

Take My Breath Away: Competing Contexts Between Domestic Violence, Kink and The Criminal Justice System in *R. v. J.A.*

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Khan, U., 2016. Take My Breath Away: Competing Contexts Between Domestic Violence, Kink and The Criminal Justice System in *R. v. J.A.* *Oñati Socio-legal Series* [online], 6 (6), 1405-1425. Available from: <https://ssrn.com/abstract=2891048>



Abstract

In the *R. v. J.A.* case, a man was criminally convicted for performing sexual activities on his partner while she was rendered unconscious through erotic asphyxiation. Evaluating the legal and ethical stakes of the case is challenging because the complainant changed her testimony from non-consent to consent at trial, and the couple's history includes both kinky sex and domestic violence. In this paper, I problematize the legal reasoning of the trial judgment (*R. v. J.A.* (J.) 2008 ONCJ 195), the Supreme Court of Canada's majority decision ([2011] 2 S.C.R. 440), as well as the LEAF factum, and some of the feminist commentary. I argue that both the legal and the feminist discourses privilege domestic and sexual violence as the preeminent context in this case, erase or gloss over kinky eroticism and subjectivity, and advance a carceral politics that privileges the criminal justice system as an articulator of truth, and a vehicle for gender justice.

Key words

Consent; kink or BDSM (bondage/discipline/sadism/masochism); sexual assault; domestic violence; unconsciousness; carceral politics; feminist legal theory

Resumen

En el caso *R. v. J.A.*, se condenó penalmente a un hombre por llevar a cabo actividades sexuales con su pareja, después de dejarla inconsciente mediante asfixia erótica. Evaluar las implicaciones legales y éticas del caso es un reto, porque la querellante cambió en el juicio su testimonio del no consentimiento al

Acknowledgements: For excellent challenges, feedback and suggested improvements, I thank the two anonymous reviewers of this article, along with Alex Boni-Saenz, Michael Boucai, Deborah Conners, Brenda Cossman, Sarah Daly, Margaret Denike, Sarah Daly; Stacy Douglas; Andrew Gilden, Lara Karaian, Suzanne Kim, Jennifer Koshan, Suzanne Lenon, Shoshana Magnet, Bruce Ryder, Sarah Swan, Kathryn Trevenen, Brian Smith, Ed Stein, Kate Sutherland, and Diana Young, all the participants in the "Radically Rethinking Marriage" workshop at the ONATI International Institute for the Sociology of Law, and the participants in the Family Law Scholars and Teachers Conference. *This research was supported by the Social Sciences and Humanities Research Council of Canada.*

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consentimiento, y la historia de la pareja incluye tanto el fetichismo sexual como la violencia doméstica. En este artículo se problematiza sobre el razonamiento jurídico de la sentencia (*R. v. A. (J.) 2008 ONCJ 195*), la decisión mayoritaria del Tribunal Supremo de Canadá ([2011] 2 RCS 440), así como el *factum* LEAF, y algunos de los comentarios feministas. Se sostiene que tanto los discursos jurídicos como los feministas consideran la violencia doméstica y sexual como el contexto preeminente en este caso, borran o disimulan el fetichismo erótico y la subjetividad, y promueven una política penitenciaria en la que el sistema de justicia penal es articulador de la verdad y vehículo para la justicia de género.

Palabras clave

Consentimiento; fetichismo sexual o bondage/disciplina/sadmismo/masochismo; asalto sexual; violencia doméstica; inconsciencia; política penitenciaria; teoría legal feminista

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1. Introduction

What happens when one's breath is taken away by another? The concept is multivalent and functions on both literal and figurative levels. As an idiom, it means "to inspire someone with awed respect or delight." (Ayto 2009, p. 43). As a romantic trope, it signifies a sublime experience of being overwhelmed with love and desire.¹ It can also be literal. One can strangle another and block their air passage, consensually or non-consensually. When done non-consensually, it's assault. When done consensually as part of the practice of BDSM (bondage/discipline/sadism/masochism), it's called erotic asphyxiation, or breath-play – but it can still be criminalized.

In this paper, I consider how such competing conceptions are implicated in the *R. v. J.A.* Canadian criminal case² that involved the complainant's (K.D.'s) breath being taken away by her domestic partner (J.A.) in the context of a sexual encounter, and subsequent activities that occurred while she was briefly unconscious. The case poses some challenges when evaluating the legality or social acceptability of the incidents because of the couple's background and the complainant's inconsistent testimony. K.D. first told police that the events were non-consensual, then later testified at trial that it had all been consensual. Moreover, while the couple has a history that included kinky sexual practices, J.A. has a criminal record involving incidents of domestic violence against the complainant. The controversial case reached the Supreme Court of Canada in 2011 and garnered much feminist scholarly attention, along with an intervention by the Women's Legal, Education and Action Fund (LEAF), a Canadian advocacy organization that promotes women and girls' constitutional equality. The trial decision found that while K.D. consented to the erotic asphyxiation, she did not, in fact, consent to the sexual activities while she was unconscious (despite her uncontradicted testimony at trial to the contrary). But even if she did consent, the judge determined that one cannot legally give advance consent to sex that will occur while unconscious. The Supreme Court of Canada affirmed the latter legal finding. In feminist commentary, K.D.'s claims of consent at trial were explained away as a fallacy produced by domestic violence, which supported a broader approach of framing sex while unconscious as a corollary of male violence against women. While potential kinky interests were acknowledged by most of the commentary, the infringement on sexual liberty was seen as an acceptable cost of protecting vulnerable women from the risk of male sexual violence.

In this paper, I problematize the legal reasoning of the trial judgment, the Supreme Court of Canada's majority decision, as well as the LEAF factum, and some of the feminist commentary on the case. While the legal and feminist evaluations of *R. v. J.A.* rely on different discourses and foreground different issues, they are united in their support of J.A.'s conviction. I argue that both the legal and the feminist discourses privilege domestic and sexual violence as the preeminent context in this case, minimize or gloss over kinky eroticism and subjectivity (or interpret the kink as abuse), and advance a carceral politics that privileges the criminal justice system as an articulator of truth, and a vehicle for gender justice. The first part addresses the legal judgments, beginning with a deconstruction of the kink-phobia of the trial decision, and then an analysis of how the Supreme Court's majority decision disregards kink sexual ontologies in its determination of acceptable and unacceptable risk. In particular, I draw upon queer theory to challenge the compulsory chronological order of normative legal sex, and to destabilize the hegemonic polarization between risk and safety. In part two, I consider the LEAF

¹ My own definition, but as a die-hard romantic and an ardent Harlequin reader, I consider myself somewhat of an expert. See also the songs Berlin, 1986, *Take My Breath Away*, Columbia, Geffen; The Corrs, 2000, *Breathless*, Dundalk, Republic of Ireland: WEA International, that express this definition.]

² *R. v. A.(J.)* 2008 ONCJ 195 (Trial decision); *R. v. A.(J.)* 2010 ONCA 226, 253 C.C.C. (3d) 153 (Court of Appeal decision); *R. v. J.A.*, [2011] 2 S.C.R. 440 (Supreme Court of Canada decision).

factum and feminist scholarship that engages the case. I demonstrate how the feminist evaluation of the case draws from what Janet Halley (2006, p. 289) calls “the injury triad,” which rests on the following formulation: female injury + female innocence + male immunity from harm. Under this ideological commitment, victim status is always attributed to women (whether they admit it or not), and never to men. Perpetrator status is always attributed to men, and never to women. In the context of *R. v. J.A.*, the injury triad is evident in the ways that feminist commentary constructed the facts, such that K.D.’s sworn testimony that she consented to the erotic asphyxiation, anal play and bondage was constructed not only as untrustworthy, but also as proof of her victimization.

There are three issues that I want to highlight and disaggregate before beginning the analysis. First is the legal question of whether one can legally consent to sex expected to occur during a period of unconsciousness. Second is the factual question: did K.D. consent in her own mind, and what context is relevant to determine the answer. In both the law, and the feminist discourse that I review, the answer to the first legal question is no, which renders the second factual question moot; it does not matter whether K.D. consented, the law vitiates that consent. Nonetheless, both the trial decision and the feminist commentary attempt to establish K.D.’s factual non-consent in ways that arguably rely on a form of paternalism, overriding a woman’s testimony and nullifying her sexual choices ostensibly for her own good, or for the greater good of womankind. Thus I spend some time engaging with the facts of the case to suggest that there is some evidence to support a finding of factual consent, if one is willing to put aside the injury triad. The third subject is J.A.’s sentencing decision, where I draw upon critical race feminism and critical criminology as a corrective to carceral feminist politics, which used the decision to deviantize J.A., without paying heed to the neo-liberal politics of criminalizing discourse and punishment, and the harm it perpetuates to accuseds, complainants and the community at large.

2. The Law

2.1. Trial decision

I will use K.D.’s uncontradicted testimony to outline the initial facts. The material events occurred on 22 May 2007, when J.A. and K.D. began sexual activities. After a period of foreplay, the couple engaged in erotic asphyxiation, with J.D. choking K.D. to unconsciousness, an activity described by K.D. as a “fetish” they had indulged in before to intensify the sexual experience. While K.D. was unconscious for about three minutes, J.A. bound her hands behind her back and inserted a dildo into her rectum. Soon after K.D. regained consciousness, J.A. removed the dildo and the couple proceeded to have penis-vagina intercourse. Once they had both “finished,” K.D. said her “safe word,” that is, an agreed upon utterance that signals to one’s lover that the BDSM scene should cease. Upon hearing the word, J.A. untied K.D. About seven weeks later, K.D. went to the police and made a complaint. According to the police, K.D. stated that she did not consent to the sexual activity that took place while she was unconscious (that is, the bondage and anal play), and a video statement attesting to this allegation was recorded. J.A. was charged with several *Criminal Code* offences, including sexual assault pursuant to section 246(a), and aggravated assault pursuant to section 268(2). At trial, K.D. recanted her police statement, explaining that her false allegations had been motivated by an argument she had had with J.A., and his threat to seek sole custody of their son. The only admissible testimony at trial was K.D.’s, where she maintained that all activities, including the erotic asphyxiation, bondage and anal play while unconscious, had been consensual. The Crown began a K.G.B. application to introduce K.D.’s video statement at the police station, which would have apparently contradicted her claims of consent (*R. v. B (K.G.)* 1993). But after all parties viewed the video during a *voir dire*, the application was abandoned. It

should thus be emphasized that while there was no admissible evidence indicating K.D. did not consent, Justice Nicholas, the trial judge, was still privy to the video's contents – although of course, she was not supposed to take this into account in her decision.

Justice Nicholas found that K.D. did not consent to the bondage and anal sex on the night in question, but even if she had, she could not legally consent to sexual activity expected to occur during a period of unconsciousness. For the count of aggravated assault because of the choking until unconsciousness, she found J.A. not guilty because the bodily harm was determined to be “transient”. In her sentencing decision, Justice Nicholas reviewed J.A.’s criminal record, which included drug trafficking, weapons and assault charges, and three counts of domestic assault – two of them involving K.D. She sentenced J.A. to 18 months (less 115 days of pre-trial credit), ordered him to provide a DNA blood sample, and registered him as a sex offender.³ In the sentencing decision, Justice Nicholas laments that the complainant asked for leniency, refused to speak to the probation officer, or provide a victim impact statement. The judge rationalized K.D.’s behaviour by labelling her a “battered woman,” implying that K.D. did not know any better, and that her wishes need not be taken seriously (*R. v. J.A.* 2008, para. 12).

A close examination of the trial decision that determined J.A.’s guilt reveals a kink-phobic sexual essentialism that links BDSM with harm, danger and degradation, and ignores the possibility that sexual subcultures may have unique ways of engaging desire and intimacy. My analysis of the trial decision will focus on the factual issue of whether K.D. consented. For the legal question, I will rely on the Supreme Court of Canada’s majority decision, as it sets the precedent and provides the most specific articulation of why consent to sex while unconscious is not to be permitted, regardless of whether the parties experience it as consensual.

In her reasoning on the factual question of K.D.’s consent, Justice Nicholas worked to undermine K.D.’s credibility – no small feat, given that K.D. consistently maintained during chief and cross examination that she consented to all activities. Justice Nicholas discredits K.D. by exceptionalizing anal sex, essentializing what constitutes sexual activity, and citing anti-s/m caselaw. To determine that K.D. was lying about her consent to the anal activity that occurred while she was unconscious, Justice Nicholas seized on the fact that K.D. modified her testimony regarding whether she had engaged in anal sex on a previous occasion. Under examination, K.D. said that she had not had anal sex before, but under cross, she agreed that she had tried it once before, a claim she had also made at the bail hearing. Justice Nicholas rejects this revised testimony, stating, “Human experience would dictate that she would not have to be reminded that anal penetration had occurred on other occasions. I find that she did not at any time consent to this penetration by the dildo in her anus” (*R. v. J.A.* 2008, para. 41). There are two remarkable assumptions underpinning the judge’s reasoning here. First, the judge assumes that anal sex is so extraordinary that “human experience” dictates that it must be branded into one’s memory. One might wonder what “human experience” Justice Nicholas refers to here, but she does not elaborate. It is reasonable to conjecture, however, that she is referring to heterosexual vanilla sexuality, universalizing it by equating it with “human experience”, and assuming that anal sex is more taboo in that context, and thus presumably more memorable. Yet for kinky couples, dabbling with anal activity may not stand out in a sexual history that includes a long list of experimental and non-procreative activities. Second, Justice Nicholas suggests that genuine consent to anal sex requires explicit and verbalized agreement. Yet again, for kinky couples, anal sex may not be understood as so hard-core as to necessitate explicitly worded consent. Both assumptions exceptionalize anal sexual activity, building upon a judicial discourse that has labeled this act as a sexual offence, indecency or obscene representation. In this

³ *R. v. A. (J.)*, 2008 ONCJ 624 (CanLII) at para. 13; 2008 CarswellOnt 7123 (Ontario Court of Justice).

regard, it should be noted that in the current *Criminal Code*, anal sex is still technically criminalized under section 159 (1), but is then subject to an “exception” (s. 159 (2)) if it occurs between husband and wife, or any two people over eighteen years old, who do it in private – with the shield of privacy negated if the number of participants is greater than two (s. 159 (3)(a)). By contrast, vaginal sex is not treated as an offence, the age of consent is 16 years of age, and there are no vaginal-sex specific privacy imperatives or prohibitions of group activities. Thus both in the *Criminal Code*, and in Justice Nicholas’s conclusion regarding K.D.’s non-consent, anal sex is seen as suspicious activity that can only be made legal under particular conditions, despite any testimony of how it was experienced by the parties.

Justice Nicholas also rejects another part of K.D.’s testimony in a way that essentializes sexual activity. K.D. testified that she said her safe word on the material night after the intercourse had ended, but while she was still in bondage, and that J.A. then cut her ties. Justice Nicholas deems K.D. to be lying: “In my view, there was no need to use the safe word at the point she described as all manner of sexual activity was complete and she is disbelieved on that point” (*R. v. J.A.* 2008, para. 5). In this finding, the judge’s assessment of what counts as “sexual activity” imposes a vanilla normativity. While the intercourse phase may be over, from a kinky perspective, being in bondage alone can constitute a sexual activity. As McClintock (1993, p. 108) states, “One of S/M’s characteristics is the eroticizing of scenes, symbols, contexts, and contradictions which society does not typically recognize as erotic.” Justice Nicholas’s disbelief concerning K.D.’s use of their safe word, based solely on her own sense of logic (and not on any testimonial inconsistencies), betrays an intercourse-centric understanding of sex, along with a willful disregard to the s/m context and K.D.’s stated agency on that night. While nothing substantial turns on this finding, accepting K.D.’s testimony on this point would have helped to establish K.D. had some sense of control, and felt entitled to use the safe word to halt an activity. Had she subjectively experienced the indicted activity (the bondage and anal play) as nonconsensual after the fact, it is reasonable to speculate she would likely have uttered the safe word soon after her return to consciousness.

Justice Nicholas’s citation of other cases further betrays her kink-phobia and conflation of s/m with unmitigated violence. In particular, her citation of the British House of Lords decision, *R. v. Brown*, through her consideration of the Canadian Court of Appeal decision, *R. v. Welch*, suggests a generally pejorative view of s/m sexuality.⁴ In *R. v. Brown*, a group of gay men engaged in hard core consensual BDSM play. None of the submissive sexual partners complained to the police, none were rendered unconscious, and none required medical attention. Nonetheless, a number were convicted of assault-related charges, including some submissives who were deemed as accessories to assault upon their own bodies. Some of the convicted men spent years in prison, and the case stands out in the global BDSM community as one of the worst and most blatant examples of the criminalization of BDSM.⁵ Justice Nicholas cites the case with approval in its characterization of s/m as “violence which is inflicted for the indulgence of cruelty” and involves “the degradation of victims” (*R. v. J.A.* 2008 citing *R. v. Brown* 1993, para. 16). The moralistic rhetoric of this citation is repeated in the concluding paragraph of her decision, where she states the complainant, “...was not legally capable of consenting to the sexual degrading acts that occurred to her,” and later elaborates,

⁴ *R. v. Brown* (1993), 97 Cr. App. R. 44, 1993 WL 963434 (HL), (1993) 157 J.P. 337, [1994] 1 A.C. 212, [1993] 2 All E.R. 75 (U.K. House of Lords) cited in, *R. v. Welch*, [1995] CarswellOnt 987 (Ont. C.A.) (WestlawCarswell).

⁵ See for example, White (2006), Stychin (1994), Houlihan (2011). Indeed, besides numerous commentary on the case, entire conferences have been dedicated to the case, see ‘Remembering Operation Spanner: Culture, Law, History and Crime’ (2016) and ‘Remembering Operation Spanner’ (2015).

"I find that the binding of her hands and the forceful insertion of the dildo to be degradation and dehumanizing acts in the circumstances of this case." (*R. v. J.A.* 2008, para. 45). Justice Nicholas's repeated use of the "degrading" pejorative label, along with the anti-s/m caselaw she cites, suggest that in addition to condemning sexual activity when unconscious, the judge also finds kinky sexual activity involving anal play and bondage objectionable as well.

2.2. Supreme Court of Canada decision

Although the Court of Appeal for Ontario overturned Justice Nicholas's decision and quashed J.A.'s conviction, the Supreme Court of Canada restored the conviction based on the legal question alone. The Supreme Court majority decision, unlike the trial decision, eschews moralistic rhetoric regarding the supposed "degrading" or "dehumanizing" nature of the kinky sex. Instead, Chief Justice McLachlin provides a dispassionate legalistic ruling based on statutory interpretation and precedent, finding that legally-valid consent requires one be conscious while the sexual activities are happening. Yet a close examination of the judgment still reveals a suspicious view of sexual relationships, where the threat of exploitation pervades, while the sexual freedom, corporeal autonomy and specific desires of harder-core kink practitioners are overlooked. The majority decision was thereby not concerned with the fact that K.D. testified at trial to her consent, or that there might be sexual stakes for the kink community in this decision. It seems clear that the major policy concern behind the decision is to prevent wrongful acquittals in the case of victims who become inadvertently unconscious, for example, due to intoxication, or for reasons relating to a disability. Nonetheless, the majority in *R. v. J.A.* perpetuates a sexual normative agenda, enforcing a hegemonic temporality that presumes a proper chronological order for an erotic encounter – and in doing so, marginalizes certain kink sensibilities.

Queer theory provides a theoretical pathway for reckoning with the Supreme Court's sexual ideology in this case. As Olson (2012, p. 175) explains in her analysis of the *J.A.* case, "S/m practices are appropriate in a discussion of queer sexualities because they represent a non-normative sexual paradigm that invites multifarious possibilities for sexual pleasure via the modalities of bondage, pain, and submission." Judith Halberstam (2005, p. 8) further draws on queer theory to specify the temporal aspects of sexual normativity: "hegemonic constructions of time and space are uniquely gendered and sexualized." I want to suggest that the use of erotic asphyxiation and the practice of sexual activity while unconscious resists these hegemonic constructions, and invokes what Halberstam (2005, p. 6) calls "queer time". As Halberstam (2005, p. 6) explains in *In a Queer Time and Place*, the notion of queerness references "nonnormative logics and organizations of community, sexual identity, embodiment, and activity in space and time." Most relevant to this analysis, queer time engages temporal logic that challenges the hierarchical dichotomization of "risk/safety".⁶ In *R. v. J.A.*, the majority insisted that consenting to unconscious sexual activity must be prohibited, in part, because of the *risks*. One such risk is that the conscious lover may misinterpret the desires of the unconscious party, or may purposefully exceed the bounds of her consent. Yet a queer approach may reject the notion that risk is something one should necessarily avoid or minimize. For the lover who is temporarily unconscious, time is queered, such that simultaneous physical sensation and the imperative of monitoring one's partner is forsaken for the pleasure of imagining what will happen during future unconsciousness, and what did happen during past unconsciousness. In addition, regaining consciousness while in the middle – as opposed to the start – of a sexual activity perverts normative sexual chronology, yet can be experienced as highly pleasurable. The risks may thus enhance the pleasure of the encounter,

⁶ As Halberstam (2005, p. 6) explains, "'Queer time' is a term for those specific models of temporality that emerge within postmodernism once one leaves the temporal frames of bourgeois reproduction and family, longevity, risk/safety, and inheritance."

and be an integral part of the kink. As Lisa Downing (2007, p. 123) suggests in her analysis of erotic asphyxiation, "Wanting something dangerous despite or because of the lack of a guaranteed safety clause could be a valid version of an ethics of pleasure". Furthermore, as the Respondent's factum suggests, even vanilla couples may request and enjoy being woken up to kisses or oral sex (*R. v. J.A.* 2011, para. 40).

While the majority decision rejects the notion that certain relationships of "mutual trust", like marriage, attenuate the risk of exploitation, what it fails to acknowledge is that some people may have a sexual bent that disregards, or even eroticizes, such a risk. Indeed, in opposition to the more acceptable s/m credo that all sexual activity should be "safe, sane and consensual", some practitioners - often called edgeplayers - adopt a philosophy described as "risk-aware consensual kink," or RACK. (Mistress Kashiko 2016) Such an approach not only asserts the right to engage in activities considered more "extreme", but also challenges the binary opposition between "safety" and "risk," noting that all sexual activity – including vanilla sexuality – carries at least some risk. With this in mind, Douglas (1992) has argued that choosing which risks to highlight, and which to ignore or naturalize as part of the order of things, reflects political power, not empirical fact.⁷ Douglas (1990) further points out that recent discourses of "risk" lend a scientific and forensic quality to the accusation that some activities carry too much risk for the law to tolerate. Thus when the Supreme Court hangs its decision on risk mitigation, it avoids appearing moralistic. Yet beneath the neutral language of risk-aversion, the majority decision imposes a sexual normativity that disregards kinky understandings of acceptable or even desirable risk in queer time, where sensation and satisfaction can happen out of sequence. The context of sexual danger thus became the master narrative through which to interpret erotic asphyxiation and sex while unconscious.

3. Feminist responses to the case

3.1. *The LEAF factum*

Feminist accounts of edgeplay reflect and reinforce this master narrative. The LEAF factum (2011) for *R. v. J.A.* exemplifies this point. In describing the relevant incidents, the factum portrays the accused's previous assault convictions as contiguous with the sexual activities in question: "This appeal involves an accused who has twice been convicted of assaulting the complainant and who this time strangled her into unconsciousness and then bound her hands behind her back and penetrated her unconscious body anally with a dildo." (para. 2) The couple's previous experiences with kinky sexuality, including erotic asphyxiation, are characterized as past incidents of "violent sexual acts" (para. 21). LEAF does not allow K.D.'s testimony that she willingly participated in these acts, and her retraction of the police complaint, to complicate its approach. Instead, that testimony is constructed as symptomatic of her victimization: "...women in relationships involving coercive control are required to be "willing victims": they must accept the abusive spouse's domination, including by reporting that they agreed to, enjoyed, or are responsible for, the violence and abuse" (para. 21). The pathologization of K.D. as a battered spouse helps to discredit her and erase her sexual agency. This erasure is further entrenched when LEAF characterizes the pleasures of erotic asphyxiation and unconscious sexual contact as solely benefiting the male conscious lover who wants to assault his partner.⁸ Alex Dymock's (2012)

⁷ For example, the law allows patients to consent to unconsciousness with their doctor without a chaperone, despite the fact that the medical community has identified sexual abuse of unconscious patients by doctors as a serious problem that plagues the profession (Dehlendorf and Wolfe 1998, Laine *et al.* 2015, McKinley 2016).

⁸ Janine Benedet and Isabel Grant's article on the case, published after the Court of Appeal decision, also perpetuates the sexually normative idea that when a couple engages in sex while one partner is

theorization of female masochism that goes beyond the “safe, sane, and consensual” approach to s/m offers an alternative lens from which to view the interests at stake for lovers who engage in such activities. Dymock (2012, p. 62) argues that desire and pleasure must be disaggregated in order for some edgeplay, like erotic asphyxiation, to become intelligible: “The problem of the desire–pleasure–acceptance mechanism is that sexual desire and pleasure are not one and the same, nor is pleasure always desire’s aim or counterpoint”. While K.D. will not experience simultaneous pleasure during her period of unconsciousness, and she risks the possibility that her partner will transgress the boundaries of her consent, it does not mean that she does not desire it. Such a desire, however, becomes unacceptable because, as Dymock (2012) points out, the law and normative society refuse to recognize female masochists as sexual agents when they transgress pleasure as well as safety imperatives. As with the dominant judicial gaze, the LEAF factum does not contemplate the desires of submissive sexuality and erotic contact that happens in queer time and out of sequence, or the potential pleasure of giving your submissive lover such an experience.

The LEAF factum expresses no concern for the impact such a decision may have on s/m practitioners, or on the legal understanding of s/m in general. However, this may be due to the constraints of advocacy writing, given that factums have page limits and practical goals of achieving specific judicial outcomes. Individual feminist legal scholars have taken such issues into account, including two 2012 articles, one by Karen Busby and the other by Lise Gotell, one 2014 article by Elaine Craig, and finally, Jennifer Koshan’s (2016) feminist judgment of the case. Although each piece has its own agenda, all four grapple with the possible ramifications of the case on female sexual agency and BDSM practitioners, fault the judiciary for allegedly ignoring or misrepresenting some of the pertinent facts and issues, and appear to support the conviction of J.A. Furthermore, the articles suggest that the judicial decisions, along with the queer commentary that expressed concern for the rights of BDSM practitioners at stake in the case,⁹ ignored the “context” of the case, and thus seek to offer a remedial contextual analysis. I argue that the process of contextualization is not self-evident in this case. As my article’s title implies, two of the conspicuous contexts at play are J.A.’s criminal record including two convictions of domestic assault against K.D., and the fact that the couple engaged regularly in BDSM.

Interestingly, from a strict legal perspective, facts related to both contexts may be inadmissible as evidence. First, J.A. never took the stand, so the Crown would be prevented from cross-examining him on his criminal record. Second, even if he had, it is unlikely that his criminal past would have been deemed relevant. As Jochelson and Kramar (2012, p. 97) explain, “This context of domestic abuse was not explored by the Court and would be of limited probative (and indeed, to the accused, highly prejudicial) value in the context of the criminal law. This is evidence that a Court is largely prohibited from using to contextualize sexual assault in most cases.” The couple’s past engagement with BDSM might also be inadmissible because of ‘rape shield’ laws that prohibit the use of sexual history evidence in sexual assault cases, subject to some exceptions.¹⁰ Nonetheless, the couple’s BDSM

unconscious, the only one who benefits is the conscious partner: “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. Valuing the individual autonomy and integrity of the individual is entirely inconsistent with affirming men’s sexual activity where the woman is akin to a corpse.” (Benedet and Grant, 2010, p. 82).

⁹ Most notably: Brenda Cossman, *Sex and the Unconscious (No, We Aren’t Speaking of Freud)* (on file with author).

¹⁰ As section 276. (1) (a) of the *Criminal Code* states: “evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge.” The rule is modified to allow some exceptions, as when the evidence: (a) is of specific instances of sexual activity; (b) is

sexual history was adduced at trial through K.D.'s testimony, apparently without objection from the Crown or judge. According to K.D., they had engaged in "sado-type" behaviour before, including breath-play to the point of unconsciousness, as well as bondage and "dirty talk." They had further agreed on a safe word to halt activity, and had previously discussed what was allowed and what was not.

Despite this testimony, feminist commentary seemed particularly invested in establishing that abuse, and not BDSM, was the real or primary context of the case. In Gotell's (2012, p. 369) words, K.D. and J.A. were in an "established and abusive heterosexual relationship". In her indictment of J.A., Busby (2012, p. 337) cites the sentencing decision, which characterizes him as a "serial abuser of women, and this woman in particular". She further argues that it was improper to allow K.D. to testify about their BDSM history without a s. 276 application, and suggests that this evidence should have been contextualized by "the defendant's prior violence against the complainant" (Busby 2012, p. 358). Craig's (2014) article focuses not on the specifics of the case, but more broadly on the stakes and risks involved when deciding how the law should treat advance consent to sex while unconscious. Nonetheless, she still puts in brackets in the body of her article: "(Although virtually ignored by the Supreme Court of Canada, it is important to note that the sexual interactions in *JA* transpired in a context of serious and ongoing violence perpetuated by J.A. against the complainant)" (Craig 2014, p. 111). Koshan (2016) chastises the appellate decisions for not contextualizing the incident between K.D. and J.A. within the context of an "ongoing history of domestic violence". These articles thus downplay evidence indicating that the couple was also in an ongoing kinky relationship, suggesting that if abuse forms any part of the couple's history, then the kink is irrelevant, not genuine, or a cover for violence.

Bracketing the doctrinal issues around advance consent to unconscious sex, and questions relating to the trial evidence, I want to challenge the privileging of the abuse history in Gotell's (2012), Busby's (2012), Craig's (2014) and Koshan's articles, using Halley's (2005) analysis of the feminist "politics of injury". Halley (2005) defines this feminist political position as an epistemological commitment to the following formula: female injury (woman is the injured party) + female innocence (woman is innocent or incapable of causing harm to man) + male immunity from harm (man is in a position of dominance and incapable of being injured or being in a position of vulnerability vis-à-vis women) = REALITY. If one begins with the politics of injury, as I believe the above cited feminist articles do, then in the case of *R. v. J.A.* the abusive context trumps the kink context (or from LEAF's perspective, there is no contest, as the kink itself is evidence of past abuse, or, in the factum's words "violent sexual acts" (*R. v. J.A.* 2011, para. 21)).

The politics of injury are thus at play when Busby (2012) and Gotell (2012) determine that K.D.'s trial testimony should be disregarded, in favor of her police statement. Recall that K.D.'s testimony at trial was that she consented to all activities; the videotaped police statement was that she did not consent to the bondage and anal play while unconscious. Although the Crown abandoned its application to admit the videotaped statement, outside of a courtroom it still represents non-admissible evidence that K.D. did not consent. Busby (2012) and Gotell (2012) seize on this evidence, and object to judicial, journalistic, and queer academic discourse that accepted K.D.'s testimony at trial, which was that the acts were consensual, and that she complained to the police after a disagreement with J.A. over matters including custody of their son. For Busby (2012, p. 8) and Gotell (2012, p. 386), such discourse implicitly entrenches the stereotype of "vengeful wives" and "lying and vengeful women and the threat of false allegations". What neither seems to note is that the "battered woman" is also a reified category that is susceptible to stereotyping. In particular, there are cultural stereotypes that women

relevant to an issue at trial; and (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice."

who have experienced abuse in a relationship cannot be trusted to tell the truth – if that truth involves defending their partners, or retracting or nuancing a claim of assault – because they are still under the power of, afraid of, or attached to their abuser. Thus the profile of the battered woman is also premised on the notion that women lie, notwithstanding the fact that those who support this claim also want to excuse their lying. In support of the view that K.D.'s trial testimony should not be trusted, Gotell (2012) and Busby (2012) cite the trial judge, who found that K.D. was in distress when the videotaped statement was played during the *voir dire* in the presence of the accused, and who was therefore said to fit the profile of a "typical" recanting witness. Gotell (2012, p. 378) reviews these facts, along with the couple's history of both domestic violence and "rough sex," to suggest that "informing this decision is a description of someone who is afraid of the accused and who may, in fact, be falsely recanting".

Yet this is not the only plausible interpretation of K.D.'s distress. Presumably, she would also appear distressed if required to watch – in the presence of a judge, Crown prosecutor and others – a videotape of herself making an untrue complaint to the police. Of course, such a hypothesis departs from the politics of injury. As Halley (2005) states, the premise of female innocence casts women as incapable of harming, or of having the agency, will, or malice to cause injury to, others – particularly men. However, if we "take a break" from the politics of injury, then there might be good reasons to put more weight on K.D.'s trial testimony. In recounting the material facts, neither Gotell (2012) nor Busby (2012) shares with readers what followed after K.D. awoke from the period of unconsciousness. This takes the anal penetration out of its sexual context, and withholds evidence that might cast a more benign light on the sexual circumstances that night. As stated, K.D. testified that after she awoke, the anal activity continued for about ten seconds, then segued into vaginal intercourse. K.D. further testified that "once he was finished and I was finished," she said the safe word, and J.A. untied her. If we take this testimony at face value, it stands as evidence that K.D. did not subjectively experience the period of unconsciousness as a sexual assault. As I argued above, if she had felt assaulted, it seems plausible that she would have used the safe word soon after she had revived. In addition, her testimony about J.A. having "finished," which was then followed by her being "finished," could reasonably be interpreted as a reference to each achieving an orgasm, or at least, satiation. This *may* provide some evidence that she did not experience the sexual activity that night as assaultive. Finally, the fact that K.D. testified that the police complaint was false, and motivated by an argument she had had with J.A. right before she went to the police station (seven weeks after the incident), *may* raise questions about whether the events of that night were experienced as sexual violation.¹¹ Of course, K.D. could be lying about the fight, or the fight could finally have caused her to admit to herself that she had been sexually assaulted by her partner, and this prompted her to go to the police at that time.¹² And of course, women can continue to have consensual sex and orgasms right after an incident of assault (or even orgasm during the assault) (Levin and van Berlo 2004). None of this evidence proves K.D. consented to the bondage and anal play occurring during

¹¹ It is important to note that s. 275 of the *Criminal Code* has abrogated the "recent complaint" common law principle such that a delay in reporting a sexual assault cannot automatically carry with it a negative inference of credibility.

¹² See, for example, L'Heureux-Dubé J. exploration of the issue in *R. v. Seaboyer* (1991), 1991 CanLII 76 (SCC), 6 C.R.R. (2d) 35, [1991] 2 S.C.R. 577, 66 C.C.C. (3d) 321, at p. 82 C.R.R., p. 334 C.C.C.

"There are a number of reasons why women may not report their victimization: fear of reprisal, fear of a continuation of their trauma at the hands of the police and the criminal justice system, fear of a perceived loss of status and lack of desire to report due to the typical effects of sexual assault such as depression, self-blame or loss of self-esteem. Although all of the reasons for failing to report are significant and important, more relevant to the present inquiry are the numbers of victims who choose not to bring their victimization to the attention of the authorities due to their perception that the institutions, with which they would have to become involved, will view their victimization in a stereotypical and biased fashion."

unconsciousness. But in combination with K.D.'s own testimony of consent, it should at least be considered relevant context. One would have to be completely devoted to a feminist politics of injury, and to understand that previous incidents of domestic assault must colour and contaminate every interaction between J.A. and K.D., to not even consider that such facts might challenge the notion that K.D.'s phenomenological experience was conclusively one of sexual victimization.

The final manifestation of the politics of injury that I want to address is Busby (2012) and Gotell's (2012) treatment of J.A., and its correspondence with the premise of male immunity from harm. Both Busby (2012) and Gotell (2012) spend much time providing context that they believe others have overlooked, in particular citing the sentencing decision, and underscoring J.A.'s criminal record. For example, Busby (2012, p. 9) cites the trial judge's characterization of J.A. as a "dangerous and deviant man," and Gotell (2012, p. 371) footnotes a lengthy quote from the sentencing decision that, in her view, demonstrates the "clear and unambiguous context of abuse within which the events in J.A. occur". A closer examination of the facts, however, suggests that the relevance of this "context" is not as clear or unambiguous as Gotell makes out. Inserting a dildo into K.D.'s rectum during a period of consensually rendered unconsciousness (even if that consent is constrained or coerced within larger systems of gender inequality), and then continuing with mutual sexual activity until each one "finished," does not fit the past pattern of abuse against K.D. (if two incidents can be called a "pattern")¹³. Neither Gotell (2012) nor Busby (2012) highlights the fact that among J.A.'s history of violent offences, none are sexual. The two incidents of domestic violence involving K.D. were in the context of heated arguments, not sexual interactions. Thus, the evidence suggests that the violence in J.A. and K.D.'s relationship may best be described as, what researchers refer to as, "situational couple violence," which occurs when a specific conflict escalates to verbal aggression and ultimately violence (Johnson *et al.* 2014). Again, I am not suggesting this proves that no sexual assault took place, but rather that it undermines the seamless connection forged by the feminist literature between the past assaults and the sexual activities in question. I think the reason that this connection seems so seamless to Busby (2012), Gotell (2012), LEAF, and the trial judge is that J.A. has been objectified as an "abuser" in their narratives, and this becomes his master status (Becker 1963). It is the core and only relevant part of J.A.'s identity.¹⁴ The politics of injury, which includes the presumption of male immunity from harm, dictates that J.A.'s identity as an abuser trumps his identity (and K.D.'s identity) as a kinky person. In this way, all issues get filtered through the abuse context, including their BDSM history, K.D.'s testimony of consent, and her pleas for leniency at the sentencing hearing. The relationship can only ever be characterized as a violent one, with J.A. always holding the power, and K.D. always understood as powerless. Within this logic, J.A.

¹³ The Sentencing decision outlines the details of the domestic violence convictions involving K.D.: "He has three previous convictions for domestic violence; two of those involve this complainant. In August 2003, Justice Lajoie sentenced him for four offences: 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 1/2 month sentence. (para. 2)

¹⁴ For a discussion of the deviantization of abusers, see Corvo and Johnson (2003).

could never be victimized by a female partner who fabricates a story that will send him to jail and allow her to keep custody of their son. This possibility is thus tautologically explained away; because they are in an “abusive” relationship, any evidence that K.D. provides of consent, or *her own* wrongdoing, must be a sign of her abuse.

In contrast to Busby (2012) and Gotell (2012), Craig (2014) is not primarily focused on the factual question of what actually happened between J.A. and K.D. on the material night, or the fact that their history includes kink and domestic assault. Instead, her nuanced agenda is to shift away from moralistic and normative evaluations of sex while unconscious, in order to justify prohibition based on risk assessment. In this way, the article supports the risk discourse of the Supreme Court of Canada’s majority decision, discussed above. One of Craig’s (2014) unique contributions in this piece is the recognition of a sexual liberty cost to this approach. Indeed, the article explicitly contemplates the possibility that “objectifying” sex (as she understands unconscious sex to be) is not necessarily exploitive, but could contribute to human flourishing. Nonetheless, in her determination, the *risk* of exploitation and violence is too high, given the possibility that the conscious partner will intentionally or unintentionally exceed the bounds of consent, and given broader societal contexts: “In a social context where sexual violence remains a preferred technology for the reification and perpetuation of systemic gender hierarchies, we ought to remain unapologetic regarding the cost to sexual liberty incurred by a criminal law of consent that requires contemporaneous capacity to revoke.” (Craig 2014, p. 130)

I have two responses to this position. The first builds off of my critique of the SCC’s risk aversion justification for denying advance consent to unconscious sex. Claiming an activity carries high risk is not an objective determination, but rather a political decision whereby some sexual risks are reified as fact and legally intolerable, and others are normalized, or at least seen as outside of the reach of the criminal law. Furthermore, the claim of intolerably “high-risk” carries with it an aura of positivist truth, without any positivist evidence about how frequent the conscious partner during unconscious BDSM sex exceeds the consent provided, or whether the unconscious partner, upon regaining consciousness, feels fulfilled or exploited. This is in contrast to other problematized time periods when sexual assault may happen, and there is evidence to support the claim of high-risk. Take, for example, the “red zone” – a period in the Fall semester that some researchers identify as the time when first-year female university students are most likely to be sexually assaulted (Kimble *et al.* 2008). Indeed, one study found that as many as 25% of first year college students have “unwanted sexual experiences” during this time, including incidents where they did not want to engage in the activity, were intimidated or forced to go along, or were incapacitated (Wible 2013). Among the many policy responses to this issue, none consider the possibility that sexual contact should be criminalized for first year college students, despite empirical studies that point to an alarming number of victims. I realize that this might read as a false or far-fetched analogy, as an unconscious partner cannot monitor or influence her lover’s activity, while a first-term college student in theory can (subject to considerations of intoxication). And yet despite the ability to monitor one’s partner, the risk of unwanted sexual experience is high for first-year college students, while reporting to the police remains very low (Sinozich and Langton 2014). I want to suggest that the reason why the criminalization of first term college sex appears absurd has nothing to do with any objective risk criteria, and everything to do with ideology, and whose freedoms matter most. First-term college sex that is wanted is more valued than unconscious sex that is wanted, and criminalizing first-term sexually active college students across the board seems more unfair than criminalizing the conscious lover in a consensual encounter involving unconscious sex. Thus while the language of morality has recently given way to harm and risk discourse in

jurisprudence and feminist legal theory, there is still a value-laden assessment of which sexual risks will be cast beyond the legal pale.

My second observation of the “high-risk” justification for criminalization is that for Craig (2014), as well as the Supreme Court, protection from danger is deemed more important than allowing (some kinds of) pleasure. It is not to say that pleasure is irrelevant in this worldview, but if it is perceived as a sum-zero game, as it is with Craig’s (2014) portrayal of the risks and pleasures of unconscious sex, then pleasure must give way to the goal of minimizing danger. This is not sex negativity, but rather a hierarchization of what matters most. I appreciate that Craig (2014) acknowledges that some consensual non-exploitative sex will be caught by this rule, and this is a “failure” of the law. But it is a productive failure in her view: “Let these moments of legal inadequacy float uncomfortably but resoundingly and unapologetically within the ocean of (sexual) injustice in which they swim.” (Craig 2014, p. 134). The main problem I have with this perspective is that it does not take into account that one of the main ways the criminal justice system systematically “fails” is by focusing its criminalizing efforts on the most marginalized.

In this way, Craig (2014) – along with Busby (2012), Gotell (2012) and Koshan (2016) – is implicated in what Halley (2006) refers to as “governance feminism,” and what Elizabeth Bernstein (2010) calls “carceral feminism”. Governance feminism denotes the mainstreaming of (certain) feminist agendas and discourses. In simple terms, feminism has acquired significant influence and power, and it has achieved many victories with this power. The fact that rape is taken seriously as a harmful practice – if still not seriously enough – is one example. One of the drawbacks of governance feminism, however, is its refusal to contend with the costs of some of these feminist gains. As Halley (2006, p. 33) states of feminism, “[It] has governance capacity to change social life, but it also avoids acknowledging the full range of its effects”. One of those unacknowledged effects is, at times, a strengthening of the criminal justice system, a coercive and violent system that consistently harms those most marginalized. When governance feminism allies with a criminalizing state that purports to address systemic and social problems through punishment – with incarceration being its main tool – this is carceral feminism.

It is noteworthy that Craig (2014), Busby (2012) and Gotell (2012) do not include the carceral effects of the J.A. decision in their articles as part of the missing “context” they seek to fill in. There is no mention of the endgame: J.A. was sentenced to eighteen months in jail, registered as a sex offender, and forced to provide a DNA sample – all despite K.D.’s protests and pleas for leniency at the sentencing hearing. Do these scholars think this was a good punishment from a retributive or utilitarian standpoint? Or is it irrelevant, because the feminist victory lies in the conviction, with other questions about the penal system deemed epiphenomenal? Whatever the reason for neglecting to mention J.A.’s punishment, it represents trends in governance feminism to ignore its will to power, and decontextualize the material effects of such criminal convictions. This is ironic because one of feminism’s most important contributions to legal critique has been to expose the material effects of abstract rulings.

In the spirit of providing additional “context” of importance, I think it is necessary to acknowledge that J.A.’s punishment more broadly legitimates the neoliberal criminal justice system, entrenches the prison industrial complex, and extends the criminalizing surveillance society. The few studies that have been conducted on sex offender initiatives, like Sex Offender Registries, suggest they do not reduce or prevent sex crimes, or promote public safety (Levenson and D’Amora 2007). Furthermore, Sex Offender Registries perpetuate the myth that stranger danger is the most pressing sexual safety concern, and negatively and disproportionately impact communities of color (Meiners 2009). To acknowledge that such policies have a discriminatory effect does not mean that one does not take sexual violence

seriously. For example, Rape Relief, a radical feminist organization and women's shelter, argues against the collection of DNA samples as a means of addressing violence against women. In an online article, "Not in Our Name," (Miller and Kubanek 2010) Rape Relief argues that collecting DNA samples from offenders works against the interests of most sexual assault survivors, and diverts public resources away from services that assist victims, and towards the police – an institution complicit in violence against women. In addition, not just concerned with women, Rape Relief also addresses the impact on marginalized men: "Native men, men of colour and poor men are jailed in Canada at a rate far out of proportion with Canadian demographics. Because their DNA would dominate the DNA databank, using such a databank to identify perpetrators of crime would reinforce and even promote more inequality in our justice system" (Miller and Kubanek 2010). Thus, on the basis of class and racial inequality, Rape Relief effectively breaks from a politics of injury to highlight male vulnerability and victimization within a decontextualized and neoliberal punishment scheme.

Besides not commenting on this penal realist context, Busby's (2012) article takes carceral feminism one step further. Not only is J.A.'s conviction deemed appropriate, she also suggests Canada might need more criminal law. Over 30 American states have passed strangulation felony crimes, and Busby, citing a New York police media release, argues this new crime construction appears to be an effective avenue for law enforcement. On the basis of this American model, she suggests that Canada should consider creating its own strangulation-specific offence. While I do not want to suggest that criminal law reform is never a legitimate avenue for social transformation, no consideration is given to the prolific scholarship by critical race feminists about the ineffectiveness of increasing police powers, diverting more funds into the prison system, or allying with the state in response to intimate partner violence; nor does Busby (2012) evaluate arguments that such approaches can cause harm to both marginalized men, and female victims of male violence.¹⁵ And of course, no mention is made of the fact that s/m players who participate in consensual breathplay are also likely to be disproportionately vulnerable to criminalization under such a new law.

In contrast to Busby's (2012) support of the penal state, Gotell (2012) does not advocate for a proliferation of criminalizing solutions. Instead, she challenges the affirmative consent discourse that portrays female victims of violence as neoliberal subjects who are responsibilized for managing the risk of sexual danger. When she refers to men, they are endowed with substantial agential power. This can be seen, for example, in her argument that insofar as cases like *R. v. J.A.* ascribe sexual subjectivity or autonomy to women, they effectively "obscure the stakes for men's sexual access and entitlement", "hold women accountable for their own objectification," and "shield from view men's agency, interpersonal and relational coercion, and larger systems of sexist oppression" (Gotell 2012, p. 376-381). Such descriptions exemplify the politics of injury in that only men can wield power and exercise agency during suspect sexual activity; any consent that women may give to submissive or risky sexual behaviour can only be the product of "larger systems of oppression." Though Gotell does not come right out and say it, it seems to me that she dismisses the possibility of women's stated consent to sex she views as objectifying by suggesting they they must either be lying because they are under systemic patriarchal duress, or they suffer from false consciousness. As Jochelson and Kramar (2012, p. 95-96) argue of Gotell's (2012) arguments in this article, "these sexual actors [women like K.D.] are agent-less automatons reacting to the market forces that encourage their sexual compliance." Moreover, as Gurnham (2014, p. 118) points out, "Gotell is appealing not to any aspect of the case at hand, but to an underlying assumption that at the heart of normative heterosexual intimacy is a violence, the function of which is to oppress women."

¹⁵ See, for example, Miccio (2005), Crenshaw (2011), Gruber (2012), Urs (2014).

In addition, the unspoken assumption in Gotell's (2012) reasoning is that foregrounding a woman's sexual agency, adventurousness, or desires – even if this is supported by the woman's own testimony – denies the existence of structural constraints. Yet as Kathryn Abrams (1995, p. 348) has argued, the recognition of systemic oppression might better be understood as a "critical description, rather than a life sentence of injury and passivity". If the contexts of kinky sexuality and past abusive incidents are acknowledged, it is possible to understand K.D. as someone who negotiates both pleasure and danger in her relationship with J.A. Moreover, recognizing that oppressive ideologies inform desire and action should not automatically mean that criminalizing the male participant in risky power-play is the answer. While Gotell (2010) has recently written on the limited effectiveness of criminal convictions as the primary or sole response to sexual assault in the context of gender inequality, her 2012 article on *R. v. J.A.* does not address the neoliberal dimensions of the criminal justice system, or comment on the ways it responsabilized J.A. as a rational actor who failed to correct his behaviour after his past convictions and stints in jail. There is no mention of the carceral system itself as a major player in inculcating violence and anti-social behavior (Mathiesen 2006). Indeed, in citing J.A.'s criminal record to establish the abusive context of his relationship with K.D., Gotell (2012) implicitly relies on the truth-value of criminalizing neoliberal discourse. As with Busby (2012), no context is provided about the ways poverty, mental health issues, intergenerational trauma, colonialism, racism and criminalization are linked to male violence in intimate partner settings. Despite Gotell's (2012) interest in exposing neoliberal ideologies in this article, the politics of injury obscures J.A.'s responsabilization in a neoliberal framework, and his victimization at the hands of the penal system.

While Craig (2014) avoids addressing the details of J.A.'s conviction, her implicit acceptance of criminalization as a helpful tool in addressing social inequities and sexual violence reveals some of the limitations of an intersectional analysis when it does not consider "offenders" alongside "victims", or men alongside women. For example, in defending the criminalization of unconscious sex, she states: "The cost to sexual liberty incurred by the injustice of criminalizing mutually desired, nonexploitative, 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." (Craig 2014, p. 133). The argument suggests that the only thing being forsaken by this rule is a bit of "sexual liberty." In fact, 'gender-, race-, and class-based conditions of vulnerability and relations of force' also make the criminal justice system a weapon of oppression. Consider some recent alarming statistics about Canada's rising prison rates (Brosnahan 2013). Canadian Correctional Investigator Howard Sapers produced a report showing that from 2003-2013, the number of visible minorities in Canadian prisons increased by 75%; 80% of offenders suffer from substance abuse problems; and nearly half of all offenders require mental health care. Furthermore, Indigenous and Black inmates are particularly victimized by the system, as they are, in his words, "over-represented in maximum security institutions and segregation placements. They are more likely to be subject to use of force interventions and incur a disproportionate number of institutional disciplinary charges. They are released later in their sentences and less likely to be granted day or full parole." (Brosnahan 2013) If we take this broader context into account, then Craig's (2014) thrice repeated assertion that feminists should be "unapologetic" about the costs of criminalizing "risky" unconscious sex must be questioned. Criminalizing unconscious sex does not just mean that some kinksters will be caught by the law and punished for having non-normative sex; it also means that those most likely to be caught and disproportionately punished often hold the least social capital.

I realize that my concern with criminal punishment goes outside of the scope of Craig's (2014), Busby's (2012) and Gotell's (2012) articles. This may be unfair,

particularly to Gotell's (2012) article, which focuses on the legal discourses at play in and around the J.A. decision. Furthermore, my critical criminological critique of Craig's (2014) article can be applied to any article that considers intersectional issues (race, class, gender, etc.), but still supports the expanding reach of criminalizing power, without acknowledging the harms of the carceral system, and its disproportionate impact on marginalized populations. But relying on state power and criminalizing discourse to counter sexual oppression and violence involves political contradictions that we should pay attention to. While finding unconscious sex to be criminal may have denunciatory and symbolic value – and may prevent wily defence lawyers from arguing consent in other future cases of non-consensual unconsciousness – it also results in some very serious consequences. Legal interpretation of unconscious sex will occasion penal violence that happens off-stage, outside of the text of Supreme Court judgments. More men – and disproportionately, more marginalized men – will be funnelled into a bloated, violent and counter-productive criminal justice system. And sexual minorities, particularly BDSM edgeplayers, will become more vulnerable to criminalization.

4. Final thoughts

To conclude, let us return to the concept of having one's breath taken away to consider another implication. When your breath is taken away, you are rendered silent. In this way, one could say that the judicial rulings and the feminist literature non-consensually took K.D.'s breath away, by treating her testimony as irrelevant. Recall that K.D. claimed all activities were consensual at trial, refused to cooperate with the criminalization of J.A. by filling out a victim impact statement or talking with the probation officer after he was convicted, and expressed a desire that J.A. continue to have a bond with their son while pleading for leniency at the sentencing hearing. The judge dismisses this behaviour by labelling her an abused spouse who thereby cannot be trusted to tell the truth, or know what's good for her or her child. The feminist commentary examined above implicitly supports this view. As Jochelson and Kramar (2012, p. 97) observed of the feminist and legal discourse, "The only clear voice left out of the political calculus is the voice of the complainant herself." I am not suggesting that we should ignore the context of past abuse when assessing the facts of the case, nor the potential of abuse if unconscious sex were legally permitted in general. Rather, when evaluating the facts, we should also take into account K.D.'s testimony, stated wishes and kink subjectivity, despite the fact that this creates a competing context. And I also think that we need to look beyond the criminal conviction, to recognize the penal violence J.A. will endure through his incarceration, the DNA extraction, and his permanent branding as a "sex offender". More broadly, we should acknowledge the legal interests of kinky practitioners, as well as the fact that the criminal law and mass incarceration have a disproportionate negative impact on the most marginalized populations. In this way, I advocate for more explicit engagement with critical race feminism, critical criminology and penal abolitionism as we consider sexual assault reform.

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