ON SEXUAL CONSENT IN CANADA: THE BALANCE BETWEEN PROTECTING AND RESPECTING SEXUAL AUTONOMY

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INTRODUCTION

In most intimate relationships, sexual consent is an afterthought: the parties willingly give of themselves to their partner, and the question of consent simply fails to arise. For the law, however, consent is always front of mind.

The explanation for the law's obsession is simple: criminal law deals with acts that transgress what we, as a society, deem to be the rules that govern how we relate to one another, and consent is the dividing line between sexual actions that are criminal and those that are not. Although there are eventual limits, even the most egregiously aggressive or demeaning sexual behaviour is allowable if consent is secured. On the flipside, even so-called "harmless" sexual touching—sexual touching that leaves no physical mark or lasting trauma—is illegal without consent. Therefore, the presence or absence of consent is the formula by which the law determines whether sexual touching is allowable or criminal.

Consent is so important that it is defined twice within the *Criminal Code*:¹ first in section 265, the assault provision which also governs the law of sexual assault, and again in section 273.1, where the *Criminal Code* provides an additional definition specifically within the context of sexual assault. The limits of the meaning of consent have been further defined through case law, especially in *R v Ewanchuk*,² which this paper discusses in the first section.

Although the meaning of consent is settled in an academic sense, in the real world the meaning is much murkier: the general public would be surprised to discover that *Ewanchuk* has determined it is illegal to initiate sexual activity via sexual touching, to touch a partner's body sexually when they do not expect it, or to kiss a sleeping spouse. In an effort to keep people safe from inappropriate sexual touching, we have outlawed activities to which most intimate partners would not object: this leads to a dilemma about

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¹ RSC 1985, c C-46.

² *R v Ewanchuk*, [1999] 1 SCR 330 [*Ewanchuk* SCC].

when protection exceeds what is necessary or appropriate and turns into inappropriate control of sexual autonomy. It is this dilemma this paper seeks to address.

In the first section, I outline the history of Canada's consent definition via *Ewanchuk* and arrive at the limits of consent in Canada. In the second section, I argue that this definition is overbroad because it captures behaviour that is not morally wrong. In the third section, I address whether overbreadth is justified as a tool to protect vulnerable members of our society from predatory men. In the fourth section, I assess possible responses to the problem of overbreadth in the definition of consent.

Ultimately, this paper argues that Canada's sexual assault laws require change in the way consent is defined, for two reasons. First, by criminalizing behaviour that is not morally wrong, criminal law is overbroad and does not fulfill its expressive function. Second, while enacted with the noble goal of protecting the sexual autonomy of women, our consent laws serve to *restrict* the sexual autonomy of women in ways that are objectionable.

I. HOW DID WE GET HERE?

This paper focuses on the limits of consent, especially as explicated through *Ewanchuk*. Therefore, prior to any analysis, it will be beneficial to lay out the facts of the decision in order to define the terms of the discussion.

Ewanchuk

On June 3, 1994, after a "business-like, polite"³ job interview inside his work van, 44-year-old Steve Ewanchuk invited the 17-year-old girl he was interviewing into his trailer to see some of the custom woodwork that formed the bulk of his business. While inside, Ewanchuk sought to initiate sexual touching with the young woman via a massage: first he asked her to massage him, then he massaged her. The touching quickly turned sexual. The underage complainant refused repeatedly, but Ewanchuk persisted: the touching progressed to Ewanchuk being on top of the complainant, grinding his pelvis into hers, and taking his penis out of his shorts. As she had throughout the encounter, the complainant protested, and Ewanchuk eventually ceased, gave the girl \$100, and they parted. Ewanchuk was later arrested.

At trial, Ewanchuk was acquitted: the judge determined the Crown had failed to meet its evidentiary burden that the complainant had not consented to the sexual touching, because throughout the encounter she had projected a calm visage. Her demeanour had been addressed directly at trial: she had attempted to remain calm to not enrage Ewanchuk and put herself in further danger.⁴ However, the judge found her demeanour left him with

³ *Ibid* at para 3.

⁴ *Ibid* at para 13.

a reasonable doubt about the defendant's guilt. The judge characterized the defence as one of "implied consent":⁵ because not enough evidence had been led to prove the sexual touching had occurred in the absence of consent, the Crown had failed to prove the *actus reus* of the crime.

This decision was upheld in the Alberta Court of Appeal, 2–1, with each justice providing reasons; both Justice McClung and Justice Foissey felt the appeal could not go forward as the acquittal was fact-driven, and therefore not open to the Court of Appeal to overturn. Justice McClung, however, went further: he wrote that the complainant did not enter the accused's trailer "in a bonnet and crinolines"⁶ and that the accused's actions were "far less criminal than hormonal."⁷

The Supreme Court of Canada (SCC) disagreed and took the opportunity to clarify the elements of sexual assault. The *mens rea* is relatively straightforward, and has two parts: first, an "intention to touch" and second, "knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched."⁸ For the *actus reus*, three elements are necessary: "(i) touching, (ii) sexual nature of the contact, and (iii) the absence of consent."⁹ The first two elements, the SCC ruled, are objective, but the third—the absence of consent—is subjective and "determined by reference to the complainant's subjective internal state of mind towards the touching, *at the time it occurred*."¹⁰ The demand for complete overlap between the touch itself and subjective consent is what this paper critiques: by demanding subjective consent of a highly-specific type, *Ewanchuk* unjustifiably restricts sexual agency.

In a concurring judgment, Justice L'Heureux-Dubé took the rare step of criticizing Justice McClung directly, writing that his judgment—especially his comments about bonnets and crinolines—"help[s] reinforce the myth that under such circumstances, either the complainant is less worthy of belief, she invited the sexual assault, or her sexual experience signals probable consent to further sexual activity."¹¹ This was not a case about consent, she wrote, because none was given. Rather, this was a case about stereotypes, "loose" women, and whether women in general should be able to control their sexual integrity.¹²

The result meant *Ewanchuk* went to jail for sexual assault, and the court closed the door on any doctrine of implied consent operating beyond the bounds of common

⁵ *Ibid* at para 16.

⁶ *R v Ewanchuk*, 1998 ABCA 52 at para 4 [*Ewanchuk* ABCA].

⁷ *Ibid* at para 21.

⁸ *Ewanchuk* SCC, *supra* note 2 at para 42.

⁹ *Ibid* at para 25.

¹⁰ *Ibid* at para 26 [emphasis added].

¹¹ *Ibid* at para 89.

¹² *Ibid* at para 82.

assault: consent to sexual touching is subjective to the complainant's state of mind and must be contemporaneous to the touching.¹³

The Reaction to *Ewanchuk* and the Limits of Consent

The reaction to *Ewanchuk* was swift. In a comment accompanying the decision in the *Criminal Reports*, Professor Don Stuart called it a “classic case of a bad case makes bad law.”¹⁴ In his view, the law made by *Ewanchuk* is “repressive” because it conflates the actions of a deliberate sexual predator with those of someone who mistakes a person's actions as granting consent and proceeds.¹⁵

Anti-feminists jumped all over the decision. Calling it a victory for political correctness, more than 40 articles were published between the *National Post* and the *Globe and Mail*, written by social conservatives, members of the Reform Party, fathers' rights groups, and conservative academics.¹⁶ These groups used the decision as a “springboard” to launch a broader attack on both feminism and what they referred to as “judicial activism.”¹⁷

Even Justice McClung got into the action: in a letter to the *National Post*, he took the “unprecedented step of retaliating” directly against Justice L'Heureux-Dubé, accusing her—via her ostensibly feminist beliefs—of being responsible for increased suicide rates among men in Quebec.¹⁸ Although the Canadian Judicial Council later called Justice McClung's actions “simply unacceptable,” the damage had been done, and the battle lines drawn.¹⁹

My argument, however, rejects those battle lines: *Ewanchuk* was not a bad decision because it makes the world more “politically correct” nor because it represents the triumph of feminism over traditional notions of masculinity. Further, it is not wrong simply because it conflates one type of illegal behaviour for another, as Stuart argues. In fact, those outcomes are positive: allowing a masculine perspective to govern sexual assault laws has caused unfathomable harm to women and to society at large, and there is no persuasive argument against injecting a feminine perspective into sexual assault laws, especially considering that women constitute the overwhelming majority of victims

¹³ *Ibid* at para 26.

¹⁴ Don Stuart, “*Ewanchuk*: Asserting ‘No Means No’ at the Expense of Fault and Proportionality Principles” (1999) 20 CR (5th) 39 at 39.

¹⁵ *Ibid* at 49.

¹⁶ 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 at 318.

¹⁷ *Ibid*.

¹⁸ *Ibid* at 317.

¹⁹ *Ibid*.

of unwanted sexual touching.²⁰ Stuart's argument is similarly unpersuasive: given that the facts of *Ewanchuk* do not permit drawing the conclusion that the complainant consented to the sexual touching, Stuart's fears that a sexual predator and a clueless lothario might be conflated via this judgment are simply unfounded.

Ewanchuk is a bad decision because it is overbroad: it punishes behaviour that is not morally blameworthy, and behaviour in which Canadians would be surprised to find they cannot legally participate. By insisting on contemporaneous consent of a *specific* kind, it criminalizes behaviour that is the norm in loving, intimate relationships across the country.

This section has outlined the definition of sexual consent in Canadian law via the *Ewanchuk* decision. It has explored the boundaries of this definition and some of its criticisms, before arguing that the definition is overbroad. The next section delves deeper into the meaning of overbreadth and the negative consequences that emerge from overbroad criminal laws.

II. OVERBREADTH

This section looks to *Canada (AG) v Bedford*²¹ for the definition and test of overbreadth in Canadian law, before exploring the legislative intentions that inform our definitions of consent. It closes by arguing that overbroad criminal laws detract from the credibility of the law.

Bedford

In *Bedford*, Canada's prostitution laws were subject to a challenge on *Canadian Charter of Rights and Freedoms* (Charter)²² grounds that they were, among other things, overbroad. Overbreadth, the SCC determined, occurs when "the law goes too far and interferes with some conduct that bears no connection to its objective."²³ In *Bedford*, it was held that the objective of outlawing living on the avails of prostitution was to punish those who would exploit sex workers—abusive pimps—but that, in effect, it also punished drivers, bodyguards, managers, or any other service provider whose work benefitted and was undertaken at the behest of sex workers.²⁴ By failing to distinguish between exploitive and non-exploitive relationships, the law captured conduct that was not morally blameworthy and was, therefore, overbroad.

²⁰ Kwong-leung Tang, "Rape Law Reform in Canada: The Success and Limits of Legislation" (1998) 42:3 Intl J Off Ther & Comp Crim 258 at 259, DOI: <doi.org/10.1177/0306624X9804200307>.

²¹ 2013 SCC 72 at para 101 [*Bedford*].

²² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

²³ *Bedford*, *supra* note 21 at para 101.

²⁴ *Ibid* at para 142.

It is possible to argue the *ratio* of *Bedford* has no application to *Ewanchuk*-type consent—after all, we are dealing with two fundamentally different issues: in *Bedford*, the law increased the danger on sex workers who were participating in a legal endeavour by criminalizing aspects of their practices that are not morally blameworthy. Conversely, following *Ewanchuk*, husbands and boyfriends were not subject to a wave of prosecution for kissing their sleeping spouses, nor were they subjected to any additional danger via the operation of the law.

As Michael Plaxton has argued, however, the problem of overbreadth is not *only* about danger, it is about labelling: whether a person who kisses their sleeping spouse is prosecuted or not, the conduct is still labelled as criminal.²⁵ This labelling is unfair and demeaning to consenting adults living their own conceptions of the “good life.” Furthermore, because the law criminalizes conduct that does no harm, it punishes—if only via this labelling—behaviour that is not blameworthy.

I will expand this argument in the next section, but before moving on I will explore the way the *Ewanchuk* decision violates Parliament’s intentions, and how overbreadth can undermine the credibility of the law.

***Ewanchuk* Does Not Fulfill the Intentions of Parliament**

In 1991, the SCC struck down Canada’s rape shield laws in *R v Seaboyer*.²⁶ Following that decision, then-Minister of Justice Kim Campbell introduced Bill C-49,²⁷ which not only reinstituted a rape shield, but also included a provision that defined consent specifically in a sexual assault context: the aforementioned section 273.1.

The Bill was contentious enough that Campbell found it necessary to answer critics in an op-ed in the *Globe and Mail*.²⁸ She wrote that the new definition of consent “does not purport to constrain or reform the sexual practices of ordinary Canadians[.] ... [I]t accepts that consensual sexual matters will unfold as they will, in a variety of ways as infinite as the number of sexual encounters.”²⁹ But this intention was not captured by *Ewanchuk*: by applying the law to such a degree that “ordinary” Canadians would be surprised to find they had become criminals, the court clearly violated the intentions of Parliament. Campbell’s op-ed also stated that the Bill was about guarding against “injustice” within the system of laws that govern sexual assault.³⁰ According to *Bedford*,

²⁵ Michael Plaxton, *Implied Consent and Sexual Assault: Intimate Relationships, Autonomy, and Voice* (Montreal: McGill-Queen’s University Press, 2015) at 5.

²⁶ *R v Seaboyer*, [1991] 2 SCR 577 at 580.

²⁷ *An Act to Amend the Criminal Code (sexual assault)*, SC 1992, c 38.

²⁸ Kim Campbell, “Not Men versus Women, But a Matter of Justice,” Editorial, *The Globe and Mail* (27 May 1992) A15.

²⁹ *Ibid.*

³⁰ *Ibid.*

however, injustice is only increased when morally permissible conduct is criminalized.³¹ Problematizing relationships of equality and respect through overbroad consent laws represents a failure both to recognize the complexity of sex within the context of relationships and to differentiate between sex within a respectful relationship and sex between strangers.³²

The next section argues that if the people governed by laws cannot see their conception of the “good life” within those same laws, the law loses credibility.

Law’s Credibility

Many scholars have linked credibility to justice, and justice to recognition. As John Rawls argues, laws that conform to society’s moral convictions are more likely to be accepted and followed by society’s members.³³ Plaxton has argued that if a law criminalizes conduct that is not morally blameworthy, it “loses some of its credibility and authority as a moral guide.”³⁴ He continues that, because the criminal law informs us of conduct that society has determined is so unacceptable it is worthy of judicial sanction and punishment, it must reflect the norms by which we live.³⁵ It cannot, without harming itself, outlaw conduct that is *not* in itself criminal to strengthen a prohibition against criminal conduct.

An example outside the realm of sexual assault may be helpful. Scholar Mary Bernstein has written about the history of anti-sodomy laws in the United States as sites of discrimination and oppression.³⁶ When activists first took notice of these laws in the 1950s, they determined that although their existence was discriminatory, they were unenforceable due to the private nature of sexual acts.³⁷ They turned out to be wrong—the law is quite capable of ferreting out private behaviour and punishing it³⁸—but this is not the thrust of Bernstein’s argument as to why anti-sodomy laws are abhorrent. Bernstein posits that anti-sodomy laws are incompatible with notions of human dignity because they mark gay sexuality as inferior to heterosexuality.³⁹ Even if no one was ever convicted under these statutes, the stigma and discrimination that attaches when private

³¹ Bedford, *supra* note 21 at para 162.

³² David Archard, *Sexual Consent* (Boulder: Westview Press, 1998) at 146.

³³ John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 1971) at 133.

³⁴ Plaxton, *supra* note 25 at 27.

³⁵ *Ibid* at 32.

³⁶ Mary Bernstein, “Liberalism and Social Movement Success: The Case of United States Sodomy Statutes” in Elizabeth Bernstein & Laurie Schaffner, eds, *Regulating Sex: The Politics of Intimacy and Identity* (New York: Routledge, 2005) 3.

³⁷ *Ibid* at 7.

³⁸ *Ibid* at 10.

³⁹ *Ibid* at 3–4.

conduct between consenting adults is made criminal marks these laws as unfair and unworthy.⁴⁰ I argue that the same is true of intimate relationships of all kinds: when the law criminalizes private conduct between consenting adults that is not morally blameworthy, it loses some of its credibility by being overbroad.

This section has explored the definition of overbreadth via *Bedford* and applied it to the sexual assault context to determine that Canada's consent laws criminalize conduct that is not morally blameworthy. It has also argued that consent as defined in *Ewanchuk* violates Parliament's intentions and threatens the credibility of consent laws. The next section explores competing meanings of consent and the way that sexual consent laws that are overbroad unduly restrict—rather than protect—sexual autonomy.

III. AUTONOMY, VOICE, AND CONSENT

This section is at the heart of my argument. This paper has outlined the limits of consent via the *Ewanchuk* decision and argued that the limits explicated by the SCC are overbroad because, in an effort to criminalize morally blameworthy behaviour, they also criminalize behaviour that falls within a reasonable conception of “the good life.” Further, these limits are inconsistent with Parliament's intentions: Kim Campbell's editorial in the *Globe and Mail* shows that Parliament intended to create a law in line with the expectations of “ordinary Canadians” as to what sexual practices are permissible under the law.⁴¹ The fact these same Canadians would be surprised to learn they have committed sexual assault for kissing their sleeping spouses suggests that consent standards are overbroad.

This section explores the *Ewanchuk* consent standards from a different angle, and argues that while it is true the sexual autonomy of women is under threat via sexual assault, our consent laws, far from *protecting* the sexual autonomy of women, serve to *restrict* women's sexual autonomy through this overbreadth by outlawing practices that ought not to qualify as sexual assault and dictating to women how they should perceive the “good life.” Prior to this discussion, however, it bears asking whether overbreadth within the law of consent serves a noble or necessary purpose and is acceptable on that basis.

So What?

Sexual violence is an epidemic in Canada,⁴² and sexual assault by intimate partners is a major part of the problem. World Health Organization statistics show that

⁴⁰ *Ibid* at 14.

⁴¹ Campbell, *supra* note 28.

⁴² André Picard, “Sexual Violence: The Silent Health Epidemic,” *The Globe and Mail* (6 February 2017) A13.

nearly one in four women will experience sexual violence perpetrated by an intimate partner.⁴³ Furthermore, rape by an intimate partner is perceived as “less harmful, less serious, and less ‘real’ in society’s eyes” than rape by a stranger.⁴⁴ This is a problem borne almost exclusively by women, and committed almost exclusively by men: ninety-percent of sexual assault victims are women, and ninety-nine-percent of perpetrators are men.⁴⁵ Finally, the fact that some judges continue to make assumptions that marriage implies sexual access to wives,⁴⁶ and insist on dealing with consent in spousal rape cases differently than they would in a case of stranger rape—keeping “alive and well”⁴⁷ the doctrine of implied consent expressly refuted in *Ewanchuk*—means that it is reasonable to ask: so what? So what if consent laws are overbroad: women are vulnerable to sexual assault and face a world of near-constant danger that their sexual autonomy will be violated, so does it matter whether the law goes too far in an effort to eradicate this threat?

A possible answer centres on the role of law in society. It is self-evident that one of the roles of criminal law is to punish those who violate it, but law must serve another function as well—it must tell us how *not* to violate it by giving us rules by which we all agree to live. In fact, according to Plaxton, this “expressive function” of the law is law’s *primary* role.⁴⁸

This primary role is disrupted when the law on the books tells us that conduct that is not morally blameworthy is nonetheless criminal. This is especially confounding considering that not *all* morally blameworthy conduct is criminal⁴⁹—our system pays no attention to everyday lies, cheating, rude behaviour, and similar conduct. Thus, raising conduct to the level of criminality is no minor action, and should not be taken lightly. In fact, because sex is not an everyday subject of discussion in polite society, because it is so fraught with the potential for misunderstandings, the expressive function of the law is especially important in the context of sexual assault.⁵⁰

⁴³ Melanie Randall, “Sexual Assault in Spousal Relationships, ‘Continuous Consent,’ and the Law: Honest but Mistaken Judicial Beliefs” (2008) 32:2 Man LJ 144 at 148.

⁴⁴ Ruthy Lazar, “Negotiating Sex: The Legal Construct of Consent in Cases of Wife Rape in Ontario, Canada” (2010) 22:2 CJWL 329 at 332, DOI: <doi.org/10.3138/cjwl.22.2.329>, citing Melanie Heenan, *Just “Keeping the Peace”: A Reluctance to Respond to Male Partner Sexual Violence*, Issues Paper No 1, Australian Centre for the Study of Sexual Assault (Melbourne: Australian Institute of Family Studies, 2004) at 16.

⁴⁵ Tang, *supra* note 20 at 259. For more recent statistics, see Samuel Perreault & Shannon Brennan, “Criminal Victimization in Canada, 2009” (2010), online: *Statistics Canada* <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2010002/article/11340-eng.htm>> [https://perma.cc/32SZ-A8HE].

⁴⁶ Randall, *supra* note 43 at 145.

⁴⁷ *Ibid* at 174.

⁴⁸ Plaxton, *supra* note 25 at 27.

⁴⁹ *Ibid* at 32.

⁵⁰ *Ibid* at 30.

Another potential justification for an overbroad law may be found in section 1 of the *Charter*. In *Ewanchuk*, Justice L’Heureux-Dubé’s concurring judgment utilizes the *Charter* to underpin her reasoning. She cites the Preamble to the 1992 *Criminal Code* amendments that instituted the definition of consent in sexual assault and states that the intention of the new law was to “promote and help to ensure the full protection of the rights guaranteed under sections 7 and 15” of the *Charter*.⁵¹ It bears asking whether an overbroad law that impugns both moral and immoral behaviour in an attempt to protect women from sexual assault is simply a matter of “enforcement practicality” that, according to *Bedford*, might be justified under section 1.⁵² Essentially, the question is whether the limitations on women’s section 15 equality rights and section 7 liberty rights created by *Ewanchuk* are justifiable in light of the need to protect women’s sexual integrity in accordance with the guarantee of security of the person in section 7. Section 1 demands that any limit placed on a *Charter* guarantee be prescribed by law—which this limitation clearly is—and be “demonstrably justified in a free and democratic society.”⁵³ To determine whether a restriction is demonstrably justified, it is necessary to apply the *Oakes* test.⁵⁴

The first step is determining whether the objective of the law addresses a “pressing and substantial” concern within society.⁵⁵ This paper has shown that sexual assault is an epidemic almost entirely borne by women, so laws that combat this certainly fit the criteria. The next step considers whether the law has a rational connection to its objective.⁵⁶ The *Ewanchuk* consent standard, especially its subjective element in the *actus reus*, fits the criteria by putting the onus on the person initiating sexual activity to ensure they have received true consent, which is rationally connected to the objective of protecting the sexual autonomy of women. Where *Ewanchuk* consent standards fail, however, is at the third stage: minimal impairment. As outlined in *Oakes*, a law that restricts a *Charter* right must do so in a way that “impair[s] ‘as little as possible’ the right or freedom in question.”⁵⁷ By being overbroad—by “sweeping conduct into its ambit that bears no relation to its objective”⁵⁸ in the language of *Bedford*—*Ewanchuk* consent standards fail the section 1 analysis by over-impairing the right at issue.

A further argument will be taken up in the next section: just as anti-sodomy laws mark gay sexuality as inferior to heterosexuality,⁵⁹ defining consent in an unduly

⁵¹ *Ewanchuk* SCC, *supra* note 2 at para 74.

⁵² *Bedford*, *supra* note 21 at para 113.

⁵³ *Charter*, *supra* note 22.

⁵⁴ See *R v Oakes*, [1986] 1 SCR 103 [*Oakes*].

⁵⁵ *Ibid* at para 69.

⁵⁶ *Ibid* at para 77.

⁵⁷ *Ibid* at para 70.

⁵⁸ *Bedford*, *supra* note 21 at para 117.

⁵⁹ Bernstein, *supra* note 36 at 3–4.

restrictive sense sends a message to women that their sexuality and sexual desires are somehow inferior—because they cannot be trusted to make decisions about who can touch them and how—and should be subject to the control of the state.

Protection versus Control

This paper has shown why the protection of women from sexual violence is a worthy preoccupation of the law: women are at risk of suffering sexual violence at overwhelming, even unimaginable, levels. But, as this section argues, a preoccupation with women's safety within the realm of sex risks perpetuating damaging, patriarchal stereotypes about sex—that women are the passive recipients of normative male violence—and robs women of their agency.⁶⁰

Through *Ewanchuk*, the SCC has given its blessing to only one form of consent, but in doing so fails to give due regard to the significance of choice in living the “good life.”⁶¹ *Ewanchuk* consent standards offer a variety of ways a woman can refuse to be touched sexually—which is good—but fail to give any significant options for engaging in sexual touching, or inviting sexual touching. As David Archard writes, it is “curiously asymmetrical to think that women should be believed when they say ‘no’ but disbelieved when they sincerely say ‘yes.’”⁶² Yet by restricting the ways a person can consent to sexual touching, the SCC has refused to consider—let alone believe—any way to say “yes” but one.

As I argue above, consent is the formula by which sexual touching moves from impermissible to permissible. Sexual impulses find a wide variety of expression: everything from a gentle caress to sadomasochistic practices that some might consider beyond the bounds of decency are permissible in the presence of consent. Taking away the choice of means to express sexual desire does not protect women from the dangers of sexual violence, it only serves a narrative that women are eternal victims within society and reinforces existing gender hierarchies,⁶³ to the continued detriment of women. The point of consent laws is to protect and enhance the sexual autonomy of women, but we cannot increase sexual autonomy by decreasing it.

Consideration of the harm targeted by sexual assault laws may help illuminate this part of my argument. As Plaxton argues, because sexual assault laws apply whether any

⁶⁰ Bibi Bakare-Yusuf, “Thinking with Pleasure: Danger, Sexuality and Agency” in Susie Jolly, Andrea Cornwall & Kate Hawkins, eds, *Women, Sexuality and the Political Power of Pleasure* (London: Zed Books, 2013) 28 at 29.

⁶¹ Plaxton, *supra* note 25 at 123–24.

⁶² Archard, *supra* note 32 at 141.

⁶³ Kevin Bonnycastle, “Rape Uncodified: Reconsidering Bill C-49 Amendments to Canadian Sexual Assault Laws” in Dorothy E Chunn & Dany Lacombe, eds, *Law as a Gendering Practice* (Don Mills, ON: Oxford University Press, 2000) 60 at 70.

physical harm comes to the victim or not, the true harm targeted by these laws should not be understood narrowly as sexual violence, but more broadly as sexual instrumentalization.⁶⁴ Sexual instrumentalization is a form of objectification that sees one partner use the other solely as a non-autonomous means to an end, the end being sexual gratification.⁶⁵ Objectification and instrumentalization are more pernicious wrongs because it is from these wrongs that sexual violence flows. We may have reformed our rape laws, but we have yet to reform our thinking that women are property, as only through imagining women as property—as something non-autonomous—could the legal system see fit to restrict their autonomy in such a serious way.

My argument should not be misconstrued as advocating for less protection for women: women are in real, constant danger of sexual violence and this epidemic must be addressed by any means that increases the chance of success for women's safety and autonomy. But the balance between protection and control in Canadian law is lopsided: the state oversteps its role as sexual protector when it takes on the role of sexual oppressor.⁶⁶ The consent standards the SCC created in *Ewanchuk* offer increased sexual autonomy with the right hand, while taking it away with the left.

A Different Kind of Consent

David Archard writes about relationships that are “beyond consent.”⁶⁷ This is not the same as a blanket consent, or an advance consent—which is impossible, according to *R v JA*⁶⁸—but a form of consent that is deep enough to do away with the need for contemporaneous consent to certain acts that have developed into norms or conventions of the relationship.⁶⁹ This type of consent does not cover every act of sexual touching: only those practices that have grown into conventions can be thought of as “beyond consent,” but the introduction of new sexual acts or new forms of touching would be subject to the need for contemporaneous consent. Furthermore, it does not rob women of agency to say that consent can be inferred via a sexual practice that has grown into a convention of the relationship, as the ability to say “no” always resides with either partner. In Archard's conception, there is no room for a “her lips said ‘no,’ but her eyes said ‘yes’” argument.⁷⁰

⁶⁴ Plaxton, *supra* note 25 at 47.

⁶⁵ *Ibid* at 107.

⁶⁶ Janet R Jakobsen & Elizabeth Lapovsky Kennedy, “Sex and Freedom” in Elizabeth Bernstein & Laurie Schaffner, eds, *Regulating Sex: The Politics of Intimacy and Identity* (New York: Routledge, 2005) 247 at 248.

⁶⁷ Archard, *supra* note 32 at 27.

⁶⁸ 2011 SCC 28 at para 34.

⁶⁹ Archard, *supra* note 32 at 32.

⁷⁰ *Ibid*.

Archard uses an analogy to explain his idea: imagine Smith and Jones are neighbours, and every Sunday, Smith borrows Jones's lawnmower. It may have started out with Smith asking to borrow the item but, over time, the conventions of the relationship become such that in the absence of any specific dissent—maybe Jones needs to mow his mother's lawn that weekend—it is reasonable for Smith to assume he can continue to borrow his neighbour's mower, and he ceases to need specific consent at the time of borrowing: he can simply take the mower without asking, because he knows that if he *did* ask, Jones would consent.⁷¹

Plaxton makes a similar argument, but from a different perspective: he draws a moral distinction between *stealing* control and *ceding* control.⁷² While stealing control of a woman's sexual autonomy is clearly impermissible, ceding control of sexual autonomy may be a woman's preferred method of participating in sex, or may be one of the methods by which she is capable of enjoying sex, on occasion. This, to Plaxton, is still the subjective consent demanded by *Ewanchuk*, albeit a subjectivity based on the accepted norms of the relationship, rather than the present moment.⁷³

Something that both these conceptions of consent share is their ability to acknowledge that people have sex within relationships for a variety of reasons, not simply out of desire or passion. Anyone who has been in a long-term relationship—or read an advice column—will understand that levels of sexual desire do not always correspond between partners: in cases such as these, it is safe to conclude that some partners agree to sex out of a sense of obligation, rather than a shared level of desire.⁷⁴ But consent that operates under a feeling of obligation is still subjective consent in that it allows a person to exercise their sexual agency, and protect their sexual autonomy.

Christine Boyle has raised an important counterpoint to the foregoing discussion of consent: subsection 273.2(b) of the *Criminal Code*. That subsection states that an accused's belief that the complainant consented is not a defence to sexual assault unless the accused takes "reasonable steps" to ascertain such consent. This translates, says Boyle, into the following: "one cannot take reasonable steps by engaging in actions which require consent in themselves."⁷⁵

As a case comment to *R v RV*,⁷⁶ the context in which Boyle is writing provides a partial answer to her counterpoint: far from a loving and stable relationship, the sexual touching in *R v RV* took place within a marriage that was "troubled," which had had

⁷¹ *Ibid* at 17.

⁷² Plaxton, *supra* note 25 at 17.

⁷³ *Ibid*.

⁷⁴ *Ibid* at 98.

⁷⁵ Christine Boyle, "Sexual Assault as Foreplay: Does *Ewanchuk* Apply to Spouses?" (2004) 20 CR (6th) 359 at 361.

⁷⁶ [2004] OJ No 849 (Sup Ct J).

“communication problems in the last few years which were not getting any better” and where the parties were sleeping in separate bedrooms.⁷⁷ Although they had not formed an intention to separate, the wife had visited with a lawyer to explore the possibility.⁷⁸ This is clearly *not* the situation of a loving, stable relationship that has developed its own norms and conventions that govern consent like the one imagined by Archard or Plaxton. Even if these two partners once had such conventions, they cannot survive the marital troubles that caused them to sleep in separate bedrooms: this was a case where the husband believed that his wife’s lips may have said no, but her eyes said yes. His conduct was morally wrong, even under the “beyond consent” standard.

A final point on Boyle’s argument is that *R v RV* resulted in an acquittal, which was upheld by the Ontario Court of Appeal in light of serious errors in the trial judge’s findings.⁷⁹ Although Boyle clearly sees this sexual touching as non-consensual—and I agree—not even the overbroad definition of consent from *Ewanchuk* could give the complainant justice. She is one of the many wives and girlfriends whose sexual integrity has not been protected by the *Ewanchuk* consent definition because, as Elaine Craig argues, many trial judges are reasoning under the wrong assumption “that between spouses the doctrine of implied consent still exists.”⁸⁰ Indeed, upon its review of *R v RV*, the Ontario Court of Appeal held that there was no implied consent in the circumstances.⁸¹ But this is not necessarily an argument *against* expanding the definition of consent, but an argument in favour of clear, commonsense consent laws that can simultaneously protect the sexual autonomy of the complainant in *R v RV* and protect the sexual autonomy of individuals whose relationship norms and conventions allow for sexual touching outside of contemporaneous consent. Restricting sexual autonomy and sexual freedom by forcing loving couples to interact as if they were strangers is unworthy of justice.

This section has argued that overbroad consent laws are unacceptable because of the law’s expressive function: the law needs to be clear about what conduct individuals can and cannot engage in, and this clarity must reflect our social norms for law to be legitimate. It has further argued that in seeking to protect the sexual autonomy of women, Canada’s *Ewanchuk* consent standards have done the opposite—unduly *restricting* sexual autonomy. Finally, this section has argued that a different conception of consent is possible within established, loving relationships. The next section explores how the definition of consent could be expanded.

⁷⁷ *Ibid* at para 4.

⁷⁸ *Ibid*.

⁷⁹ *R v RV*, [2004] OJ No 5136 (CA) at para 3 [*RV ONCA*].

⁸⁰ Elaine Craig, “Ten Years After *Ewanchuk* the Art of Seduction is Alive and Well: An Examination of the Mistaken Belief in Consent Defence” (2009) 13:3 *Can Crim L Rev* 247 at 249.

⁸¹ *RV ONCA*, *supra* note 79 at para 1.

IV. EXPANDING THE DEFINITION OF CONSENT

This section explores two ways the law of consent can be expanded to allow for sexual touching in the absence of contemporaneous consent in a way that both respects and protects the sexual autonomy of women: Plaxton's implied consent doctrine, and a re-drafting of the definition of consent within the *Criminal Code*. But it starts by asking whether the law *should* define consent.

Should the Law Define Consent?

Canadian law has defined consent specifically within a sexual assault context since 1992. Bill C-49, which brought in the new consent law, was a collaborative effort by the government and women's groups to respond to the striking down of the rape shield law, as well as other concerns stemming from the state of sexual violence in Canada.⁸² But critics of the new law called it a "pyrrhic victory"⁸³ and claimed that by fixing the definition of consent within the law, judges could "reproduc[e] dominant discourse[s] about rape" by forcing each sexual assault to conform to the law's definition of consent, thereby rejecting any competing notion of what sexual violation is.⁸⁴

This criticism is a mirror image to my own criticisms of the consent laws, except that instead of arguing that a fixed definition of consent limits the agency of women by not allowing for different types of consent, the argument here is that a fixed definition of consent constrains women's agency by not allowing them to voice their *actual* experience of sexual assault, and forces them to substitute an experience that is cognizable to the justice system, whether or not it is an experience cognizable to them. In both of these arguments, the law sees sexual assault survivors as having no agency of their own and substitutes the law's agency and opinions for true sexual autonomy.⁸⁵ Considering that consent is a dynamic process,⁸⁶ and different for each couple and each sexual event, this argument has traction. This argument fails, however, because in seeking to provide the ultimate measure of sexual autonomy, it neuters the law's power to protect.

Without *any* statutory definition of consent, the justice system would be forced to revert to common law definitions of consent and sexual assault, which define rape as a crime against a man's property—either the father or husband of the complainant.⁸⁷ While over time a more just common law definition could emerge—and it is likely this will be

⁸² Renate M Mohr & Julian V Roberts, "Sexual Assault in Canada: Recent Developments" in Julian V Roberts & Renate M Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 3 at 10.

⁸³ Bonnycastle, *supra* note 63 at 61.

⁸⁴ *Ibid* at 77.

⁸⁵ *Ibid* at 73.

⁸⁶ Randall, *supra* note 43 at 147.

⁸⁷ Tang, *supra* note 20 at 259.

the case, given the shift in social attitudes, however incomplete—it is simply unconscionable to open women up to further victimization or objectification. Therefore, a definition of consent remains necessary, and the next sections outline two avenues to expand on the current, unsatisfying definition.

Plaxton’s Doctrine of Implied Consent

In 1983, amendments to the *Criminal Code* abolished the crime of “rape” and substituted the crime of sexual assault, based on the tripartite categorization of existing assault laws: it was now possible to charge for sexual assault, sexual assault with a weapon or causing bodily harm, or aggravated sexual assault. This reform was an effort to link the new offence with assault in order to focus on the violence of the crime, rather than its sexual nature—a result lobbied for by feminists.⁸⁸ However, not every aspect of the law of assault was transferred: the meaning and power of consent is understood differently in assault and sexual assault contexts.

As per *Ewanchuk*, the most noticeable difference is the absence of the implied consent doctrine. This doctrine allows for some conduct that would otherwise be assault to occur legally, such as in a boxing match, or even a consensual fistfight provided no serious bodily harm comes to either participant, per *R v Jobidon*.⁸⁹ This absence is a problem for Michael Plaxton, who sees the doctrine of implied consent as the answer to the problems of *Ewanchuk*’s too-narrow consent standard. For Plaxton, implied consent is a subjective set of relationship norms that govern sexual touching, such that the ordinary sexual touching that occurs outside of contemporaneous consent in loving relationships—but which is not morally blameworthy—can find permission within the law.⁹⁰ Wrapped up in the ideas of sexual agency that this paper has already explored is Plaxton’s contention that the law should recognize an individual’s right to allow sexual touching without providing contemporaneous consent, if that is the way an individual prefers to express their sexual autonomy.⁹¹ And, because he is a *Canadian* law professor, Plaxton employs a hockey metaphor to explain his conception.

Hockey is played via rules that allow for touching within set boundaries: stick checks, body checks, aggressive positioning in front of the net. We might call these forms of touching “legal” under the rules of the game. But touching in hockey can also *transgress* the rules: fighting, cross-checking, tripping, or slashing. While we might call these forms of touching “illegal” within the rules of the game, the fact is that these forms of touching are accepted by the players and spectators as forming the *norms* of the game: when a player consents to play a game of hockey, that person consents not only to the

⁸⁸ *Ibid* at 260.

⁸⁹ [1991] 2 SCR 714 at 767–768.

⁹⁰ Plaxton, *supra* note 25 at 19.

⁹¹ *Ibid* at 17–18.

touching that occurs within the rules, but also the touching that occurs within the norms. They don't necessarily *invite* these instances of "illegal" touching, but these instances—so long as they remain within the norms of the game—are covered by the consent offered upon agreement to play, and players do not consider any of the touching inherently wrongful.⁹² Touching outside the rules and norms of the game—a particularly vicious high stick, perhaps—can result in legal penalties.⁹³

Plaxton's contention is that, like hockey, relationships can have norms that govern how touching can occur, but which are different for every relationship, and that these norms deserve to be respected by the law in the same way that touching within the context of hockey's norms is respected by the law. In the same way that no two sports have identical norms that govern touching—golf, for instance, looks askance at *any* roughhousing between participants—no two relationships will have the same norms, and it is these subjective norms—as well as what has *actually* been communicated between the parties—that the law must look to when determining whether a relationship allows for sexual touching without the need of contemporaneous consent.⁹⁴

Plaxton's contention that the law should recognize different forms of consent as a way to more fully respect sexual agency is sound, but his solution leaves something to be desired: Plaxton's overall argument is predicated on his conception of the expressive function of the law, but the doctrine of implied consent fails to address this concern because the consent is "implied" only, and stems from case law. Nowhere in the *Criminal Code* is the doctrine spelled out, therefore it is arguable that importing the doctrine into sexual assault does nothing to help individuals understand how they should treat each other within a sexual context: the law would remain as opaque as if the doctrine never existed. Of course, individuals could read the case law to ascertain the limits of the doctrine and follow along as the doctrine is reinterpreted based on different facts, but our society does not demand that each of us become a lawyer in order to understand how to act. If the expressive function of the law is to be given the importance Plaxton thinks it deserves, proper conduct must be more accessible than case law, which can be difficult to parse, even for legal professionals.

An argument could be made that there are multiple ways to explain the law and fulfill its expressive function. For example, on university and college campuses where sexual assault is an ongoing and pernicious problem, campaigns have been undertaken to explain the meaning of consent in such a way that everyone can understand. These campaigns often utilize slogans—"no means no" for instance, or "only yes means yes"—

⁹² *Ibid* at 70–73.

⁹³ See Tom Spousta, "McSorley Found Guilty; No Jail Time," *The New York Times* (7 October 2000) D7 (Marty McSorley's vicious slash to the head of Donald Brashear in a game between the Vancouver Canucks and the Boston Bruins: McSorley was convicted of assault but granted a conditional discharge).

⁹⁴ Plaxton, *supra* note 25 at 171.

to impart to students that consent must be voluntary, affirmative, and continuous. These initiatives are good, but do not address Plaxton's demand that the *law* have an expressive function: these are merely interpretations of the law designed for broad understanding. Furthermore, they may not reflect the true state of the law. For example, a slogan like "no means no" is an excellent general rule, but such a pithy statement does not properly reflect the subjective dimensions of *Ewanchuk* consent, which demands consent via the complainant's "internal state of mind," *not* their words.⁹⁵ A campaign such as "no means no" or "only yes means yes" fails to capture the fact consent can be vitiated by fear, for instance, even without an overt threat.⁹⁶

To ensure the law gives full respect to the sexual autonomy of the people it governs, and to give proper consideration to the law's expressive function, an actual change to the text of the law ought to be considered, and the next section outlines a starting place.

Rewriting Section 273.2

Section 273.2 of the *Criminal Code* governs the use of the defence of honest but mistaken belief in consent in the sexual assault context. It provides, in brief, that the mistaken belief in consent defence is not available when this belief arises from self-induced intoxication, recklessness, or willful blindness and, in subsection (b), that the defence is not available 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."⁹⁷ I am proposing a rewrite of subsection 273.2(b), or the inclusion of an additional subsection, that clarifies the meaning of "circumstances known to the accused at the time" so as to include the norms and conventions of the relationship. This new section or subsection should additionally make clear that the continued operation of these norms can be rebutted if the circumstances of the relationship are no longer those that fostered and gave rise to the norms.

A case from British Columbia's Court of Appeal lends support to the idea that such a section could operate to both respect sexual autonomy and identify the difference between relationship norms that ought to govern a relationship and those that should no longer govern: *R v RG*.⁹⁸ In *R v RG*, during a period of separation, a husband sexually assaulted his wife. As part of his defence, the husband claimed that the circumstances known to him at the time included a relationship norm of having sexual intercourse as a way of "'making up' after a quarrel."⁹⁹ What is especially interesting about this case is

⁹⁵ *Ewanchuk* SCC, *supra* note 2 at para 26.

⁹⁶ *Ibid* at para 39.

⁹⁷ *Criminal Code*, *supra* note 1, s 273.2(b).

⁹⁸ [1994] 53 BCAC 254.

⁹⁹ *Ibid* at para 26.

that although the court rejected the accused's defence on the evidence—not only was the couple estranged, the accused had physically assaulted his wife prior to the sexual assault—the court did not dismiss the possibility of a defence that imported the norms of the relationship into the “circumstances” of subsection 273.2(b): the court held that the subsection “creates a *proportionate relationship* between what will be required in the way of reasonable steps by an accused to ascertain that the complainant was consenting and ‘the circumstances known to him’ at the time.”¹⁰⁰ This proportionate relationship, I argue, opens the door to a difference in consent standards between strangers and those in ongoing, loving relationships, because it implies that reasonable steps could be different if circumstances are different. This is the intended effect of the law of which I am in favour.

The ability to rebut the conventions of the relationship if the circumstances of the relationship no longer include such conventions addresses the situations that caused Christine Boyle's concern, which was discussed in Section III of this paper. A revised section 273.2 that clearly indicates that conventions that govern a relationship cannot be relied upon as a defence if they have subsequently ceased to govern the relationship would address Boyle's concern that husbands are being let off the hook *and* would also send a clear message that marriage does not provide continuous consent, as some judges think.¹⁰¹ This change to the law would reflect the reality that consent is a dynamic process that is subject to renegotiation.

Finally, by writing the law into the *Criminal Code* itself rather than having it operate as a doctrine, this solution better fulfills the expressive function of the law: an intelligible subsection will inform individuals of the conduct expected of them by society better than the common law.

This section began by asking whether it was appropriate for the law to define consent in the first place, and concluded that, despite concerns that current consent standards unfairly force women to conform their broad experiences to the narrow definition in the *Criminal Code*, some kind of consent standard is necessary to effectively protect sexual autonomy. It then considered Plaxton's implied consent doctrine but concluded that it does not sufficiently address the concern that the law should give individuals all the information necessary to live in conformity with the law—the expressive function. Finally, this section proposed rewriting section 273.2 of the *Criminal Code* to clarify that the “circumstances known to the accused” in subsection 273.2(b) include the conventions of the relationship, so long as these conventions remain operational at the time of the alleged sexual assault.

¹⁰⁰ *Ibid* at para 29 [emphasis added].

¹⁰¹ Randall, *supra* note 43 at 167.

CONCLUSION

Consent is the formula by which sexual touching moves from criminal to acceptable, and even to wanted. This paper has argued that Canada's consent standard requires change for two reasons: (1) because criminalizing morally acceptable behaviour makes the law overbroad and fails to fulfill the law's expressive function, and (2) because while the narrow consent standard was enacted to protect the sexual autonomy of women, not allowing for competing but reasonable conceptions of consent serves to *restrict* this sexual autonomy.

Sexuality is generally a private matter and the law should exercise caution in intervening: as this paper has shown, when the law does not exercise caution and gets it wrong—as it did in the context of LGBTQ sexualities—the effects on individuals and communities can be profoundly negative. Nevertheless, the law should intervene to protect people when it is necessary: achieving a better balance between protection and control should be the preoccupation of the law of consent.

This paper has also considered potential solutions to the challenges of Canada's consent standards. It considered Michael Plaxton's implied consent doctrine but rejected it in favour of a textual solution that better fulfills the law's expressive function.

Ultimately, this paper has tried to thread a needle between protecting women's sexual integrity and protecting their sexual autonomy. The balance I have proposed may require further refinement, but the current law clearly fails to properly balance these concerns, and some kind of solution is necessary.