is more. The space between law and justice revealed by the criminalization of this type of mutually desired, non-exploitative sex between ongoing partners also exposes the dysfunction of a criminal legal process that cannot be trusted with the discretion that a contextual, relational

⁹³ Judith Halberstam, *The Queer Art of Failure* (Durham: Duke University Press, 2011) at 3.

⁹⁴ *Ibid* at 88.

application of the doctrine of consent would necessitate. This is illuminative. Failure, as Halberstam suggests, offers a different way of knowing.⁹⁵

This moment of failure offers the opportunity to step out of the routine and homogenizing narratives that oppress and dominate vulnerable groups - to instead point fingers at a social context that produces gendered, racist, ageist and classist sexual violence. It offers a moment to indict the class, race and gender based systems that perpetuate a legal context that lacks the capacity to properly protect sexual integrity. Revealing one of the limits to the legal concept of consent invites discussion of some of its other interrelated limits. Scholars have argued that the language of consent signifies and legitimates a traditional gendered rape script and its reliance on social assumptions about active masculinity and passive femininity.⁹⁶ Equally problematic, the focus on consent, even the affirmative definition adopted by Canadian sexual assault law, places too much emphasis on the individual. Consider again the feminist critiques of recent neo-liberal trends in sexual assault law referenced in Part II. The law's focus on consent facilitates a neo-liberal trend towards re-privatization in the law's response to sexual violence.⁹⁷ It produces judicial reasoning that places on women an expectation that they assume responsibility for their sexual safety while failing to recognize the systemic and structural factors that perpetuate sexual violence against women in Canada.⁹⁸ Lise Gotell observes that the affirmative definition of consent under Canadian law has further responsibilized individual sexual actors by placing emphasis on "discrete sexual transactions, consent-seeking actions and the moment of

⁹⁵ *Ibid* at 24.

⁹⁶ Gotell, *supra* note 17; Nicola Lacey, *supra* note 83.

⁹⁷ See Lisa Gotell, "The Discursive Disappearance of Sexualized Violence: Feminist Law Reform, Judicial Resistance and Neo-liberal Sexual Citizenship" in Dorothy E Chunn, Susan B Boyd & Hester Lessard, eds, *Reaction and Resistance: Feminism, Law and Social Change* (Vancouver: UBC Press, 2007) 127 at 128. See Elizabeth Comack & Tracey Peter, "How the Criminal Justice System Responds to Sexual Assault Survivors: The Slippage Between 'Responsibilization' and 'Blaming the Victim'" (2005) 17 Can J Women & L 283.

⁹⁸ *Ibid*.

agreement.”⁹⁹ The problematic result, she suggests, is that “[n]ormative sexual interaction is reconceived as being like an economic transaction and good sexual citizens are reconfigured to resemble rational economic actors assuming responsibility for their actions and the risks that they take.”¹⁰⁰ As a result individual women who take risks are held responsible for their own violation and the power structures embedded in the sociality that produces sexual violence remain in place.

There is a further element to the opening provided by this site in law where reason runs. It is an opportunity to re-think sexual liberty. “Under certain circumstances, failing...may in fact offer more creative, more cooperative, more surprising ways of being in the world.”¹⁰¹ The impossibility of tailoring this law of consent in a way that excludes from the criminal law’s reach a potentially significant amount of desired, non-exploitative sex provides a platform from which to argue that everyone bears the responsibility for promoting the social, political, and legal conditions that will make sex safer and to argue that the failure to do this reveals a dysfunctional social context or community. This is a circumstance that imposes (sexual liberty) costs on everyone.¹⁰² It is an opportunity to understand sexual freedom as about distributing power through collective engagements with the particular relations of force and interdependencies that structure the social context in which sexual violence is produced.¹⁰³ Freedom, unlike individual sovereignty, might be understood as a “reaching out to the world that is accomplished through collective projects rather than solely an individual consciousness achieved alone.”¹⁰⁴ In this way, sexual liberty (as one component of sexual integrity) could be framed as a shared interest in

⁹⁹ Lisa Gotell, *supra* note 17.

¹⁰⁰ *Ibid.*

¹⁰¹ Halberstam, *supra* note 93 at 2.

¹⁰² See Robin West, “Tragic Rights: The Rights Critique in the Age of Obama” (2011) 53 Wm & Mary L Rev 713).

¹⁰³ Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 2007). Elizabeth Anker characterizes Wendy Brown’s account of freedom this way in “Feminist Theory and the Failures of Post-9/11 Freedom” (2012) 8:2 Politics and Gender 207.

¹⁰⁴ Elizabeth Anker, *ibid.*

promoting greater social, economic and political equality such that sexual diversity could safely flourish. Instead of advancing arguments about diminished sexual agency, false consciousness, or the inherent immorality of some types of sex - arguments that devalue women's desire and the importance of sexual adventure and diversity - feminists should shrug their shoulders in the face of this failure (this space between law and justice) and suggest that law stop looking for happy endings. Embrace the failure. The cost to sexual liberty incurred by the injustice of criminalizing mutually desired, non-exploitative and potentially pleasure producing sex is an unavoidable side effect of a social context in which gender, race and class based conditions of vulnerability and relations of force make sex a weapon of choice for oppression. The freedom to engage in risky sex requires conditions for the promotion and protection of sexual integrity (understood as a shared interest). This requires renovating and dismantling these relations of force. The criminal law is an insufficient tool with which to pursue this objective. Constructing sexual assault law in a discourse of hope perpetuates oppression by celebrating the very system that gives meaning (and thus power) to the inequitable legal and social divisions between women and men, queers and non-queers, the promiscuous and the chaste, aboriginals and non-aboriginals....¹⁰⁵ Failures offer a way to take a detour around the usual markers of accomplishment, satisfaction (and justice). "Rather than resisting endings and limits, let us instead revel in and cleave to all of our own inevitable fantastic failures."¹⁰⁶ Let these moments of legal inadequacy float uncomfortably but resoundingly and unapologetically within the ocean of (sexual) injustice in which they swim.

¹⁰⁵ Halberstam, *supra* note 93 at 107 made this point in discussion of the relationship between the concepts of futurity and nationalism: "ffuturity signifies the nation, the divisions of class and race upon which the notion of national belonging depends, and the activity of celebrating of the ideological system that gives meaning to the nation and takes meaning away from the poor, the unemployed, the promiscuous, the non-citizen, the radicalized immigrant, the queer...." I am borrowing her analysis and applying it in the context of law.

¹⁰⁶ *Ibid* at 187.

Conclusion

Defining legal capacity to consent to sex throws into relief the tensions between sexual liberty and the protection of sexual integrity. This is true across jurisdictions, regardless of the substantive definition of consent adopted by a particular legal system. Establishing these limits based on normative assessments about specific sexual acts poses too great a threat to the liberty interests of women and sexual minorities. A better approach is to accept that in sex, as is probably true of all complex human interactions, an accurate application of the definitional turns on the particular. Context is everything. No sexual act, including those that objectify (and possibly even those that exploit depending on one's definition of mutuality) is inherently harmful. As such, laws defining capacity to consent should be justified on the basis of assessments of risk rather than moral assessments about sex. This stands to circumscribe law's limits on sexual liberty in ways that are better for women and sexual minorities. What this approach does not resolve is the paradox presented by the reality that while sex is inherently contextual criminal laws prohibiting violations of sexual integrity cannot be applied contextually.

The issue of capacity to provide advance consent to unconscious sex reveals this paradox. The law of consent in Canada captures what might be a good deal of desired and non-exploitative unconscious adult sex. It creates an entire category of morally inculpable sexual assault. This result is an unavoidable by product of a dysfunctional society in which trust in our legal and social institutions as well as our sexual relationships – certainly a necessary condition for the promotion of sexual integrity as a shared good – is ill advised. This is not a hopeful and happy solution. It is an inchoate, depressingly pragmatic response to a broken community. In recognition of that lies failure's opportunity.