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**Fucking with Notions of Disability (In)Justice:  
Exploring BDSM, Sexuality, Consent, and Canadian Law**

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**Abstract**

A progression towards the non-tokenistic inclusion of people with disabilities (PWD) in society, and of PWD's needs in legal processes, necessarily entails acknowledging and respecting disability-informed approaches to sensual and sexual experience, expression, and connection.

**Keywords**

BDSM, sexuality, consent, law, health, autonomy

*Introducing the Dis/Ability-Kink-Sex Connection: From Assumptions to Negotiations<sup>1</sup>*

"The rest of [the] world could take a real clue from the way BDSM<sup>2</sup> is negotiated."  
– Andrea Zanin, BDSM educator and writer (Ratchford, 2014, November 4)

"I can see how you might find the legalities of sexual consent and BDSM practices interesting," the law student I consulted about writing this article from a legal angle responded, "but what's that got to do with disability?"

Upon hearing this highly intelligent, well-intentioned soon-to-be-lawyer's genuine puzzlement at the links I saw between the law's regulation of "intimate" interactions and its failure to recognise

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<sup>1</sup> The author wishes to extend her gratitude to the early readers and anonymous reviewers whose generous and insightful comments and suggestions greatly strengthened the present article and offered inspiration for extending its ideas into future work.

<sup>2</sup> BDSM, a shorthand initialism containing three two-letter pairings (referring, respectively, to bondage and discipline; domination and submission; and sado-masochism), is used as a blanket term covering any number of so-called "kinky" practices. For a comprehensive definition of BDSM, see Section 4.2 in Zanin (2010, pp. 62-69).

disabled subjects, I found myself at a loss for words – but inspired to rediscover and articulate my arguments here. In the pages that follow, I make a case that a progression towards the non-tokenistic inclusion of people with disabilities (PWD) in society, and of PWD's needs in legal processes, necessarily entails acknowledging and respecting disability-informed approaches to sensual and sexual experience, expression, and connection.

The law informs and responds to how people with varying degrees and kinds of impairments are, or become, disabled – or, as Eli Clare might put it, “enabled” (1999, p. 67) – in different ways, depending on specific social, institutional, and behavioural contexts. Yet, the rules according to which people are instructed or encouraged to engage, or discouraged or prohibited from interacting, with others – physically, interpersonally, and contractually – are seldom clearly defined. The relevant ethical issues are complex, especially when mind-body states considered “abnormal” are factored into socio-legal equations. There exists no simple “one size fits all” mandate where sexuality is concerned; at either end of the spectrum of legislative solutions for PWD lie less-than-ideal extremes: from the over-protective infantilising of disabled adults to the failure to protect vulnerable individuals prone to being targeted for exploitation.

In reviewing coinciding socio-legal questions pertaining to PWD's access to sensual and sexual opportunities, this article contributes to an interdisciplinary project making connections between legal dictates, academic discourses, and social dialogues on disability, sexuality, BDSM, health, bodily autonomy, and corporeal relating. Taken together, these topics tap into and complicate overlapping discussions and debates that call into question the common separation of “public” from “private” and the belief – which Susan Wendell calls the “myth of control” – “that it is possible, by means of human actions, to have the bodies we want and to prevent illness, disability, and death” (1996, pp. 93-94).

Starting from Finger's (1992) seminal writing, this article begins by briefly outlining sexuality-related arguments and interventions within disability activism and scholarship. Moving through socio-legal frameworks and relevant case law, it weaves observations of the current legalities of sexual consent and capacity into contemporary theoretical perspectives on disabled sexuality in order to flag issues whose importance and relevance to PWD is often overlooked. To keep within a manageable scope, this article attends primarily to Canadian laws that pertain to aspects of sexuality involving discrete "sexual"<sup>3</sup> and/or sensual acts (regardless of whether their effects might be procreative<sup>4</sup>, connective, or cathartic). Examples of alternative sexualities that link queer and disabled approaches are discussed, drawing attention to the influence of social conventions and biases in judicial processes. The potential for BDSM or "kinky" practices to enhance embodied interactions engaged in by PWD in "intimate relationships" – defined by Liddiard (2013, p. 116) as "(non-commercial) shared intimacy with another person" – ranging from casual to conjugal is explored. Further, legal decisions made in consideration of the capacity of (presumably able-bodied) practitioners to consent to sexual/BDSM activities are revisited through a disability lens, in light of some PWD's fluctuating capacity to fulfill the mandated legal consent requirements due to their impairments (irrespective of whether their chosen intimate activities would fall into BDSM categories or not). In addition, sexual services rendered in exchange for pay are considered.

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<sup>3</sup> The question of which activities are in fact "sexual" (and for whom) is a motif in this article around which there is little consensus in the legal, academic, or lay literature. No easy, comprehensive, or universal answers will be provided here. As Tobin Siebers (2012, p. 49) elaborates, "[a] crucial consideration for people with disabilities is not to judge their sexuality by comparison to normative sexuality but to think expansively and experimentally about what defines sexual experience for them." For better or worse, our laws, which prohibit sexual activity in certain circumstances, also fail to clearly outline which activities are (and are not) considered sexual in such contexts. For example, after being found guilty of "running a common bawdy house" at her bungalow a Toronto suburb, professional dominatrix Terri-Jean Bedford noted that the judge never said what she "can or can't do. In his ruling, Judge Roy Bogusky of the Ontario Court's Provincial Division sidestepped completely the initial issue between the Crown and defence – whether sadomasochistic acts constitute sexual activity" (Claridge, 1998, October 10).

<sup>4</sup> A comprehensive legal analysis of reproductive rights is, unfortunately, outside the scope of the present article.

*Sexuality, Disabled: How Far From Trees Can "Forbidden Fruit" Fall?*

"Sexuality is often the source of our deepest oppression; it is also often the source of our deepest pain... While the story of rape and sexual abuse of disabled people must be told and while we must find ways to end it, the current focus on sexual exploitation of disabled people can itself become oppressive."

– Anne Finger (1992), *Forbidden Fruit*

In 1992, the *New Internationalist* published an article featuring Anne Finger's now-famous articulation of sexuality as the deepest source of oppression and pain afflicting people with disabilities. Notably, the piece contains not one warning about the kinds of pain that sometimes accompany enthusiastically embarked-upon sexual escapades. The pain against which Finger rails is not "sexy pain": neither the discomfort that can accompany consensual sexual interactions (a natural side-effect of the risk-aware pursuit of physically and emotionally intense activities, especially for those whose bodies are non-normative, impaired, and/or unpredictable); nor the sadomasochistic pain some seek as an alternate route towards sensual pleasure and relief.

Finger duly acknowledges the need to end the rape and sexual abuse of vulnerable disabled populations; yet, she also critiques how a constant spotlight on the sexual exploitation of PWD "can itself become oppressive" (1992). Indeed, her call to arms hones in on less-discussed, sometimes subtle, yet not incidental harms: those experienced by the many PWD whose access to the full spectrum of sexual and reproductive possibilities is restricted throughout their lifetimes. Moreover, her explicit and unapologetic disability-sex-positive (as it might be termed today) agenda, articulated decades ahead of its time (and still widely referenced as relevant – e.g., see McRuer & Mollow, 2012), does not (exclusively) blame the able-bodied world for PWD's sexuality and reproduction being "often relegated to the back burner" (Finger, 1992). In fact, her pointed critique aims squarely at the disability rights movement (DRM) itself.

Finger (1992) asserts that in prioritising “strategies for changing discrimination in employment, education, and housing,” the mainstream DRM fundamentally fails to serve the more intimate interests of the disabled people for whom it advocates.<sup>5</sup> Its silence on the topic of personal relationships feeds into, rather than alleviates, the suffering of many PWD who struggle with being excluded from “private” realms of fulfillment (from romance to procreation to more fleeting forms of gratification). Almost a quarter-century after Finger first penned her “Forbidden Fruit” treatise, damages still accrue to disabled children (and adults), who continue to receive messages that “their sexuality will be realized through their sexual victimization” – and not through pleasure, intimacy, (self-)understanding, or (self-)love (Barbara Faye Waxman, cited in Finger, 1992).

*On The Books: (Re)Claiming Disabled Sexual Embodiment for People With Disabilities*

“[T]he major texts in disability studies – those that have become canonical in the field – don’t discuss sex in much detail... Our point... is not that theorists of sex and sexuality should be thinking about disability all the time, or that disability theorists should be thinking about sex all the time (although we don’t want to *not* make these points). Rather, we wish to ask: what happens to our models, central arguments, and key claims when we politicize sex and disability together?”  
– Anna Mollow and Robert McRuer (2012, pp. 3-4), *Sex and Disability*

Seventeen years after penning her time-tested reflections (1992), Anne Finger (2009, December 7, cited in McRuer & Mollow, 2012, p. 2) observed that the topic of sexuality continues to highlight “our need for more than rights, for cultural changes – the kind of cultural change we’ve seen in more recent years in the work (writing, painting, performance, dance) of Eli Clare, Terry Galloway, Riva Lehrer, Sins Invalid, Axis Dance Company, etc.” Certainly, there has been considerable recent acknowledgement that sexuality is important for the vast majority of individuals, including PWD

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<sup>5</sup> The author wishes to thank an anonymous reviewer for pointing out the “interesting parallels between the desexualization of disability politics and the desexualization of the gay rights movement, both for the sake of being palatable to those outside the movements” with regard to the strategic deprioritisation of PWD’s sexuality by the DRM (e.g., see Berlant & Warner’s 1998 “Sex in Public”).

(e.g., see Kaufman, Silverberg, & Odette, 2003; Liddiard, 2013; Erickson, 2015). Yet, as McRuer and Mollow (2012) point out, this increased consciousness has not translated into disabled sexuality's becoming a primary focus of mainstream disability studies curricula; nor has PWD's "right" to sexual expression been acknowledged in legal realms so much that only cultural considerations are now relevant.

Along these lines, McRuer and Mollow ask: "What would it mean to apply the concept [of 'access'] to the private sphere? Can disabled people demand 'access' to sexual experiences with others? To masturbation? To reproduction?" (2012, p. 4). These are both socio-cultural and legal questions about how PWD, as a so-called sexual minority, might find emancipation. Surely, as Davies (2000) asserts, "ableism, body fascism, and economic disadvantage are key social factors that cause many disabled people to remain single and isolated against their will." However, to draw a clear divide between law and culture ignores how, despite the imagined or idealised objectivity of the law, the reality of its social construction is undeniable. Police officers, lawyers and judges are brought up in the same societies as everyone else, and thus they internalise the moral codes with which they are raised. If law-makers and law-enforcers find the sexual/sensual activities of the likes of people with disabilities, queers, sex workers, and BDSM practitioners "perverted" or otherwise objectionable, this cannot help but inform their professional responses.<sup>6</sup>

Weiss (2006, p. 103) notes that, in liberal American political paradigms

the mainstream representation of sexual minorities is a sign of progress. The time line is as follows: first representation and visibility, next acceptance or tolerance of the minority, then an empathetic form of understanding, and finally sexual freedom. There are assumed causal links

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<sup>6</sup> E.g., Khan describes how, in an oral ruling that rejected "a request for a stay of proceedings because of abuse of process" in a raid on the defence's home-based dominatrix business, the judge dismissed the young officers' offensive behaviour as "rowdyism"; he rationalised that "[i]f you want to get a reaction from a bunch of young bucks present them with some imagery of the male anatomy, including images of penises plus equipment for cross-dressing... The reaction which flowed was almost predictable" (Bogusky J. in *R. v. Bedford* Ruling (re Charter application) 1998, 1378-80, as cited in Khan, 2014, p. 272).

between increased visibility, acceptance, understanding, and such political gains as the ability to assert rights and privileges, and the freedom from unjust persecution. (Weiss, 2006, p. 103)

With regard to BDSM in particular, the *R. v. Price* (2004) decision reflects current community standards revealing that "contemporary Canadians" are generally tolerant of other Canadians' witnessing or participating in BDSM as "part of normal and acceptable adult sexual behaviour." Yet, as Weiss (2006, p. 103) argues, the simultaneous "normalization" and "pathologization" underlying increasing "acceptance" and "understanding" of BDSM in the "mainstream" seems, counterintuitively, to "reinforce boundaries between protected/privileged and policed/pathological sexualities"; these forms of acceptance and understanding, Weiss (2006, p. 105) asserts, "do not further the cause of sexual freedom" for their practitioners. And although engaging in sexual or sensual activities as or with someone oriented towards BDSM (or, as or with PWD) is not itself illegal, as will be discussed below, there are certainly categories of intimate activities and intimate actors whose access to freely-chosen sensual/sexual expression is more or less legally protected.

In a practical sense, the degree to which existing laws can be ignored or evaded at least partly reflects the attitudes of those who might enforce them; stereotypes and biases carry over not only into legal judgements, which inform charges, determine laws, and, in turn, shape and reinforce social mores, but into law enforcement itself. As Patricia Hughes (1996) comments:

Criminal law is intended to reflect the values and interests of 'society' or the state in encouraging certain types of behaviour and discouraging others, including sexual behaviour. The choice of which behaviours to promote and the means by which to do so are not neutral, but carry historical and political baggage which reflects and reinforce the fundamental racial, economic, and sexual divisions of power relations in society.

On the other hand, in some scenarios, both the law and its application can prove counterintuitive – and even directly out of line with the range of activities generally deemed societally acceptable.<sup>7</sup>

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<sup>7</sup> E.g., many lay Canadians who rushed to defend the "right" of consenting adults to participate in alternative sexual practices in the wake of a recent scandal involving Canadian radio celebrity Jian Ghomeshi (who responded to allegations of sexual assault by claiming that his accusers had consented to BDSM activities) were shocked to discover



*Conscious Consent and the Law*

Although Justice Abella argued that “**No one could argue that an unconscious individual is capable of giving consent...** [as] such an individual has been deprived of the ability to make an informed decision,” she was wrong (*R. v. R.R.*, 2001, 44 – emphasis mine).<sup>8</sup> In recent years, many have argued – more<sup>9</sup> and less<sup>10</sup> successfully – that fully unconscious individuals did, in fact, consent to sexual activity. Nonetheless, a decade after Abella J. wrote the *R. v. R.R.* decision (2001), the Supreme Court of Canada ultimately ruled, in the landmark case of *R. v. J.A.* (2011, 66), that an unconscious individual is unqualifiedly incapable of giving – or implying<sup>11</sup> ongoing – sexual consent.

However, the 2011 *R. v. J.A.* decision was by no means unanimous; nor was surrounding criticism scarce among non-judicial commentators (e.g., see DiManno, 2011, May 29). Justice Fish, who wrote the dissenting opinion on behalf of himself and two other judges, objected emphatically to the majority judgement. He asserted that because the complainant said she had consented to the

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that some such practices are, officially, against the law – even when they involve no coercion or consent violations. As Brenda Cossman (2014, Oct. 28) explains: “BDSM sexuality still lives on the margins of legality in Canada. Fifty shades of grey is actually a pretty good description of its legal status.”

<sup>8</sup> I make this limited assertion only in response to Justice Abella’s statement that: “No one could argue that an unconscious individual is capable of giving consent” (*R. v. R.R.*, 2001, 44). However, the issue truly being disputed by the majority and dissenting judges in *R. v. J.A.* was never whether an unconscious individual could give consent, but rather whether consent given in advance of an expected unconsciousness would carry over to “post-consciousness.” (Or, as Justice Fish might put it, whether “yes means no” or “yes means yes.”)

<sup>9</sup> E.g., in the case of *R. v. M.S.*, in which a “woman blacks out, awakening in an inner city park to find a man beating and raping her” (*R. v. M.S.* [2003] A.J. 1516 (Alta. Prov. Ct. Nov. 27, 2003), as cited in Gotell, 2009, p. 865), the assailant was acquitted; in spite of a witness hearing the woman’s cries of “He’s raping me,” the judge found “reasonable doubt” the woman may have consented to the activity in question.

<sup>10</sup> E.g., in *R. v. Ashlee*, [2006] A.J. No. 1040 (Alta. C.A. Aug. 23, 2006), the Crown’s appeal was allowed, restoring convictions of two men, whom a passing driver observed lying on a sidewalk on either side of an unconscious woman, whom they were both fondling “under her brassiere”; the Crown argued successfully that even if such consent had existed, it would have been vitiated by the unconsciousness.

<sup>11</sup> As Major J. stated in *R. v. Ewanchuck* (1999, S.C.R., 51-52): “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” (as cited in Randall, 2011, p. 18).

activities in question while she was fully conscious and capable, the conviction of J.A. was tantamount to a finding “that ‘yes’ actually means ‘no’ under [sexual assault] law” (Marcus, 2011, June 16). Articulating the perspective that the relevant laws “aim to safeguard and enhance the sexual autonomy of women, and not to make choices for them,” he argued against the majority’s reading of the *Code* as though it were intended to protect women from themselves and their own decisions, rather than abuse by others (*R. v. J.A.*, 2011, 72). It would seem that Fish J., and those who shared his dissenting reasoning, might defend “the right to be foolish”<sup>12</sup> as applying equally to the realm of sex as to other legal contexts.

Indeed, even Chief Justice McLachlin, who wrote the *R. v. J.A.* (2011, 65) majority decision, acknowledged that “the concept of consent Parliament has adopted may seem unrealistic” in some situations. According to her judgement, not even the most soberly-considered, risk-informed, meticulously-planned, fully-articulated, conscientiously-negotiated decision to engage in specific sexual activities using agreed-upon safety precautions – a standard to which few individuals (or couples or groups) hold themselves accountable – would be valid beyond any planned lapse in consciousness (*R. v. J.A.*, 2011, 66). Legally, it is irrelevant how much a hypothetical individual (A) wants to enact a particular sexual scenario in which her willing partner (B) continues planned activities after A is no longer conscious (whether this lapse is intentional or not); were this case to ever end up in court, precedent dictates that A would be presented as a victim and B as a criminal. The Supreme Court has spoken: valid consent to sexual interaction (however this might be defined by a particular judge) is vitiated at the exact moment a consenting individual is no longer conscious – or, by extension, no longer consciously capable of communicating ongoing consent.<sup>13</sup>

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<sup>12</sup> Justice Quinn famously stated that this particular right “is an incident of living in a free and democratic society” (see *Koch (Re)* [1997] O.J. 1487, p. 24, paragraph 64).

<sup>13</sup> It is unclear from the case law specifically which such activities, under what circumstances, would constitute the kind of touching or other bodily relating that might legally require this degree of ongoing conscious consent (e.g., see Note 3,

In this respect, the fears raised by Fish (and others) over the implications of the majority decision's possible infringement on the sexual autonomy of (presumably able-bodied female) BDSM practitioners who may wish to consent to continued sexual activity throughout a brief chosen lapse of consciousness may apply equally, if not more so, to PWD. In particular, although these laws have not yet been addressed with specific regard to disability, it seems worth noting that the symptoms of some medical conditions and episodic impairments/disabilities affect individuals' capacity to remain fully conscious and communicative – and thus capable of giving legally-defined-as-continuously-conscious-and-capable-of-communicating "in the moment" (as opposed to prior) consent. Further, the dividing line between "fully conscious" and "unconscious" is not always "black and white" or perfectly correlated with one's capacity to clearly communicate.

That PWD, whose capacities to consciously consider and/or clearly communicate continuously may be affected by episodic or ongoing impairments, may wish to pre-negotiate the nature of the intimate interactions they desire (whether these entail a full cessation of activity, light kisses and caresses, or more overtly sexual activities) throughout such anticipated, generally unchosen, lapses with their intimate partners adds a new layer to questions raised about intimate/sexual autonomy and consent. For example, Olson (2012, p. 191) asks critically relevant questions for those wishing to respect both their partners' wishes and the relevant laws, such as: "What is the time limitation on consent? Immediate or within an hour?"

*No Right to Fuck "Foolishly": Mind Over Matter*

"[W]hat then should be the determination for those who may not, for [reasons other than being fully unconscious], possess the cognitive abilities to make such an informed decision? Surely that

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supra). Analogously speaking, it is also interesting to consider that, were the same strict consent standards to be applied in medical settings, all procedures under full anaesthesia would be rendered criminal acts and most major surgeries would be impossible to perform legally (as later discussed with reference to Olson (2012) and Khan's (2016) observations on some of the more troubling aspects of this parallel).

decision must be a question of fact to be determined by the trier of each case, having regard to the circumstances." – Justice Abella in *R. v. R.R.* (2001, 44)

As noted above, a "black and white" declaration that it is officially illegal for a conscious person to perform any sexual act upon an unconscious individual still leaves room for many "shades of grey" for those in less clear-cut states of consciousness. Yet, there is no case law that specifically delineates the degree to which people who are not fully unconscious, yet nonetheless potentially incapable of giving legally valid consent for other, possibly impairment-related reasons (whether momentarily or longer term), might legally engage, or be engaged, in sexual activities (however these are defined). Nor does the law concern itself with articulating any "best practices" that might outline for concerned partners the specific steps they might reasonably take to ensure that the activities in which they are participating involve legally adequately, if not enthusiastically, consenting parties.<sup>14</sup>

One of the most interesting (and, for some, troubling) aspects of this legal precedent is that, in theory, once any activity under consideration is determined to be of a sexual nature in a court of law, and the party considered the "victim" is judged to have been incapable of consenting at the time in question, any consent to this activity given beforehand, no matter how enthusiastic, becomes legally irrelevant. Neither party's desires, sentiments nor follow-through around the mutual negotiations matters – up to and including the "incapable" party's preceding requests from a position of "risk aware informed consent"<sup>15</sup> for the exact activities in question to take place.

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<sup>14</sup> There seems to be a paucity of more general discussions, legal and lay, around the philosophical and practical issues relating to who, in what mental state, can consent to which activities, with whom, and under what circumstances. For example, circus-style acrobatics and sharp (or flaming) object-manipulations employed in martial and performance arts, "flying" partner yoga, and a many other interactive "extreme" sports carry risk for harm analogous to that which might come with sexual or BDSM activity. With "organised sport" being deemed a legal exception to laws declaring that one cannot consent to "assault causing bodily harm" (Luksic, 2015, January 13), similar questions about what constitutes so-legitimised sport might be raised as those regarding what constitutes sexual activity. (See Notes 3 and 13, *supra*.)

<sup>15</sup> The widely-used term "safe, sane, and consensual" has, in some BDSM circles, been replaced by the notion of risk-aware informed consent, along similar lines to how the term "safe sex" has, more generally, been replaced with the term "safer sex" to acknowledge the risk inherent to any such activities. See BlakkReignn, (2013, April 30) for further

By contrast, in a medical setting, there are only four elements necessary "in order to obtain a valid consent from a patient that will satisfy the common law": "the consent must be voluntary, it must be given by a person with capacity to consent, it must refer to both the treatment and the provider of treatment and it must be informed"; further, physicians who "breach the standard of care in disclosing information [where] this breach resulted in the plaintiff's loss" can only be accused of negligence rather than the easier-to-prove charge of battery (Flood, 2000, p. 23).

In examining the differences between the legal context of lay exchanges of personal and intimate care (including sensual and sexual attention or "services") and that of medical care provided by licensed professionals, certain double standards become apparent. These are evident in the degree of bodily autonomy and protection a person on the receiving end of a potentially harmful (yet also potentially beneficial) action might expect to be granted, the level of accountability the actor is expected to assume, and the willingness of the law to accuse and/or punish a transgressor. As Khan (2016) points out, these differences exist in a culture of "sexual exceptionalism" and "sex negativity" that inform relevant laws, such that "while we can purchase intimate services like child care, cleaning, massage and pubic hair waxing, buying sexual services is a crime"; and, moreover, "the law allows patients to consent to unconsciousness with their doctor without a chaperone despite the fact that the medical community has identified doctor perpetrated sexual abuse of patients as a serious problem that plagues the profession." Along similar lines, Olson (2012, p. 191) notes the current double standard in that "if an individual is judged to be rational and capable of consenting to being rendered unconscious and undergo invasive surgery then a similar person

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discussion of the rationale behind the four most common such acronyms: SSC (safe, sane, consensual), RACK (risk-aware consensual kink), PRICK (personal responsibility informed consensual kink) and CCC (committed compassionate consent). It seems ironic that the only constant amongst all these terms – the "C" for "consensual" or "consent" – is, in fact, legally vitiated in any instance of the very "bodily harm" that many BDSM practitioners willingly risk (and, in some cases, invite).

should have the autonomy to consent and engage in contentious S/m practices” – or, as I might argue by extension, the sometimes equally legally contentious practice of “sex while disabled.”

Although there is no overt mention of disability in the *R. v. J.A.* case<sup>16</sup>, it is possible that Chief Justice McLachlin had the protection of PWD at the back (or forefront) of her mind when she wrote:

Our task... is to determine whether the Criminal Code defines consent as requiring a conscious, operating mind throughout the sexual activity. I conclude that 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.** (*R. v. J.A.*, 2011, 3 – emphasis mine)

Yet, did McLachlin C.J. or her fellow judges consider the possibility that if Parliament requires that all individuals engaging in sexual activity be capable of asking their partners to stop at any point as an indication of their ongoing, conscious consent, many sexually desirous adults might be, in effect, denied (or, at least, compromised with regard to) legal access to sexual expression? And, if so, did they care?

As noted above, many conditions (e.g., intellectual disabilities, communications impairments, and other physical and emotional factors outside a person’s conscious control) might interfere with PWD’s ongoing capacity to both give consent and to communicate it in real time, all the time. Moreover, how do such requirements implicate (potential) partners who, despite wanting to take reasonable steps to ensure their disabled partners’ ongoing consent (as well as safety and satisfaction), may, for their partners’ benefit and with both their boundaries considered, opt to fulfill their “consent-questionable” requests? Are they all, in effect, barred from legally having the sex they want to have with one another?

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<sup>16</sup> Nor, even though the couple involved in *R. v. J.A.* has been described elsewhere as knowingly engaging “in what BDSM practitioners refer to as ‘edgeplay’ – that is, activities considered extreme or risky” (Khan, 2014, p. 252), did the case notes name or contextualise any of the alternative sexual practices (nor the accompanying community standards for securing adequate consent – see Note 15, *supra*). Reynolds (2007) discusses the importance of such naming and contextualising.

In some cases, the law seems to have decided precisely that. Justice Spies' reasoning in *R. v. C.C.* (2013) holds that an individual "functioning intellectually like a child" should be protected from even desired sexual interactions as though they were a child (presumably for the duration of their life):

Based on the evidence that I heard at trial and my own observations of S.A. in the witness stand, I concluded that at the material time, S.A. was functioning intellectually like a child between the age of three and five. The evidence of Mr. C. was that S.A. liked him and wanted to have sex with him. I found that evidence to be plausible because S.A. was sexually mature and Mr. C. was a man who came into her life whom she liked at the time. I accepted Mr. C.'s evidence that he was a friend to S.A. although I made no finding as to his motive. I found that S.A. may well have become infatuated with Mr. C. (*R. v. C.C.*, 2013, 8)

In sum, Justice Spies acknowledged the potential for S.A., the intellectually disabled adult complainant<sup>17</sup>, to have been infatuated with Mr. C., the defendant. She also found Mr. C's evidence that "S.A. liked him and wanted to have sex with him" to be plausible "because S.A. was sexually mature and Mr. C. was a man who came into her life whom she liked at the time" (*R. v. C.C.*, 2013, 8). Further, it was noted that English was not the complainant's first language, based upon which the possibility exists that some of the communications difficulties observed in court were the result of a language barrier. Nonetheless, Justice Spies deemed S.A. incapable of consenting to sexual activity and convicted Mr. C. of sexual assault.

While Justice Spies' skepticism as to Mr. C's motive for befriending S.A. may not be baseless, her remarks on this matter resonate with the common "ableist" attitude that nobody<sup>18</sup> could authentically befriend an intellectually disabled neighbour, nor find them attractive outside of a purely predatory relationship. This case exemplifies how legal proceedings can, in effect, result in a blanket prohibition on certain individuals' involvement in sexual activity in ways that reify cultural prejudices. In the same breath, a judge can claim that they are not making universal judgements

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<sup>17</sup> Whom Justice Spies assessed as "not seem[ing] to understand what it meant to be pregnant," the "the risks of getting pregnant" or "that the baby was aborted" (*R. v. C.C.*, 2013, 56).

<sup>18</sup> Or perhaps, as the saying goes, "nobody in their right mind..."

because they are considering the details of a specific case, yet write off PWD (and their sexuality) in a systemically synchronous way.<sup>19</sup>

For example, Justice Abella explained the intention behind consent law in *R. v. R.R.* thus:

The appellant argued that before guilt is found based on an incapacity to consent, there should be some evidence to show with certainty that a person who is severely or moderately mentally disabled does not understand the sex act. This distorts how the issue of consent is to be approached. Under any circumstances, there is a responsibility, prior to engaging in sexual activity, to take reasonable steps to ascertain consent: Criminal Code s. 273.2(b). But in circumstances such as these, **where one of the participants has demonstrable mental limitations, the threshold of responsibility escalates exponentially. This is not to suggest that persons who are developmentally disabled cannot consent; rather, it requires that prior caution be exercised to avoid the exploitation of an exceptionally vulnerable individual. The issue in any event was not the capacity of persons with developmental disabilities to consent to sexual activity; rather, the issue was the capacity of this particular complainant to consent to sexual activity with the appellant and whether he had an honest but mistaken belief in that capacity.** (*R. v. R.R.*, 2001, 57 – emphasis mine)

Here, although Justice Abella clarified that her intention was not to claim that all persons with intellectual disabilities are incapable of consenting to sexual activity, she did not elaborate on how someone might meet the exponentially escalated “threshold of responsibility” incumbent upon those who might legally engage sexually with such vulnerable individuals (nor whether this threshold would differ if both partners were intellectually disabled).

Such incomplete explanations are problematic. While seemingly protecting PWD from abuse, they fail to acknowledge that, in legal practice, incapacity to consent “is understood as a fixed status that disqualifies women from any consensual sexual activity” rather than being “defined situationally – in a functional manner that maximizes women’s sexual self-determination while still recognizing when they are exploited in situations of power imbalance” (Benedet & Grant, 2013, 3).

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<sup>19</sup> A further complication, undermining the notion that charges are only pressed in cases where an assault was perceived to have occurred by the complainant, is noted by Marian MacGregor (Equity Advisor, Law Society of Upper Canada): “It is often not the “victim” in such cases who is making the complaint but rather someone who has control over her that brings the complaint on her behalf or tells her what happened was wrong” (personal communication, June 16, 2015).



In a similar vein to the explanations offered by Justices Abella and Spies (*supra*), Chief Justice McLachlin offered little practical guidance on the more nuanced elements of the *R. v. J.A.* judgement. Her reasoning did not outline the specific characteristics of “a conscious, operating mind”; nor how lay people involved in a tryst might assess whether their partners possess one; nor how they might all determine whether it is “operating... throughout the sexual activity” (*R. v. J.A.*, 2011, 3). Hence, other than the degree to which one’s fear of incurring legal wrath might encourage abstinence from sexual activity in certain circumstances, the rationale behind this reasoning, presented as a mechanism by which “to ensure that women and men are not the victims of sexual exploitation,” is imperfect at best.

As touched on in earlier sections, the legal decisions around consent in a BDSM context raise particular questions regarding the capacity for some PWD to consent (whether or not they are BDSM practitioners). It may be true, as McLachlin C.J. states, that the approach to sexual assault and consent taken in the *R. v. J.A.* (2011) ruling produces “just results in the vast majority of cases” (2011, 65). Nonetheless, as noted above, the implications of the current laws regarding sexual consent are concerning to those for whom the sexual situations in which they are desiring and/or able to be involved fall outside Chief Justice McLachlin’s privileged norm and its accompanying likelihood of “just results” (e.g., practitioners of BDSM, people with intellectual disabilities, and people with different kinds of physical and emotional impairments that can affect their in-the-moment mental and physiological capacities). As Khan (2016) points out:

this pragmatic approach to the law does not adequately take into account all the different ways that consensual BDSM practitioners can come to the attention of the criminal justice system. For example, BDSM lovers might have consensual sex in public, they might make recordings that are discovered by third parties, or if they do require medical treatment, a doctor may report them to the police. Furthermore, as infrequent as it might be, not all complainants are always truthful. 'Always believe' may be a great slogan for activists, but it makes a terrible legal doctrine. Ultimately, this approach is vested in securing more convictions for sex offenders, no matter if a few BDSM practitioners get thrown under the bus to achieve this goal. (Khan, 2016)

Here, it seems worth highlighting that, relative to their able-bodied counterparts, many adult PWD require higher levels of interaction with medical professionals and other caregivers, who may, with the best intentions, wish to "flag" their intimate behaviours as meriting the attention or investigation of authorities. Given their reduced access to normative levels of privacy, PWD (and their partners) may be at comparatively higher risk of facing legal repercussions for consensual activities that would otherwise be unlikely to be reported by anybody other than those involved, and would thus go "under the radar" of public notice unless a problem was perceived by a directly-involved party.

Moreover, as Brenda Cossman explains, with activities that risk causing bodily harm, whether or not they are overtly sexual, even active conscious consent is not considered a legal defence (Luksic, 2015, January 13; February 26). The contexts in which the "consensual" adoption of risk of harm has been most explored and delineated in the legal system are those of BDSM, sport, medicine, body modification, and entertainment (Luksic, 2015, February 26). It is unclear whether bodily harm risked by interacting sexually in ways not normally considered violent with someone known to be physically impaired and consequently especially susceptible to injury would, like BDSM, fall under a prohibited category of conduct considered assaultive. By extrapolation from the existing laws, having "vanilla"<sup>20</sup> sex with certain disabled people could be deemed as illegal as having violent sex or BDSM encounters (regardless of consent) with able-bodied individuals.<sup>21</sup>

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<sup>20</sup> See Clarisse Thorn's (2009, January 8) blog post for a "dissection" of the term "vanilla," which is frequently employed to connote non-BDSM or non-alternative sexualities and activities.

<sup>21</sup> I.e., if a person deemed to be "functioning intellectually like a child" should be protected from even desired sexual interactions on the grounds that people with childlike intellects are not capable of consent (as per *R. v. C.C.*, 2013, 8), then it could be argued that the consent of a person who risks bodily harm for a different motive than one of the classes of activity within which one can legally consent to be harmed by another (e.g., medical procedures, body modifications, making a socially valuable cultural product, etc.) is, in fact, as vitiated as it would be for anyone else participating in activities with a similar relative risk. (For a well-articulated exploration of the relevant laws, refer to Luksic, 2015, January 13; February 26).

Surely, such legal ambiguity might concern anyone who (or whose partner) periodically becomes "incapable" through such activities as sleeping, staying awake too long, ingesting substances with temporarily incapacitating effects, etc. Yet, the potential impact of these laws is far greater for those whom the law (and the expert medical opinions that guide the law-makers) might consider permanently (or unpredictably and intermittently) incapable of consenting to sex or related activities (whether because such consent is deemed outside their mental capacity or constituting "harm") and their partners. Those who would idealistically argue that all adults ought to be able to explore and express themselves sexually, while at the same time wanting to safeguard against abuses, would have difficulty stating with certainty how the relevant actors might reasonably enact their desires within the current constricts of Canadian law.

*Criminal Desire-Ability*

"I try to push boundaries... because I believe that this shaming silence that surrounds our collective sex lives is what leads to us all having bad sex. It is why we judge other people's sexuality. It is why we don't know how to respect one another's bodies and one another's boundaries. It is why we don't know what consent can look like..."

– Kaleigh Trace, *Hot, Wet, and Shaking: How I Learned to Talk About Sex* (2014, p. 6)

The voices and perspectives of those on whose behalf legal decisions are made are frequently omitted from legal reasoning (Khan, 2014). Self-identified queer disabled author and sex educator Kaleigh Trace writes:

I do believe that the more... we talk about that which we have such a hard time talking about, then we will all feel a little less ashamed and... more open to new possibilities and new kinds of pleasure... And beauty will become something more than being able-bodied, young and white. And sexual autonomy and expression will be something that we will all have the right to. And consent will evolve into something that we will all be versed in practicing. It is on account of these hopes that I talk about sex all of the time. Loudly. On principle. (Trace, 2014, pp. 6-7)

Outside of legal realms, the (perhaps overly – see Weiss, 2006) optimistic notion that simply talking about one's own alternative sexuality or other marginalising experience can constitute a liberatory

act has been put forth in a variety of settings; within academia, such discourses are more generally associated with “queer” and “gender/sexuality” studies than “disability studies” (e.g., see McRuer & Mollow, 2012; Piepmeier, Cantrell, & Maggio, 2014). That the sexual wellbeing, activities, and interests of many categories of people (e.g., non-heterosexually-partnered, genderqueer, kinky, age-diverse, racialised, sex-work-involved, etc.) are deprioritised and stigmatised for reasons other than disability is hardly recent news (e.g., see Rubin, 1984). The ways in which the sexual and reproductive autonomy of women (and, to a lesser degree, men) of various backgrounds, orientations, classes and abilities has been undermined have inspired much legal, academic, and popular writing and debate over the years (e.g., see Withers, 2012) and continue to influence the societal attitudes that inform what sexualities are deemed normal and acceptable. Yet, the inclusion of disability as a marginalised specifically sexual identity, and the intersectional considerations that abound when discussing the sexualities of “multiply-marginalised” PWD<sup>22</sup>, are still too frequently overlooked.

Mark Sherry (2004) draws links between how non-heterosexuals have been pathologised as though homosexuality were a disability and how PWD have been “queered”

through various cultural processes of enfreakment, particularly those that produce (often contradictory) notions of asexuality, vulnerability, inexhaustible sexual voraciousness, perversion, and exoticism. The cultural construction of a spectacle around disability, such as the freak show, further queers disabled people by constructing fears and anxieties around Otherness. These fears also surface when disabled people express their needs for reasonable accommodations in the sexual arena, such as the cultural positioning of a demand for facilitated sex as a form of perversion. (p. 781)

Sherry also notes related tensions within queer and disability communities, citing “one of the major debates within both Queer Theory and Disability Studies” as involving “whether queers and

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<sup>22</sup> E.g., Nisha (2004) – who publishes using only a first name – discusses the regulation of disabled women’s sexuality in India. She quotes a disability movement colleague’s disparaging remarks on the notion of “sex and disability” as unimportant in the Indian context, indicative of “sex obsessed Western thinking” (2004, p. 1).

disabled people should adopt a political position of assimilation (arguing that they are 'just like you' and therefore deserve exactly the same rights as heterosexuals or nondisabled people)" (2004, p. 778).

The punishment of sexual "deviancy" (whether homosexual or not) as a social-legal phenomenon (see Khan, 2014) frames the law's jurisdiction to make determinations in cases involving sexual crimes. In practice, some judgements seem based less on the notion that "consent is the legal dividing line between wanted and unwanted sexual contact" (Randall, 2011, p. 1) and more on "a hierarchical system of sexual value" by which modern Western societies appraise sex acts, and in which extra-marital and non-reproductive sexualities are considered deviant (Rubin, 1984, p. 151)<sup>23</sup>. For example, it is notable that the act upon which the *R. v. J.A.* (2011) conviction rested involved anal penetration with a sex toy, generally considered a non-normative "queer" or "kinky" act, as opposed to "standard" heteronormative sexual intercourse (e.g., penis in vagina). Consistent with the argument that the law reflects "a masculinist perspective on sexual violence" (Randall, 2011, p. 10), judges seem more likely to extend a "reasonable doubt" of "honest belief" in consent in circumstances of partner sexual assault and to adopt a more forgiving approach to perpetrators in cases where no "actual intercourse" (but, rather, other non-consensual assaultive acts deemed of lesser import, but possibly as or more traumatising to the victim) occurred (e.g., see *R. v. A.G.*, 2004, 25)<sup>24</sup>.

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<sup>23</sup> Notably, disability is not mentioned once in Rubin's 1984 "radical theory of the politics of sexuality."

<sup>24</sup> In *R. v. A.G.*, it was deemed important to note with regard to sentencing that "[n]either of the offences involved actual intercourse" in the case of a minor who was sexually assaulted by her uncle, whose "abuse began with attempts to show the complainant how to kiss and progressed to fondling her breasts, sucking her breasts and ultimately digital penetration and having the complainant masturbate the offender to ejaculation. The charges related to two specific incidents. With respect to the indecent assault conviction the offender repeatedly attempted to force his penis into the complainant's mouth but each attempt failed." (O.J. No. 4563 (Ont. C.A.), 2004, cited in *R. v. C.C.*, 2013, O.J. No. 379)

Along more positive, yet related, lines, it is worth recalling the diversity of embodiments and needs that encompass PWD<sup>25</sup> that might be mobilised to inform ideas of what constitutes "actual sex." For some PWD, increasing access to desired sexuality may simply be a matter of combatting the social stigma surrounding disabled individuals' engaging in "conventional" sex; for others, increased attention to the physical mechanics of sexual activities and to inherently "unconventional" (and hence, more legally suspect) "accommodations" may be in order.

*Theorising Practice: What It Is That We Do<sup>26</sup> (Or Could Do)*

"BDSM is an important potential mode of personal empowerment for people with disabilities, because it represents a sexual community that accommodates different bodies and alternative lifestyles. In addition, BDSM plays with the unstable boundary between pain and pleasure, an issue that affects many people with disabilities, particularly those living with chronic pain."

– Dawn Reynolds, "Disability and BDSM: Bob Flanagan and the Case for Sexual Rights" (2007, p. 40)

Many authorities view non-normative sexuality as inherently "unhealthy" (Khan, 2014, p. 246). Using the illustrative case of Bob Flanagan, "a man with the fatal, painful condition of [Cystic Fibrosis, who] sought out BDSM as his choice of sexual expression, in part because of its ability to manage pain," Reynolds (2007, p. 42) points out what she calls "a dangerous sanctioning of heteronormative sexual relationships in the field of disability studies at the expense of... alternative sexual practices"<sup>27</sup> (p. 40). Reynolds' use of the word "dangerous" is interesting, especially given McRuer's (2006, p. 182) observation that the consensual beatings Flanagan received at the hands of

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<sup>25</sup> As I argue elsewhere (Goldberg, 2015), it is crucial to consider McCall's (2005) notion of "intracategorical complexity" (i.e., the "complexity of lived experience" within marginalised groups) when advocating on behalf of those represented by the PWD construct.

<sup>26</sup> The "alternative sexualities community" initialism WIITWD (short for "What it is that we do" and sometimes written WIIWD ("What it is we do")) "is intended to include all activities that the mainstream would consider 'Kinky'" ("Ms. Pomegranate," 2015, February 23).

<sup>27</sup> Reynolds (2007, p. 40) specifies that these "so-called kink or fetish practices, which lie outside of mainstream sexuality, include bondage, dominance, sadism, and masochism (BDSM); polyamory; fetishism; amputee devotion; body modification; and sexual surrogacy, among others."

his partner<sup>28</sup> were "at once therapeutically useful for Flanagan (clearing the respiratory system, keeping the lungs as free of mucus as possible) and, presumably, erotically satisfying for both participants."

Flanagan's story, and others like it, present a challenge to legal and medical orthodoxies holding that only "experts" can dictate what ("risky") activities are in PWD's best interests. As disabled writer "Carrie" (2014, March 11) concludes: "if you're not able-bodied, it's really hard to get people to take you seriously." Her article "Know Me Where It Hurts: Sex, Kink, and Cerebral Palsy" speaks out against what Burgess-Jackson (1995, 38)<sup>29</sup> calls "parentalistic and paternalistic" attitudes, which prevent many PWD from exploring their own (alternative) sexualities:

They will tell you how brave and inspirational you are, for sure (which, of course, is more about them than you). They'll tell you God loves you extra. Bonus points if they are also crying. But they're uncomfortable, on some level, with you making your own choices — especially if those choices might have painful outcomes. Everyone around you will manicure your life so that you don't have to experience difficulty. Things will happen around you rather than to you. Risk taking isn't presented as an option. There are a couple different assumptions at work here: first, that you've already been through so much that you deserve the gold star of a decision-free life, and second, that you are a child in need of constant protection. That becomes a self-fulfilling prophecy: when everyone takes care of you, it's damn near impossible to grow up. ("Carrie," 2014, March 11)

Reynolds (2007, p. 42) describes how disabled scholars "have begun explicitly naming their impairments and their corporeal characteristics, including pain, in both their academic texts and their autobiographical works" in what Siebers (2001) calls "a new realism of the body." Popular writers, like "Carrie" (supra) and those listed in Corey Alexander's (2014, July 10) "A few resources on kink and chronic pain," have similarly articulated embodied experiences, including the

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<sup>28</sup> Sheree Rose, "per Flanagan's request, was consistently the sadist—referred to as mistress, dominant, or top—whereas Flanagan was the masochist, known as submissive, slave, or bottom" in their relationship (Reynolds, 2007, p. 42).

<sup>29</sup> Keith Burgess-Jackson's (1995, 38) suggests that "[p]erhaps we should say that the law is both parentalistic and paternalistic" in such instances where "it treats a mature individual like a child" and involves "men telling women what they can and cannot do."

application of BDSM practice to what Garland-Thomson (2014) calls "body management." Yet, despite scientific and anecdotal evidence from diverse sources that consensual<sup>30</sup> BDSM practice can alternately be benign, pleasurable, and even healing for PWD<sup>31</sup> – in other words, as the Xeromag website puts it, "BDSM is NOT abuse!" (CAPS original, cited in Ross, 2012, p. 232) – as discussed above, the law holds otherwise.

Specifically targeted alternative sexual and sensual practices engaged in by lay people, like the late Flanagan and his partner, in addition to being an entertaining social bonding activity, might replicate, complement, and even replace professionally-provided health-benefiting services – in some cases, arguably as or more effectively and with fewer negative side effects than more costly and invasive "conventional" (e.g., pharmaceutical, technological, and/or therapeutic) interventions.<sup>32</sup> With the right impetus, legislation regarding BDSM may conceivably evolve; yet, regardless of any medical benefits of BDSM, it seems unlikely that doctors in the current sociopolitical climate will be prescribing floggings and the like (for PWD or otherwise) any time soon. Then again, historically speaking, stranger (or at least equally strange) things have occurred.

*Working It: Sexual and Sensual Services, Simplified*

"The vibrator was, in fact, invented by respectable Victorian doctors, who grew tired of bringing female patients to orgasm using their fingers alone, and so dreamt up a device to do the job for them. Their invention was regarded as a reputable medical instrument – no more improper than a stethoscope – but became wildly popular among Victorian and Edwardian gentlewomen, who soon began buying vibrators for themselves."

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<sup>30</sup> The importance of distinguishing between consensual and non-consensual kinks is key in considerations of those who are made the object of others' unidirectional fetishes. See Alison Kafer's (2012) piece on "devoteeism" for an insider's perspective from both sides of one such disability-related fetish.

<sup>31</sup> E.g., according to Borreli (2015, February 10), consensual BDSM "play" has been associated with such benefits as: improved communication, increased intimacy, reduced stress, increased "positive" brain chemicals (e.g., dopamine, serotonin, and vasopressin) and reduced stress chemicals (i.e., cortisol). Although "bottoms" sometimes experience increases of cortisol "before coming down at the end," Borreli notes that they seem to do so without any accompanying psychological stress.

<sup>32</sup> See Note 31 (supra).



– Decca Aitkenhead (2012, September 7), "The buzz: how the vibrator came to be"

According to Bill C-36, which recently criminalised the purchase of sexual services for the first time in Canadian criminal law, an offence is committed "every time prostitution takes place"; under this bill, "obtaining sexual services for consideration, or communicating in any place for that purpose (section 286.1)" can result in a "maximum penalty of 5 years imprisonment," depending on how the charge is prosecuted, and "escalating mandatory minimum fines" for the purchasers of sexual services<sup>33</sup> (Department of Justice Canada, 2014). The writers of the Bill claim its objective is to reduce demand for such services "with a view to ultimately abolishing prostitution to the greatest extent possible"; to this end, they assert that "[t]he purchasing offence is carefully tailored to its objective of reducing the demand for sexual services" (Department of Justice Canada, 2014). The wording is clear that "[s]exual activity involving no expectation of getting paid for the services provided"; "in the context of ongoing relationships" ("unless... the alleged consideration was contingent on the provision of a particular sexual service"); and "between those having an affinity towards one another" is not considered "prostitution" (Department of Justice Canada, 2014).

In other words, societally-condoned normatively-unassisted able-bodied sexual exchanges, in which the emotional and physical labour undertaken in private occurs without being clearly negotiated, articulated, or given a monetary value – the very kinds of activities that some PWD have difficulty performing "normally" and may therefore seek paid assistance to help them carry out – are not seen as offences. Whereas, a situation in which somebody pays a willing partner a negotiated amount deemed fair by all parties for a given sexual interaction puts the payer in a

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<sup>33</sup> Again, here, the law is unclear about specifically which acts are prosecutable under prohibitions on selling "sexual services": "[W]hether a particular service meets the test outlined above is a factual determination to be made by a court. Applicable jurisprudence provides flexibility in addressing new ways of effecting prostitution, while also limiting the scope of such offences to acts related to prostitution, consistent with its objective of reducing demand for sexual services" (Department of Justice Canada, 2014).

compromising legal position, whereby they are framed as victimising the payee. Yet, what alternatives are available for sexually isolated and/or inexperienced PWD desiring such interactions in the absence of partners willing to "volunteer" to provide sexual education or companionship?<sup>34</sup>

Nowhere does Bill C-36 mention disability, nor any of the non-criminally-minded factors that might create a "demand for sexual services" that cannot be met in more normative non-commercial contexts. For example, its writers failed to imagine the impairment-related reasons<sup>35</sup> for which disabled men and women might, at times, seek out now-criminalised professional sex services, and how these might fit in with other professional personal care services some PWD receive. Bill C-36's silence regarding disability is similar to the DRM's silence regarding sexuality (per Finger, 1992): relegating unpartnered PWD (and those PWD partnered with other such PWD) requiring manual or other assistance to achieve sexual release to certain criminalisation or perpetual frustration.

Shuttleworth (2000) based his PhD thesis partly on his experiences as an attendant for a disabled man whom he took to strip clubs in search of "the perfect sexual arrangement with a sex worker"; he describes Josh's situation as different than that of many other men who "resort to these kind of hegemonic masculine practices" in that Josh

believed that prostitution or sexual surrogate therapy were the only current avenues available to him as a man with cerebral palsy in searching for physical affection and sexual intimacy. Feeling blocked in his everyday encounters, that is, being desexualized by others and his own incorporation of the negative images of disability in relation to desirability, he [saw] these avenues as offering him a modicum of what non-disabled people experience. (p. 248)

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<sup>34</sup>In addressing how some PWD may have different (e.g., disability stigma and/or impairment-related) reasons not shared by their able-bodied counterparts for accessing paid sexual services, I by no means wish to imply or convey that all PWD are sexually inexperienced, isolated, or otherwise interested in "transactional" or "educational" sex.

<sup>35</sup> For example, Mark (whose mother took him to a brothel for his "first time"), uses a communications device to explain: "People do not understand the difference that sex makes. Part of having cerebral palsy is spasticity and muscle spasms. I need sex all the time to make my muscles relax and I like sex" (Scott, Fiske, & Wotton, 2011).

Similarly, Eric O'Brien (1990), whose essay "On Seeing A Sex Surrogate" inspired the Hollywood movie *The Sessions*, described the process whereby a medically-trained sexual professional facilitated his first erotic experiences. Even if (the nonfiction version of) O'Brien (1990) ended up feeling let down and wondering whether the experience had been "worth it, not in terms of the money but in hopes raised and never fulfilled," eventually (like Shuttleworth's Josh) he moved on from paid sex to a normatively romantic, stable, non-commercial, heterosexual relationship. This progression speaks to how contracted sex can serve the purpose of increasing embodied awareness and sexual confidence. In a sense, it might be seen as remedial "hands on" sex education for those who did not have the chance to experience such "normal" milestones earlier on, as a matter of course – the likes of which many able-bodied youth first realise through experimentation with relationships no less no doomed for the long-term than those involving more clear-cut exchanges with sex workers or surrogates.

Australian documentary *Scarlet Road* puts into action the radical notion that "everyone has a right to sexual expression, and that includes people with disability" (Scott, Fiske, & Wotton, 2011). Filmed in New South Wales, one of only two places in the world with a decriminalised sex industry<sup>36</sup>, it reflects a socio-political backdrop whereby neither buyers nor sellers of sexual services need to operate in secrecy or shame. It features work that would elsewhere be framed as sexual surrogacy, including an in-depth training by Touching Base, an organisation specialising in teaching interested sex workers how to provide accessible sexual services to disabled clients. Notably, the protagonist identifies proudly as a sex worker, not a surrogate (in spite of roughly half her clientele being PWD). In fact, the term "surrogacy" is not employed once in the film. It would

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<sup>36</sup> New Zealand is the only other location where sex work has been fully decriminalized (e.g., where sex work is treated as a "legitimate business"), as opposed to the many places where it has been legalised (meaning that "prostitution [is treated] as a vice to be controlled") (Kuhr, 2007, Mar 28).

seem that where sex services are universally accessible and readily available to all who can afford to pay the fees (including PWD), and where sex workers feel empowered, respected and protected in their jobs, there is no need to couch sexual services for disabled people and others with sexual challenges in medicalised language to justify their existence or sidestep pervasive stigma against both sex work(ers) and disabled sexuality.

In the *Scarlet Road*, Denise Beckwith of "People with Disability Australia," whose physical limitations prevent her on some days from performing such tasks as buttoning up her own clothing, talks about being grateful that her first sexual encounter was with a sex worker: "It's about maneuver and it's about satisfaction for me, to be honest" (Scott et al., 2011). Echoing Finger (1992) from a 21<sup>st</sup> century, Australian standpoint, Beckwith explains: "Sexuality and sexual expression is [sic] the last bastion and last wave. People with disability want connection and intimacy and touch" – which she, for one, has no problem paying to receive on her own terms (Scott et al., 2011).

The "free market" approach to disabled sexual fulfillment taken by Touching Base, while not unproblematic<sup>37</sup>, normalises access to life-enhancing facilitated sexual encounters (Scott et al., 2011). In so doing, it navigates the nuanced distinctions between the biological necessities of interacting physically with people whose impairments require "special" care or attention, and the dominant "medical model"<sup>38</sup> attitudes that many PWD abhor. It is possible, by contrast, that in places where prostitution carries excessive social stigma and raises legal concerns (e.g., most of

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<sup>37</sup> E.g., Lise Gotell (2009, p. 897) points out that: "[w]ithin recent judicial discourses, normative sexual interaction is reconstructed as being like an economic transaction, and privileged actors within a sexual marketplace display behaviors that mimic the market citizen of neo-liberalism... We must be attentive to how this reformulation of normative sexual subjects enacts new patterns of exclusion and disqualification."

<sup>38</sup> The medical model portrays "'disability' (understood medically as synonymous with 'impairment')... as an individual problem that is both a.) undesirable and b.) needs to be 'fixed' or 'cured' through medical/institutional/scientific intervention" (Souza, 2014, February 3).

North America), the language and differentiation of surrogacy may help PWD gain "legitimate" access to sex, especially for those who must use an intermediary to make the relevant arrangements. After all, long gone are the days when doctors might offer clients therapeutic "paroxysms"<sup>39</sup> (Aitkenhead, 2012, September 7).

Further, our historically progressive narratives of Canadian sexual emancipation do not account for disability. For example, discussing his 1969 Omnibus Bill, then-Prime Minister Pierre Trudeau declared: "There's no place for the state in the bedrooms of the nation... What's done in private between adults doesn't concern the criminal code. It's when it becomes public it's a different matter" (CBC Digital Archives, 1967, December 21). In reference to able-bodied homosexuals wishing for respite from state-sanctioned harassment, this green light to engage sexually (at least in private) without unwanted intervention indicated progress. Yet, those whose bedrooms are sites of isolation and/or monitoring rather than spontaneous, fulfilling connection might benefit from more, rather than less, intervention (of a supportive kind).<sup>40</sup>

Even if insurance-covered orgasms are not on our national or provincial health care agendas, and the legal exceptions for "assault causing bodily harm" do not extend to potentially "impactful" sexual or BDSM acts, there is still much room for positive change. By listening more carefully to, and taking seriously, PWD and their (sexual) allies, perhaps law-makers, policy-writers, and others can be inspired to consider disability and impairment when making legislative and procedural

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<sup>39</sup> Incidentally, almost nobody ever referred to "paroxysms" as orgasms (Aitkenhead, 2012, September 7), likely for similar reasons as some people employ the term "surrogate" instead of more stigmatised labels denoting "sex worker." Certainly, the manual or vibrator-induced doctor-controlled "hysterical paroxysms" of days past – "designed to make solitary masturbation with the hand seem unsatisfying by comparison" (Schwyzer, 2012, May 31) – would constitute "sexual services" today under Bill C-36. After all, "masturbation of a client in the context of a massage parlour, whether or not the client climaxes"; "sado-masochistic activities, provided that the acts can be considered to be sexually stimulating/gratifying"; and even "acts... that take place in a private room... that are sexual in nature, but do not involve physical contact between the 'client' and 'performer', such as self-masturbation, have been found to constitute prostitution" (Department of Justice Canada, 2014).

<sup>40</sup> Metaphorically speaking, rather than the turning of a prudish eye, the loan of a (consensual) hand, might be more benevolent in the case of PWD whose impairments render unassisted sexual activity difficult or impossible.

amendments that help people work together towards mutually beneficial solutions to the challenges posed by the so-called "last bastion and last wave" of the DRM (Scott et al., 2011).<sup>41</sup>

*(In)Conclusive: (No) Happy Endings?*

"I use the phrase embodiment to literally mean occupying our bodies. There's no way to do that outside of a political, social, historical, cultural context."

– Patricia Berne (quoted in Pentilla, 2014, October 3)

Based on the cases and commentaries reviewed above, it seems evident that the current social and jurisprudential governance of citizens' conduct does little to facilitate positive sexual, sensual, and other intimate experiences for PWD (and others with "unsanctioned" needs and desires). On the one hand, the rampant sexual abuse of vulnerable PWD continues. On the other, with Bill C-36's criminalisation of paid sex and the legal strictures pertaining to "kink" and otherwise-contentious sexual practices outlined above, so does the paternalistic policing of non-normatively embodied people, those they might contract to provide sexual services or engage with in non-transactional intimacy, and mediating allies. Where does this situation leave people with intellectual and physical impairments who wish to fully express their sexualities (with or without intimate partners)?

Apparently, in risky places.

While many PWD engage in "normative" sexual relationships, and others successfully navigate "alternative" relationships, many PWD don't feel empowered and/or safe enough (emotionally or physically) to seek out the sex they want with others seeking complementary arrangements. Hence,

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<sup>41</sup> E.g., To use an inspirational example, "Disability Discrimination Commissioner and Race Discrimination Commissioner, Australian Human Rights Commission" Graeme Innes (2010) writes in the introduction to a Touching Base "Policy and Procedure Guide... aimed at assisting the disability service sector to develop their own policies":

Access to the sex industry for people with disability in Australia has historically been fraught with difficulties both attitudinal and legal. Many of those barriers have now been removed. In [New South Wales], for example, a best practice model of decriminalising the sex industry has been adopted, which better enables access for people with disability whilst supporting the rights of sex workers. Community attitudes towards the sexualities of people with disability have also improved and people with disability have been speaking out on issues relating to their sexual rights, including the right to access sex services. (2010, iii)

challenges abound both for those employing sex workers/"surrogates" and those who struggle to maintain non-contractual intimate relationships (per Liddiard, 2013). In the "bigger picture," despite recent attention to the intersection of disability and sexuality in academia, art, and activism, the specific situations, needs, and challenges that PWD face in these realms are still too seldom overtly considered. For example, disability tends not to factor into more broadly relevant conversations, such as those surrounding so-called sexual citizenship – around which discussions regarding inclusion have tended to explore "the respective exclusion of women, minorities, and/ or homosexual subjects" "from the full and equal enjoyment of rights" (Cossman, 2007, p. 3) – but not that of PWD, who are scarcely mentioned as (potential) "sexual citizens".

Although this article has specifically focused on sexual access, at risk of projecting normative expectations (per Berlant & Warner, 1998) onto PWD, it seems worth noting that, for many, sexual fulfillment often hinges on other, more holistic human needs. Certainly, it is an ableist phenomenon to frame purely platonic friendships – along the lines of Erickson's mother's consistently responding to her being romantically/sexually rejected with "it's better just to be good friends" (2015, p. 2) – as more desirable for PWD than for able-bodied individuals (regardless of whether platonic emotional intimacy may "objectively" seem more stable, if not more passionate, than romantic-sexual liaisons). And, indeed, the physical entanglements and relations associated with sex, BDSM, and other intimate activities can, in and of themselves, help people "feel good" in their bodies and minds, as well as feel connected to one another: thus counterbalancing common complaints that some impairments themselves, as well as the associated effects of disability, can make people "feel bad" and/or isolate PWD from communities.

Yet, beyond the involved "acts," the confidence that accompanies an individual's successful formation and sustenance of relationships (sexual or otherwise) can lead to a greater sense of

personal autonomy, belonging, and overall wellbeing. As Shakespeare (2006) – for whom McRuer and Mollow (2012, p.29) note “the importance of sex seems to be on the decline” – reflects:

[B]y making sexuality our primary concern, we failed to understand that intimacy is perhaps a greater priority for disabled people. Sexuality is an important form of intimacy, and modern Western societies are fascinated with sexual acts and sexualised bodies. But friendship and acceptance are more fundamental than sex. (p. 168)

These considerations, together, are valuable, insofar as they frame exploratory and/or simply enjoyable sexual/sensual experiences as potentially both (hopefully) pleasurable, fleeting moments; and, also, more than just that: potential avenues for building self-esteem, body awareness, relationship skills and a repository of pleasurable memories maintained beyond one’s most sexual years.<sup>42</sup>

Moving forward, it remains to be seen how society and the law will co-evolve; how disabled people will agitate; and how opportunities for and barriers to intimate connections may be acknowledged and addressed by both PWD and others. Together, these factors will determine the kinds of conversations and relationships PWD and their allies, advocates, and partners will need to keep cultivating, over time, in order to address our individual and collective desires and struggles for greater sexual freedom and intimacy that’s as “vanilla” or “kinky” as we want it to be.

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<sup>42</sup> Shakespeare (2006, p. 168) notes that “sexual desire appears to play a major part in life between the age of puberty and midlife: perhaps three decades out of a possible seventy or eighty years” while also acknowledging that “it is offensive and inaccurate to see older people as asexual.”



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