



## **The Treatment of Consent in Canadian Sexual Assault Law**

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TABLE OF CONTENTS

<b>PART 1: CONSENT, SEXUAL ASSAULT IN INTIMATE RELATIONSHIPS AND GENDER INEQUALITY .....</b>	<b>1</b>
INTRODUCTION .....	1
SEXUAL ASSAULT IN MARRIAGE AND OTHER INTIMATE RELATIONSHIPS: DYNAMICS AND IMPACTS.....	2
SEXUAL ASSAULT AND CONSTITUTIONALLY PROTECTED EQUALITY RIGHTS.....	7
THE TROUBLE WITH “CONSENT:” THE COMPLEXITIES OF CONSENT IN THE CONTEXT OF GENDER INEQUALITY .....	10
<i>Sexual Assault, Power and the Law: Taking Gender Inequality Seriously in         Analysing Consent</i> .....	11
<b>PART II -- THE CRIMINAL LAW OF SEXUAL ASSAULT IN CANADA: A BRIEF OVERVIEW.....</b>	<b>13</b>
CONSENT AS THE KEY ELEMENT IN THE LAW OF SEXUAL ASSAULT IN CANADA	16
LEGISLATIVE REFORM AND THE SHIFT TO AN AFFIRMATIVE CONSENT STANDARD: THE REASONABLE STEPS REQUIREMENT.....	17
CONSENT CAN NOT BE “IMPLIED,” CONSENT MUST BE EXPLICIT.....	18
THE “HONEST BUT MISTAKEN” BELIEF IN CONSENT DEFENCE .....	18
PAST SEXUAL HISTORY EVIDENCE AND THE TEST FOR ADMISSIBILITY IN SEXUAL ASSAULT CASES .....	19
<b>PART III SEXUAL ASSAULTS IN INTIMATE RELATIONSHIPS – TRENDS IN THE CANADIAN CASE LAW .....</b>	<b>21</b>
CONSENT AND CONFUSIONS ABOUT CONTEXT: THE MISTAKEN BELIEF THAT SEXUAL ASSAULTS IN INTIMATE RELATIONSHIPS REQUIRE A DIFFERENT LEGAL ANALYSIS OF CONSENT .....	23
THE MISTAKEN BELIEF IN CONTINUOUS CONSENT: JUDICIAL “READING IN” OF IMPLIED OR ONGOING CONSENT IN INTIMATE RELATIONSHIPS.....	25
THE MISUSE OF “CONTEXT” IN RELATION TO CONSENT: PAST SEXUAL HISTORY EVIDENCE TO BOLSTER BELIEF IN CONTINUOUS CONSENT.....	26
CONSENT AND JUDICIAL EXPECTATIONS OF RESISTANCE IN MARITAL SEXUAL ASSAULTS .....	29
CONSENT CAN NOT BE GIVEN IN ADVANCE, OR WHILE UNCONSCIOUS: <i>R. v. J.A.</i> .....	33
CONCLUSION.....	36

## **PART 1: CONSENT, SEXUAL ASSAULT IN INTIMATE RELATIONSHIPS AND GENDER INEQUALITY**

### Introduction

Consent is the legal dividing line between wanted and unwanted sexual contact. As such, it is a critically important legal term of art. Yet despite statutory attempts to delineate its boundaries, its meaning is elusive, complex and inextricably bound up with social attitudes and expectations about sexual and gender relationships.

In the absence of consent, voluntarily and freely given, sexual contact is criminal. This is the case regardless of the nature of the relationship between the parties. As the political slogans tell us, “no means no,” and “without consent it’s sexual assault”.

Yet as simple and clear as this idea seems to be, its translation into law remains complicated and murky. This is especially the case with regards to sexual assault in the context of marriage or other intimate relationships. An explicit historical expectation that consent to sex was always, by definition, and automatically given by women to the men to whom they were married, was codified in law until 1983 in Canada. Only with the elimination of spousal immunity for sexual assault was the idea that a man’s conjugal rights to his wife entitled him to forced, coerced or violent sex with her, officially challenged. But the dismantling of the social attitudes has been a much longer project, and one which remains very significantly incomplete.

Many countries of the world do not even recognize the rape of women in the context of marriage or other intimate relationships to be criminal conduct. For example, Jamaica, Iran, Pakistan, Bolivia and Laos, are countries where sexual assault of married women by their husbands is not criminalized.<sup>1</sup> In those countries which have criminalized sexual assault of women by their male intimates, enforcement of the law may be so absent, and social inhibitions against reporting to the police so powerful, that it might as well not be. Internationally, *The Declaration on the Elimination of Violence Against Women*, requires that member states seek to eradicate the problem of violence against women within their respective jurisdictions and challenge religious beliefs, social attitudes, and customs which legitimate it. Marital rape is recognized within the Declaration yet this does not mean that the project of ending social and legal impunity for it is even seriously begun in many, perhaps nearly all countries of the world.

Canada, however, has made serious attempts to criminalize violence against women generally, efforts which include sexual violence in intimate relationships. The criminal law is explicit in defining sexual assault, articulating the factors

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<sup>1</sup> See, for example, <http://www.un.org/News/Press/docs/2009/wom1743.doc.htm>

which nullify consent and limiting the operating of traditional and sexist defences to sexual assault. The clarity of the *Criminal Code*, however, has not translated smoothly into practice. Rape and sexual assault within intimate relationships remains woefully under reported. And while the statutory prohibition on sexual assault, and the fact that no exemption exists for offenders who are married to their victims is unambiguous, the judicial record on this front is uneven. To the extent that there is a broad lack of understanding of this issue and wider social attitudes about sexual assault in intimate relationships remain mired in misinformation and faulty assumptions about what is expected and accepted in this context, the judicial record is not surprising.

### Sexual Assault in Marriage and Other Intimate Relationships: Dynamics and Impacts

Sexual violence is a distinctly gendered crime.<sup>2</sup> Though in the popular imagination men who sexually assault are thought to be dangerous strangers, the fact is that sexual assaults are most often perpetrated by men against women known to them.<sup>3</sup> This includes men who are husbands, common law spouses or boyfriends.

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<sup>2</sup> See for example, information and statistics from the World Health Organization, <http://www.who.int/gender/violence/gbv/en/index.html>, for Canadian data see Holly Johnson and Myrna Dawson, *Violence Against Women in Canada Research and Policy Perspectives*, Toronto: Oxford University Press Canada, 2011; Statistics Canada, “Measuring Violence Against Women: Statistical Trends 2006”, online: Statistics Canada <<http://www.statcan.ca/cgi-bin/downpub/listpub.cgi?catno=85-570-XIE2006001>> (analysis of statistics on sexual assault, including relationships between victims and perpetrators).

<sup>3</sup> See Statistics Canada, “Measuring Violence Against Women: Statistical Trends 2006”, online: Statistics Canada <<http://www.statcan.ca/cgi-bin/downpub/listpub.cgi?catno=85-570-XIE2006001>> (analysis of statistics on sexual assault, including relationships between victims and perpetrators); Melanie Randall and Lori Haskell, “Sexual Violence in Women’s Lives: Findings From the Women’s Safety Project, a Community-Based Survey” (1995) 1 *Violence Against Women* 6 at 23-4; Rachel Jewkes, Purna Sen, Claudia Garcia-Moreno “Chapter 6: Sexual Violence,” in Etienne G. Krug Etienne G. Krug, Linda L. Dahlberg, James A. Mercy, Anthony B. Zwi and Rafael Lozano eds., World Health Organization, *World Report on Violence and Health* (Geneva: World Health Organization, 2002) at 152-3, World Health Organization <[http://whqlibdoc.who.int/publications/2002/9241545615\\_chap6\\_eng.pdf](http://whqlibdoc.who.int/publications/2002/9241545615_chap6_eng.pdf)>.

While the problem and prevalence of violence against women in intimate relationships, most commonly referred to as domestic violence, has become the focus of increasing social and legal attention in recent years,<sup>4</sup> less attention has been paid to the problem of sexual violence perpetrated by men against their female intimates. Yet sexual violence in intimate relationships is a significant problem in terms of prevalence and harmful impacts.<sup>5</sup> For a variety of complex reasons, not least of which is women's reluctance to report, it is a crime which remains largely beyond the reach of the criminal justice system.

Violence against women has been conceptualized as existing along a continuum.<sup>6</sup> So too has the levels and elements of sexual violence in women's lives been described as a continuum. In a consultation on specifically *sexual* violence against women held under the auspices of The Global Forum for Health Research (an International NGO established in Geneva) this idea was embraced by researchers to describe "the varied elements of sexual violence including: concepts of consent [free and willing agreement], concepts of marital/sexual needs and rights of men and women, the relationship between the victim and the perpetrator, the settings in which SVAW is perpetrated [public and private spheres], and the continuum of SVAW - from harassment to homicide."<sup>7</sup> This way of thinking about sexual violence situates the specific problem of sexual

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<sup>4</sup> See, for example, Jennifer Koshan, "The Legal Treatment of Marital Rape and Women's Equality," (2010) online at: [theequalityeffect.org/pdfs/maritalrapecanadexperience.pdf](http://theequalityeffect.org/pdfs/maritalrapecanadexperience.pdf); Woolley, Morgan Lee, "Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues," (2007) 18 *Hastings Women's L.J.* 269; Eastal, Patricia 1997 "Marital Rape: Conflicting Constructions of Reality," 3 *Women Against Violence: An Australian Feminist Journal* 23-30; Judith McFarlane, Ann Malecha, "Sexual Assault Among Intimates: Frequency, Consequences and Treatments, U.S. Department of Justice, October, 2005, available online at: [www.ncjrs.gov/pdffiles1/nij/grants/211678.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/211678.pdf).

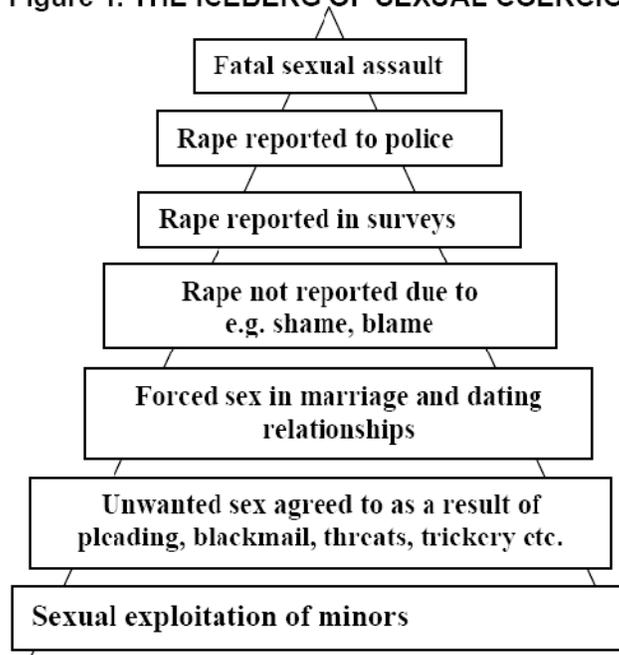
<sup>5</sup> Kersti Yllo, "Wife Rape: A Social Problem for the Twenty-First Century" (1999) 5 *Violence against Women* 1059, Patricia Esteal and Louise McOrmond-Plummer, *Real Rape, Real Pain: Help for Women Sexually Assaulted by Male Partners* (Melbourne: Hybrid, 2006); Diana E.H. Russell, *Rape in Marriage*, 2nd edition (Bloomington: Indiana University Press, 1990); David Finkelhor and Kersti Yllo, *License to Rape: Sexual Abuse of Wives* (New York: Free Press, 1985); Jennifer A. Bennice and Patricia A. Resick, "Marital Rape: History, Research, and Practice" (2003) 4 *Trauma, Violence, and Abuse* 228; Glanville Williams, "The Problem of Domestic Rape" (1991) 141 *New Law Journal* 205.

<sup>6</sup> Cites on continuum of violence against women.

<sup>7</sup> "Eliminating Sexual Violence Against Women: Towards a Global Initiative," Report of the Consultation on Sexual Violence Against Women, The University of Melbourne, May 2000, Overview of Sexual Violence against Women in South Africa (Rachel Jewkes), at 14, Melbourne Report, at 26-27.

assault in intimate relationships within a broader context of other forms of men's sexual aggression against women and girls in family situations and also demonstrates how few of these instances ever reach the attention of the police and the law.

**Figure 1. THE ICEBERG OF SEXUAL COERCION**



Source: "Eliminating Sexual Violence Against Women: Towards a Global Initiative," Report of the Consultation on Sexual Violence Against Women.<sup>8</sup>

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<sup>8</sup> "Eliminating Sexual Violence Against Women: Towards a Global Initiative," Report of the Consultation on Sexual Violence Against Women, The University of Melbourne, May 2000, Overview of Sexual Violence against Women in South Africa (Rachel Jewkes), at 14, Melbourne Report 14. See also: Jewkes, Rachel; Abrahams, Naeema, "The epidemiology of rape and sexual coercion in South Africa: An overview," *Social Science & Medicine*, Vol 55(7), Oct 2002, 1231-1244.

The scale of gendered violence specifically in intimate relationships was demonstrated in a ten-country study on women's health and domestic violence conducted by the World Health Organization, which found that "[b]etween 15% and 71% of women reported physical or sexual violence by a husband or partner."<sup>9</sup> One American study of the experiences of women who had been physically assaulted by a man who was their intimate partner found that two-thirds of the women had also been sexually assaulted by that partner.<sup>10</sup>

Some research has suggested that sexual violence against female partners was even more common among men who were lethal offenders, in other words, men who ultimately killed their intimate partners.<sup>11</sup> Put differently, the men who are most violent against their wives or female partners, men who may ultimately kill them, are the same men who are not only physically but also sexually violent towards their female intimates.

Research with a sample of 229 diverse men in a batterers intervention program in a large Northeastern city in the U.S. found that over half of the men admitted to sexually forcing their female intimate partners to have sex with them.<sup>12</sup> In responding to a detailed questionnaire that incorporated specific, behaviorally-based questions, fifty-three percent (53%) of these men answered "yes" to questions about their sexually violent or coercive behaviour towards their female intimate partners. Their conduct met the legal definition of sexual assault or rape. Not surprisingly, when asked explicitly and directly about the same subject but with more value laden language – i.e. when asked if they had ever “sexually abused” their partners -- only 8% answered in the affirmative.<sup>13</sup> This kind of

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<sup>9</sup> World Health Organization, *Violence against women*, World Health Organization <<http://www.who.int/mediacentre/factsheets/fs239/en/index.html>>.

<sup>10</sup> Reported in sexual assault in abusive relations, 2007. See also: “About Male Batterers Who Sexually Abuse Their Partners,” November/December, 2006, available online at: <http://www.njep-ipsacourse.org/PDFs/Civresearchmalebatterers.pdf>.

<sup>11</sup> See, R. Emerson Dobash, Russell P. Dobash, “Lethal and Nonlethal Violence Against an Intimate Female Partner, Comparing Male Murderers to Nonlethal Abusers,” *Violence Against Women*. 2007 Apr;13(4):329-53; and Jacquelyn C. Campbell, PhD, RN, Daniel Webster, ScD, MPH, Jane Koziol-McLain, PhD, RN, Carolyn Block, PhD, Doris Campbell, PhD, RN, Mary Ann Curry, PhD, RN, Faye Gary, PhD, RN, Nancy Glass, PhD, MPH, RN, Judith McFarlane, PhD, RN, Carolyn Sachs, MD, MPH, Phyllis Sharps, PhD, RN, Yvonne Ulrich, PhD, RN, Susan A. Wilt, DrPH, Jennifer Manganello, PhD, MPH, Xiao Xu, PhD, RN, Janet Schollenberger, MHS, Victoria Frye, MPH, and Kathryn Laughon, MPH, “Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study,” *Am J Public Health*, 2003 July; 93(7): 1089–1097.

<sup>12</sup> Bergen & Bukovec, *Men and Intimate Partner Rape*, 2006.

<sup>13</sup> Bergen & Bukovec, *Men and Intimate Partner Rape*, 2006.

denial and minimization of violent conduct by the men who perpetrate it is very well documented and analysed in the literature.<sup>14</sup>

Forced or coerced sex in intimate relationships does not necessarily require physical violence for its accomplishment. In many cases, victim fear of her partner, her strategy of avoidance of physical violence, and psychological coercion from the offender create the conditions where “saying no” is not experienced as an option. DeKeseredy et al found in their study of women sexually assaulted by the men from whom they had separated,

many participants were emotionally pressured to have sex against their will. This is not surprising, given 79% of the women stated that the men who abused them strongly believed that they “should be in charge.” As Bergen and Bukovec... reminded us, “Men who believe that they have a right, or entitlement to sex within their intimate partnerships, often rely on emotional pressure or coercion to force their partners to comply.

The impact of sexual violence in intimate relationships can be particularly devastating, despite the widely held misapprehension to the contrary. Yet as one researcher notes, “compared to sexual assault by an acquaintance or stranger, wife/partner rape is still perceived to be less harmful, less serious, and less “real” in society’s eyes.”<sup>15</sup> This minimization, in turn, limits the likelihood that a woman who has experienced sexual violence in her marriage or other intimate relationship, will seek help, let alone report this criminal conduct to authorities. As two scholars note, the research in this area clearly indicates that “the widespread cultural belief that marital rape is not real rape prevents the identification of these crimes and, as a result, invalidates the traumatic experiences of marital rape victims. Thus, there is often a failure to label oneself or others as crime victims in the case of marital rape.”<sup>16</sup>

Nevertheless, the psychological and other impacts of forced or coerced sex in marriage or other intimate relationships can range from negative, harmful, to profoundly traumatic. The literature in this area demonstrates that, like those harmed by rape and sexual assault in other contexts, the psychological effects of marital rape can include depression, a sense of helplessness, feelings of self-blame and worthlessness.<sup>17</sup> Furthermore, because the sexual violence has been

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<sup>14</sup> See, Dobash and Dobash; James Ptacek; Walter S. DeKeseredy, Martin D. Schwartz, Danielle Fagen, Mandy Hall, “Separation/Divorce Sexual Assault: The Contribution of Male Support,” (2006) 1 *Feminist Criminology*, 228-250.

<sup>15</sup> Lazar, (2010) *CJWL*

<sup>16</sup> Bennice, J. A., & Resick, P. A. (2003). *Marital rape: History, research, & practice. Trauma, Violence, & Abuse*, 4, 228-246, at 233.

<sup>17</sup> Reported in research review, Bennice and Resick, 2003, at 238.

perpetrated by someone who is supposed to be safe and trustworthy, the experience of sexual violence in marriage and other intimate relationships can trigger a deep sense of betrayal, powerlessness and isolation.<sup>18</sup>

Some of the research in this area in fact points to even greater negative impacts on women raped by a male intimate, than for rapes perpetrated by other categories of offenders, though this depends of course, on context and a variety of relevant circumstances.<sup>19</sup> Nevertheless, the problem of sexual violence in intimate relationships is a significant one, a problem which harms the victims and one which requires greater effort for its eradication.

### Sexual Assault and Constitutionally Protected Equality Rights

The equality rights guarantee found in section 15 of the *Canadian Charter of Rights and Freedoms*<sup>20</sup> has been crucially significant to the reform of sexual assault law. In the jurisprudence of the Supreme Court of Canada there has also been some important and express acknowledgment that sexual assault is an issue of gender inequality.

For example, the Preamble to Bill C-46, the *Criminal Code* amendments governing the production of records in sexual offence proceedings, enacted in 1997 through feminist lobbying in response to the Supreme Court's decision in *R. v. O'Connor*,<sup>21</sup> expressly cites section 15 equality rights as centrally important to the evidentiary reforms, stating that the

Parliament of Canada continues to be gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual violence against women and children. . . [and] the Parliament of Canada recognizes that violence has a particularly disadvantageous impact on the equal participation of women and children in society and on the rights of women and children to security of the person, privacy and equal benefit of the law as guaranteed by sections 7, 8, 15 and 28 of the *Canadian Charter of Rights and Freedoms*.<sup>22</sup>

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<sup>18</sup> Bennice and Resick, (2003), at 238.

<sup>19</sup> Fikelnhor and Yllo, 1988.

<sup>20</sup> Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

<sup>21</sup> *R. v. O'Connor*, [1995] 4 S.C.R. 411.

The gendered nature of sexual assault and the extremely harmful impacts of sexual assault have been noted by various members of the Supreme Court of Canada in some of the key criminal law case law in this area. In *R. v. McCraw*, for example, Corey J. speaks of the grave harm associated with sexual assault, an analysis which is also approvingly referred to by the Supreme Court in *Non-Marine Underwriters, Lloyd's of London v. Scalera*.<sup>23</sup> In Corey J.'s words:

It seems to me that to argue that a woman who has been forced to have sexual intercourse has not necessarily suffered grave and serious violence is to ignore the perspective of women. For women rape under any circumstance must constitute a profound interference with their physical integrity. As well, by force or threat of force, it denies women the right to exercise freedom of choice as to their partner for sexual relations and the timing of those relations. These are choices of great importance that may have a substantial effect upon the life and health of every woman. Parliament's intention in replacing the rape laws with the sexual assault offences was to convey the message that rape is not just a sexual act but is basically an act of violence. See K. Mahoney, "R. v. McCraw: Rape Fantasies v. Fear of Sexual Assault" (1989), 21 Ottawa L. Rev. 207, at pp. 215-16.<sup>24</sup>

In *Ewanchuk*, L'Heureux-Dube situated sexual assault as a form of gendered and noted that:

Violence against women takes many forms: sexual assault is one of them. In Canada, one-half of all women are said to have experienced at least one incident of physical or sexual violence since the age of 16 (Statistics Canada, "The Violence Against Women Survey", The Daily, November 18, 1993). The statistics demonstrate that 99 percent of the offenders in sexual assault cases are men and 90 percent of the victims are women (Gender Equality in the Canadian Justice System: Summary Document and Proposals for Action (April 1992)).<sup>25</sup>

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<sup>22</sup> Bill C-46, *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, 2d Session, 35th Parliament, 1997, Preamble (assented to 25 April 1997), S.C. 1997, c.30.

<sup>23</sup> *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551, at 120.

<sup>24</sup> *R. v. McCraw*, [1991] 3 S.C.R. 72, at pp 83-84.

<sup>25</sup> *Ewanchuk*, at paragraph 68.

Justice L’Heureux-Dubé was also hard hitting in her acknowledgment of criminal justice system failures in relation to crimes of sexual assault and the fact that legal decision making about sexual assault law has too often been shaped by sexist biases and myths. As Justice L’Heureux-Dubé explains:

Complainants should be able to rely on a system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions. The [Criminal] *Code* was amended in 1983 and in 1992 to eradicate reliance on those assumptions; they should not be permitted to resurface through the stereotypes reflected in the reasons of the majority of the Court of Appeal. It is part of the role of this Court to denounce this kind of language, unfortunately still used today, which not only perpetuates archaic myths and stereotypes about the nature of sexual assaults but also ignores the law.<sup>26</sup>

Justice L’Heureux-Dubé regularly and eloquently spoke of violence against women in terms of equality rights during her tenure on the Supreme Court, but other judges have also made these links. Justice Cory, for example, in *R. v. Osolin*,<sup>27</sup> wrote that:

It cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all the other forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women. The reality of the situation can be seen from the statistics which demonstrate that 99% of the offenders in sexual assault cases are men and 90% of the victims are women.<sup>28</sup>

The equality rights section of the Charter [s. 15] can be read as requiring that Parliament, having chosen to legislate in the area of sexual assault, set minimum standards of care in ensuring consent for those who undertake to have sex.<sup>29</sup> Indeed, as Cory J. observed in *Osolin*, sexual assault “is an assault upon human dignity and constitutes a denial of any concept of equality for women.”<sup>30</sup>

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<sup>26</sup> Ewanchuk, at 95.

<sup>27</sup> [1993] 4 S.C.R. 595, 86 C.C.C. (3d) 481 [cited to C.C.C.].

<sup>28</sup> *Ibid.* at 521.

<sup>29</sup> McInnes & Boyle, “Judging Sexual Assault”, *supra* note 2 ¶ 23.

<sup>30</sup> *Osolin*, at p 669.

## The Trouble with “Consent:” The Complexities of Consent in the Context of Gender Inequality

*“From women’s point of view, rape is not prohibited, it is regulated.”<sup>31</sup>*

A significant body of analysis and scholarship, some of which is echoed or referenced in some of the case law on sexual assault which has emerged from Canada’s Supreme Court, addresses the ways in which the law of sexual assault has hardly been neutral or fair in relation to the victims of this crime. If law reflects a masculinist perspective on sexual violence then this necessarily calls into question the utility of the concept of consent as the demarcation between illegal and legal sexual contact.

As Robin West notes,

Liberal legal theory primarily, and liberal feminist legal theory derivatively, have jointly shaped much of our contemporary understanding of the various relations between sex and law. At the heart of that familiar liberal legalist paradigm is the distinction between consensual and non-consensual sex.<sup>32</sup>

One of the foremost feminist legal scholars in this area and certainly among the most highly regarded and controversial, is Catharine MacKinnon. Her work has been foundational to the conversation about how to understand the law of sexual assault in contemporary North American societies, Canada included, and what needs to be done to move it towards embracing a true equality standard.

A great deal of MacKinnon’s legal scholarship has been an expose of the way in which the appearance of neutrality in law has actually disguised a profoundly gendered – i.e. male – point of view. MacKinnon explains that “objectivity” is legal liberalism’s (mis)representation of itself – instead, the law has embodied a male point of view.

In explaining the embeddedness of the male point of view of sex in the law of sexual assault, MacKinnon observes:

“The problem is that the injury of rape lies in the meaning of the act to its victim, but the standard for its criminality lies in the meaning of the act to the assailant.”<sup>33</sup>

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<sup>31</sup> Catharine MacKinnon, at 179.

<sup>32</sup> Robin West, “Sex, Law and Consent,” In, *The Ethics of Consent: Theory and Practice*, Alan Wertheimer & William Miller eds.

<sup>33</sup> at 180.

“The point of view of men up to this time, called objective, has been to distinguish sharply between rape on the one hand and intercourse on the other.”<sup>34</sup> But MacKinnon effectively problematizes this distinction by demonstrating that under conditions of sex inequality women can barely know their own desires or experience the freedom necessary to achieve true sexual autonomy. Only under social conditions of gender equality, from which are still, unfortunately, quite far away, will it be possible to meaningfully speak of sexual autonomy, freedom and mutuality in intimate and sexual relationships between women and men.

### **Sexual Assault, Power and the Law: Taking Gender Inequality Seriously in Analysing Consent**

“Rape is indigenous, not exceptional, to women’s social condition”<sup>35</sup>

In her analyses of gender, power, and the law, MacKinnon challenges us to rethink the meaning and utility of legal conceptions of consent in a society where violence against women is endemic, gender inequality is defining and attitudes and practices shaping traditional heterosexuality are built upon scripts of masculine dominance and feminine submission. As she puts it: “If sex is normally something men do to women, the issue is less whether there was force than whether consent is a meaningful concept.”<sup>36</sup>

This is indeed a radical conceptual and political challenge, and it goes to the core of the problems in law regarding the criminal processing of sexual assault cases, perhaps most sharply so in relational contexts. As MacKinnon explains, consent “transpires somewhere between what the woman actually wanted, what she was able to express about what she wanted, and what the man comprehended she wanted.”<sup>37</sup>

In speaking to the difficulty reconciling how it is that a person in an intimate relationship with another can disregard their partner’s sexual integrity and autonomy, MacKinnon asks the following question:

“why do men still want ‘it,’ ‘feel entitled to it’, when women do not want them? The law of rape presents consent as free exercise of sexual choice under conditions of equality of power without exposing the underlying structure of constraint and disparity”<sup>38</sup>

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<sup>34</sup> MacKinnon, at 86 (1981).

<sup>35</sup> MacKinnon at 172.

<sup>36</sup> at 178.

<sup>37</sup> MacKinnon, at 182.

<sup>38</sup> MacKinnon, at 175.

MacKinnon deftly describes the dilemma of the authenticity of women's agency and ability to freely "choose" and voluntarily "consent" to sex with men, under conditions of sex inequality. This analysis is particularly germane to unequal intimate relationships built around traditional notions of masculine-husbandly superiority and feminine-wifely inferiority and subordination. As MacKinnon expresses it, "A lot of not-yes-saying passes for consent to sex."<sup>39</sup> This nicely captures the ways in which women's resignation to or accommodation of unwanted sex, or sense of an inability to have a right to refuse sex they don't want, is often taken, by both husbands and the law, to constitute consent.

MacKinnon elaborates on this idea as follows:

The accession to proceeding known as legal consent that makes sex not rape can, in addition to an express no that becomes a legal yes, include resigned silent passive dissociated acquiescence in acts one despairs at stopping, fraud or pretence producing compliance in intercourse for false reasons or with persons who are not who they say they are; multiplicity triggered by terror or programming (so that the person who accedes to the sex is just one inhabitant of the body with whom sex is had); and fear of abuse short of death or maiming or severe bodily injury (such as loss of one's job or not being able to graduate from high school, including in jurisdictions that do not consider rape itself a form of severe bodily injury) resulting in letting sex happen.<sup>40</sup>

An important empirical study of the ways in which spousal sexual assault is treated by the criminal justice system in Canada was undertaken by Ruth Lazar. This study examined not only reported cases of sexual assault in marital relationships but also involved interviews with criminal defence lawyers and prosecutors, to elicit their views on the subject. In analysing the findings from her interviews with key criminal justice system personnel on marital rape Ruth Lazar observes that:

Their narratives reveal difficulties with acknowledging concepts of "non-consent," given the nature of marriage and the association of consent with love, sex, intimacy, familiarity, prior sex, and couples' personal language. Although the legislation says quite the opposite, my findings demonstrate that key justice system players themselves presume consent to sex in intimate relationships, which, in turn, shapes the way these players construct and litigate wife rape.<sup>41</sup>

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<sup>39</sup> at 243.

<sup>40</sup> Catharine MacKinnon, *Women's Lives, Men's Laws* (Harvard University Press, 2005), at 243.

<sup>41</sup> Lazar, 2010, CJWL.

Usually, “consent is a club used as a fence by a man at the point a women says he raped her” . . . To this extent, then, MacKinnon argues that under social conditions of gender inequality, “*consent is more attributed than exercised.*”<sup>42</sup>

## **PART II -- The Criminal Law of Sexual Assault in Canada: A Brief Overview**

This section of the paper traces and analyses the criminal law governing the offence of sexual assault including attention to the significant and important reform which has been undertaken to sexual assault law over several decades. This reform was the result of a protracted period of advocacy, education, lobbying and engagement between the feminist social movement and government representatives. Feminist legal scholars, women’s groups such as the National Action Committee on the Status of Women (NAC), the National Association of Women and the Law (NAWL), and the Women’s Legal Education and Action Fund (LEAF), rape crisis centres and others, organized and lobbied for a improvements to the processing of sexual assault cases in the criminal justice system and the tendency to subject women who reported sexual assault to what has been described as a “second” assault or a process of review. This history has been described and analysed by a number of scholars.<sup>43</sup> The sections below describe the basic contours of the criminal law in Canada pertaining to sexual assault.<sup>44</sup>

Prior to 1983, crimes of sexual assault were gender specific -- separate offences for indecent assault of a male and female were defined in the *Criminal Code*. Indecent assault of a male was punishable by a maximum of 10 years imprisonment. Interestingly, indecent assault of a female by a male was

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<sup>42</sup> at 243 [Emphasis added].

<sup>43</sup> See Sheila McIntyre *et al.*, "Tracking and Resisting Backlash Against Equality Gains in Sexual Offence Law" (2000) 20(3) *Canadian Woman Studies* 72; Elizabeth Sheehy, "Legal Responses to Violence against Women in Canada" (1999) 19(1/2) *Canadian Woman Studies* 62; Lise Gotell, "The Discursive Disappearance of Sexualized Violence: Feminist Law Reform, Judicial Resistance, and Neo-liberal Sexual Citizenship," in Dorothy E. Chunn, Susan B. Boyd, and Hester Lessard, eds., *Reaction and Resistance: Feminism, Law, and Social Change* (Vancouver: UBC Press, 2007) 127 ["Discursive Disappearance"]; Sheila McIntyre, "Personalizing the Political and Politicizing the Personal: Understanding Justice McClung and His Defenders," in Elizabeth Sheehy, ed., *Adding Feminism to Law, the Contributions of Justice Claire L'Heureux-Dubé* (Toronto: Irwin Law, 2004) 313; Sheila McIntyre, "Redefining Reformism: The Consultations That Shaped Bill C –49," in Roberts and Mohr, at 293; Tang.

<sup>44</sup> This does not include an analysis of the sexual assault of minors.

punishable by only 5 years, indicating a gender discount depending on who the victim was.<sup>45</sup>

The current *Criminal Code*<sup>46</sup> in Canada, however, is now gender neutral and does not distinguish between rape and sexual assault. In 1983, significant revisions were made to the *Code* which legally defined the offence of sexual assault and delineated its different levels, brought about by the passage of Bill C-127. Before 1983, the crimes of “indecent assault” were gender specific and constituted distinctly defined crimes in the *Code*.<sup>47</sup>

The law reform brought about by this Bill replaced the offences of rape and indecent assault with a new three tier definition of “sexual assault.” The levels of sexual assault – including sexual assault causing bodily harm, and aggravated sexual assault – are defined through sections 271 and 273 of the *Criminal Code*. The three levels of sexual assault are characterized in terms of their seriousness, defined in terms of the level of physical violence associated with the sexual crime. The first and “simplest” level of sexual assault carries a maximum sentence of ten years. Next are sexual assaults causing bodily harm or committed with a weapon which are punishable to a maximum of 14 years and finally the *Code* defines an “aggravated” sexual assault, which causes wounding or disfigurement, and can have a sentence imposed of up to a term of life imprisonment.<sup>48</sup>

It is in s. 265 of the *Code* that sexual assault is defined, as an intentional touching without consent. The gender neutral language in the *Criminal Code* describing the offences -- contemplating that the accused and complainant can be either male or female -- has been subject to some debate and controversy in light of the fact that the overwhelming number of sexual assaults are perpetrated by men against women, and the remaining cases are almost all perpetrated by men against other men or boys.

The explicit repeal of the legal immunity for spouses who commit sexual assault is specified in s. 246 of the *Criminal Code*, a provision which is also gender neutral. That provision stipulates that:

Spouse may be charged

278. A husband or wife may be charged with an offence under section 271, 272 or 273 in respect of his or her spouse, whether or not the spouses were living

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<sup>45</sup> *Criminal Code* (1970), sections 149 and 156. Sexual intercourse by a male with a female person who “is feeble-minded, insane, or is an idiot or imbecile” also carried a sentence of 5 years imprisonment. This provision of the *Code* was repealed in 1983.

<sup>46</sup> *Criminal Code*, R.S.C. 1985, c. C-46.

<sup>47</sup> See Benedet and Grant for an historical review of these reforms.

<sup>48</sup> Bill C-127, *supra*, enacting sections 246.1, 246.2 and 246.3 of the *Criminal Code* (now sections 271, 272 and 273).

together at the time the activity that forms the subject-matter of the charge occurred.<sup>49</sup>

What constitutes “sexual” is not laid out in the Code. The Supreme Court, however, has defined the specifically sexual element of a sexual assault in *R. v. Chase*<sup>50</sup>:

‘Sexual assault is an assault ... which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: “Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?”’<sup>51</sup>

Proving a sexual assault involves proof of both the actus reus and the mens rea elements. The actus reus includes all forms of intentional sexual touching which is non-consensual. The Supreme Court of Canada has clarified the legal requirements of both the actus and mens rea elements of sexual assault in some of the key case law on sexual assault over the past few decades.

For example, the Supreme Court clarified, in *R. v. Park*, that the actus reus of a sexual assault comprises two components: sexual touch and a lack of consent to that touch.<sup>52</sup>

The actus reus of sexual assault requires that the Crown demonstrate a touching of a sexual nature, combined with a lack of actual consent to that touching. The mens rea for sexual assault is established by showing that the accused intended to touch the complainant in a manner that is sexual, and knew of, or was reckless or wilfully blind to, the fact that the complainant was not consenting to that touching. Our law typically takes this to mean that the accused must be shown to be aware of, or reckless or wilfully blind to, the fact that non-consent was communicated.<sup>53</sup>

The mens rea element of sexual assault with regard to “consent” is an objective one. This means that if the accused claims that he had an “honest but mistaken” belief that the complainant *consented and communicated her consent to him*, and the trier of fact is persuaded of this, then the accused will escape culpability.

However, the defence can not be raised unless the accused can substantiate it with evidence of the “reasonable steps, in the circumstances known to the accused at

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<sup>49</sup> Criminal Code.

<sup>50</sup> *R. v. Chase*, [1987] 2 S.C.R. 293.

<sup>51</sup> *R. v. Chase*, [1987] 2 S.C.R. 293 at 302.

<sup>52</sup> *R. v. Park*, [1995] 2 S.C.R. 836

<sup>53</sup> *R. v. Park*, [1995] 2 S.C.R. 836, at 39.

the time” taken to ascertain consent.<sup>54</sup> Finally, the consent the accused honestly and mistakenly believed to have been communicated to him can not be tainted by any of the statutory factors which vitiate consent.

### Consent as the Key Element in the Law of Sexual assault in Canada

Consent in the Canadian *Criminal Code* is described both in terms of its absence and its presence. Section 265 of the Criminal Code outlines the factors which vitiate consent. Put differently, this section of the Code lists the statutory factors and conditions under which it is not possible to find that consent has been legally given, because the complainant has either been subjected to force, fraud, or the exercise of power and authority over her. The provision also makes clear that a lack of resistance or the appearance of submission on the part of the complainant in relation to any of these factors can not lead to a legal finding of consent.

The provision reads:

- (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
  - (a) the application of force to the complainant or to a person other than the complainant;
  - (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
  - (c) fraud; or
  - (d) the exercise of authority.

The Code’s articulation of “the meaning of consent” is found in 273.1.<sup>55</sup> Consent is defined in positive terms in Section 273.1 of the Criminal Code. This provision emphasizes that consent must be *voluntary* and based on an *agreement* between the parties to the sexual encounter. The section specifies that:

- (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of [the sexual offences], the *voluntary agreement* of the complainant to engage in the sexual activity in question. [Emphasis Added]

The provision then stipulates where no consent can be obtained:

- (2) No consent is obtained, for the purposes of [various sexual offences], where

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<sup>54</sup> *Criminal Code*, s. 273.2(b).

<sup>55</sup> *Criminal Code*, s. 273.1.

- (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.

Legal debates about the meaning of these provisions, in particular the idea of communicating consent “by words or conduct” have, not surprisingly, been the focus of much of the sexual assault criminal case law and the corresponding academic commentary and analysis.

#### Legislative Reform and the Shift to an Affirmative Consent Standard: The Reasonable Steps Requirement

One of the most significant achievements of feminist law reform in the area of sexual assault is the shift to an affirmative consent standard in the Canadian criminal law of sexual assault, and, in particular the establishment of the “reasonable steps” provision. This provision places an onus on an accused who raises a consent defence to a sexual assault charge, to adduce evidence to demonstrate what reasonable steps were taken to ascertain that the complainant was consenting to the conduct which is the subject of the criminal charge. Without this evidence before the Court, which the trier of fact must find persuasive in order to allow the defence, the accused can not claim that he “honestly but mistakenly” believed that the complainant consented to the sexual touching which is the subject of the charge.

The legislated restrictions on consent defences are found in section 273.2 of the Criminal Code. According to this provision the “belief in consent is not a defence,” where the accused’s belief arose from:

- (i) self-induced intoxication,
- (ii) recklessness or willful blindness, or
- iii) if the accused did not take reasonable steps, in the circumstances known to the accused at the time to ascertain that the complainant was consenting.<sup>56</sup>

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<sup>56</sup> *Criminal Code*, R.S.C. 1985, c. C-46, as am. by S.C. 1992, c. 38 s. 1.

The shift to the affirmative consent standard – and the legal requirement that consent must be expressly and positively communicated -- is perhaps the most significant substantive reform to the criminal law of sexual assault in Canada in the last 20 years, and, in theory at least, marks a new era in how sexual assault cases and the legal analysis of consent, are to be adjudicated.

### Consent Can Not be “Implied,” Consent Must be Explicit

Perhaps among the most important sexual assault decisions in Canadian law is *R. v. Ewanchuk*.<sup>57</sup> This decision of the Supreme Court of Canada remains a pivotal case in clarifying legal interpretations of consent in Canadian sexual assault law.

In *Ewanchuk*, the Court rebuked the lower courts for having allowed an acquittal to a sexual assault charge based upon a defence of “implied consent,” which did not and does not exist in Canadian law. As Major J. clarified:

[T]he trier of fact may only come to one of two conclusions: the complainant either consented or not. There is no third option ... The doctrine of implied consent has been recognized in our common law jurisprudence in a variety of contexts, but sexual assault is not one of them. There is no defence of implied consent to sexual assault in Canadian law.<sup>58</sup>

In the *Ewanchuk* decision The Supreme Court strongly stipulated that consent can not be inferred from passivity, silence or ambiguity from the complainant. Further, the Court stressed that an express lack of agreement – a “no” – to sexual activity cannot be taken as an invitation to further, more insistent, or more aggressive sexual contact. As Major J. explained: “An accused cannot say that he thought ‘no meant yes’.”<sup>59</sup>

### The “Honest But Mistaken” Belief in Consent Defence

Not surprisingly, in many, perhaps most cases of sexual assault which are criminally prosecuted, the essential issue is consent. Typically the defence argument on behalf of the accused is that consent was either given, or that the accused had an “honest but mistaken” belief that consent was given.

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<sup>57</sup> *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 [*Ewanchuk*].

<sup>58</sup> *Ibid.* ¶ 31.

<sup>59</sup> *Ibid.* ¶ 51-52.

In *R. v. Pappajohn*, a controversial and problematic older sexual assault decision, the Supreme Court ruled that the mens rea element of rape (the criminal category at the time of the case), was negated by proof (which obviously has to be accepted by the trier of fact) that the accused held an “honest but mistaken” belief that the complainant consented. While it had to be “honest” (however that was expected to be determined) the Court nevertheless found that the belief could be unreasonable, clearly embedding a masculine perspective on the “what happened” in a sexual assault and nullifying any requirement that the experience of the violated woman had to be legally taken into account.

While there were further clarifications, such as in *R. v. Sansregret*, the contours of the “honest but mistaken belief in consent” defence were further and very importantly clarified in the *Ewanchuk* decision. Mere assertion will not suffice. Instead, the Court found that any claim of a mistaken belief in consent as a defence must be clearly grounded in evidence put before the court to support defence, to indicate how this mistake might reasonably have arisen.

If his belief is found to be mistaken, then honesty of that belief must be considered ... to be honest, the accused's belief cannot be reckless, willfully blind or tainted by an awareness of any of the factors enumerated [in the sections of the Criminal Code that appear above]. If at any point the complainant has expressed a lack of agreement to engage in sexual activity, then it is incumbent upon the accused to point to some evidence from which he could honestly believe consent to have been re-established before he resumed his advances.<sup>60</sup>

#### Past Sexual History Evidence and the Test for Admissibility in Sexual assault Cases

Past sexual history evidence is supposed to be very rarely relevant in a sexual assault trial, and evidentiary reforms to the criminal law have been brought about to prohibit its inappropriate use. Its use to support rape “myths and stereotypes” – particularly those which suggest that a woman was more likely to consent to a sexual encounter if she had consented in the past - is statutorily prohibited by s. 276 of the Criminal Code of Canada.

These provisions were brought into force in 1992 and are more commonly known as the “rape shield provisions”. Section 276.(1) instructs that evidence of a complainant’s sexual history is not admissible to support an inference that the complainant is more likely to have consented or is less worthy of belief.<sup>61</sup>

Past sexual history can only be introduced into evidence if the trier of fact determines that i) it relates to specific instances of sexual activity which are the

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<sup>60</sup> *Ibid.* ¶ 64-65.

<sup>61</sup> *Criminal Code*, R.S.C. 1985, c. C-46, as am. by S.C. 1992, c. 38 s. 2.

subject of the charge, ii) it is relevant to an issue at trial, and iii) it has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.<sup>62</sup>

A set of procedures surrounding the application which must be made by the defence in order to seek a determination of the admissibility of the evidence are also set out in s. 276. The Supreme Court of Canada upheld the constitutionality of this provision in a failed constitutional challenge to it made in *R. v. Darrach*.<sup>63</sup>

Only in very specific and relatively narrow instances can evidence of prior sexual activity between an accused and a complainant be potentially admissible in a sexual assault criminal trial. But the evidence of past sexual history can not be adduced to support a general inference that the complainant is “more likely to have consented” in the instance which is the subject of the criminal charge.

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<sup>62</sup> *Ibid.* s. 276(2).

<sup>63</sup> *R. v. Darrach*, [2000] 2 S.C.R. 443 [*Darrach*].

### **PART III SEXUAL ASSAULTS IN INTIMATE RELATIONSHIPS – TRENDS IN THE CANADIAN CASE LAW**

This section of the paper addresses some of the examples of problems with the legal analysis in the Canadian sexual assault case, and an examination of some key cases pertaining to spousal sexual assault and consent.

There are a number of key cases which capture and reveal the difficulties judges have in applying the law of sexual assault when the complainant and accused are or have previously been in a marital or other intimate relationship. This section of the paper addresses some of the problems in the case law on spousal sexual assault, revealing the absence of adequate legal analyses and the presence and intrusion of myths and stereotypes about sex in marriage and other marriage like relationships.

For the Equality Effects project a case law review and analysis was conducted, which focuses primarily on the judicial treatment of cases of marital rape, broadly defined, after 1983 and up to 2010.<sup>64</sup> Overall, a sample of 275 cases of sexual assault in spousal contexts was analysed, the results of which were first reported in “The Legal Treatment of Marital Rape and Women’s Equality: An Analysis of the Canadian Experience,” written by Professor Jennifer Koshan, and available on the Equality Effect website.<sup>65</sup> It must be remembered that research has demonstrated that very few experiences of sexual assault in marriage or other intimate relationships are ever reported to the authorities or come to the attention

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<sup>64</sup> As is noted in Jennifer Koshan’s paper, the case search was conducted by project volunteer Vasanthi Vekantesh. The method was as follows: cases were searched using Quicklaw and the search terms “sexual assault” or “rape” in the same paragraph as one of the following words: “partner” OR “girlfriend” OR “boyfriend” OR “spous!” OR “wife” OR “relation!” or “consent”. A sample of approximately 6200 cases was produced, and was reviewed by student volunteers to find the relevant cases – i.e. those involving sexual violence in a spousal relationship (where the parties had cohabited and / or had children in an intimate relationship). Dating and other intimate relationships short of spousal relationships were not included in the final list of cases due to the large sample size and because of the unique nature of spousal (and former spousal) relationships. Given the large sample size and the sharing of various sub-samples amongst different students, it is fair to say that the list of relevant cases is reasonably comprehensive (although the number of cases from Quebec is small given that English search terms were used, meaning that only cases reported in English were identified, and samples from Manitoba, Ontario and Quebec are incomplete).

<sup>65</sup> Jennifer Koshan, “The Legal Treatment of Marital Rape and Women's Equality: An Analysis of the Canadian Experience” (Ottawa: The. Equality Effect, 2010), published on-line. See: <http://theequalityeffect.org/pdfs/maritalrapecanadexperience.pdf>.

of the criminal justice system, and further, of those that do and are processed criminally, the reported cases represent only a small proportion. This means that reviews of reported case law, while important for demonstrating trends in legal analysis and results, are a necessarily limited sample.

The problems in the case law specifically with regard to consent can be organized around the following themes:

- the mistaken use of context to assert that the relational context of marriage or ongoing intimate relationship means that the legal analysis of consent differs. Put differently, the mistaken view that the consent analysis in law when applied to a sexual assault in a spousal relationship is different from the consent analysis in other contexts
- the mistaken presumption of continuous consent in spousal relationships
- the assumption that past sexual history is almost always necessarily relevant for a sexual assault in the context of a spousal relationship, because it assists the consent analysis, even in the absence of the test for its admissibility
- the assumption that the “reasonable steps” provision does not apply to spousal sexual assault cases

These themes are further explicated in the sections below.

## Consent and Confusions about Context: the Mistaken Belief that Sexual Assaults in Intimate relationships Require a Different Legal Analysis of Consent

Among the most egregious of the apparent mistaken beliefs evident in the judgments analyzed in this paper, is the idea that the legal test for consent should differ in an ongoing and “viable” intimate (spousal) relationship, from the legal test applied in other contexts.

In fact, in some of the judgments, there is a quite astonishing assertion of a new legal test or burden for the Crown to meet in cases where the relational context of a sexual assault charge is a marital one. In legal terms, what seems to be at issue is, as Christine Boyle has aptly asked, whether the Supreme Court of Canada’s analysis of sexual assault law in *R. v. Ewanchuk* applies to spouses.<sup>66</sup> The answer, in some judges’ minds at least, appears to be that it does not.<sup>67</sup>

For example, in his reasons for judgment in a sexual assault case, *R. v. R.V.*, Justice Wolder opined about the nature of marriage, essentially defining marriage as a sexual relationship.<sup>68</sup> Ironically, this section of his reasoning, appears under a subheading in the decision, (mistakenly?) entitled “The Law.”

After pointing out that unconsummated marriages can be annulled, he concludes that,

[W]hen parties get married, they, *by the very nature of the relationship, are consenting to engaging in sexual intercourse and consummating the marriage.* Even after consummation, a marriage continues to imply that parties have joined together for various purposes including that of retaining or continuing their sexual relationship. A husband and wife's sexual relationship is just one means through which they communicate in the marriage.<sup>69</sup> [Emphasis added]

On this view, then, the sexual element of the relationship, and the assumption of ongoing consent to that sexual element, is definitional in a marriage.

Justice Wolder further explained that in his view, a distinct legal approach is required in a sexual assault claim in a “viable” marriage. As he explains:

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<sup>66</sup> Christine Boyle, “Sexual assault as Foreplay: Does Ewanchuk Apply to Spouses?” (2004) 20 C. R. (6<sup>th</sup>) 359 [Boyle, “Sexual Assault As Foreplay”].

<sup>67</sup> See, in particular, *R. v. Went* (2004), 25 C.R. (6<sup>th</sup>) 350 (B.C.S.C.), especially at paragraph 22, for an explicit discussion of why “a history between the parties” changes the legal approach to consent and the defence of “honest but mistaken” belief in consent [*Went*].

<sup>68</sup> *R. v. R.V.*, [2001] O.J. No. 5143 ¶ 10.

<sup>69</sup> *Ibid.*

*w[h]ere a viable marital relationship exists*, then it is not enough for the Crown to simply prove that the sexual conduct took place without the stated consent of the other party in order to secure a conviction for sexual assault by one marital partner against the other.<sup>70</sup>

This perspective, which is actually a mistake of law, suggests that this judge erroneously believes that saying no to sex in a marriage is not sufficient to negative consent, and, further, that the Crown bears a different and higher burden in a criminal sexual assault prosecution that would be borne in another kind of sexual assault case.

In *R. v. Bodnar*, a decision which pre-dates *Ewanchuk*, the judge noted that the relational context of an intimate relationship means that:

the cohabitational relationship permits of certain acts and conduct which would otherwise be criminal. For example, if a man walks up to a strange woman and cups her breast, he commits a sexual assault. Within a cohabitational context, such may not be the case. Likewise, a man (or woman) in a cohabitational relationship may choose to bring to an end a dispute between them in a passionate or sexual manner. His (or her) initial sexual advances would not necessarily constitute a sexual assault within the parameters of cohabitation. However, once apprised of the other partner's lack of consent, the advances must cease.<sup>71</sup>

This same idea was echoed in *R. v. A.W.S.*<sup>72</sup>, a decision from Manitoba, in which the Court of Appeal stated that

“the law cannot ignore *the reality of normal human behaviour*. ... it would be wrong to conclude that a person involved in an ongoing intimate relationship must secure the express consent of his or her partner prior to initiating any sexual act...”<sup>73</sup> [emphasis added]

And in *R. v. Ashlee*, Justice Conrad of the Alberta Court of Appeal commented on the significance of the relationship between the parties observing that:

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<sup>70</sup> at paragraph 14, emphasis added.

<sup>71</sup> *R. v. Bodnar*, [1990] M.J. No. 418 (Prov. Ct.). The accused plead guilty to sexually assaulting his spouse, but was given a suspended sentence because the assault was seen to be of a minor nature.

<sup>72</sup> *R. v. A.W.S.*, [1998] M.J. No. 26, [1998] 4 W.W.R. 364, 126 Man.R. (2d) 51, 122 C.C.C. (3d) 442, 37 W.C.B. (2d) 140 (C.A.) at 12.

<sup>73</sup> *R. v. MacFie*, [2001] A.J. No. 152, 2001 ABCA 34 at para. 12.

It is certainly foreseeable that in intimate relationships partners may well have agreed to sexual touching while one partner or the other is asleep or, for that matter, in circumstances where either becomes unconscious from alcohol.<sup>74</sup>

For some judges, then, the fact that a sexual assault complaint took place in an intimate relationship leads to the inference that the way in which consent is understood is different. Overall some of the cases analysed indicate that the very fact of a spousal relationship between the parties in a sexual assault case can be seen by judges as relevant to the legal analysis, and can support the finding of a “honest but mistaken” belief in consent even in the absence of any requirement of proof of reasonable steps taken to ascertain consent. This seems explicable only in relation to a judicial assumption that consent in spousal relationships is assumed to be continuous.<sup>75</sup>

#### The Mistaken Belief in Continuous Consent: Judicial “Reading In” of Implied or Ongoing Consent in Intimate Relationships

Historically, marriage represented the physical and legal union of a man and his wife. Under the doctrine of coverture married women lost independent legal personhood and certainly lost rights to their sexual autonomy. One of the findings a review of reported cases of sexual assault in spousal relationships shows, is the adherence on the part of at least some judges, to the belief that women’s consent to sex in marriages is ever present or continuous. This dangerous judicial assumption clearly runs interference with a rigorous consent analysis in law.

This mistaken presumption about the existence of continuous consent in intimate relationships is certainly not limited to members of the judiciary. Indeed, Ruthy Lazar documented that this very same belief is alive and well in the minds of some of the criminal justice system personnel she interviewed for her study of marital sexual assault. Lazar observes that:

Although the defence and prosecuting lawyers that I interviewed disavowed adherence to the notion of continual consent for married women, their extensive discussions of sexual history as relevant to the issues at trial, the focus on “secret language,” and the characterization of these crimes as simply “unwanted sex,” construct consent in intimate relationships as almost invariably present.<sup>76</sup>

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<sup>74</sup> R. v. Ashlee, [2006] A.J. No. 1040 at paragraph 71.

<sup>75</sup> Randall at 145, 161, 179.

<sup>76</sup> Lazar, CJWL, at.

Pointing out that it is precisely these ideas which underpin the “twin myths” about sexual assault repudiated by Canada’s Supreme Court, Lazar concludes that:

Essentially, these lawyers are arguing that in the case of wife rape the fact that she has consented before is evidence suggesting that she consented this time, arguably relieving husbands of the legal obligation to ask [for consent].<sup>77</sup>

This is perhaps the most fundamental of the mistaken assumptions, widely held, which limits women’s rights to having their experiences of sexual assault in intimate relationships reach the standards of justice the law, in theory at least, demands. Indeed, the very idea that consent exists continuously in an intimate relationship undermines women’s rights to sexual integrity and autonomy, let alone their rights to expect that the criminal justice system will fairly adjudicate a report of spousal sexual assault.

#### The Misuse of “Context” in Relation to Consent: Past Sexual History Evidence to Bolster Belief in Continuous Consent

The Criminal Code is very clear in limiting defence access to and deployment of past sexual history evidence in a sexual assault trial. The unambiguous statutory language, however, has not precluded the admission of past sexual history evidence in cases of sexual assault in the context of intimate relationships. Moreover, in these cases, it is sometimes taken into account with no adherence to the evidentiary procedures required to determine admissibility. In the same way that consent is often presumed in marital sexual assault cases, the relevance of past sexual history is presumed to be a significant part of the context in which the consent analysis takes place. Put differently, there is evidence in the case law of troubling judicial assumptions about past sexual history in spousal sexual assault cases and, as a consequence, misapplications of the law.

The backdoor entrance of past sexual history evidence in cases of sexual assault in spousal relationships is a disturbing trend in the case law. This is a trend also documented in Ruthy Lazar’s research on criminal justice system processing of marital rape cases.

In *R. v. D.M.*<sup>78</sup> another sexual assault case involving intimate partners, the “honest but mistaken belief in consent” defence was successfully advanced, in part through the admission of past sexual history evidence. In that case, Tetley J. found that in the context of an intimate relationship, the accused was entitled to

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<sup>77</sup> Lazar, CJWL.

<sup>78</sup> *R. v. D.M.*, [2004] O.J. No. 4376 (Ct. J.).

rely on past experiences with the complainant in judging her consent. In his words,

While it may objectively be viewed as remote, the defendant was entitled to rely and I find did rely on previous sexual encounters with the applicant where consent to the continuation of a sexual act was given in spite of protestations to the contrary.<sup>79</sup>

This judicial approach is a very surprising repudiation of the statutory requirement for a s. 276 application by the accused. Instead, the judge has already done the work for the defence by simply asserting the relevance of the sexual history and, furthermore, by factoring it in to bolster the “honest but mistaken belief in consent” defence. Moreover, it relieves the accused of having to prove that he took the “reasonable steps” the criminal law requires.

The seeping in of past sexual history evidence, often without the proper s. 276 application and judicial review was clearly also at play in *R. v. Went*,<sup>80</sup> in which the British Columbia provincial court’s conviction of the accused for sexual assault in an ongoing intimate relationship, was overturned on appeal.<sup>81</sup> At trial, the accused’s successful defence was based on “honest but mistaken belief in consent” a defence which the judge seemed to accept based on the nature of the relationship between the accused and the complainant.

The problematic reasoning in this case again reveals judicial assumptions about the accused’s reasonable inference of consent, however mistaken, based upon the nature of the relationship itself. Koenigsberg J. explained that he did not adopt the defence argument that the sexual history and pattern between the couple legitimated the accused’s “honest but mistaken” belief in consent.

Throughout the trial and during this appeal, the defence accepts that Ms. D. did not consent to the sexual activity being sought to be initiated or the sexual touching that occurred in Mr. Went's attempt to initiate sexual activity. It is the defence position however, that Mr. Went had an honest but mistaken belief in her consent, *based largely on the sexual history and pattern of behaviour between the couple*.<sup>82</sup> [Emphasis added.]

And yet it seems as if implicitly at least, Koenigsberg J. did, in fact, accept that the history of the couple’s relationship itself lent support to an “honest but mistaken” belief in consent on the part of the accused. In specific, Koenigsberg J. distinguished *Ewanchuk* as a case involving sexual assault between “virtual strangers,” and suggested that it “stands for the proposition that

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<sup>79</sup> *Ibid.* ¶ 113.

<sup>80</sup> *Went*, *supra* note 4.

<sup>81</sup> Some of this analysis originally appeared in Randall, 2008.

<sup>82</sup> *Ibid.* ¶ 17 [emphasis added].

there is no implied or behavioral consent which can be inferred between such individuals” – that is, individuals who are strangers.<sup>83</sup>

Koenigsberg J. then took the position that *Ewanchuk* does not apply to an accused and a complainant who stand in a spousal, or intimate relationship with one another. In other words, the judge seemed to suggest that “implied” or “behavioural” consent, can, in fact, be inferred in these spousal relationships. An interesting aside is that even though the Supreme Court of Canada was unambiguous in convicting Ewanchuk of sexual assault, Koenigsberg J. referred to what happened in the *Ewanchuk* case, as only an “alleged” assault.<sup>84</sup>

Relying on the idea of “behavioral consent”, Koenigsberg J. elaborated upon the relevance of the relationship context to the determination of whether or not a sexual assault has occurred:

*Ewanchuk* does not stand for a broader proposition than that one cannot assume or imply behavioural consent as part of an honest but mistaken belief in consent when there is no history between the parties which would allow the accused to infer consent from anything other than express consent. Clearly, this was not the case before the learned trial judge nor is it on this appeal. This assault occurred between two people *who had a very active two year sexual relationship and were still having that relationship when this incident arose.*<sup>85</sup> [Emphasis added.]

This is a bald statement, indicating that the relational context is essential in determining whether or not a sexual assault has taken place. Not only does Koenigsberg J. suggest that *Ewanchuk* does not apply to spouses, but he also failed to apply the reasonable steps provision of the consent defence. In fact, it is ignored entirely. Instead, Koenigsberg J. stated,

The question is, if the trial judge cannot discount that the complainant may have given signals to the accused consistent with an honest belief in consent, is this not evidence raising a reasonable doubt as to whether the accused had an honest but mistaken belief in consent?<sup>86</sup> [Emphasis added.]

In this case, Koenigsberg J.’s assumptions and inferences clearly run interference with the proper legal analysis required by the law of sexual assault.

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<sup>83</sup> This case is also analysed in *Manitoba Law Journal*.

<sup>84</sup> *Ibid.* ¶ 22 [emphasis added].

<sup>85</sup> *Ibid.* [emphasis added].

<sup>86</sup> *Ibid.* ¶ 34 [emphasis added].

In a ruling on a *voir dire*<sup>87</sup> in *R. v. Latreille*, the judge also made a range of comments revealing the judicial assumption that the status of an intimate relationship (in this case between common law spouses) is relevant to a viable assumption that “continuous consent” operates within the relationship. In this case, Heeney J. also drew on *Ewanchuk*, but did so in order to argue that the complainant’s assertion that there was no consent must be assessed “in light of all the evidence of the case.” Describing this requirement, and consistent with the reasoning adopted in *R. v. Went*, Heeney J. noted,

[S]uch evidence might arguably include a pattern of repeatedly consenting to sex with the accused in similar circumstances. It is not the sexual nature of the activity that is relevant, but rather the repetitive pattern of consenting.<sup>88</sup> [Emphasis added.]

Although the judge acknowledged the repudiation of the “twin myths” prohibited by s. 276, he nevertheless surprisingly continued to find that within an ongoing spousal relationship, the idea of “continuous consent” was simply one of “common sense.” In Heeney J.’s words:

It is one thing to assert that females who are sexually active are "easy" and therefore readily consent to sex. It is another thing altogether to assert that a male and female in an intimate relationship of long standing readily have consensual sex. The first is a rightly discredited myth. The second is a matter of common sense.<sup>89</sup>

### Consent and Judicial Expectations of Resistance in Marital Sexual Assaults

The common law rule requiring proof a complainant’s vigorous resistance to a sexual assault was never codified in Canadian criminal law, and the statutory and doctrinal developments have been positive on this official front. In the Supreme Court’s decision in *R. v. M. (M.L.)*,<sup>90</sup> for example, a unanimous court ruled that the Court of Appeal of Nova Scotia had erred in holding that a sexual assault victim was “required to offer some minimal word or gesture of objection,” and also erred in finding that a “lack of resistance must be equated with consent,” and

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<sup>87</sup> *R. v. Latreille* [2005] O.J. No. 4845 (Sup. Ct.) [*Latreille*].

<sup>88</sup> *Ibid.* ¶ 19 [emphasis added].

<sup>89</sup> *Ibid.* ¶ 22.

<sup>90</sup> [1994] 2 S.C.R. 3.

restored the offender's conviction. In other words, in this decision the Supreme Court stipulated that resistance was not required to prove a sexual assault.

Despite the absence of any legal requirement in Canadian criminal law requiring proof of resistance the idea persists in some judicial minds, as well as more broadly, that in a situation of a "real" sexual assault the victim should be able to demonstrate that she fought back to prove that she did not consent to the sexual contact. The historical and still present expectation, though not legal requirement, that proof of resistance demonstrates the absence of consent to unwanted sexual contact is organized around pervasive misunderstandings about sexual assault. Perhaps chief among these is the tenacious belief that the most "real" and harmful kind of sexual assault is that perpetrated by a woman by a man who is a stranger.

In this version of what a "real" sexual assault looks like, a woman will struggle, fight back, and strenuously resist the assailant, thereby "proving" her lack of consent to the sexual contact foisted upon her by a stranger. However, in a relational context, within which most sexual assaults indeed take place, the dynamics of such violence are markedly different, along with the meanings of and possibilities for resistance. This is perhaps most acutely the case in intimate relationships where women are less likely to engage in the kind of resistance strategies, including physical violence, they might at times deploy in a sexual attack perpetrated by a stranger. This is categorically not to suggest that a woman is likely to physically resist a sexual assault from a stranger – indeed there are a range of possible responses, including freezing, to frightening and unexpected events. The point is that the dynamics in intimate heterosexual relationships, particularly ones organized around traditional expectations of masculine superiority and authority and feminine subordination and accommodation, are less likely to be conducive to a woman's sense of entitlement to resist her husband's sexual coercion, or intrusion.

One might have hoped that the pivotal case of *Ewanchuk*, would have definitively laid to rest the mistaken assumption that a lack of resistance can be taken as sufficing for consent. In *Ewanchuk*, the Supreme Court of Canada importantly clarified the law on consent, repudiating the possibility of a implied consent," and stipulating that passivity, silence or ambiguity can definitely *not* be substituted for an affirmation of consent.

Some of the sexual assault decisions following *Ewanchuk*, however, repudiate the clear directive from the Supreme Court of Canada indicating that consent to sexual contact can *not* be inferred from a failure to resist.<sup>91</sup> In fact there are sufficient examples from reported case law pertaining to sexual assaults in

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<sup>91</sup> See, for example the cases discussed by Elizabeth Sheehy, "Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women" forthcoming in Sheehy, *Sexual Assault Law*, *supra* note 19.

intimate relationships to illustrate the tendency, on the part of some judges, to expect the evidence to show clear or satisfactory resistance on the part of the complainant to the unwanted sexual advances and intrusions of the accused.

In other words, the absence of proof of resistance, usually physical resistance, appears to undermine defence of “the credibility of the complainant’s account, and, in some of the cases analysed below, are taken to support the defence of “honest but mistaken” belief in consent defences advanced by the accused. This suggests that the judges presiding over these trials also expected that if the sexual contact the complainants described had truly been unwanted, the women should have been able to demonstrate that they fought back in some way, or physically exited the situation.

One of the most striking of the spousal sexual assault cases, *R. v. R.V.*,<sup>92</sup> first heard at the Ontario Court of Justice, and then appealed to the Ontario Superior Court, quite starkly exemplifies many of the fundamental difficulties some judges still have in recognizing and understanding the nature of sexual aggression, coercion and assault in the context of intimate relationships, their confused assumptions around resistance, and the seriously flawed legal analyses which flow from these difficulties.<sup>93</sup> At two levels of trial in a case known as *R v. R.V.*,<sup>94</sup> judges in Ontario ignored evidence of a woman’s clear and unambiguous resistance, both verbal and physical, to unwanted sexual contact by her husband. Indeed, this resistance is effectively disappeared from the legal analysis of the two lower court judges. Fortunately their errors were corrected, if only in the most cursory way, at the Ontario Court of Appeal.

In these two decisions, the woman’s record of actual resistance disappeared in the judicial legal analysis of the “honest but mistaken” belief in consent defence. While resistance is not required to prove the absence of consent, the defence claim that an accused “honestly and mistakenly” believed that consent was present in the fact of clear verbal and physical resistance clearly lacks an “air of reality.”

So a part of what is particularly interesting and troubling in the judicial reasons in the trials, is that the clear evidentiary record of her resistance was erased by two different judges. *R.V.*’s resistance strategies in the incident(s) that became the subject of the sexual assault charge, demonstrate that she verbally and

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<sup>92</sup> *R v. R.V.*, [\[2001\] O.J. No. 5143](#) (Ct. J.); *R. v. R. V.*, [\[2004\] O.J. No. 849](#) (Sup. Ct.); *R. v. R.V.*, [\[2004\] O.J. No. 5136](#) (C.A.) [*R.V.*].

<sup>93</sup> The decisions in this case have been analysed in some detail in: Randall, Melanie, “Sexual Assault in Spousal Relationships, 'Continuous Consent', and the Law, Honest but Mistaken Judicial Beliefs”(February 25, 2010). University of Manitoba Law Journal, Vol. 32, No. 1, 2008.

<sup>94</sup> *R v. R.V.*, [\[2001\] O.J. No. 5143](#) (Ct. J.) (QL); *R. v. R. V.* (2004), 20 C.R. (6th) 346 (Ont. Sup. Ct.); *R. v. R.V.*, [\[2004\] O.J. No. 5136](#) (C.A.) (QL) [*R.V.*].

unambiguously declared to her (estranged) husband that she did not want to have sex with him, that she did not consent.

She physically pushed him away from her, and she also became visibly upset and raised her voice to him in protest. These facts that were put into evidence and even noted in the judgment, yet apparently not observed or understood by the judge.<sup>95</sup> In other words, two different judges failed to recognize the complainant's very clear resistance strategies communicating her refusal of consent to any sexual contact with her husband. Consequently, these judges failed to apply the law governing sexual assault properly. They inappropriately permitted the "honest but mistaken" belief in consent defence to be raised, thereby committing what the Court of Appeal described as "serious errors of law."<sup>96</sup>

What powerful belief systems must be lurking in the minds of some judges to account for their utter inability to correctly follow the requirements of the law of sexual assault when it is spousal? It must be their mistaken assumptions about the relational context in which the conduct took place, assumptions which include interpretations of the complainant's behavior which are at odds with her own evidence before the court.

In another case between spouses, *R. v. T.V.*,<sup>97</sup> for example, the fact that the woman remained in the same room as her husband also apparently indicated, in the mind of one of the judge's hearing the case, the presence of consent to sexual contact. Most surprising is that this mistaken belief was held both by the accused *and the judge*. In Justice Baldwin's words,

It is reasonable to infer that he thought she was consenting when she lay down on the bed after he had made it known that he wanted to make love to her. She made no attempt to sit up or leave the room. After having had the benefit of listening to the complainant testify for three days, I am satisfied that the complainant is an assertive and strong-willed woman. Her failure to simply leave the room was not credibly explained in her evidence.<sup>98</sup>

This passage from her reasons for judgment acquitting the accused demonstrates the judge's clear assumption that the woman failed to physically resist the unwanted sexual contact, and this therefore somehow supported the accused's "honest but mistaken" belief in consent, *even in the face of the complainant's repeated verbal communication of non-consent*.

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<sup>95</sup> See Randall, "Honest but Mistaken," for a detailed analysis of these decisions.

<sup>96</sup> *R.V.*, *supra* note 91 at para. 1.

<sup>97</sup> *R. v. T.V.*, 2006 ONCJ 338, [2006] O.J. No. 4089 (Ct. J.) (QL) [*T.V.*].

<sup>98</sup> *Ibid.* at para. 163.

The fact that the complainant was seen by the judge to be “assertive” and “strong-willed” appears to suggest that the judge believed that the woman was required physically to exit the room in order to rebut the accused’s assertion of belief in consent. This is an astonishing example of mistaken judicial assumptions interfering with a correct legal analysis. Furthermore, the judge seems uncomfortable with the implications of her assumptions about the sexual assault analysis, by cautioning that, “these reasons are not to be interpreted in any way as saying that a husband can have sex with his wife when she says that she does not want to.” The judge then proceeds to situate the legal analysis back with the spousal relationship, by concluding that, “the findings in this case are based on the uniquely intimate and troubled relationship that existed between the parties in question.”<sup>99</sup>

#### Consent Can Not Be Given in Advance, or while Unconscious: *R. v. J.A.*

A very important and recently decided Supreme Court of Canada case on sexual assault in an intimate relationship was released in 2011. The central legal issue of the case is the definition of consent, whether or not consent can be given in advance to a sexual encounter, and whether it remains valid during unconsciousness at the point of the sexual contact. As the Chief Justice put it: “Our task on this appeal is to determine whether the Criminal Code defines consent as requiring a conscious, operating mind throughout the sexual activity.” But the legal question as framed by the court is already a denuded version of the story of the case, and the “what happened.”

The *J.A.* case is a complex story but the issue put before the Supreme Court of Canada on appeal was narrow, dealing only with the viability of the validity of consent. The complainant had notified the police that she had been sexually assaulted by her spouse, that he had choked her into unconsciousness and she awakened to find that he was penetrating her anally with a dildo. The complainant reported that she did not consent to the sexual activity. The incident took place in a relationship characterized by a history of domestic violence and at time of the sexual assault charge, the accused had already been twice convicted for assaulting her. By the time of the trial, the complainant’s evidence changed and the trial judge referred to a “typical cross-examination of a recanting complainant in a domestic matter.”<sup>100</sup>

Beyond a bare recitation of the facts, none of these complexities or the dynamics of sexual violence in the context of a relationship characterized by domestic violence, were canvassed in the Supreme Court’s decision in *J.A.* Instead, the context of the legal analysis was narrowed as the case made its way up to the Supreme Court. At the trial of first instance Nicholas J. found that the

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<sup>99</sup> *Ibid.* at paras. 175-6.

<sup>100</sup> *R. v. A.(J.)*, 2008 ONCJ 195 (CanLII) at paragraph 8.

complainant, K.D., had consented to being choked into unconsciousness but not to the insertion of the dildo. The trial judge found, in the alternative, that K.D. could not in law consent to sexual activity that took place while she was unconscious.<sup>101</sup>

At the Court of Appeal the court split on the legal validity of whatever consent K.D. gave in advance of being choked into unconsciousness. Simmons J.A. for the majority held that consent in advance to sex while unconscious was legally valid<sup>102</sup>, while in dissent Laforme J.A. disagreed that consent at law was possible, because an active mind was required for it, throughout the duration of the sexual activity for which consent was at issue.<sup>103</sup>

At the Supreme Court the majority judgment of 6 of the court's members, found that consent in advance to sex while unconscious is legally invalid. In dissent, three of the justices held that a conscious person can freely and voluntarily consent in advance to sexual activity intended to occur while unconscious.<sup>104</sup> Indeed, writing for the dissent, Justice Fish further makes the controversial argument that to hold otherwise would be inimical to women's autonomy interests.

The majority, however, refers to both the holding in *Ewanchuk* and legislative intent behind the Criminal Code definition of consent, to argue that consent must be tied to the ongoing capacity to revoke it, which requires consciousness at the time of sexual activity. As the Chief Justice notes:

the Code makes it clear that an individual must be conscious throughout the sexual activity in order to provide the requisite consent. Parliament requires ongoing, conscious consent to ensure that women and men are not the victims of sexual exploitation, and to ensure that individuals engaging in sexual activity are capable of asking their partners to stop at any point.

The Chief Justice further explained that:

The definition of consent for sexual assault requires the complainant to provide actual active consent throughout every phase of the sexual activity. It is not possible for an unconscious person to satisfy this requirement, even if she expresses her consent in advance. Any sexual activity with an individual who is incapable of consciously evaluating whether she is consenting is therefore not consensual within the meaning of the *Criminal Code*.<sup>105</sup>

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<sup>101</sup> At paragraph 45.

<sup>102</sup> CA at paragraph 77.

<sup>103</sup> CA at paragraph 117.

<sup>104</sup> Supreme Court of Canada At paragraphs 103, 014, 105, 108.

<sup>105</sup> At 66.

The decision in *R. v. J.A.*, then, confirms the repudiation of any idea of implied consent, of crucial significance for cases of sexual assault in intimate relationships where judges, reflecting broader social mores, too often veer into making assumptions about implied or ongoing consent in spousal relationships.

## Conclusion

In the Canadian jurisprudence, the *Ewanchuk* and *J.A.* decisions stand out as clear and forceful articulations by the Supreme Court of Canada that consent must be affirmatively communicated and requires a conscious mind capable voluntary decision making to be valid in law. To this extent these decisions go a long way towards repudiating the idea that implied or continuous or advance consent can be claimed as defences by men accused of sexual assault – all of which is deeply important for ending sexual violence against women in intimate relationships.

Many of the deeply held misapprehensions and stereotypical assumptions about sexual assault - what it actually looks like and especially what the absence of consent looks like- continue to thrive, perhaps most sharply observed in relation to sexual assaults in intimate relationships. Sexual assaults in the context of intimate relationships, then, especially spousal relationships, are therefore the least likely to come to the attention of the criminal justice system.

The trouble with consent and sexual assault law is that the very validity of the concept of consent is predicated on the idea of free, equal and autonomous adults. But men and women remain deeply unequal in Canadian society, and, not coincidentally, the criminal justice system remains deeply flawed in its processing of criminal sexual assault cases.

As Catharine MacKinnon astutely observes, “If sexuality is relational, specifically if it is a power relation of gender, *consent is a communication under conditions of inequality.*”<sup>106</sup>

The significance of this insight has perhaps been under appreciated. It has certainly, to put it mildly, been under recognized in law. Taking this idea seriously would demand a rigorous rethinking of the balance between and configuration of the rights of the accused against the state and the rights of complainants to a fair trial.

In fact, the idea that complainants in sexual assault cases should be entitled to a fair trial has no place in the rationale underpinning the criminal justice system, which is entirely oriented to protecting the rights of the accused. The evidentiary protections for victim-witnesses to crimes against the state which do exist acknowledge, at least formally, the trauma associated with testifying and being subject to “myths and stereotypes,” but this is tinkering around the edges of a system in which victims fundamentally are side players to a legal drama between accused and government.

The rhetoric about the equality standard in sexual assault law in Canada must be more fully realized in practice. Yet this remains a daunting task.

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<sup>106</sup> MacKinnon, *Women’s Lives, Men’s Law’s* at 181. [Emphasis added]

[T]he legal standard for consent to sex ... does not hold contested sexual interactions to a standard of sex equality. That is, when the law of rape finds consent to sex, it does not look to see if the parties were social equals in any sense, nor does it require mutuality or positive choice in sex, far less simultaneity of desire.<sup>107</sup>

To the extent that the legal system has entrenched and rendered invisible one perspective on sexual assault over another – that of men over women – it has been deeply implicated in ensuring that the law of sexual assault does not and can not embrace and live up to an equality standard. In particular, long standing and traditional approaches to the mens rea of sexual assault and consent embody a masculinist perspective on the “what happened” in assaultive sexual encounters between men and women.

The legislative reforms requiring that the mens rea elements of consent adhere to an objective standard – and not the subjective standard of the male accused who readily claims that he “honestly” believed she wanted it, but the “objective” standard of the reasonable person *who can prove taking reasonable steps to ascertain the presence of consent* – is a crucial attempt to ensure that an equality standard is codified in the *Criminal Code*. Nowhere is this standard more important than in the context of sexual assaults in intimate relationships. Ensuring that this codification of the statutory required legal consent analysis is vigilantly carried out by the judiciary, particularly when they are judging cases of sexual assault in the context of intimate relationships, is another step altogether.

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<sup>107</sup> MacKinnon, *Women’s Lives, Men’s Law’s* at 242-243.