

Marriage and Advance Consent to Sex: A Feminist Judgment in *R v JA*

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Abstract

This paper is a feminist judgment in *R v JA* (Supreme Court of Canada 2011), a spousal sexual assault case involving the issue of whether parties can consent in advance to sexual activity that will occur while they are asleep or unconscious. The Supreme Court's ruling in *JA* has generated critique and debate amongst feminist and law and sexuality scholars that pits women's equality and security interests against their affirmative sexual autonomy. Using the methodology of a feminist judgment, I endeavour to analyze whether it is possible to adopt an approach to advance consent that protects or at least balances all of these interests. My particular focus is the spousal context, where courts have often interpreted the sexual assault provisions of the *Criminal Code* to the detriment of women's sexual integrity and equality, yet where arguments about affirmative sexual autonomy have also predominated. Taking a harm-based approach to criminality that considers both negative and positive sexual autonomy, the judgment concludes that advance consent should not be considered valid without certain legal safeguards being put into place.

Key words

Sexual assault; marital rape; consent; feminist judgments

Resumen

Este artículo es una sentencia feminista de *R v JA* (Tribunal Supremo de Canadá 2011), un caso de agresión sexual conyugal que implica la cuestión de si las partes pueden consentir de antemano una actividad sexual que ocurrirá mientras están dormidos o inconscientes. El fallo de la Corte Suprema en *JA* ha generado críticas y debates entre feministas e investigadores en derecho y sexualidad, que enfrentan los intereses de igualdad y seguridad de la mujer con su autonomía sexual afirmativa. Utilizando la metodología de un juicio feminista, se intenta analizar si es

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posible adoptar un enfoque de consentimiento anticipado que proteja, o al menos equilibre, todos estos intereses. El enfoque particular es el contexto conyugal, donde los tribunales han interpretado a menudo las disposiciones sobre el asalto sexual del Código Penal en detrimento de la integridad sexual y la igualdad de las mujeres, incluso también donde también han predominado los argumentos sobre la autonomía sexual positiva. A partir de un acercamiento a la criminalidad basado en el daño, que considera la autonomía sexual negativa y positiva, la sentencia concluye que el consentimiento previo no debe ser considerado válido sin que se pongan en práctica ciertas garantías legales.

Palabras clave

Asalto sexual; violación matrimonial; consentimiento; sentencias feministas

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Author's note

R v JA (2011) is a decision from the Supreme Court of Canada considering whether advance consent to sexual activity that will take place while one partner is unconscious is permissible under Canadian law. The case arose in the context of a spousal relationship where there had been previous violence by JA against his partner KD, as well as previous experimentation with bondage and erotic asphyxiation. In a judgment authored by Chief Justice Beverley McLachlin, a majority of the Supreme Court held that advance consent was not consistent with Canadian law, and restored the conviction of JA for sexual assault. Heated debate about and critique of the judgment ensued by Canadian scholars writing from a variety of perspectives, as did intense media attention to the case. My objective was to produce a feminist judgment in *R v JA* that would contribute to the theme of "radically rethinking marriage" by recognizing the patriarchal and colonial underpinnings of legislative and judicial approaches to spousal sexual violence and analyzing issues related to advance consent in a way that recognizes both women's equality and security from violence as well as their sexual autonomy.

I served on the case subcommittee of the Women's Legal Education and Action Fund (LEAF) that developed legal arguments for an intervention in *JA* (LEAF 2011). LEAF's advocated outcome was accepted by the majority of the Supreme Court, but the majority reasons are bereft of the context that LEAF put forward as essential to thinking about the proper outcome. My judgment endeavours to take a more contextual approach, and is informed by my participation in the LEAF intervention as well as by case comments on *JA* written by feminist, law and sexuality and other scholars in Canada (Benedet and Grant 2010, Tanovich 2010, Young 2010, Cossman 2011, Busby 2012, Cunliffe 2012, Gotell 2012, Jochelson and Kramar 2012, Olson 2012, Benedet 2013, Craig 2014, Khan 2014, 2016, Sealy-Harrington 2014). The judgment also provides an opportunity to acknowledge and reflect on the feminist activism that led to the current shape of Canadian sexual assault laws and their interpretation by the courts (Sheehy 1999, McIntyre *et al.* 2000, Denike 2010, Benedet 2014).

My judgment is further influenced by research I conducted for the Equality Effect, an NGO which is seeking to address the legal impunity for marital rape in Kenya, Ghana and Malawi through education, policy reform, and litigation, using the Canadian experience of criminalizing marital rape to provide insights (The Equality Effect 2015). My study reviewed the history around the legislative immunity for marital rape in Canada, the impetus for criminalization in 1983, and the judicial treatment of marital rape cases since then (Koshan 2010, 2017a, 2017b). *JA* allows for a discussion of the history and current treatment of marital rape, both because of the spousal context of the case (which I define to include non-married spouses, providing they were co-habiting and/or had child(ren)) and because the Supreme Court's reasons incorporate some classic marital rape myths into its analysis (see Randall 2008, Lazar 2010, Busby 2012). It also provides a forum for addressing some of the specific impacts that laws governing spousal sexual violence and consent have had on Indigenous women and women with disabilities (LEAF 2011). Given the context of the case, my focus is on criminalization of marital rape and the laws of sexual assault in Canada, but I also examine sexual assault law in England and Wales, as their approach to sex during unconsciousness was suggested as a possible model by Justice Fish, writing in dissent in *JA*.

My aim was to write a judgment that addressed the tensions inherent in the legal regulation of sexual relations in spousal relationships. Feminist activists have long argued that sexual assault laws should not be interpreted less stringently when there is an intimate relationship between the parties (Advisory Council on the Status of Women 1976, National Action Committee on the Status of Women 1977, National Association of Women and the Law 1981). To consider the relevance of marriage in this context is what led to the marital rape immunity and related

notions such as implied consent. Yet to ignore the existence of an intimate partner relationship may reinforce stereotypes of women as vulnerable victims rather than (or sometimes as well as) autonomous sexual partners. Using the methodology of a feminist judgment required me to consider how the resolution of the advance consent issue might capture both the possibility of violence (the right to say no) and the possibility of more affirmative sexual autonomy (the right to say yes), and to take seriously the arguments of law and sexuality scholars that denial of advanced consent may perpetuate heteronormativity and the criminalization of members of sexual minorities and other marginalized groups (Cossman 2011, Khan 2016). Analyzing *JA* in a feminist judgment format allows these issues to be critically explored, and, by necessity, resolved.

It must also be acknowledged that there have been critical reflections on feminist judgment writing projects (Davies 2012, Hunter 2012, Rackley 2012). Feminist judgments do not read as real judicial decisions, generally citing much more scholarly literature and sometimes taking liberties with evidence, parties, and chronology. However, feminist judgments can also serve as models of how judicial decisions should be crafted, and in fact have been crafted at some moments in time. For example, although Canadian courts have largely retreated from the practice of citing feminist literature in cases involving violence against women, this was more common while Justices Bertha Wilson and Claire L'Heureux Dubé sat on the Supreme Court (see e.g. *R v Lavallee* 1990, *R v Seaboyer* 1992). In spite of the Court's failure to cite feminist literature in *JA*, however, gender does seem to have mattered to the outcome, as all four female Supreme Court judges were in the majority.

Another critique of feminist judgments, drawing upon our experience with the Women's Court of Canada project (Women's Court of Canada 2006), is that they have rarely been cited by scholars (let alone courts) since they were published. If one of the goals of writing feminist judgments is to create debates within socio-legal discourse, yet this impact is not being achieved, should the claims of this methodology to be a form of "academic activism" (Rackley 2012, p. 390) be rethought? More fundamentally, feminist judgments engage with law in ways that may reify its power and neo-liberalizing tendencies (Hunter 2012). In the context of sexual assault in particular, engagement with law and encouragement of a reformist agenda may create "dubious political alliances" and fail to "contribute to a more radical reconstruction of sexual relations" (Lacey 1998, p. 49; see also Smart 1989, Khan 2016). As noted by Hunter (2012, p. 145), "In order to avoid feminist alternative accounts from becoming equally oppressive and constraining ... they must be contextualized, contingent, subject to discussion and debate, remain open to revision, and arise from a diversity of feminist voices."

With these cautions in mind, my judgment should be considered as one possible feminist response to *JA*, with space for others to follow.

1. Introduction

1. The narrow issue in this case is whether the law of sexual assault in Canada permits advance consent to sexual activity that will occur while one of the parties is unconscious. The broader context asks us to consider to what extent marriage or a spousal relationship should influence the courts' approach to sexual assault. The Supreme Court of Canada judgments in this case barely recognized the existence of an intimate partner relationship between the parties or the previous history of violence by *JA* against *KD*, and more broadly ignored the history of legal regulation of spousal sexual violence by Parliament and the courts. This judgment seeks to reintroduce that context by assessing the validity of advance consent and the implications of recognizing that form of consent in marriage and other intimate partner relationships.

2. Facts and judicial history

2. The Supreme Court's majority judgment, written by Chief Justice Beverley McLachlin, sets out the facts of this case as follows (*R v JA* 2011, paras. 4-6, 8-9):

On May 22, 2007, the respondent J.A. and his long-time partner K.D. spent an evening together at home. While watching a movie on the couch, they started to kiss and engage in foreplay. After some time, they went upstairs to their bedroom and became more intimate. They both undressed, and started kissing on the bed.

While K.D. was lying on her back, J.A. placed his hands around her throat and choked her until she was unconscious. At trial, K.D. estimated that she was unconscious for "less than three minutes". She testified that she consented to J.A. choking her, and understood that she might lose consciousness. She stated that she and J.A. had experimented with erotic asphyxiation, and that she had lost consciousness before.

When K.D. regained consciousness, she was on her knees at the edge of the bed with her hands tied behind her back, and J.A. was inserting a dildo into her anus. . .

J.A. removed the dildo ten seconds after she regained consciousness. The two then had vaginal intercourse. When they had finished, J.A. cut K.D.'s hands loose.

K.D. made a complaint to the police on July 11. In a videotaped statement, she told the police that she had not consented to the sexual activity that had occurred. She later recanted her allegation, and claimed that she made a false complaint to the police because J.A. had threatened to seek sole custody of their two-year-old son. J.A. was charged with aggravated assault, sexual assault, attempting to render the complainant unconscious in order to sexually assault her, and with breaching his probation order.

3. The Supreme Court also noted that there was conflicting testimony as to whether KD and JA had previously engaged in sexual activity involving anal penetration, and whether she had consented on the occasion in question (*R v JA* 2011, paras. 6-7). The trial judge, Justice KM Nicholas of the Ontario Court of Justice, found as a fact that anal penetration had not occurred before, and that while KD had consented to being choked into unconsciousness, she had not consented to the insertion of the dildo (*R v JA* 2008a, para. 41). Justice Nicholas rejected the complainant's trial evidence that she consented to anal penetration in favour of her statement to police that she had not, noting that KD was "typical . . . of a recanting complainant in a domestic matter." (*R v JA* 2008, para. 8). In the alternative, she held that as a matter of law, KD could not "consent to sexual activity that takes place when she is unconscious" (*R v JA* 2008a, para. 45).

4. As a result of the absence of consent in fact and in law, Justice Nicholas convicted JA of sexual assault, contrary to section 271 of the *Criminal Code* (1985). She declined to convict him of aggravated assault or the included offence of sexual assault causing bodily harm in relation to the choking. Bodily harm is defined in section 2 of the *Criminal Code* to require "hurt or injury" that is more than "merely trifling or transient." Justice Nicholas found KD's unconsciousness to have been transient, and rejected the Crown's argument that choking into unconsciousness by definition constituted bodily harm to which she could not consent, noting the lack of expert evidence on this point (*R v JA* 2008a, paras. 26, 45). She also noted that while KD had experienced rectal bleeding following the incident, the Crown conceded that this was transient harm that did not meet the *Criminal Code* definition (*R v JA* 2008a, para. 21). JA was also acquitted of attempting to render the complainant unconscious to enable him to sexually assault her under section 246 of the *Code*, in light of the trial judge's finding that KD consented to being choked and rendered unconscious (*R v JA* 2008a, para. 45).

5. JA appealed his conviction to the Ontario Court of Appeal, where the Court unanimously accepted the defence argument that there was insufficient evidence at trial to conclude beyond a reasonable doubt that as a matter of fact, KD did not consent to anal penetration before being rendered unconscious (*R v JA* 2010, paras.

55, 114). The Court split 2:1 on the issue of whether advance consent was available as a matter of law, with the majority (Justices Janet Simmons and RG Juriansz) answering this question in the affirmative (*R v JA* 2010, paras. 69-88), and the dissent (Justice Harry La Forme) answering in the negative (*R v JA* 2010, paras. 116-132).

6. The majority of the Court of Appeal also addressed the Crown's argument that the trial judge erred by failing to hold that choking the complainant into unconsciousness amounted to bodily harm, thus vitiating any consent to the sexual activity. Justice Simmons agreed that the trial judge had erred in rejecting a finding of bodily harm on the basis that the harm to KD was transient in nature, without considering whether it was more than merely trifling (*R v JA* 2010, para. 95). However, even if choking a person into unconsciousness did constitute bodily harm, JA was not charged with sexual assault causing bodily harm, such that "the Crown did not formally allege that the complainant suffered bodily harm that would vitiate the complainant's consent to sexual activity" (*R v JA* 2010, para. 109). JA's conviction for sexual assault was thus overturned by a majority of the Court of Appeal.

7. Because there was no explicit dissent at the Ontario Court of Appeal regarding whether bodily harm can vitiate consent for sexual assault simpliciter, there was no appeal as of right to the Supreme Court on this question (*R v JA* 2011, paras. 21, 88). The Crown did not seek leave to appeal this finding, so the only question for the Supreme Court was whether advance consent was available in sexual assault cases as a matter of law.

8. The Supreme Court was also divided in its opinion. For the majority, Chief Justice McLachlin (with Justices Marie Deschamps, Rosalie Abella, Louise Charron, Marshall Rothstein and Thomas Cromwell concurring) held that advanced consent was not recognized under the *Criminal Code* nor under the existing jurisprudence on sexual assault (*R v JA* 2011, paras. 31-66). In dissent, Justice Morris Fish (with Justice Ian Binnie and Louis LeBel concurring) found that advanced consent was not precluded by the language of the *Criminal Code*, the case law, or policy considerations (*R v JA* 2011, paras. 92-144).

9. The Supreme Court did not make any mention of previous violence by JA towards KD, which was noted by Justice Nicholas in her sentencing judgment (*R v JA* 2008b). This evidence would have been admissible at trial only under limited circumstances, for example where the requirements of similar fact evidence or prior discreditable conduct were met (Busby 2012, p. 355-357). Nevertheless, it is a key part of the context of this case when considering the potential risks of permitting advance consent:

J. A. is a man with a serious record; he has been convicted on 26 previous occasions, between 1982 and 2007, of 43 criminal offences. ... He has three previous convictions for domestic violence; two of those involve this complainant. In August 2003 [J.A. was sentenced for] assaulting this complainant on two occasions, forcibly entering her residence, and damaging her property. He had called her in an angry manner; a confrontation occurred in front of her place; he then kicked the door in. During the assault he narrowly missed her with a wine bottle, hitting a wall instead. He was calling her a "whore, bitch, skank". Police later observed red marks above and below her right eye. She said everything was okay originally but gave a statement when the accused was out of sight that he had also assaulted her days prior by striking her head and causing blood blisters. She had not reported it because she thought it would not happen again. He received a 90 day intermittent sentence in addition to 45 days pre-trial custody, the equivalent of a six month sentence. On January 31, 2007 he was again sentenced for assaulting this complainant. They had an argument while taking their son to a doctor; after a verbal confrontation with OHIP staff he left her and the child there to return by bus. The complainant feared for her safety and called her mom to come get her son. J. A. returned in anger calling her, again, a "bitch, cunt, skank". He threw a clock against a wall; backed her against a wall, punched her in

the rib area which knocked the wind out of her. She had a red mark on her face and called 911. He twisted her finger causing it to swell. After credit for 55 days of pre-trial custody at two for one he received a further two months or the equivalent of a 5 ½ month sentence. . . . He presents a clear and present danger to the complainant and her child (*R v JA* 2008b, para. 2).

10. Based on a pre-sentence report, Justice Nicholas noted that JA had not been employed since 2007 and his only income was from drug trafficking. He had completed a program for partner abuse once, but did not report to the program when referred to it again in 2008, and in fact laughed when the Crown requested further such programming. Justice Nicholas characterized the incident before her as “an offence of domestic violence” and noted that KD’s recanting and ongoing support for JA – including requesting leniency at sentencing – “fit well the profile of a battered woman” (*R v JA* 2008b, paras. 6, 12). She sentenced JA to a term of imprisonment of 18 months, to be followed by a two year term of probation that prohibited contact with KD and mandated supervision of any access JA had to their son (*R v JA* 2008b, para. 13).

3. Issues

11. One might state the issue in this case narrowly, in terms of whether Canadian law recognizes advance consent where the sexual acts will be performed on a person after they are *rendered* unconscious. The Supreme Court majority and dissent framed the issue in those terms at several points in their decisions (*R v JA* 2011, paras. 1, 2, 51 (majority); para. 80 (dissent)). At other points, the majority viewed the issue more broadly, as whether Canadian law defines consent “in a way that extends to advance consent to sexual acts committed while the complainant *is unconscious*” (*R v JA* 2011, para. 43, emphasis added). More broadly still, we could ask whether the law recognizes advance consent where the sexual activity will be performed while the person is *unconscious or sleeping*, which is how the Crown put forward the issue in its Notice of Appeal (*R v JA* 2011, para. 84).

12. Given that there was controversy over whether the complainant could consent to being rendered unconscious in this case, or whether that amounted to bodily harm that vitiated consent, framing the issue solely in terms that focus on the asphyxiation would be too narrow. Moreover, a broader consideration of the legal availability of advance consent will ensure a more fulsome exploration of the impact of recognizing this form of consent in the context of spousal relationships. A wider focus on sexual activity during unconsciousness is also important in the case of women who are unconscious as a result of intoxication (voluntary or involuntary), illness or disability (LEAF 2011, para. 5). Framed this way, the issue goes beyond the particular facts of this case, although I will return to the circumstances of KD and JA at various points in this judgment.

4. Analysis

4.1. Legislation and case law

13. Generally speaking, I agree with the view of the Supreme Court majority that the current provisions of the *Criminal Code* and the existing jurisprudence do not encompass advance consent. I am also of the opinion that for reasons of policy, the *Criminal Code* definition of consent should not be expanded to allow for advance consent to sexual activity during sleep or unconsciousness without certain safeguards being put into place to protect the equal right of spouses to be free from sexual violence and free from the prejudicial ways that their complaints of such violence have been treated by legal actors historically.

14. Consent is one of the essential elements of the *actus reus* of all assault offences. Since 1992, the *Criminal Code* has defined consent in sexual assault cases as follows:

273.1 (1) Subject to subsection (2) and subsection 265(3), “consent” means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

(2) No consent is obtained, for the purposes of sections 271, 272 and 273, where

(a) the agreement is expressed by the words or conduct of a person other than the complainant;

(b) the complainant is incapable of consenting to the activity;

(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

15. In *R v Ewanchuk* (1999, paras. 31, 45), the Supreme Court interpreted this provision to mean that there is no concept of implied consent recognized in Canadian sexual assault law. The Court held that the consent element is an affirmative one which can be satisfied by evidence that the complainant did not say “yes”, as well as by evidence that she said “no”.

16. The complainant was conscious in *R v Ewanchuk*, so no issue specifically arose in that case as to the interpretation of consent in circumstances involving advance consent and unconsciousness. However, in the earlier case of *R v Esau* (1997, para. 73), Justice McLachlin (as she then was, in dissent) had this to say about unconscious complainants (albeit in the context of mistaken belief in consent, an aspect of *mens rea* rather than *actus reus*):

The complainant in this category lacks the capacity to communicate a voluntary decision to consent. Such lack of capacity would be obvious to all who see her, except the wilfully blind. This makes any suggestion of honest mistake as to consent implausible. To put it another way, the necessary (but not sufficient) condition of consent – the capacity to communicate agreement – is absent. The hypothetical case of a complainant giving advance consent to sexual contact before becoming unconscious does not constitute an exception. Consent can be revoked at any time. The person who assaults an unconscious woman cannot know whether, were she conscious, she would revoke the earlier consent.

17. Drawing on these provisions and judgments in her majority reasons in *JA*, McLachlin CJ stated that in her opinion, “Parliament viewed consent as the conscious agreement of the complainant to engage in every sexual act in a particular encounter” (*R v JA* 2011, para. 31). This interpretation did not require a new category of non-consent under section 273.1(2), but flowed from the interpretation of the existing categories in that section setting out the circumstances in which consent is not recognized. The proper focus of section 273.1 was said to be on *the sexual activity in question*, which suggested that “the consent of the complainant must be specifically directed to each and every sexual act, negating the argument that broad advance consent is what Parliament had in mind” (*R v JA* 2011, para. 34). More specifically, the stipulation in section 273.1(2)(b) that no consent is obtained where the complainant is incapable of consenting suggested that “Parliament was concerned that sexual acts might be perpetrated on persons who do not have the mental capacity to give meaningful consent”, including persons who were unconscious, again indicating that consent was intended to mean “the conscious consent of an operating mind” (*R v JA* 2011, para. 36, citing *R v Esau* 1997).

18. The majority also found that the ability of a complainant to revoke consent at any time pursuant to section 273.1(2)(e) supported the position that Parliament

intended consent to be on-going and the product of a conscious mind (*R v JA* 2011, para. 40). To the extent that section 273.1(2)(e) deals with the expression of consent, McLachlin C.J. noted that it was applicable to the accused's *mens rea* rather than to the complainant's subjective consent; however this provision was still seen as relevant to a consideration of the proper interpretation of consent for unconscious complainants. Similarly, McLachlin C.J. found it useful to consider the *Criminal Code* provisions on mistaken belief in consent, even though that defence was not at issue in this case:

273.2. It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

(a) the accused's belief arose from the accused's

(i) self-induced intoxication, or

(ii) recklessness or wilful blindness; or

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

19. McLachlin C.J. queried how someone could take reasonable steps to ascertain whether a person was consenting if that person was unconscious (*R v JA* 2011, para. 42). This too supported the view that Parliament did not intend to include advance consent for sexual activity occurring during unconsciousness within the *Criminal Code* definition of consent.

20. Turning to Justice Fish's dissenting judgment, he opened by citing a phrase that has been a rallying cry for feminist anti-violence activists (*R v JA* 2011, paras. 68-69, 71):

It is a fundamental principle of the law governing sexual assault in Canada that no means "no" and only yes means "yes". K.D., the complainant in this case said yes, not no. ... We are nonetheless urged by the Crown to find that the complainant's yes in fact means no in law. With respect for those who are of a different view, I would decline to do so.

21. The dissent believed that advanced consent should be permitted, "absent a clear prohibition in the *Criminal Code*, absent proven bodily harm that would vitiate consent at common law, and absent any evidence that the conscious partner subjected the unconscious partner to sexual activity beyond their agreement" (*R v JA* 2011, para. 80). Justice Fish focused on the word "obtained" in section 273.1(2)(b) and found that this wording only vitiated the giving of consent while unconscious and did not preclude advance consent (*R v JA* 2011, para. 101). Nor did he agree with the majority that section 273.1(2)(e) should be interpreted so as to preclude advance consent: "If anything, the wording of [this section] suggests that the complainant's consent *can* be given in advance, and remains operative unless and until it is subsequently revoked" (*R v JA* 2011, para. 104). As for *R v Ewanchuk* (1999), Justice Fish found that its rejection of implied consent and its focus on the timing of sexual activity did not preclude allowing advance consent as a matter of law. He focused primarily on distinguishing *Ewanchuk* on the facts and did not refer to *Esau* (*R v JA* 2011, paras. 123-128).

22. These competing readings of the consent provisions should not be seen as an abstract dispute about statutory interpretation. The current sexual assault provisions of the *Criminal Code*, and their application regardless of the relationship between the parties, were the product of a hard fought battle by feminist activists in Canada, and they must be interpreted in light of that struggle and the interests it sought to protect.

4.2. Canadian sexual assault laws: history and context

23. From the time of Canada's first *Criminal Code* in 1892 until 1983, men were immune from criminal consequences for raping their wives. This immunity, derived from the English common law, last appeared in the definition of rape in section 143 of Canada's 1970 *Criminal Code*, which provided that: "A male person commits rape when he has sexual intercourse with a female person who is not his wife ... without her consent."

24. There were several rationales for men's historical criminal immunity for marital rape, most deriving from British legal norms and attitudes. Under the implied consent theory, women gave up their entitlement to resist sexual relations with their husbands upon marriage. According to Sir Matthew Hale, "the husband cannot be guilty of a rape committed by himself, upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract" (Hale 1763, p. 629, cited by Fus 2006, p. 483, see also Boyle 1981, p. 195-196, Backhouse and Schoenroth 1983, p. 49, Lesses 2014). The theory of coverture provided that after marriage a woman was incorporated into the person of her husband, making marital rape impossible (Fus 2006, Lesses 2014). Wives were also seen as the property of their husbands, conferring an entitlement on the latter to sexually violate their wives with impunity (Boyle 1981, p. 202, Backhouse and Schoenroth 1983, p. 48). As Laureen Snider (1985, p. 339) put it, rape was thus "a crime committed by men against men." Other rationales included the alleged propensity of women to lie about rape to gain an advantage in divorce, matrimonial property or child custody proceedings and the importance of maintaining marital privacy and harmony (Backhouse and Schoenroth 1983, p. 52-53, Fus 2006, p. 483).

25. It is important to place marital rape within the broader context of domestic violence, especially given the evidence in this case showing a previous history of violence by JA towards KD. Statistics show that 16% of women experiencing domestic violence are sexually assaulted compared to a "statistically insignificant" proportion of males reporting spousal abuse (Statistics Canada 2006, p. 15, 161). Sexual violence in intimate relationships is also a serious risk factor for domestic femicide (O'Marra 2005, p. 86). Poverty and social inequalities may make it difficult for women to leave violent relationships, putting them at risk of further violence and harm. Conversely, spousal sexual violence may displace women from their homes and communities. Statistics Canada's (2008, p. 15) documentation of the usage of shelters in Canada shows that almost 50% of shelter residents escaping sexual violence were abused by a spouse or intimate partner.

26. Reform efforts in Canada in the 1970s and 1980s sought to abolish the marital rape immunity as well as other problematic aspects of sexual violence law, such as the rules around corroboration, recent complaint, and sexual history / reputation evidence. These efforts were led by women's groups and rape crisis centres (Advisory Council on the Status of Women 1976, National Action Committee on the Status of Women 1977, National Association of Women and the Law 1981, Stanley 1985).

27. Although these efforts began before the equality provisions of the *Canadian Charter of Rights and Freedoms* came into effect in 1985, arguments for reform were often framed in terms of women's equality, sexual autonomy, self-determination, dignity and physical integrity (Boyle 1981, p. 196-197, Backhouse and Schoenroth 1983, p. 53-54, McIntyre *et al.* 2000, p. 2, Fus 2006, p. 497-498). In the particular context of marital rape, the immunity was seen to perpetuate the domination of wives by their husbands, maintaining dependency relationships. At the same time, views of women as "sexually passive" and men as "sexually aggressive" were also thought to be harmful to women, as well as to men. This thinking informed not only the argument for abolishing the marital rape immunity,

but also for enacting a gender neutral scheme of sexual assault laws that was intended to focus on the violence inherent in the assault (Fus 2006).

28. On January 1, 1983, Bill C-127 came into effect, replacing the offences of rape and indecent assault with a new, gender neutral scheme of “sexual assault” offences, and a specific section was enacted to make it clear that the marital rape immunity had been abolished. In addition, the rules concerning corroboration and recent complaint were abrogated and new provisions to limit the admissibility of sexual history and reputation evidence were enacted (Bill C-127 1980-81-82, sections 246.4, 246.5, 246.8).

29. Not all feminists embraced the sexual assault reforms that were passed in Bill C-127 McIntyre *et al.* 2000, p. 75). For example, Boyle (1981, p. 199) questioned the practical impact the reforms would have. True to this prediction, reporting rates for sexual assault continue to be very low, and may be especially low when there is a close relationship between the perpetrator and the victim (Randall 2008, p. 144; but see Benedet 2014, p. 166, citing Statistics Canada 2013). Criminal charges in spousal sexual violence cases continue to be rare (Bala 2004), and in cases where charges are laid and proceed to court, the practices of some defence lawyers and Crown prosecutors continue to be influenced by myths about women as spouses and sexual partners (Lazar 2010), as are the decisions of some judges (Koshan 2017b).

30. Other feminists argued that the success of Bill C-127 was due largely to support of law enforcement agencies and the alignment between women’s interests and the interests of the state, questioning whether the Bill could be counted as “a pluralist or feminist victory over patriarchy” (Snider 1985, p. 350). There was very little consideration at the time of Bill C-127 of the impacts the reforms might have on women and men who are marginalized as a result of racialization, culture, disability, poverty, sexuality, or gender identity. Moreover, there was no discussion of the particular impact of the colonial regulation of sexuality and marriage on Indigenous peoples in Canada, nor of the implications of the reforms for their sovereignty over resolving issues of interpersonal violence.

31. Further reforms to the sexual assault provisions of the *Criminal Code* were made in 1992, again largely as a result of feminist advocacy efforts (National Association of Women and the Law 1992, Native Women’s Association of Canada 1992, LEAF 1992, McIntyre 1994). The 1992 reforms implemented the current definition of consent as “the voluntary agreement of the complainant to engage in the sexual activity in question” in section 273.1 (Bill C-49 1992). As noted above, this section stipulates that consent cannot be obtained in certain circumstances, including where the complainant is incapable of consenting, the accused induces the sexual activity by abusing a position of power, or the complainant expresses a lack of agreement to engage in or continue in the activity. The 1992 amendments also enacted section 273.2, which provides that no defence lies for sexual assault where the accused believed that the complainant consented, if that belief arose from self-induced intoxication, recklessness or wilful blindness, or if the accused did not take reasonable steps to determine consent.

32. The preamble to these reforms noted Parliament’s grave concern “about the incidence of violence and sexual abuse in Canadian society”, particularly against women and children, its wish “to encourage the reporting of incidents of sexual violence or abuse”, and its intention “to promote and help to ensure the full protection of the rights guaranteed under sections 7 and 15” of the *Charter* (Bill C-49 1992).

33. The overarching spirit of the 1983 and 1992 reforms is that sexual assault laws must be interpreted and applied by state actors – including judges – so as to promote the *Charter* values of equality, sexual autonomy, and security of the person, cognizant of the intersecting inequalities faced by some women. Judicial

interpretations must also discount myths and stereotypes about women and sexual violence. These obligations flow from the *Charter*, as well as from international human rights protections such as the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979)*, the CEDAW Committee's landmark interpretation of the treaty in *General Recommendation 19: Violence against women* (Committee on the Elimination of Discrimination against Women 1992), and the *Declaration on the Elimination of Violence Against Women* (1993).

34. It is with this context and these obligations in mind that I turn to the issue of whether advance consent is or should be available under Canadian law.

4.3. A contextual interpretation of the availability of advance consent

35. Canadian law has moved towards a harm-based approach to criminality in a number of contexts, including obscenity, indecency and sexual assault (see e.g. *R v Butler* 1992, *Little Sisters* 2000, *R v Labaye* 2005, Tanovich 2010, Olson 2012). Craig (2014, p. 120) has argued that "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 ... [and] not because it is a sexual act that has not achieved social approval ... [or] is presumptively exploitative or immoral." I accept this approach – it takes a view of sexual autonomy that avoids majoritarian conceptions of sexuality and is informed by the values of equality and bodily integrity. It also creates space for the legality of sexual practices that are negotiated between truly consenting sexual partners, and accepts the possibility that sex while unconscious can be seen as mutually desirable and non-objectifying (see Nussbaum 1995, Lacey 1998, Munro 2008, 2014, Tanovich 2010, Young 2010, Nedelsky 2011, Craig 2014, Khan 2016). At the same time, it views harm not just at the individual level – which may have neo-liberalizing consequences, as Lise Gotell (2012) contends– but also at the group and societal levels (Tanovich 2010, Young 2010, Craig 2014).

36. Taking this approach, should sexual assault law be read as permitting advance consent to sexual activity that will occur during unconsciousness? Put another way, should accused persons be able to use the argument of advance consent to refute their culpability for sexual activity that occurs while the complainant is asleep or unconscious? This, in practice, is the way the issue will come before the courts (LEAF 2011, paras. 1, 3).

37. In my view, the cumulative import of defining consent in section 273.1 as "the *voluntary agreement* of the complainant to engage *in the sexual activity in question*" and the stipulations that no consent is obtained where "the complainant is *incapable of consenting* to the activity" or where "the complainant, having consented to engage in sexual activity, *expresses ... a lack of agreement to continue to engage in the activity*" is that consent requires an ongoing conscious state of mind while the sexual activity is occurring. Only this interpretation protects against the risk that the conscious party might exceed the limits of specific sexual activity that was agreed to in advance of the other party becoming unconscious, with the latter then unable to withhold or revoke her consent. Similarly, only this interpretation protects the unconscious party's right to revoke her consent if circumstances change, are not as she expected, or she otherwise would have changed her mind if conscious (Young 2010, LEAF 2011, para. 16). And only this interpretation gives true effect to the reasonable steps requirement in section 273.2 of the *Criminal Code*, as the conscious party "cannot know whether, were she conscious, [the other party] would revoke the earlier consent" (LEAF 2011, para. 12, citing *R v Esau* 1997). Most importantly, this is the interpretation that best accords with the spirit of provisions on consent and mistaken belief in consent and the interests they were intended to protect, including women's sexual autonomy, equality and security of the person.

38. This is also the interpretation that best aligns with the Supreme Court's leading decision on consent, *R v Ewanchuk* (1999). It is true that *Ewanchuk* did not

deal with advance consent, as noted by the dissenting justices at the Supreme Court (*R v JA* 2011, paras. 126-127) and some commentators (e.g. Sealy-Harrington 2014, p. 132-136). *Ewanchuk* raised the issue of whether consent could be implied in the context of a conscious complainant, whose behavior and attire had been seen as raising a reasonable doubt about consent by Justice McClung at the Alberta Court of Appeal (*R v Ewanchuk* 1998). As indicated above, the Supreme Court in *Ewanchuk* rejected the notion of implied consent as inconsistent with section 273.1 of the *Criminal Code*. Although advance and implied consent are two different concepts, the ongoing consent of an unconscious person to whatever they might have agreed to in advance can only be implied, and does not account for the possibility that the advance consent would be revoked if the risks just outlined came to pass (LEAF 2011, paras. 1, 6, 15-17).

39. This interpretation also aligns with the Supreme Court ruling in *R v Hutchinson* (2014), decided subsequent to *JA*. In *Hutchinson* the accused deliberately pricked a condom in an attempt to make his long term partner pregnant. A majority of the Court resolved the case on the basis that the complainant's consent was vitiated by fraud perpetrated by the accused, and found that the risk of pregnancy could be seen as akin to a significant risk of serious bodily harm (*R v Hutchinson* 2014, paras. 69-71). The concurring justices reasoned that there was no consent in the first place, as the complainant had agreed to a qualitatively different act than what transpired (*R v Hutchinson* 2014, paras. 78-9). For them, consent incorporated voluntary agreement to the manner in which the sexual activity would occur, as determined at the time of the activity (*R v Hutchinson* 2014, para. 86, citing *R v JA* 2011), confirming the interpretation that consent may be revoked by the complainant when she becomes aware that the nature of the activity has changed. To reiterate, only a conscious complainant is able to make such a determination and revocation.

40. There are also evidentiary challenges inherent in cases of advance consent (Benedet and Grant 2010, p. 83). McLachlin CJ's judgment at the Supreme Court acknowledged this difficulty: "If the complainant is unconscious during the sexual activity, she has no real way of knowing what happened, and whether her partner exceeded the bounds of her consent" (*R v JA* 2011, para. 61). Justice Fish's comment that "prior consent affords no defence where it is later revoked or where the ensuing conduct does not comply with the consent given" (*R v JA* 2011, para. 76) begs the question of how the consent could be revoked or the lack of compliance proved. The complainant cannot testify as to what happened while she was unconscious unless the same activity is ongoing when she regains consciousness or there is other evidence that supports the occurrence of sexual activity that went beyond her consent. Permitting arguments of advance consent would thus create a risk that the administration of justice will be undermined by false acquittals (Young 2010, p. 292-294).

41. This evidentiary challenge is critical in the spousal context given that "women in relationships are particularly vulnerable to being sexually assaulted while sleeping or otherwise incapacitated" (LEAF 2011, para. 19). A recent study on marital rape cases in the 30 years since criminalization suggests that many cases of sexual assault against a sleeping or unconscious partner only come to light where the accused recorded the sexual activity (Koshan 2017b, p. 5-7, see also Benedet and Grant, 2010, p. 83). Justice Fish relies on the justice system's ability to make determinations about consent in this context (*R v JA* 2011, para. 108), but his faith is belied by decades of judicial decisions that continue to embrace problematic interpretations of consent, especially in cases where there is a relationship between the parties or the complainant does not meet the standards of the "ideal victim" (Gotell 2008, Randall 2010, Koshan 2017b, p. 25-26).

42. Another potential evidentiary problem exists that was not mentioned by Chief Justice McLachlin. Sexual history evidence has been a major site of feminist

activism since the late 1970s, and has been circumscribed in the *Criminal Code* at least to a degree since 1976 (*Criminal Law Amendment Act 1975*, Bill C-49 1992). Yet arguments of advance consent would invariably rely on evidence of past sexual history, especially in cases where there is a previous relationship between the parties, where such evidence has a tendency to “creep in” (Randall 2008, p. 158, Koshan 2017b, p. 12). In fact, sexual history evidence was introduced at trial in this case without an application under section 276.1 of the *Criminal Code*, and was referred to by the courts at all levels regardless of this procedural error (LEAF 2011, paras. 7, 21, Busby 2012, p. 332). The consideration of this evidence was also substantively erroneous, as it was referenced with regard to KD’s likelihood of having consented to anal penetration, an impermissible use of sexual history evidence (*Criminal Code* 1985, section 276, Busby 2012, p. 352). To permit defence arguments of advance consent and thereby indirectly permit the admission and consideration of sexual history evidence risks diminishing the protections of sexual assault laws for women, particularly those in spousal relationships (LEAF 2011, paras. 21-22).

43. A related point is that none of the judgments at the appellate levels in this case referred to the previous history of violence by JA towards KD, or his contempt for probation and anti-violence programming, which led the trial judge to have serious concerns for the safety of KD and her child. Although we may take issue with Justice Nicholas’s characterization of KD as a “typical recanting spouse” and “battered woman” (Martinson *et al* 1981, Shaffer 1997), she was the only judge in this case who saw the incident within the context of an ongoing history of domestic violence. As noted above in paragraph 9, evidence of previous violence by JA would have been admissible at trial only under limited circumstances, but the Supreme Court still missed an important opportunity to situate the issue of advance consent within the broader context of domestic violence and marital rape, which allows for a more informed consideration of the potential risks of advance consent.

44. It may appear inconsistent to find that the domestic violence context in this case is relevant while the parties’ previous sexual practices – including their history of bondage and erotic asphyxiation – are irrelevant (Khan 2016). I am not drawing any conclusions about whether the previous kinky sex between KD and JA was consensual, nor am I suggesting that parties who are in an abusive relationship can never have consensual sex, kinky or otherwise. As the *Criminal Code* makes clear, previous sexual practices are not relevant to whether the sexual activity that was the subject matter of the offence was itself consensual. Consent must always be assessed as of the time of the activity in question; it is possible that a woman may say no regardless of how many times she has said yes previously, and regardless of what she has said yes to previously. To assume otherwise is to engage in false logic (*R v Boone* 2016). On the other hand, when a complainant recants a claim of sexual assault, it is not unreasonable to assume that an ongoing relationship of violence may have influenced her decision to do so. Although the Crown failed to pursue this line of questioning at trial, the history of violence in this case was relevant to the credibility of KD’s recantation, and thus to whether she consented in fact, while her previous sex life with JA was not. And a history of violence may create risks when it comes to sex that occurs while the woman is unconscious, which is relevant to the legality of advance consent.

45. Chief Justice McLachlin also ignored the gendered context of sexual violence in her reasons for decision. Her language seems deliberately gender neutral throughout, referring to complainants as “persons”, defendants as “he or she”, and “women and men” as the potential victims of sexual assault (*R v JA* 2011, paras. 1, 3, 24, 60). It may be that McLachlin CJ was endeavouring to ensure that sexual violence between same-sex, bisexual and transgender partners was included within the scope of her reasons, but there is nothing explicit to this effect. She made no acknowledgement that sexual assaults are predominantly committed by men against women, or of the gendered underpinnings of sexual violence laws and their

application historically. In the context of marital rape, a recent study found that only one out of over 400 marital rape cases reported between 1983 and 2013 did not involve male on female violence (Koshan 2017b). Only the dissenting justices at the Supreme Court in *JA* discuss gender in their account of the objectives of modern sexual assault laws (*R v JA* 2011, paras. 72, 110-112; see also Benedet 2013, p. 174); however this acknowledgement is made to reinforce the point that women's sexual autonomy requires the recognition of advance consent, a point to which I will return below.

46. There was also no discussion in the Supreme Court judgment of the ways in which the legal availability of advance consent may exacerbate women's inequalities, including those experienced by women who are particularly susceptible to myths and stereotypes in the context of sexual violence and unconsciousness (Busby 2012, p. 334, Benedet 2013, p. 174-175). These risks of inequality operate at the individual, group and societal level.

47. In its factum to the Supreme Court in this case, LEAF (2011, para. 29) argued that the recognition of advance consent would have an adverse impact on Aboriginal women by reinforcing stereotypes of the "drunken squaw" as "both more likely to be passed out and [to] experience less harm", thereby "creating real risk to their lives and safety" (see also Lindberg *et al.* 2012). Although Indigenous women experience disproportionately high rates of sexual violence, as recent reports on missing and murdered Indigenous women have documented (Amnesty International 2009, Inter-American Commission on Human Rights 2014, United Nations, Committee on the Elimination of Discrimination Against Women 2015), their harms are often overlooked by the justice system (Lindberg *et al.* 2012, p. 89).

48. For Indigenous women, the colonial context of sexual violence and the legal regulation of marriage and sexuality must also be considered. Sexual violence against Indigenous women was used by settlers to Canada as a means of domination and colonization (Ruparelia 2012, p. 665, 684, citing Razack 2000). The legal regulation of marriage and status under the *Indian Act* is another notorious example of Canada's ongoing colonization of Indigenous women and their families (Eberts *et al.* 2006). Contrary to the tendency of the Government of Canada (2015) and justice system (Gotell 2012, p. 365-366, Craig 2014, p. 127) to treat sexual violence as a matter of individual transgression to be resolved by the criminal justice system, Indigenous women also see sexual violence as "a threat to health and security of the entire community" (Native Women's Association of Canada 1992, p. 3).

49. LEAF also argued that women with disabilities would be adversely impacted by the recognition of advance consent. Women with physical and mental disabilities experience disproportionately high rates of sexual violence, and are especially vulnerable to being sexually assaulted while sleeping or while unconscious or incapacitated as a result of their disabilities or medication (LEAF 2011, paras. 30-31; see also Benedet and Grant 2007, Odette 2012). There are several reported cases of spousal sexual violence against women with disabilities (Koshan 2017b, p. 24-25; see also Benedet and Grant 2007, p. 255), which underscores the risk of permitting advance consent for these women.

50. More broadly, cases involving women who were unconscious at the time of the sexual assault, whether because of disability, medication, intoxication, or otherwise, are numerous and – in spite of section 273.1(2)(b) of the *Criminal Code* relating to capacity to consent – acquittals are not uncommon (Benedet 2010, LEAF 2011, para. 25, Sheehy 2012). This is true in other jurisdictions as well (Finch and Munro 2004, Cowan 2008). In the context of intoxication especially, it would be all too easy for the accused to argue that the complainant had simply forgotten that she consented in advance, and for the courts to use reasoning influenced by constructions of the ideal victim (Young 2010, p. 292, LEAF 2011, para. 27, Gotell

2012, p. 367). Again, these are risks that should not be ignored when considering the legal status of advance consent under Canadian law.

51. In light of this context, to allow an interpretation of the consent provisions that would permit unqualified recognition of advance consent, as advocated by the majority at the Ontario Court of Appeal and the dissent at the Supreme Court of Canada, would be to ignore the ways that advance consent might harm the sexual autonomy, integrity and equality rights of women, especially those most susceptible to sexual violence and/or to myths and stereotypes about sexual violence.

52. In addition to ignoring this context, certain myths, stereotypes and discredited assumptions about sexual assault have been invoked in this case, some of which echo the historic rationales for the marital rape immunity.

53. First, the references of the courts below (*R v JA* 2010, paras. 11-12, *R v JA* 2011, paras. 8, 62, 69) to the previous sexual history between JA and KD suggest that perceptions of KD's likelihood of consenting to the sexual activity that was the subject of the charges against JA should be influenced by her other sexual behaviour. These references bring into play notions of implied consent, which – although rejected in the *Criminal Code* and *Ewanchuk* – still resurface in many spousal sexual assault cases (Randall 2008, Craig 2009, Koshan 2017b).

54. Second, both judgments at the Supreme Court note the fact that KD did not make a complaint of sexual assault until two months after the incident, “when J.A. threatened to seek sole custody of their two-year-old child” (*R v JA* 2011, paras. 70, 9). Karen Busby (2012, p. 336) found that many media accounts of JA focused on the delay and the custody battle as evidence of fabrication. These accounts rely on the discredited notion of recent complaint, which required the complainant to make a prompt “hue and cry” after the alleged event or face an adverse inference as to her credibility (Boyle 1984, p. 14-16). They also risk perpetuating the marital rape myth that women are more likely to fabricate sexual assault allegations in the event of a custody dispute. While it was KD who raised the custody battle as an explanation for recanting her allegation of sexual assault, the appellate courts took this statement at face value rather than viewing the recantation in the overall context of violence and unequal power relations between the parties.

55. Third, the Supreme Court both minimized and paid too much attention to the relationship between the parties in this case. The majority indicated that an intimate relationship should not influence the inquiry into consent, but then, without explanation, went on to state that “the relationship between the accused and the complainant ... may be evidence for both the *actus reus* and the *mens rea*” (*R v JA* 2011, para. 64). The majority also failed to mention section 273.1(2)(c) of the *Criminal Code* (1985), which provides that no consent is obtained where “the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority.” This provision should be considered relevant in a case involving a previous history of violence between the parties. It is interesting to note that in England and Wales – a jurisdiction that the dissent raised as a comparator in JA – sexual assault laws make violence and threats more explicit exceptions to consent (*Sexual Offences Act 2003*, section 75(2)).

56. On the other hand, the dissenting justices found the relationship between the parties to be relevant, but it was invoked to question the propriety of convicting spouses for sexual activity with their partners (*R v JA* 2011, paras. 74, 105). The dissent also referred to the private nature of the sexual conduct “as a fundamental social value and an overarching statutory objective” (*R v JA* 2011, para. 116), as did the media (Busby 2012), again relying on one of the rationales for the marital rape immunity.

57. These discredited notions are embedded in other decisions involving spousal sexual violence (Koshan 2016b), and rather than take the opportunity to refute them, the Supreme Court reinforced them in this case. The risk of perpetuating

marital rape myths is another reason to reject the legal availability of advance consent in light of the problematic assumptions it may reinforce, especially in the context of spousal relationships.

58. So far my analysis has led to the preliminary conclusion that a contextual interpretation of the consent provisions does not permit advance consent. I have focused primarily on negative sexual autonomy, i.e. the complainant's right to say no and to have that right respected, as well as on broader concerns related to women's security, equality and the administration of justice. Yet the right to say yes is also raised in this case, and this affirmative version of sexual autonomy is crucially important for its recognition of women's self-determination and agency (Munro 2014, p. 747-749). Are there ways to recognize advance consent and affirmative sexual autonomy without triggering the risks noted earlier?

59. There are two main scenarios where it has been argued that affirmative sexual autonomy requires the recognition of advance consent to sexual activities that will occur while one partner is asleep or unconscious, without criminal consequences. A third category, involving a sexual partner who is unconscious as a result of intoxication or medication, is generally agreed not to engage sexual autonomy given the likely lack of capacity for advance consent in fact (Benedet and Grant 2010, p. 83, Young 2010, p. 291, Sealy-Harrington 2014, p. 128).

60. The first scenario was raised by Justice Fish in *JA*, who stated that to disallow advance consent "would deprive women of their freedom to engage by choice in sexual adventures that involve no proven harm to them or to others" (*R v JA* 2011, para. 73; see also paras. 72, 110-111, 115-116, and 138). This reference to "sexual adventures" may have been a colloquial attempt to raise the issue of BDSM (Bondage-discipline-domination-submission-sado-masochism). In that context, Brenda Cossman (2011), Ingrid Olson (2012, p. 194), and Ummni Khan (2014, p. 256, 2016) contend that the majority decision in *JA* reinforces heteronormativity and reflects distaste and mistrust of BDSM and its practitioners (see also Tanovich 2010). Khan argues that the consideration of risks associated with advance consent must be complicated, or more specifically queered, by recognizing that practitioners of kinky sex may be willing to undertake levels of risk that others would find unacceptable, at the same time reminding us that "all sexual activity – including vanilla sexuality – carries at least some risk" (Khan 2016, p. 1413; see also Cowan 2010).

61. In response, Busby calls into question whether the majority decision in *JA* will actually increase the risk of prosecution of BDSM practitioners, noting that unconsciousness is not typically their aim given their credo of "safe, sane, consensual" sex and the dangers inherent in erotic asphyxiation leading to unconsciousness (Busby 2012, p. 338-339, 345, 353, see also Young 2010, p. 303, Jochelson and Kramar 2012, p. 86-88, Olson 2012, p. 176-178). Busby also contends that arguments like *JA*'s – typically made in cases involving allegations of sexual assault between heterosexual partners – "appropriate BDSM practices to raise doubt as to consent" in circumstances where there was no consent in fact, such that concerns about sexual autonomy are not actually engaged (Busby 2012, p. 329, 347-351).

62. Busby's last point is attenuated somewhat by the critiques of *JA* by the law and sexuality scholars cited above, who rely at least in part on notions of sexual autonomy in encounters between truly consenting partners (Cossman 2011, Olson 2012, Khan 2014, 2016). On the other hand, Gotell expresses concern about the neo-liberalizing tendencies of too great a reliance on affirmative consent and sexual autonomy without a focus on structural inequalities, gendered power imbalances, and other sites of marginalization. A focus on the complainant's subjective consent results in "judicial constructions of complainants as flirting with risk", undermining their credibility and failing to place their actions in broader context (Gotell 2012, p. 366, see also Benedet 2013, p. 186-187). Arguments about affirmative sexual

autonomy are often accompanied by arguments about privacy (Mackenzie 2010, Tanovich 2010, p. 86), which raise similar concerns (Cunliffe 2012, p. 309, Gotell 2012, p. 370) and risk perpetuating one of the marital rape myths noted earlier about marital privacy and harmony.

63. I fully accept that BDSM practices may be consensual, that the risks are often discussed between partners and that the boundaries of consent may be well negotiated and drawn (Olson 2012, p. 176-178, Khan 2014, 2016, Munro 2014, p. 762-763). I also accept that BDSM practices may be undertaken in furtherance of the parties' affirmative sexual autonomy, and that this is an important value to protect notwithstanding the critiques noted above. BDSM practices may also be seen to engage the interests of sexual minorities, bringing equality values and group-based concerns into play (Cossman 2011, Deckha 2011, Cowan 2012, Khan 2016). It is therefore inappropriate to consider BDSM practices as non-consensual *per se*. Indeed, it has been argued that the stigma associated with criminalization may increase risk by driving BDSM practices underground and depriving BDSM practitioners of access to education about safe practices (Mackenzie 2010, p. 248).

64. BDSM practices intended to and causing bodily harm are a different matter, however. Although the Supreme Court has not weighed in on the issue, the Ontario Court of Appeal ruled in *R v Welch* that one cannot consent to sexual activities that cause bodily harm in the BDSM context. Its ruling was based on the principle that persons cannot consent to the infliction of bodily harm unless the perpetrator of the harm is acting pursuant to a generally approved social purpose (*R v Welch* 1995, para. 87; see also *R v Jobidon* 1991). Bodily harm must be deliberately inflicted and must actually be caused by the accused in order for consent to be vitiated (*R v Paice* 2005, *R v Quashie* 2005; *R v Zhao* 2013).

65. This position has been critiqued on the basis that the courts' views of approved social purposes are often heteronormative or otherwise majoritarian, and that they have tended to find bodily harm in BDSM cases in situations that are inconsistent with cases outside this context (Cowan 2012, p. 133-135, Craig 2014, p. 115, Khan 2014, Munro 2014, p. 760-762). In England and Wales, BDSM cases have typically come to the attention of the authorities via the complaints of persons other than the parties themselves (e.g. *R v Brown* 1993, *R v Emmett* 1999). This differs from the situation in Canada, where Busby's research reveals that complaints in cases of BDSM causing bodily harm are normally made by a party to the sexual activity who did not consent in fact, and often involve spouses (Busby 2012, p. 346-347).

66. Whether the specific practice of erotic asphyxiation that leads to unconsciousness should be legally permitted was explicitly left open by the Supreme Court in this case, where the majority stated that "it would be inappropriate to decide [this] matter without the benefit of submissions from interested groups" (*R v JA* 2011, para. 21). LEAF (2011, paras. 18, 20) argued in its factum before the Supreme Court that choking into unconsciousness should be seen as aggravated assault, and noted the correlation between strangulation and femicide. This matter has been decided in England and Wales, where erotic asphyxiation leading to bodily harm cannot be consented to (*R v Emmett* 1999, *R v Coutts* 2006). It is telling that many of those advocating in favour of a more expansive approach to recognizing consent to BDSM practices allow for some limits to legality, for example in cases involving grievous bodily harm or death (Mackenzie 2010, Tanovich 2010, p. 94, Cowan 2012, p. 135). A decision on this issue requires a full evidentiary record concerning both the risks and positive social benefits of erotic asphyxiation, and submissions representing a full range of interests and *Charter* values.

67. Whether a party can consent in advance to sexual activity that will take place after she is rendered unconscious is inextricably linked to the issue of whether the underlying practice of erotic asphyxiation leading to unconsciousness is

permitted (Benedet and Grant, 2010, p. 82). Until that issue is resolved, it is inappropriate to allow advance consent in this context as a matter of policy.

68. Even if the Supreme Court were to recognize the legality of erotic asphyxiation leading to unconsciousness, it must be recognized that there are risks to allowing advance consent in this context. Although typically there is active negotiation of consent amongst BDSM practitioners, it is also typical that consent envisions the use of safe words, which cannot be invoked during unconsciousness (Busby 2012, p. 339-340, Jochelson and Kramar 2012, p. 87). For example, in *Emmett*, an erotic asphyxiation case from England involving spouses, the accused “lost track of what was happening to the complainant. He eventually became aware that she was in some sort of distress, was unable to speak, or make intelligible noises”, and removed the plastic bag from her head, but not before bodily harm had ensued (*R v Emmett* 1999, p. 3).

69. The risks of bodily harm resulting from erotic asphyxiation may be risks that the parties are prepared to accept (Khan 2016) – in fact in *R v Emmett* it was the woman’s doctor who reported the matter to police, and she did not testify. However, the existence of other cases where there is a power imbalance between the parties should give us pause before allowing advance consent to sexual activity that will occur following asphyxiation (Weait and Hunter 2010, p. 243, Gotell 2012, p. 362, Munro 2014, p. 747-749). This is not to stereotype all women as battered spouses or victims of false consciousness (Khan 2014, p. 261-262; see also Deckha 2011, p. 141). Rather, it is to recognize that in relationships of serious disempowerment, the need to ensure consent, the ability to revoke consent, and the requirement to take reasonable steps to determine consent may be intensified, especially where bodily harm may result. This is part of the context which will have to be considered in deciding whether to permit advance consent if the underlying issue is resolved in favour of permitting erotic asphyxiation.

70. The second category of cases where it has been argued that advance consent should be allowed so as to protect affirmative sexual autonomy is the sleeping partner scenario. Here, it is argued that consenting sexual partners should be able to engage in pleasurable sexual activities, such as being awakened by a kiss or caress, without fear of criminalization (Young 2010, Sealy-Harrington 2014, p. 121-122).

71. This scenario was a concern for the dissenting justices at the Supreme Court. Justice Fish stated that the denial of advance consent “would also require us to find that cohabiting partners across Canada, including spouses, commit a sexual assault when either one of them, *even with express prior consent*, kisses or caresses the other while the latter is asleep” (*R v JA* 2011, para. 74). The majority responded that this hypothetical situation “would only provide a defence where the complainant specifically turns her mind to consenting to the particular sexual acts that later occur before falling asleep” (*R v JA* 2011, para. 60). Both judgments agreed that the *de minimus* doctrine would not necessarily help the defence, with the majority noting that “even mild non-consensual touching of a sexual nature can have profound implications for the complainant” (*R v JA* 2011, para. 63; see also para. 121). The perceived inadequacy of this response, in addition to perceived problems with leaving such matters to prosecutorial discretion, led Justice Fish to conclude that Parliament could not have intended to criminalize all sexual activity for which advance consent had been given. He once again couched this conclusion in terms of sexual autonomy (*R v JA* 2011, paras. 120, 138).

72. Canadian scholars have also debated the appropriate balance between negative and affirmative sexual autonomy in the sleeping spouse scenario (Young 2010, Gotell 2012, p. 367, Benedet 2013, p. 186-187, Sealy-Harrington 2014). Craig discusses the possibility of carving out an exception to the illegality of advance consent in this context, but concludes that it is impossible to do so “without risking revival of the spousal rape exemption” (Craig 2014, p. 124; see

also Young 2010, p. 304-305, Gotell 2012, p. 377). She recognizes “the cost to sexual liberty incurred by a criminal law of consent that requires contemporaneous capacity to revoke”, but argues that “in a social context ... of systemic gender hierarchies we ought to remain unapologetic” about this cost (Craig 2014, p. 130).

73. I agree that it is inappropriate to carve out an exception for advance consent in this context, especially in light of the historic inequities embedded in the marital rape immunity and the continued influence of its rationales even decades after its repeal. Indeed, it is interesting that the proposed exception is often framed as a “sleeping spouse” scenario rather than aimed at sexual partners more broadly, who might give advance consent to be awakened with sexual activity even after a one night stand. The way this potential exception has been framed accentuates the concerns about how advance consent may be perceived and the risks of it being implied in the spousal context.

74. Until there are legal safeguards in place to ensure that cases of spousal sexual violence are not adversely treated by legal actors, I am persuaded that advance consent in the sleeping sexual partner scenario should not be permitted as a matter of policy. One suggestion for such a safeguard is that the *Criminal Code* might be amended to include an interpretive clause to the effect that the provisions on consent, mistaken belief in consent and associated evidentiary rules should not be attenuated where the sexual assault is alleged to have occurred in a spousal context (Koshan 2017a, p. 21). Legislative amendments are within the purview of Parliament rather than the courts, but I use this opportunity to note that precedent exists for this sort of interpretive clause in sections 276(3), 278.3(4) and 278.5(2) of the *Criminal Code* (1985), which stipulate factors which must be considered when judges are ruling on applications related to sexual history evidence and the production of personal records in sexual assault cases.

75. Another legislative safeguard, referenced by the Supreme Court in this case, was adopted in the United Kingdom’s *Sexual Offences Act 2003*, which introduced in England and Wales an evidential presumption of non-consent where the complainant was asleep or otherwise unconscious (*Sexual Offences Act 2003*, sections 75(2), 142). For Justice Fish, this legislation offered a suggestion for how Parliament might respond to concerns arising from the recognition of advance consent without completely invalidating such consent (*R v JA* 2011, para. 142). But how well has this safeguard worked?

76. The *Sexual Offences Act 2003*, section 74 provides that “a person consents if he agrees by choice, and has the freedom and capacity to make that choice.” Section 75 provides for a number of evidential presumptions related to consent. Generally, if it is proved that the defendant committed the relevant act and that certain circumstances existed to his knowledge, the complainant is presumed not to have consented “unless sufficient evidence is adduced to raise an issue as to ... consent” (*Sexual Offences Act 2003*, section 75(2)). The presumptions also apply to the defendant’s reasonable belief in consent. In addition to the presumption created where “the complainant was asleep or otherwise unconscious at the time of the relevant act,” evidential presumptions exist in circumstances where there was violence or threats of violence against the complainant or another person; the complainant was unlawfully detained; the complainant was unable to communicate consent because of physical disability; and the complainant was given a stupefying substance (*Sexual Offences Act 2003*, section 75(2)(a)-(f)). Additionally, section 76 provides for conclusive presumptions against consent in circumstances where “the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act” or “intentionally induced the complainant to consent to the relevant act” by impersonation.

77. This is a very different scheme than Canada’s *Criminal Code*, where we have a number of conclusive presumptions against consent in section 273.1(2) but no evidential presumptions. Indeed, the *Sexual Offences Act 2003* has been critiqued

on the grounds that there is no apparent rationale for differentiating between the circumstances leading to conclusive versus evidential presumptions (Temkin and Ashworth 2004, p. 336-337). Another critique is that the lists of presumptions are closed and omit certain circumstances where consent might reasonably be presumed absent, such as incapacity caused by voluntary intoxication (Temkin and Ashworth 2004, p. 339, 344).

78. With respect to the evidential presumption involving complainants who were asleep or otherwise unconscious, Temkin and Ashworth (2004, p. 337) argue that it “takes the law backwards” by altering the conclusive presumption at common law that there was no consent in these circumstances. The common law position was based on the understanding – similar to that of the majority of the Supreme Court of Canada in *JA* – that consent must be present contemporaneously with the sexual act (*R v Larter and Castleton* 1995).

79. Case law on the application of the evidential presumption regarding sleeping or unconscious complainants in England and Wales is scant, but it does raise some concerns. In *R v White* (2010), the accused took intimate photographs of himself engaged in sexual activity with the complainant, his former intimate partner, and later sent them to her from his mobile phone. She testified that she did not consent to the photos or the sexual activity they captured, which must have occurred while she was asleep. In cross-examination the complainant agreed that the photos could have been taken following consensual sexual intercourse, and also agreed that there had been times when she had consented to sexual activity with the accused after she had been drinking alcohol (*R v White* 2010, para. 3). This evidence was seen to be sufficient to rebut the evidential presumption relating to unconscious complainants by raising an issue of consent or reasonable belief in consent. For the Court of Appeal, the jury’s question: “If she gave consent beforehand and then fell asleep during the photo preparation, is the consent still current?” should be answered in the affirmative and would provide a defence to the accused (*R v White* 2010, paras. 9, 12).

80. In *R v Ciccarelli* (2011, para. 4), the Court of Appeal considered a situation where the complainant was sexually touched by the accused while she was “fast asleep or unconscious through drink, and possibly drugs, without her consent.” The only issue was the accused’s reasonable belief in consent, and the trial judge concluded that sufficient evidence had not been raised to leave this issue with the jury. The Court of Appeal upheld this ruling, but also suggested that if there had been a previous relationship between the parties, that may have affected the question of whether there was sufficient evidence of belief in consent to rebut the presumption (*R v Ciccarelli* 2011, paras. 5, 19).

81. This commentary and case law on the *Sexual Offences Act 2003* reinforces the concerns I noted earlier with respect to the difficulties of proof in cases involving sleeping or unconscious partners, the improper introduction of sexual history evidence, and the relaxation of standards around consent and mistaken belief in consent in cases involving spousal relationships. A provision such as an evidential presumption regarding sleeping or unconscious complainants would therefore not adequately safeguard against the risks associated with allowing advance consent under Canadian law.

5. Conclusion

82. I recognize that this judgment may be critiqued on the basis that it gives too much weight to negative sexual autonomy at the expense of affirmative sexual autonomy, but I have left open the possibility that advance consent might be permitted in certain circumstances if adequate safeguards can be shown or are established. I acknowledge that the denial of advance consent may adversely impact sexual minorities, including gay, lesbian, bisexual and trans persons, particularly those who are disproportionately susceptible to criminalization on the

basis of race and class (Cossman 2011, Khan 2014, 2016). These concerns certainly merit attention, and I would call upon the government to track the outcomes of criminal prosecutions involving circumstances that raise advance consent in order to establish data about the impact of denying this form of consent.

83. In the meantime, I conclude that the existing provisions of the *Criminal Code*, properly interpreted in light of the interests they were intended to protect, the context of this case, and the broader context of sexual violence and spousal sexual violence, do not permit arguments of advance consent to be recognized under Canadian law.

Appeal dismissed.

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