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Conscious Representations: Critically Interrogating the Engagements and Representations of Extralegal Discourse in *R. v. J.A.*

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Abstract:

This paper is an exploration of how (mis)representations of justice may emerge from a failure to properly engage with and critically analyze the discourse that is privileged within legal cases. It problematizes the widespread feminist approval of the verdict reached in *R. v. J.A.*, 2011 SCC, and suggests that to truly understand the process by which law was reformed, it is necessary to consult its predecessors, *R. v. A.(J.),* 2008 ONCJ 195 and *R. v. J.A.,* 2010 ONCA 226. At the trial level in particular, there was a demonstrable privilege afforded to the trial judge's ability to make extralegal claims about J.A. and K.D.'s sexual conduct. Other ancillary bodies and professional knowledges were employed to validate the legal (re)construction of non-consensual sexual interaction, and are accordingly critiqued as advancing risk-averse politics at the expense of queer or marginalized sexualities.

Introduction

> Our task on this appeal 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. I would therefore allow the appeal and restore the conviction of the respondent.
>
> -Chief Justice McLachlin, speaking for the majority in *R. v. J.A.* 2011, at para. 3

Citing serves a valuable purpose in academic work; it allows our readers to consult the same sources, but most importantly, it credits the source material and authors for their own original thought. In citing *R. v. J.A.* above, I have cited the words of Chief Justice

McLachlin, the opinion of the majority, and the case itself. This decision rendered by the Supreme Court of Canada in 2011 has since become the ultimate expression and application of Canadian criminal law with respect to interpretation of sexual consent under the law. It has also marked the culmination of the criminal justice system's response to what was ultimately ruled sexual assault by the defendant, J.A. The above judgement should be read symbolically, as a representation of what our highest court believes is justice and a just response to unconscious sexual activity. It should also be read as an understanding of unconscious consent as invalid, and of responding to a partner's advanced consent as a violent form of injustice. This paper critically examines the means by which our court claims to know law as it adjudicates. The source material used to reach this understanding was not limited to the justices, the accused, J.A., who did not testify, or the complainant, K.D.; in fact, it barely acknowledged her testimony (Jochelson & Kramar, 2012, p. 97). Here, I would argue that the construction of this case — and more broadly, law itself — is informed through the social. It is an ongoing process, informed through knowledge and power that is deeply rooted within discursive institutional contexts and sociopolitical climates. Pearce and Woodiwiss (2001, p. 61) note that while discourse is a clear realm of representations, it holds "socially determinative power not simply because of its representational character but because it is always part of variously constructed 'regimes of truth.'" In citing Chief Justice McLachlin's words above, the reference is to something larger: an understanding of truth and justice constituted and built by discourse that then produces knowledge within the legal sphere. The feminist legal scholarship that has engaged with *R. v. J.A.* to date has, for the most part, done so without critically interrogating the discourse that was prioritized in written rulings and factums (Gotell, 2012; Craig, 2014; Busby, 2012; Koshan, 2016). It has also limited itself almost exclusively to the Supreme Court judgement, representing the case as it exists within legislative hierarchy and ignoring the discursive effects of lower court judgements. This paper will outline a theoretical framework to

shed light on how discourse analysis and governmentality literature can be used to better conceptualize power dynamics in law, with the aim of moving to a more thorough conceptualization and representation of judicial decisions or justice. It will then move to analyze *R. v. J.A*[1] under this framework in order to demonstrate how dominant, risk-averse understandings of sex and pleasure are prioritized and queer, marginalized sexualities are suppressed and subjected to carceral responses.

Law as Conceptual Terrain

With respect to case law analysis, I claim Foucault's work can be employed by considering how judgements selectively use discourse to rationalize a verdict and suggest a remedy for injustice. Robert Young (1981, p. 48) introduces Foucault's lecture, "The Order of Discourse," explaining how Foucault, in his fruitless search for an alternate, 'authentic' discourse on madness instead was led to "[reflect] on all those rules, systems and procedures which constitute, and are constituted by, our 'will to knowledge.'" These systems, rules and procedures create "a discrete realm of discursive practices — the 'order of discourse' — a conceptual terrain in which knowledge is formed and produced" (Young, 1981, p. 48). The ensuing analysis is then not just concerned with the knowledge that is produced, but the processes and rules that bring order to that knowledge production. These rules (or the 'order') is assumed to be an integral, connected part of the discourse itself, and therefore is legitimized as a part of knowledge. As these discursive practices are seen as fundamental to the creation of knowledge, they often go unexamined.

The discursive practices that underlie and embody case law are not exempt from this. Case law forms a dominant understanding of both social injustices and legislative remedies that are employed to better

[1] *R. v. J.A.*, used without a date, is meant to refer to the case itself or speak to the collective, evolving arguments from the Ontario Court of Justice (*R. v. A.(J.)*, 2008 ONCJ 195), the Ontario Court of Appeal (*R. v. J.A.*, 2010 ONCA 226), and the Supreme Court of Canada (*R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440).

attain justice. However, in analysing legislative decisions and engaging with discourse produced from judgements, it is necessary to examine discourse alongside the discursive practices that create it (Foucault, 1969). These practices are able to mask discourse through signs, systems, and processes that are socially understood as necessary to create knowledge, which leads scholars who would examine justice through legal cases to overlook other discursive practices that are employed to uphold current relations of power and governance.

To critically examine what is presented to us as "justice," we might choose to imagine the case as a conceptual terrain; the case is actively involved in the creation of knowledge, of discourse, and embodied with its own discursive practices to bring order to its construction. The rules and order internally used to render a legal verdict also resonate with the exercise of power itself. By selecting, excluding, and dominating certain discourses over others, discursive rules both create a dominant knowledge through the social system while existing to reinforce and reproduce the social system in place (Young, 1981, p. 48). What we understand to be true directly influences social systems. This is not a relative relationship or inference — scholars must then critically examine the "truths" we tell, as this has a direct, and often validating, affect on our social system and conditions. Discourse analysis then must understand both the historical situating of knowledge and sociopolitical circumstances that are involved in the representation of truth and knowledge (Hook, 2001, p. 525). Cases are ideal for this form of analysis, and may have something to offer scholars who would interrogate how judicial decisions represent a sociohistorical understanding of what is just. They are temporally situated and examinable; the discursive elements underlying a case often require rigorously documented time frames, references to precedent, and situating the case itself within past and current forms of law. They also are spatially located, with in-province rulings being afforded a greater weight than out-of-province rulings,

and subject to a hierarchy, where judicial structure informs the degree of legal superiority to be imposed on a case.

In "The Order of Discourse," Foucault (1970, p. 64–65) comments on the reality of discourse within philosophical thought:

> I wonder whether a certain number of themes in philosophy have not come to correspond to these activities of limitation and exclusion, and perhaps also to reinforce them. They correspond to them first of all by proposing an ideal truth as the law of discourse and an immanent rationality as the principle of their unfolding, and they re-introduce an ethic of knowledge, which promises to give the truth only to the desire for truth itself and only to the power of thinking it. Then they reinforce the limitations and exclusions by a denial of the specific reality of discourse in general.

This pattern of exclusion and limitation is resonant with the reality of discourse within the legal process. Structural rules and order prioritize and privilege knowledge systems that exist to uphold the current social system in place. Documented case law begins by overviewing key words or principle concepts underlying the case itself, giving order and structure to the document before it is read. This subtle direction focuses the reader's attention on noteworthy issues; alternately, the main points of departure or challenge to existing law then must be interpreted according to the existing framework of law, considering the legal process, along with its systems and rules. In this sense, the law self-validates by relying on its own systems to make meaning. There is little opportunity for resistance or challenge within the document when the issues that are given priority are ones that further refine the common law. The case then proposes an ideal truth as the dominant discourse by presenting the decision made by the majority, which is presented as fact and further validated as it forms law. Arguments are subjected to an immanent rationality through strict organization and structure, and are numerically ordered. Engagements with the law itself are

chronicled as they unfold; with one argument conclusively decided, the case then moves on to address the next. Dissenting arguments are still limited to this order and structure, and are limited to engagement with the legal issues at hand. Minority decisions have also historically been used to validate future judgements and rulings. In this way, they still are integral to the discursive process as they demonstrate the acceptable range to which the majority decision may be challenged. Their inclusion within a written legal case further demonstrates this, as legal cases often document very little verbatim testimony and knowledge that is introduced by parties without legal authority. Case law further uses professional forms of discourse from extralegal spaces[2] to reintroduce an ethic of knowledge, as well as knowledge from those involved who are not institutionally or professionally situated. In *R. v. J.A.* and, I would argue, many other Supreme Court cases which further inform law, professional and institutionally based knowledge is prioritized over more individual, and perhaps marginalized, forms of knowledge. In presenting this ethic of knowledge, professional or institutional sites are assumed as not representing their own interests or sociopolitical stance, but rather, speaking to the futurity of law and what certain judicial rulings may come to mean for certain interest groups. This resonates strongly with promising to give the truth only to the desire for truth itself and only to the power of thinking it, as the truth is assumed to be given for universal benefit, and only to be given to the judiciary. Finally, in reinforcing the limitations and exclusions of the reality of discourse, I would suggest that the Canadian court system is not

[2] Law's engagement with extralegal discourse has been observed within socio-legal scholarship before, where outsider resistances and transgressions are able to take a constituent role in law's (re)formation (Golder & Fitzpatrick, 2009, p. 56). In legal cases, the use of certain professional forms of knowledge, constitutional challenges brought before the Supreme Court, and even individual instances of offending may be characterized as an outsider resistance that shapes law. Judges may also choose to speak to popularized social discourse and engage with or disregard prominent movements. This was most recently seen in *R. v. Nyznik*, where Justice Molloy made reference to social media use, specifically the virality of #ibelievesurvivors, after highly publicized sexual assault cases, writing that "the slogan 'Believe the victim' … has no place in a criminal trial" (*R. v. Nyznik*, at para 17).

introspective in nature. It uses a highly formalized system with the aims of "justice seeking," and does not consider its role in social spheres of discourse or its application to form and reproduce knowledge. It only looks to itself, including its minority decisions, when establishing precedent or questioning a lower court's decision, but all self-referencing or self-examination occurs according to formal discursive practices that are normalized by the legal institution.

With respect to the law, Foucault (1978a) acknowledges in Vol. 1 of *The History of Sexuality* that the power to regulate sex is maintained through discourse that ultimately articulates a rule of law. The law articulates a rule that then becomes absolute. Foucault (1978a, p. 83) roots this "pure form of power" as residing within the legislator and, with regards to sex, it acts through a "juridico-discursive character." Using this term, Foucault is suggesting that discursive events find their place also in a juridical system and — specifically concerning limits imposed on sexuality — gain legitimacy through the discourse that creates law. However, in structuring his understanding this way, Foucault is suggesting that discourse is responsible for the creation of law, yet the law in itself is a discursive event. In this sense, he is suggesting that these two spheres (law and discourse) are so intimately interconnected that they both are involved in a process of informing the other. Here, he speaks to this as a function of exclusion, regulation, and limitation of sexuality while still rooting it in power. It is important to note that Foucault's earlier work contradicts this,[3] but only his stipulation of power limiting sexuality. If we begin to consider self-regulation, where a person chooses to

[3] In Foucault's (1975, p. 194) *Discipline and Punish: The Birth of the Prison*, he states: "We must cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals'. In fact, power produces; it produces reality; it produces domains of objects and rituals of truth." While supporting the understanding of power actively involved in constructing discourse, this challenges his understanding of juridico-discursive powers limiting sexual expression.

avoid engaging in practices of sexuality that are classified as deviant by the law, it is not difficult to see where law's articulation may be seen as a power that limits.

Governmentality through Law

This conception of law identifies it as a form of disciplinary power, but also hints at placing law as a broader function within governmentality studies (Rose, O'Malley, & Valverde, 2006; Rose & Valverde, 1998; Simon, 2006). However, this must be understood with a caveat: in accepting law as a function of governmentality, the specificity of law's relationship with administrative or governmental powers is lost and "law simply becomes one of the many different aspects of our late modern administered world … subsumed by the techniques of governmentality" (Golder & Fitzpatrick, 2009, p. 35). With this caveat in mind, I will argue that seeing law as a governmental institution has a great deal of merit within socio-legal scholarship.

In his later works, Foucault introduces the term 'governmentality,' suggesting this as a concept analysis to use in future analyses. Governmentality is understood by Foucault (2007, p. 108) as "the ensemble formed by institutions, procedures, analyses and reflections, calculations, and tactics that allow the exercise of this very specific … power that has the population as its target, political economy as its major form of knowledge, and apparatuses of security as its essential technical instrument." Here, we are invited to study how actors in parallel fields of society attempt to govern (Simon, 2006). Much of the scholarship on governmentality has been written posthumously, and much of it distances law from its examination, prescribing in some sense to the expulsion thesis or through a failure to address legal specificity (Rose, O'Malley, & Valverde, 2006; Rose & Valverde, 1998; Simon, 2006). However, in introducing governmentality, Foucault (2007, p. 110) specifically proposed examining "the state of justice" as a major power that could be studied and reconstructed through the use of a governmental

framework. In Jonathan Simon's monograph *Governing through Crime*, he critically examines the shifting social context and heightened interest in criminalization as a process of governance. I would suggest that this is highly relevant through verdicts that extend the reach of the law, verdicts that can be said to be net-widening. The criminal trial has long existed as the popular paradigm of justice (Simon, 2006); therefore, to effectively examine the state of justice, one must engage with the law, and acknowledge the law as a specific source of both disciplinary and governmental power. Governmental in how it is publicly consumed and attended to[4] and disciplinary in the consequences that are enforced through a structure of legislative authority.

"Foucault likened France's legal system to one of Tinguely's constructions: [one] of those immense pieces of machinery, full of impossible cog-wheels, belts which turn nothing and wry gear-systems: all these things which 'don't work' and ultimately serve to make the thing 'work'" (Foucault, 1978b, quoted in Gordon, 1980, p. 257). This 'construction' can be seen clearly in the modern courtroom and in case law, as extralegal discourse enters and is circulated within a realm presented as purely legal. Rose and Valverde (1998, p. 543) understand this to be the governmentalization of the legal complex:

> Foucault suggested the workings of this legal complex had become increasingly pervaded by forms of knowledge and expertise that were non-legal. Its regulations, practices, deliberations and techniques of enforcement increasingly required supplementation by the positive knowledge claims of the medical, psychological, psychiatric and criminological sciences, and the legal complex thus enroled a whole variety of "petty judges of the psyche" in its operations.

[4] Here we can revisit the example of #ibelievesurvivors and social media activism surrounding legal (in)justice.

Jochelson and Kramar (2011, p. 27) have previously demonstrated how Foucaultian analytics can be used in the study of judicial decisions, "[providing] us with some interesting theoretical and practical challenges from within the inter-discipline of law and society." In doing so, "[they] see case law as not merely treatises of precedent but as reflections and refractions of societal ordering" (Jochelson & Kramar, 2011, p. 30). Case law is constructed not simply as a norm of the rule, but also a norm of the social (Jochelson & Kramar, 2011, p. 30). Berlant (2007) has understood 'the case' as a theoretical concept to situate itself as singular, general, and normative. It has a role in organizing the public and, in doing so, public discourses. The case also employs relative expertise to form a shared knowledge:

> It could be casual expertise, deliberately cultivated, licensed by training — no matter; deciding what defines the surplus to singularity is now the province of the expert, the expert who makes the case. But who counts as expert is often an effect of the impact of the case the expert makes. Therefore the case is always pedagogical, itself an agent. (Berlant, 2007, p. 664–665)

In this understanding, the case is influenced through governmentality in the same way a self-governing subject might be "'both crafted and crafting' ... hence not a metaphysical 'substance', but rather the unfinished result of a political negotiation with and through others" (Golder & Fitzpatrick, 2009, p. 115). It is attentive to social discourse, and is afforded power through the sociopolitical systems in place; it is therefore limited in its ability to act as resistance. It further requires the circulation of discourse as a condition of its being, and seeks to analyze and further clarify discourse as an obligation (Berlant, 2007, p. 668).

Analytical Framework

In order to properly engage with legal cases, it is necessary to understand them as discursive processes that are deeply rooted within their sociopolitical context. With respect to our current sociopolitical context, law is continuously reformed under neoliberal logics of precaution and harm reduction (Jochelson, Gacek, & Menzie, 2018) that tend to disproportionately capture, and perhaps even target, marginalized populations (Khan, 2016). In order to understand how various contexts, voices, and types of actions are prioritized over others, it helps to look at legal referencing of the social climate. This can be understood as extralegal knowledge or referencing behaviours and discourse that falls outside of the realm of the case at hand, but situates the sociopolitical context. Professional knowledges will be examined, particularly those that depart from traditional legal knowledges and are rooted solely in the legitimacy afforded to statements made by a person of 'authority.' Finally, mobilization of extralegal, governing institutions will be considered, specifically the labelling of "sadomasochist" behaviour and the mechanisms used by the courts to mobilize medical discourse within law. These necessarily intertwine and connect to each other, as they materialize within the same case as an underlying rationale that allows law to find truth. Therefore, this analysis makes, and is benefited through, an analysis referencing overlap between the social, the classified 'professional,' and the governmental. The social realm, the professional speaker, and the governmental body are all interrogated and expected to speak to both Parliament's intent and K.D.'s consent. In removing the autonomy of K.D. to define consent in her own terms while prioritizing Parliamentary interests, the state is further exercising disciplinary power through governmental mechanisms.

The (Undisputed) Facts of *R. v. J.A.*

In May of 2007, J.A. and K.D. engaged in sexual activity that reformed the legal understanding of consent within a Canadian context. During the course of this activity, K.D. was consensually choked to the point of losing consciousness. Less than three minutes

later, she awoke to find herself bound, with J.A having continued sexual activity while she was unconscious and in the process of using a dildo to anally penetrate her. K.D. and J.A. then consensually engaged in "actual intercourse"[5] and, upon both finishing, K.D. used her safe word, as an indication that she wanted to stop, and was subsequently untied. The issue presented for legal determination was whether the complainant was capable of consenting to these sexual activities,[6] not whether K.D. had consented (the facts indicate that she had). In this sense, a 'truth' is being formed regarding the legitimacy of K.D.'s consent and the futurity of consensual sexual interaction through legal powers that engage with their own governmental, discursive structure. Simply put, how consent is understood has moved from the individual who grants consent to the legal structure itself: a structure engaged with various systemic processes to determine a 'truth' that, as a part of the process itself, relies on professional and institutional forms of knowledge to further disperse and legitimize its power to form discourse.

The Social: Rough Sex and the 'Choking Game'

The trial judge made several points of analysis that framed K.D. and J.A.'s sexual conduct within an evolving social sphere. In doing so, their behaviour was categorically organized and understood as it related to various social understandings of sex, and unconsciousness and recreational choking practices. This is not a passive process, or one that is necessarily integral in justice seeking, but part of how power and knowledge is created. K.D. and J.A.'s behaviour must have constituted or related to a greater meaning: the futurity of law. Addressing this, the Crown initiated a precautionary, proactive approach, where citizens are spared from "untold harm, devastating

[5] As described by K.D. (referring to vaginal intercourse) at para. 5 of *R. v. A.(J.)* 2008.
[6] K.D.'s capacity to consent was questioned with regard to consenting to one's own bodily harm at the Ontario Court of Justice and the Ontario Court of Appeal, and with regard to consenting while unconscious at the aforementioned levels of court as well as the Supreme Court of Canada.

long-term injury and … fatalities" (*R. v. A.(J.)* 2008) that would be otherwise sanctioned by the "undoubtedly dangerous practices" (*R. v. A.(J.)* 2008) in which K.D. and J.A. engaged. The trial judge instead situated their sexual practices within an emerging transgressive sexuality formed "through the internet and more liberal content in ads, magazine content and movies" (*R. v. A.(J.)* 2008, at para. 28). These sexual practices include rough sex, bondage, sexual asphyxia, and the use of dildos and are said to be involved in forming part of the sex life of a subset of consenting adults. In acknowledging the legitimacy of K.D. and J.A.'s sexual behaviour, the trial judge must look to the social, to the broad knowledge that is created and held surrounding sexual exploration and pleasure. Institutions that have chosen to focus efforts on furthering sexual autonomy or who have used sex to sell (e.g., ads, magazines, movies, pop culture) have become part of informing the social on what sexual behaviours might be accepted. This is then further represented and legitimized through the disciplinary power of the law. While this established an understanding of our current social norms and acceptable forms of sexual expression, the practice of choking was situated separately. The trial judge chose to consider it both as a part of sexual pleasure and of recreation without sexual context. She commented that "[i]n recent months, there have been published news reports of children involved in a choking game for the high; some cases have resulted in death. This phenomena appears to exist other than in a sexual context" (*R. v. A.(J.)* 2008, at para. 32). She used this social phenomena to consider whether being choked to the point of losing consciousness constituted endangerment of life, or the necessitated use of force to obtain compliance from K.D. Instead of considering non-normative expressions of sexuality and reintroducing conceptions of rough sex, deviance, and sadomasochism, the trial judge chose to situate choking within an understanding of recreational practices that are seen by many as dangerous and, most importantly, not aligned with the same pleasure-seeking interests of those who practice erotic asphyxiation or belong to a marginalized community. Also problematically, in doing so, the trial judge drew parallels to the incidences of death through choking and youth

culture, and indirectly hinted at a supposed innocence and a challenge to sexual agency. She removed the concept of power play that many understand to exist in practices that fall under BDSM, and turned choking to child's play. This overview of social situating speaks to the intentions of the trial judge and how facts might be discursively manipulated within the realms of the social to minimize K.D.'s agency and sexual autonomy. However, this should not be understood to be a miscarriage of justice or a skewing of facts, but a necessary, interpretive process engaged in by law and the judiciary, which is, in fact, the very nature of justice.

Professional Knowledges: Justice through Justices, and the Use of Interveners

Many forms of professional knowledges enter the courtroom, but in the interests of a succinct illustration, two will be considered: the knowledge afforded to the justice, and one intervener in particular, Dr. Elizabeth Sheehy of the Women's Legal Education and Action Fund (hereafter, LEAF). While Sheehy was just one member of co-counsel who assisted in drafting a factum for LEAF, that factum relies heavily on a logic following her academic and institutionally situated knowledge.

Attending first to the judge, several comments were made expressing her capacity to know or inform knowledge that was not, strictly speaking, legal knowledge. Her identification as a professional, or one with the capacity to judge, extended to matters outside of her professional sphere and outside of the law. K.D. is classified by the trial judge as a "typical" recanting complainant in a domestic matter, indicating that the trial judge's past experiences with complainants informed her understanding of K.D. Here, "the pathologization of K.D. as a battered spouse helps to discredit her and erase her sexual agency" (Khan, 2016, p. 1413). This is in spite of the fact that the context of domestic abuse was not explored by the court and, should it have been used as evidence, would have been both highly prejudicial towards the accused and of limited probative value

(Jochelson & Kramar, 2012, p. 97). Here, the judge uses her legal authority to classify K.D. within the context of domestic violence, sidestepping procedural and due process rights to the accused.

Despite using language that consistently indicated a lack of personal familiarity with the sexual practices K.D. and J.A. took part in, the trial judge dismissed K.D.'s timeline due to a personal disbelief that "there was no need to use [her] safe word at the point [that K.D.] described" (*R. v. A.(J.)* 2008, at para. 5). The trial judge further introduced her understanding of the "universal human experience," which "dictate[d] that [K.D.] would not have to be reminded that anal penetration had occurred [prior]" as she testified in court (*R. v. A.(J.)* 2008, at para. 41). When the defence suggested that — due to a failure by the Crown to present relevant medical evidence, and without having professional medical knowledge herself — the trial judge would be unable to conclusively address the question of bodily harm, she commented:

> Sexual asphyxia and auto eroticism are not novel legal concepts in my view; those subjects formed part of the curriculum in the Forensic Science course I took in law school in 1978. I do agree however with defence that, without expert evidence, I am ill equipped in this case to decide the medical mechanism of unconsciousness, the degree of force required, the duration of force required to cause loss of consciousness, and likely injuries associated with choking, strangulation or unconsciousness. (*R. v. A.(J.)* 2008, at para. 26)

Despite this, the trial judge (as recognized on appeal) expressed her own belief that a reasonable person would conclude that choking to the point of unconsciousness interferes with their health or comfort (*R. v. A.(J.)* 2008, at para 26, referenced in *R. v. J.A.* 2010, at para 44).

With respect to interveners, the intent is to advocate for a decision advancing and forming the law as they believe it should materialize while speaking within the context of the case. They speak to interests held by nonparties, and thus are not interested in the specific individuals in the case at hand, but rather the wider application of a reformed law. This again speaks to law's role in transforming social discourse. While interveners do not make law in the same sense that justices do, they prepare a factum, an extensively researched and often cogent argument. While it could be said that the submissions from interveners do not form law, they are considered by the court, so much so that Chief Justice McLachlin commented that, in her view, "it would be inappropriate to decide [matters that have not been introduced as points of consideration] without the benefit of submissions from interested groups" (*R. v. J.A.* 2011, at para. 21).

The submissions presented by LEAF were concerned with presenting K.D. as a battered woman, a woman who does not engage in these sexual practices through her own autonomy, but through coercive control (Women's Legal Education and Action Fund 2011, at para 21.) Their factum reframed the case as a form of "opportunistic" violence enacted by a sexual offender. It engaged, in great detail, with the hardships faced by Aboriginal women or women with physical and mental disabilities. Their factum spoke to all of this, after first acknowledging that a legal understanding of consent "cannot be severed from [its] context" (Women's Legal Education and Action Fund 2011, at para. 18). Rather than acknowledging the whole of this context —K.D.'s own description of the sexual activity as part of a "kink," a "fetish" shared by herself and the accused in an effort to "spice things up" — LEAF focused on the couple's frequent separations and what the trial judge described as "some physical incidents" (*R. v. A.(J.)* 2008, at para. 4) to present K.D. as a battered woman. Sheehy's extensive and valuable contributions to the study of battered women's syndrome and its legal implications were read into the factum that informed the Supreme Court of LEAF's official position. Feminist commentary and the feminist legal community

reproduced LEAF's position, and failed to take into account competing discourses and contexts, downplaying evidence that indicated the couple's ongoing involvement in a kinky relationship (Khan, 2016). Here, this commentary created an erasure of kink identity, and portrayed it as irrelevant, not genuine, or a cover for predominantly gender-based violence (Khan, 2016, p. 1415). In doing so, it contributed to an ongoing dialogue of harm reduction, and protecting the vulnerable through precautionary measures within the sociopolitical climate of neoliberalism.

Institutional Governance: Medical Institutions and Sadomasochism

Finally, it can be argued that institutional bodies, the networks Foucault considers under the umbrella of governmentality, make their way into law. In doing so, they further validate their own knowledge claims when they become part of the evidentiary record of law's disciplinary power, but also strengthen law's perceived legitimacy through the introduction of professional knowledge and discourse. This professional knowledge is not rooted within an individual, whether through their role as a lawmaker or their body of academic work; it is here where the conceptual difference between this category and the aforementioned can be seen. Here, I am speaking to the dominant understanding within an institutional field, not a theory, concept, or personal belief validated through one's place in the institution. This, necessarily, overlaps both with social discourse and professional knowledges.

While many institutions could be examined as they place themselves within the court, *R. v. J.A.* mostly engaged with medical discourse in their reasoning. How unconsciousness impacts a person's mental state was considered, as well as distinguishing forms of consent within sexual and medical contexts (i.e., advanced consent to a surgical procedure). As well, K.D. and J.A.'s behaviour was repeatedly, through all levels of court, described as sadomasochistic, an understanding of sexual behaviours that categorizes one party as a sexual sadist and one as a sexual masochist. It is important to note

that — at this time — both sexual sadism and sexual masochism were labels of mental illness within the DSM-IV (discussed in sections 302.84 and 302.83 respectively). Within the facts of the case it was written that "[t]he violence of sado-masochistic encounters involves the indulgence of cruelty by sadists and the degradation of victims. Such violence is injurious to the participants and unpredictably dangerous" (*R. v. Brown* 1993, quoted in *R. v. A.(J.)* 2008, at para. 16). Again, this speaks to the mobilization of medical knowledges with the aims of harm reduction and precautionary logic. Submissions by the Crown also made reference to both the University of Wisconsin Hospitals and Clinics Authority's website[7] and to autoerotic-asphyxiation.com[8] in the hopes of establishing the point where asphyxiation is no longer sexually pleasurable. They use these institutional knowledges to conclude that once "the person loses the capacity to feel or respond," the behaviour can no longer be understood as desirable (*R. v. A.(J.)* 2008, at para. 23). This institution is given the capacity to weigh in on the point where K.D. would no longer have wanted consensual contact from her partner. This is a great deal of power afforded to the medical institution, and we can see this power and respect afforded again through the separation of consent by its medical context. Parliament enacts special protections for medical practitioners, creating a separate body of context-specific rules governing consent within medicine independent of consent within sexual activity (*R. v. J.A.* 2011, at para. 55). In this way, the judiciary is affirming the power held by the medical institution and prioritizing determinations of consent made by those institutions over the individual. It validates and situates that realm as independent from others and worthy of separate legislative considerations.

[7] The Crown references their website (uwhealth.org) within their arguments, found at para. 23 in the case (*R. v. A.(J.)* 2008).
[8] This website is no longer accessible.

Possible Critiques

It might be said that using Foucault to consider discourse and power through law is problematic. Foucault (1976, p. 90) states that, in understanding the regulation of sex, it is important to "rid ourselves of a juridical and negative representation of power, and cease to conceive of it in terms of law, prohibition, liberty, and sovereignty." Many scholars have understood this concept within his work as an 'expulsion thesis,' an understanding that Foucault made the conscious choice to actively exclude, or fail to properly theorize, law. His relative inattention to law was not simply inattention. Golder and Fitzpatrick (2009, p. 33) argue that Foucault implied interrelations of "legal, disciplinary and governmental strategies" in his work, and that law then becomes part of the wider dispersal of governmental sites, functioning as a part of the social body. With this implication in mind, I believe it is necessary to consider the law as a unique institutional sphere that is both disciplinary and governmental. Simon (2006) notes that all governance, whether public or private, requires a structure of legislative authority. Here, the exercise of power is to guide the possibility of social conduct and putting in order the possible outcomes of conduct (Frauley, 2007). However there are very real disciplinary consequences to violating the law, which is overlooked by most of the feminist legal analyses of *R. v. J.A.*

The current legal interpretation of unconscious sex now will occasion penal violence and carceral responses. "J.A. was sentenced to eighteen months in jail, registered as a sex offender, and forced to provide a DNA sample — all despite K.D.'s protests and pleas for leniency at the sentencing hearing" (Khan, 2016, p. 1419). The legal system brings with it disciplinary consequences, even as it acts to label deviance and restrict social conduct. The feminist commentary I make reference to was thoroughly critiqued in Khan's (2016) work "Take My Breath Away: Competing Contexts Between Domestic Violence, Kink and The Criminal Justice System in R. v. J.A.," and I see limited value in echoing her assessment of past feminist scholarship here. However, this work has received, and is open to, critique suggesting that it ignores the very real threat posed by

intimate partner violence, as well as critique that it ignores the favourable outcome of the court and the consequences it imposed in light of gender-based violence. Khan (2016) notes that risks of gender-based violence occur in contexts outside of BDSM and consensual choking practices, and uses the example of temporal periods where female college freshmen experience an increased risk of sexual violence. Here, the choice to highlight risks expressed through non-normative sexual conduct should be seen as a political choice (Douglas, 1992), and not representative of a legal system striving to provide justice in light of systemic gender-based sexual violence.

Final Thoughts

To conclude, the representation of justice through judicial verdicts in many ways misses the mark of systemic power imbalances and ignores carceral politics at play. The carceral politics advanced in *R. v. J.A.* not only privileged the criminal justice system as an instrument of truth, but resulted in scholarship that upheld this verdict as a movement towards gender justice (Khan, 2016). More legal scholarship should make the move to analyze case law as part of an ongoing discursive process, requiring deeper engagement with lower court rulings and the knowledge that is used in judging, governing, and disciplining. Legal scholarship that is interested in exploring representations of justice should be wary of relying solely on written judgements without interrogating the sociopolitical context from which these judgements were written. By examining discourse that underlies and is embodied through case law, we can move socio-legal and criminological scholarship towards a clearer, more critical representation of how our court systems uphold current power relationships while, on the surface, claiming to address and remedy social injustice.

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