JAKE AND JOSIE GET DRUNK AND HOOK UP: AN EXPLORATION OF MUTUAL INTOXICATION AND SEXUAL ASSAULT

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In R. v. Daviault, *the Supreme Court of Canada recognized a defence of extreme intoxication to general intent offences, including sexual assault. In the aftermath of* Daviault, *Parliament swiftly enacted section 33.1 of the* Criminal Code. *While the lower courts are divided on the constitutionality of section 33.1, its operation precludes a defence of extreme intoxication for some general intent offences. Thus, intoxication can prevent the complainant from giving valid consent, but cannot prevent the accused from forming the necessary intent. How should criminal liability be determined where two individuals become voluntarily intoxicated to the point of incapacity and engage in sex? In theory, the criminal law is committed to the protection of the bodily integrity of all individuals and to the punishment of only the morally blameworthy. However, this article argues that the law's treatment of mutual voluntary intoxication violates these core principles of our justice system.*

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I. THE PROBLEM

In 2008, the Campus Assault Resource Education Support Coalition at the Coastal Carolina University produced a poster aimed at educating students about sexual assault. In particular, the poster highlighted the inability to give consent while intoxicated. It featured two characters, Jake and Josie, and the following stark message:

JAKE was DRUNK.
JOSIE was DRUNK.
JAKE and JOSIE HOOKED UP.
JOSIE COULD NOT CONSENT.
The next day JAKE was charged with RAPE.
A woman who is intoxicated cannot give her legal consent for sex,
so proceeding under these circumstances is a crime.
It only takes a single night to ruin your life.
Think About It! Be responsible.[1]

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1 Samantha Rogers, "How This School's Old Anti-Rape Poster Sparked New Controversy," *The Daily Dot* (17 July 2015), online: <https://www.dailydot.com/irl/anti-rape-poster-reddit-conversations/>.

In the summer of 2015, this poster was discussed on the popular social media sites, Reddit and Twitter. Some users argued that the implication that only Jake was criminally liable was problematic.[2]

A similar sentiment has been echoed in other discussions of intoxication and sexual assault in the popular press. Conservative commentator, James Taranto, writing in the *Wall Street Journal*, argues:

> If two drunk drivers are in a collision, one doesn't determine fault on the basis of demographic details such as each driver's sex. But when two drunken college students "collide," the male one is almost always presumed to be at fault. His diminished capacity owing to alcohol is not a mitigating factor, but *her* diminished capacity is an aggravating factor for *him*.[3]

Similarly, California defence attorney Vanessa Place argues in her book, *The Guilt Project: Rape, Morality, and Law*, that:

> Demonstrating the anomalous situation in which two people, equally loaded, agree to have sex, and one of the two is legally relieved of the effect of her consent by virtue of her voluntary intoxication, whereas the other is fully responsible for the effect of both parties' agreement. At the risk of sounding ungrateful, there's no feminist purpose served by allowing only one side full agency, even as that agency is temporarily impaired. Sauced goose should also be sauce for the gander—shouldn't it?[4]

These critics argue that in its application, shaped as it is by societal beliefs, the law holds men responsible for their drunken conduct, while absolving women of responsibility.

In response to this line of criticism, others argue that this amounts to a form of victim-blaming. They argue that this image of rapist and victim in symmetrical positions is a mischaracterization. Instead, they argue that alcohol is a weapon employed by perpetrators in a calculated decision to target their victims.[5]

This conceptualization of rapists may hold true in some — possibly the majority of — cases. It also provides a clear basis for the attribution of moral blameworthiness to the accused's conduct. Their conduct — in particular, the decision to commit a criminal act — is voluntary, satisfying the general common law requirement.[6] However, it is unclear that we

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2 *Ibid*.

3 James Taranto, "Drunkenness and Double Standards: A Balanced Look at College Sex Offences," *The Wall Street Journal* (10 February 2014), online: <www.wsj.com/articles/SB10001424052702304558804579374844067975558> [emphasis added].

4 Vanessa Place, *The Guilt Project: Rape, Morality, and Law* (New York: Other Press, 2010) at 140 [footnotes omitted].

5 See e.g. Tara Culp-Ressler, "Wall Street Journal Columnist: Rape Victims are Just as Guilty as Rapists if They're Both Drunk," *Think Progress* (11 February 2014), online: <https://thinkprogress.org/wall-street-journal-columnist-rape-victims-are-just-as-guilty-as-rapists-if-theyre-both-drunk-f2b4f3695596>. See also David Lisak & Paul M Miller, "Repeat Rape and Multiple Offending Among Undetected Rapists" (2002) 17:1 Violence & Victims 73.

6 Susan Dimock, "What are Intoxicated Offenders Responsible for? The 'Intoxication Defense' Re-Examined" (2011) 5:1 Criminal L & Philosophy 1 at 6.

can dismiss the possibility of a drunken sexual encounter where the accused did not intend to engage in sexual activity.[7]

Consider an anecdote reported by the *New York Times* in a story on bystander intervention programs.[8] The intervener, Matt Martel, describes a situation that arose between his friend and an intoxicated woman after a college party. While he doesn't explicitly indicate that his friend had been drinking, this seems likely as they had both attended the party.[9]

Martel describes the situation thus: "The two of them were touching, cuddling, it was obvious she was down for whatever.… She'd lost her inhibitions to the point that it really seemed like a good idea for her to go home with this guy she hardly knew … I said, 'Dude, come on, she's hammered.'"[10] Martel intervened, stopping the situation from progressing further. While we don't have enough information to determinatively assess their legal capacity to consent, it seems quite possible that the individuals in this anecdote both lacked the capacity to consent.[11]

Such a scenario — where two intoxicated individuals engage in apparently consensual sexual activity — plays out on campuses, in bars, and elsewhere across Canada. In at least some of these encounters, both participating individuals lack the legal capacity to consent. Individually, their sexual activity would then constitute the act of sexual assault against each other. On what principled basis can we distinguish the actions of accused and complainant in such cases of mutual voluntary intoxication?

This article proposes to examine the question of how the law should address this situation — where two people engage in sexual touching, while both are legally incapable of consenting, when both signal consent. That is, when "yes" actually means "no" for both parties, because they lack the capacity to give legally valid consent due to their consumption of alcohol. Is the current approach to this issue consistent with fundamental principles of criminal justice? This article will proceed by first motivating this issue with reference to relevant statistical information. It will then outline the law around sexual assault in Canada, focusing in particular on intoxication, capacity, and section 33.1 of the *Criminal Code*.[12] Finally, it will examine the philosophical debate around intoxication and consent to sex, providing principled recommendations for amendment to the criminal law.

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7 The idea that the sex offender is archetypally a repeat predator plays into their characterization as an other — unlike most of us who could never commit an offence — a monster in our midst. For a discussion of constructions of sex offenders within popular culture, see Chrysanthi S Leon, *Sex Fiends, Perverts, and Pedophiles: Understanding Sex Crime Policy in America* (New York: New York University Press, 2011) at 14–24.

8 Michael Winerip, "Stepping Up to Stop Sexual Assault," *The New York Times* (7 February 2014), online: <https://www.nytimes.com/2014/02/09/education/edlife/stepping-up-to-stop-sexual-assault.html>.

9 In most alcohol-related sexual assault cases, both the complainant and accused are drinking. See Antonia Abbey, "Alcohol-Related Sexual Assault: A Common Problem Among College Students" (2002) 14 J Studies on Alcohol Supplement 118 [Abbey, "Alcohol-Related Sexual Assault"].

10 Winerip, *supra* note 8.

11 The Canadian standard for capacity to consent is an inquiry into whether the complainant had an operating mind. This is discussed at Part IV, below.

12 RSC 1985, c C-46.

II. THE SCOPE OF THE PROBLEM

Alcohol consumption is widespread in Canadian society. Among Canadians in 2012, 78.4 percent reported consuming alcohol in the past year.[13] Men (82.7 percent) are more likely to report consuming alcohol in the past year than women (74.4 percent).[14] While youth drinking has declined in prevalence since 2004,[15] and youth are less likely to report drinking in the past year,[16] certain alcohol consumption patterns are more prevalent for youth than for older adults.[17]

In 2011, Canada introduced the Low-Risk Alcohol Drinking Guidelines (LRDG). Low-Risk Drinking Guideline 2 deals with acute drinking practices, suggesting that "[t]hose who drink within this guideline do so by drinking no more than 3 drinks (for women) or 4 drinks (for men) on any single occasion. Plan to drink in a safe environment. Stay within the weekly limits outlined" in Guideline 1."[18] The weekly limits in Guideline 1 (chronic drinking) are 10 drinks for women and 15 drinks for men.[19]

Men and youth are more likely to engage in risky drinking behaviour. With respect to acute drinking, 17.9 percent of youth drinkers exceeded the amount set out in Guideline 2 as compared to 11.9 percent of drinkers 25 and older.[20] Men are also more likely than women to engage in excessive alcohol consumption. 15.8 percent of male drinkers exceed the quantity set out in Guideline 2, while only 9.7 percent of female drinkers exceed their threshold in this guideline.[21] Thus, men and youth are more likely to engage in excessive acute alcohol consumption.

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13 Health Canada, "Canadian Alcohol and Drug Use Monitoring Survey" (Health Canada, 8 April 2014), online: Health Canada <www.hc-sc.gc.ca/hc-ps/drugs-drogues/stat/_2012/summary-sommaire-eng.php> [Health Canada, "2012 Survey"].

14 *Ibid*.

15 The 2004 Canadian Addiction Survey found that 82.9 percent of youth (aged 15–24) had consumed alcohol in the past year: Health Canada, "Table 9: Prevalence of Alcohol Use and Exceeding Low-Risk Drinking Guidelines, by Age, CAS 2004 and CADVMS 2008-2012," *Canadian Alcohol and Drug Use Monitoring Survey* (2012), online: <www.hc-sc.gc.ca/hc-ps/drugs-drogues/stat/_2012/tables–tableaux-eng. php#t9> [Health Canada, "Table 9"]). The "2012 Survey," *supra* note 13 found that 70.0 percent had consumed alcohol in the previous year.

16 In 2012, the rate of past-year alcohol consumption was 70 percent for youth (15-24 years old) and 80 percent for those aged 25 and older: see Health Canada, "Table 9," *ibid*.

17 Health Canada, "2012 Survey," *supra* note 13.

18 *Ibid* [footnotes omitted].

19 *Ibid*. Some scholars, such as Janine Benedet, argue that we should be more concerned with intoxicated women than men, as women tend to have a lower average alcohol tolerance than men. This augments power imbalances between the two. Benedet writes:

> However, so long as the incapacity threshold remains high, courts need to consider how intoxication affects the voluntariness of consent and the balance of power between the parties. In most of these cases, the accused man is much less intoxicated than the complainant. Indeed, advertising and social pressure for young women to keep up with men drink for drink ignore the fact that women are usually smaller than men and that their bodies metabolize alcohol at different rates. Where there is a considerable disparity in the level of intoxication of the parties, it augments the imbalance of power between them.

Janine Benedet, "The Sexual Assault of Intoxicated Women," (2010) 22:2 CJWL 435 at 461. However, the problem of difference in average alcohol tolerance is remedied by the different standards for alcohol consumption between the genders. That is, a man needs to consume more alcohol in order to "binge drink." As we will see, men are more likely than women to exceed even their higher threshold for alcohol consumption. This also does not address the central question of this essay, which presumes, *ex ante*, that both parties lack the legal capacity to consent.

20 Health Canada, "2012 Survey," *supra* note 13.

21 *Ibid*.

Alcohol consumption is related to sexual assault.[22] Research suggests that a significant fraction of sexual assaults involve alcohol consumption.[23] In most alcohol-facilitated sexual assaults, both the complainant and the alleged perpetrator are drinking.[24]

While in the archetypal sexual assault, the complainant is female and the perpetrator is male, the criminal law protects both men and women. There is an increasing awareness that men are the victims of sexual assault.[25] In fact, one study of alcohol-related activities among post-secondary students in British Columbia found that 9.3 percent of males and 7.2 percent of females reported being the victim of sexual assault while drinking.[26]

Given that most alcohol-facilitated sexual assaults involve both parties drinking and that the criminal law provides equal protection to both men and women, a clear delineation of criminal liability and intoxication is essential.

III. SEXUAL ASSAULT IN CANADIAN LAW

Section 271 of the *Criminal Code* makes sexual assault a hybrid criminal offence, punishable as an indictable or summary conviction offence. Specifically, the section provides:

> Everyone who commits a sexual assault is guilty of
>
> (a) an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or
>
> (b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.[27]

Sexual assault is characterized as an assault which violates the sexual integrity of the complainant and is of a sexual nature. In *R. v. Ewanchuk*, the Supreme Court of Canada wrote: "The offence is comprised of an assault within any one of the definitions in s. 265(1) of the [*Criminal Code*], which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated."[28]

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22 See e.g. Robert Nash Parker & Kevin J McCaffree, *Alcohol and Violence: The Nature of the Relationship and the Promise of Prevention* (Plymouth, UK: Lexington Books, 2013); Benedet, *supra* note 19; Antonia Abbey et al, "Alcohol and Sexual Assault" (2001) 25:1 Alcohol Research & Health 43 [Abbey et al, "Alcohol"].

23 Abbey et al, "Alcohol," *ibid*.

24 Abbey, "Alcohol-Related Sexual Assault," *supra* note 9.

25 See e.g. Bryana H French, Jasmine D Tilghman & Dominique A Malebranche, "Sexual Coercion Context and Psychosocial Correlates Among Diverse Males" (2015) 16:1 Psychology Men & Masculinity 42; Jessica A Turchik, "Sexual Victimization Among Male College Students: Assault Severity, Sexual Functioning, and Health Risk Behaviours" (2012) 13:3 Psychology Men & Masculinity 243.

26 Amanda V McCormick et al, *Binge Drinking Among Post-Secondary Students in British Columbia* (British Columbia Centre for Social Responsibility, 2007) at iii, 31.

27 *Criminal Code*, *supra* note 12, s 271.

28 *R v Ewanchuk*, [1999] 1 SCR 330 at para 24 [*Ewanchuk*].

Section 265(1) provides that the accused commits an assault where:

> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
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> (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.[29]

Sexual assault, then, is the application of force without consent in sexual circumstances, which violate the sexual integrity of the complainant.

The Supreme Court identified the elements of sexual assault in *Ewanchuk*. The *actus reus* is established by demonstrating three elements: (1) touching, (2) the sexual nature of the touching, and (3) the absence of consent of the complainant.[30] The first two elements of the *actus reus* are objective. The Crown need only prove that the actions were voluntary.[31] The sexual nature of the action need not be intended by the accused; if it is objectively sexual in nature, that will suffice. The accused's intention is a factor in this determination, but is not determinative.[32] The third element — the absence of consent — is dependent on the subjective state of mind of the complainant with respect to the touching at the time it happened. That is, the subjective, internal state of mind of the complainant at the time of the touching is wholly determinative of whether there was consent.[33] Finally, "[t]here is no defence of implied consent to sexual assault in Canadian law."[34]

As sexual assault is a form of assault, there must be an application of force without the consent of the complainant. However, the courts have clearly indicated that there is no minimum threshold of violence required to constitute the force. Justice L'Heureux-Dubé, in a concurring judgment in *R. v. Cuerrier*, wrote that "[f]orce can include any touching, no matter the degree of strength or power applied, and therefore is not only those physical acts designed to maim or cause injury."[35] Similarly, the Ontario Court of Appeal held:

> The "force" required for an assault may be no more than a touching of the person of the complainant in circumstances which interfere with the bodily integrity of the complainant. In the context of the definition of assault, "force" does not necessarily connote some minimum level of violence or any animus towards the complainant by the perpetrator.[36]

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29 *Criminal Code*, *supra* note 12, s 265(1).
30 *Ewanchuk*, *supra* note 28 at para 25.
31 *Ibid*.
32 *R v Litchfield*, [1993] 4 SCR 333 at 344, citing *R v Chase*, [1987] 2 SCR 293 at 302.
33 *Ewanchuk*, *supra* note 28 at paras 26–27.
34 *Ibid* at para 31.
35 [1998] 2 SCR 371 at para 10.
36 *R v A(Z)* (2000), 137 OAC 385 at para 6 (CA).

It is thus clear from the case law that the required non-consensual application of force to constitute an assault under section 265(1)(a) can be satisfied by any touching which interferes with the bodily integrity of the complainant.[37]

It is also worth briefly considering what is meant by "touching," as this is an element of sexual assault identified by *Ewanchuk*. It remains open to the courts to convict for sexual assault where the accused did not touch the complainant in some circumstances.[38] For example, in one case, a teacher would beckon his young students to perform oral sex or masturbate him. The teacher was convicted of sexual assault on the basis that his acts and gestures constituted a threat — not merely an invitation — to violate the bodily integrity of the complainants, and that this threat, in combination with his present ability, met the criteria[39] for assault.[40]

However, where the accused does not use, attempt or threaten force, there is no assault.[41] In *R. v. Palinker*, the accused extorted the complainant to touch the accused sexually.[42] While he was convicted of two other offences, the accused was acquitted of sexual assault, because he had blackmailed the complainant to touch him but was not found to have touched — that is, applied force to — her. As the judge wrote: "In order to commit an assault, a person must apply force to another person. That would not be accomplished by Ms. O.L. touching Mr. Palinker."[43] Therefore, it is clear that there must be some application of force to constitute an assault (or a sexual assault).[44]

Sexual assault is a general intent offence; only the basic intention to touch is required.[45] However, only non-consensual touching is criminal; therefore, the morally innocent — those with an honest but mistaken belief in consent — should not be captured by the criminal law.[46] Therefore, the *mens rea* of the offence of sexual assault is established through two elements: (1) the intention to touch the victim; and (2) knowledge of, or wilful or reckless blindness to, the absence of consent by the victim.[47] In order to rely upon mistaken belief in consent as a defence there must be evidence to show that the accused "believed that the complainant communicated consent to engage in the sexual activity in question."[48] It is not sufficient for the accused merely to mistakenly believe that the complainant in her mind

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37 See also *R v L(S)*, 2013 ONCA 176, 300 CCC (3d) 100 at para 35.

38 *Ewanchuk*, *supra* note 27 at paras 23–25.

39 The current legislative provision can be found in the *Criminal Code*, *supra* note 12, s 265 (1)(b): "[H]e attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose." At the time of the offence, it was 244(1)(b) of the *Criminal Code*.

40 *R v Cadden* (1989), 48 CCC (3d) 122 at 128 (BCCA).

41 Prohibitions can be found on the direct or indirect use of force: *Criminal Code*, *supra* note 12, s 265(1)(a); the attempt or threat of force (paired with present ability to use force) (*ibid*, s 265(1)(b)). The prohibition on accosting, impeding or begging while openly carrying a weapon (*ibid*, s 265(1)(c)) is surely intended to protect someone from being subject to an implicit threat of force.

42 2008 CanLII 15776 (Ont Sup Ct) [*Palinker*].

43 *Ibid* at para 97.

44 Consider, however *R v A(Z)*, *supra* note 36. While the case stands for the proposition that there is no minimal level of violence required to constitute the application of force required to constitute an assault (at para 6), the facts of the case seem similar to those of *Palinker*, *ibid*. The accused allegedly promised the complainant gum to induce her to perform oral sex on him (the complainant was incapable of consenting due to her age (*R v A(Z)*, *ibid* at para 1). Like in *Palinker*, the complainant was induced to sexually touch the accused.

45 *Ewanchuk*, *supra* note 28 at para 41.

46 *Ibid* at para 42.

47 *Ibid*.

48 *Ibid* at para 46 [emphasis omitted].

consented, he must mistakenly believe that she communicated consent. Consent can be communicated through words or actions.[49] In order to raise the defence of mistaken belief in consent, the accused must establish that there is an air of reality to it.[50]

However, section 273.2 of the *Criminal Code* limits the defence of mistaken belief in consent. In particular, a mistaken belief in consent is no defence where "the accused's belief arose from the accused's … self-induced intoxication."[51] This statutory bar precludes the consideration of the defence of honest but mistaken belief in consent where such a belief arose due to the accused's state of intoxication.[52] It often acts in combination with the other requirements for the defence enumerated in section 273.2; that is, the accused must not be reckless or wilfully blind and must take all reasonable steps in the circumstances in order to rely upon the defence.[53] Thus the intoxicated accused may be precluded from availing himself of the defence of honest but mistaken belief as to consent.

IV. INTOXICATION AND INCAPACITY

In order to be legally valid, consent must be voluntarily given.[54] Section 273.1(2)(b) precludes consent from being obtained where "the complainant is incapable of consenting to the activity."[55] A complainant can be incapable of granting consent for a number of reasons, including age, mental disability, and unconsciousness. Voluntary or involuntary intoxication is another reason for which a complainant may be incapable of granting legal consent.

The precise level of intoxication at which a complainant loses the capacity to consent is not entirely clear. Benedet, for example, writes: "Where the complainant is not unconscious, but merely drunk or high, courts have struggled to articulate a threshold for incapacity short of total non-responsiveness."[56] It is clear that drunkenness alone does not necessarily lead to incapacity.[57] Nor can the loss of inhibitions, imprudent decision-making, or memory loss resulting from self-induced intoxication be equated with an inability to give legally valid consent.[58] However, it is clear that at some stage of intoxication, short of unconsciousness, the complainant loses the ability to offer legal consent.[59]

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49 *Ibid* at paras 46–47.
50 *R v M(O)* (1999), 138 CCC (3d) 476 at paras 9–10 (Ont CA), aff'd 2000 SCC 49, [2000] 2 SCR 594; *R v Davis*, [1999] 3 SCR 759 at paras 81–83.
51 *Criminal Code*, *supra* note 12, s 273.2(a).
52 See *R v Cummer (SDL)*, 2014 MBQB 62, 304 Man R (2d) 152; *R v W (CG)*, 2011 BCSC 197, 84 CR (6th) 188; *R v Morningchild (DLT)*, 2004 SKPC 39, 245 Sask R 295; *R v S(PW)*, 1999 CarswellYukon 101 (WL Can) (Terr Ct).
53 *Ibid*; *Criminal Code*, *supra* note 12, s 273.2.
54 *Criminal Code*, *ibid*, s 273.1(1).
55 *Ibid*, s 273.1(2)(b).
56 Benedet, *supra* note 19 at 442.
57 *R v Jensen* (1996), 106 CCC (3d) 430 at 437–38 (Ont CA).
58 *R v Merritt*, 2004 CarswellOnt 1214 (WL Can) at para 55 (Sup Ct J) [*Merritt*].
59 *R v Sarson (LW)* (1992), 115 NSR (2d) 445 at paras 18–19 (SC (AD)).

In *R. v. Daigle*, the Supreme Court upheld the ruling of the Quebec Court of Appeal.[60] The Court of Appeal in *Daigle* quoted its earlier judgment in *R. v. Saint-Laurent*.[61] In *Saint-Laurent*, Justice Fish[62] wrote, in part: "Nor is the consent requirement satisfied if, because of his or her mental state, one of the parties is incapable of understanding the sexual nature of the act, or of realizing that he or she may choose to decline participation."[63] Similarly, in *R. v. Patriquin*, the Nova Scotia Court of Appeal held that the complainant's ability to consent could be understood "in terms of not appreciating the difference between right and wrong and the nature, quality and import of what she was doing, and in terms of not having an operating mind."[64]

Putting aside the difficulties — both practical[65] and evidentiary[66] — of using the tests as outlined by the courts in *Daigle* and *Patriquin*, it is clear that there is a level of intoxication—short of unconsciousness—at which an individual can no longer give valid consent.[67] In order to give legally valid consent, an individual must be able to make moral decisions and understand the nature of the activity in which she is participating.[68]

However, this test appears to be rather difficult for a prospective sexual partner to apply in practice. How is such an individual supposed to identify whether their prospective partner is able to make a moral decision or understand the nature of the activity? This becomes even more challenging when the individual is intoxicated. Yet, as noted above, section 273.2 acts to limit the mistaken belief defence where such a belief is grounded upon the accused's intoxication.

It is also worth noting that an individual must be consenting at the time the sexual touching occurred.[69] Their views before and after the act are not relevant. Thus, counter-intuitively, an individual who wished to have sex while intoxicated, who became intoxicated for this purpose, and was happy with sexual activity once they became sober again, could

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60 [1998] 1 SCR 1220 [*Daigle* SCC].

61 *R v Saint-Laurent* (1993), 90 CCC (3d) 291 (QC CA) [*Saint-Laurent*], leave to appeal to SCC refused, 23982 (5 May 1994).

62 Who was then of the Quebec Court of Appeal.

63 *R v Daigle* (1997), 127 CCC (3d) 130 at 137 (Qc CA) [*Daigle* CA], citing *Saint-Laurent*, *supra* note 61 at 311.

64 2004 NSCA 27, 221 NSR (2d) 370 at para 20 [*Patriquin*].

65 By practical, I mean the difficulty for a prospective sexual partner (who is potentially intoxicated themselves) in assessing whether their potential partner has the capacity to give consent.

66 By evidentiary, I mean the difficulty in establishing beyond a reasonable doubt, whether the complainant was capable of consenting at the relevant time (see, for example: *R v Quintanilla (MV)*, 1999 ABQB 769, 251 AR 59), particularly given that excessive alcohol consumption can cause memory loss, and this does not necessarily mean that the complainant was incapable of consenting (see *Merritt*, *supra* note 58).

67 Some scholars have argued that the courts have been reluctant to hold that the complainant was incapable of giving consent in cases where the complainant was not unconscious for at least part of the sexual encounter. For example, Benedet writes: "A survey of recent decisions on incapacity and intoxication shows that judges are generally willing to find incapacity to consent in the face of voluntary intoxication only where the complainant was unconscious or asleep during much of the sexual activity and especially where she was intoxicated or asleep when it commenced": *supra* note 19 at 443. However, this statement ignores cases such as *Patriquin*, *supra* note 64, where the Courts have held that a complainant who was conscious throughout the sexual interaction did lack the capacity to consent. In *Patriquin*, the complainant was performing oral sex on another individual at the time of the sexual assault by the accused (*ibid* at para 5). See also *R v R(J)* (2006), 40 CR (6th) 97 (Ont Sup Ct J).

68 See *Daigle* SCC, *supra* note 60; *Daigle* CA, *supra* note 63 at 137; *Patriquin*, *supra* note 64 at paras 10, 20.

69 *R v J(A)*, 2011 SCC 28, [2011] 2 SCR 440 [*J(A)*]. In *J(A)*, the explicit prior consent of the complainant was not legally sufficient where they lacked the capacity to consent (due to unconsciousness) at the time the sexual touching occurred (*ibid* at para 66). Consent to sexual acts requires an operating mind at the time the touching occurs (*ibid*).

still not consent in law, if they lacked the capacity due to intoxication, at the time the actual sex act took place. However, such an individual would likely never file a criminal complaint, since, *post facto*, they were happy with the touching which occurred. Therefore, while the criminal law could potentially attach liability to the actions of the complainant's partner, no consequences are likely to follow. As a result, the application of the criminal law is determined, to a significant degree, by the perceptions of potential complainants and the social forces which shape those perceptions.[70]

V. *R. v. DAVIAULT*

In *R. v. Daviault*, the Supreme Court of Canada was called upon to re-examine the role of self-induced intoxication in ascribing responsibility for general intent offences.[71] The controversial judgment would have significant implications for Canadian jurisprudence. The facts in *Daviault*, as the Court itself emphasized, were extremely unusual. The complainant in the case was a 65-year-old woman who was confined to a wheelchair due to her partial paralysis. She knew the accused, who was a chronic alcoholic, through his wife. At the complainant's request, the accused brought a bottle of brandy to her home one evening. The complainant drank a small amount of brandy and subsequently fell asleep in her wheelchair. The accused had been drinking at a bar during the day, consuming seven or eight bottles of beer. He proceeded to finish the bottle of brandy while the complainant slept. The complainant awoke during the night in order to go to the bathroom. However, the accused grabbed her wheelchair and forced her to the bedroom, where he sexually assaulted her. The accused testified that he had no memory of the events after he arrived at the complainant's home and had a glass of brandy. He did not recall sexually assaulting the complainant.[72]

The defence called a pharmacologist to give expert evidence in support of the accused's testimony. Based on the amount of alcohol the accused had consumed, the pharmacologist estimated the blood alcohol level in the accused's system. The pharmacologist testified that the accused's chronic alcoholism made him less susceptible to the effects of alcohol. A non-alcoholic could suffer death or a coma as a result of the blood to alcohol ratio of the accused at the time of the offence.[73] As a result of the blood alcohol content, the accused

> might suffer an episode of "l'amnésie-automatisme", also known as a "blackout". In such a state the individual loses contact with reality and the brain is temporarily dissociated from normal functioning. The individual has no awareness of his actions when he is in such a state and will likely have no memory of them the next day.[74]

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70 For example, there are gendered expectations with respect to victimhood. Men are perceived as less likely to be victims of crime. As Sandra Walklate writes, "[m]uch victimological work implicitly leaves us with the impression that victims are not likely to be male. It renders female victimization visible and male victimization invisible": Sandra Walklate, *Gender, Crime and Criminal Justice*, 2nd ed (Portland: Willan, 2004) at 77. See also Nina M Reich, "Towards a Rearticulation of Women-as-Victims: A Thematic Analysis of the Construction of Women's Identities Surrounding Gendered Violence" (2002) 50:3 & 4 Communication Q 292. Arguably, this is particularly true for sex crimes. Other identities and social circumstances have a similar impact on who is likely to bring forward a criminal complaint. Issues of both self-identification (as a victim of crime) and social recognition (by police, prosecutors and triers of fact) lead to a selective enforcement of the criminal law.

71 [1994] 3 SCR 63 [*Daviault*].

72 *Ibid* at 104–105.

73 *Ibid* at 105.

74 *Ibid*.

Thus the defence was able to establish that the accused was extremely intoxicated at the time he committed the alleged offence. At trial, the accused was acquitted because the trial judge was left with a reasonable doubt whether he possessed the necessary *mens rea* for sexual assault due to his extreme level of intoxication.[75] The Court of Appeal overturned the trial verdict, because the defence of intoxication was not available for general intent offences, like sexual assault.[76] This led to the case's consideration by the Supreme Court.

Prior to the Supreme Court's ruling in *Daviault*, the rule established in *Leary v. The Queen*[77] had held that voluntary intoxication could never negate the *mens rea* of a general intent offence, like sexual assault. The intentional act of becoming intoxicated is substituted for the intent to commit the general intent offence. Voluntary intoxication could only serve as a defence, by negating the *mens rea* requirement, for specific intent offences.[78] It was on this basis that the Quebec Court of Appeal had overturned the verdict in *Daviault*.[79]

However, in a 6-3 judgment, the Supreme Court in *Daviault* overturned the *Leary* rule and instead held that the existence of an extreme voluntary intoxication defence was required for general intent offences. Specifically, the majority held that the rigid application of the *Leary* rule — preventing a defence of extreme intoxication — was a violation of the *Charter* rights of the accused under sections 7 and 11(d).[80]

The majority emphasized the importance of the *mens rea* element of the offence. They wrote: "The mental aspect of an offence, or *mens rea*, has long been recognized as an integral part of crime. The concept is fundamental to our criminal law."[81] It is essential, in the majority's view, that the accused voluntarily engage in the morally blameworthy conduct. They rejected the substitution of the intention to drink alcohol for the intention to commit sexual assault; as the majority noted, drinking alcohol does not lead inexorably towards the commission of sexual assault.[82]

Similarly, the majority held that a strict application of the *Leary* rule offends section 11(d) of the *Charter*, the presumption of innocence. A state of such extreme intoxication, akin to automatism,[83] leaves the voluntariness of the conduct in doubt. As the judgment noted, the voluntariness of the conduct is an essential element of the crime and the *Leary* rule would allow a finding of guilt where there is a reasonable doubt with respect to this element. They wrote, "it was found that s. 11(d) would be infringed in those situations where an accused could be convicted despite the existence of reasonable doubt pertaining to one of the essential elements of the offence."[84]

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75 *Ibid* at 106–107.
76 *Ibid* at 107–108.
77 [1978] 1 SCR 29 [*Leary*].
78 *Ibid* at 50–53.
79 See *R v Daviault* (1993), 80 CCC (3d) 175 at 188–89 (Qc CA).
80 *Canadian Charter of Rights and Freedoms*, ss 7, 11(d), Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]; *Daviault*, *supra* note 71 at 91–92.
81 *Daviault*, *ibid* at 89.
82 *Ibid* at 89–93.
83 Some authors argue that alcohol consumption cannot result in such a state. See e.g. Harold Kalant, "Intoxicated Automatism: Legal Concept vs Scientific Evidence" (1996) 23:4 Contemporary Drug Problems 631.
84 *Daviault*, *supra* note 71 at 90.

Instead of the strict application of the *Leary* rule, the majority carved out a narrow exception for the defence of extreme voluntary intoxication. This defence is limited to "rare occasions" and is difficult to make out.[85] To establish the defence, the accused must prove on a balance of probabilities that they were in a state of such extreme intoxication as to be akin to automatism or insanity. Writing for the majority, Justice Cory held: "The phrase refers to a person so drunk that he is an automaton. As such he may be capable of voluntary acts such as moving his arms and legs but is quite incapable of forming the most basic or simple intent required to perform the act prohibited by a general intent offence."[86]

This defence will "undoubtedly require" expert testimony to establish the level of intoxication.[87] Thus, the defence has three salient features: (1) a level of extreme intoxication akin to automatism or insanity, (2) the transfer of the onus to the accused to prove on a balance of probabilities and (3) expert evidence to establish the level of intoxication of the accused.[88] Some courts have subsequently held that, in extraordinary cases, expert evidence may not be required to establish an extreme intoxication defence.[89] While the defence with its reversal of onus is a prima facie violation of *Charter* rights, the majority in *Daviault* concluded that it would be saved by section 1.[90]

In contrast, the dissent would have upheld the *Leary* rule, preventing the resort to a defence of extreme intoxication for general intent offences. They argued that the general rule that the mental fault element is tied to the *actus reus* of the offence is subject to exceptions and therefore cannot be a principle of fundamental justice.[91] Instead, fundamental justice only requires that the moral culpability of the offender not be disproportionate to the gravity of the offence. As Justice Sopinka wrote in dissent, fundamental justice would be satisfied where "a blameworthy mental element be proved and that the level of blameworthiness not be disproportionate to the seriousness of the offence."[92] Thus, the dissent would be content to substitute the mental fault evidenced by the decision to become extremely intoxicated for the intention to commit sexual assault, arguing that this is not a *Charter* violation. The dissent argues that sound policy considerations support their position. In particular, they are wary of allowing prospective criminals to use alcohol to facilitate their criminal behaviour,[93] by drinking to increase their chance of acquittal.[94] Further, the dissent suggests that society must be allowed to protect itself from the harms caused by individuals who become voluntarily intoxicated: "Society is entitled to punish those who of their own free will render themselves so intoxicated as to pose a threat to other members of the community."[95]

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85 *Ibid* at 100.
86 *Ibid*.
87 *Ibid* at 103.
88 *Ibid* at 99–101.
89 *R v B(SJ)*, 2002 ABCA 143, 5 Alta LR (4th) 207 at para 42. The judge wrote: "I do not, however, read the judgment of Cory, J. to require as a condition precedent that expert evidence be called where the trial judge is of the view that there is an air of reality to the defence that the accused 'was virtually unconscious and unaware of what he was doing.'"
90 *Daviault*, *supra* note 71 at 101.
91 *Ibid* at 115–16.
92 *Ibid* at 118.
93 Susan Dimock, "Intoxication and the Act/Control/Agency Requirement" (2012) 6:3 Criminal L & Philosophy 341 (the idea of "grand schemers" at 341).
94 *Daviault*, *supra* note 71 at 114.
95 *Ibid*.

Ultimately, the Court in *Daviault* established a new defence of extreme intoxication available to those accused of general intent offences.

VI. SECTION 33.1

Unsurprisingly, the Supreme Court's decision in *Daviault* quickly caused controversy. While the evidence suggests that the *Daviault* defence had very little impact in practice — being successfully invoked only a few times — it was met with widespread condemnation.[96] In particular, the judgment was viewed as undermining women's rights and interests.[97] Drassinower and Stuart describe the public backlash thus:

> Public reaction to Daviault was swift. The Minister of Justice was reported to be "deeply troubled" by the ruling because it had "tremendous ramifications in sexual assault cases." The decision was widely condemned as unacceptable and giving the wrong message to those who drink and harm. For some, the decision seemed to signal "a licence to rape": rapists would be acquitted as long as they were drunk. By the end of June 1995, the Minister's Bill C-72 to abolish the Daviault defence to general intent crimes had quickly passed through Parliament. It remains to be seen whether the legislation will survive the inevitable Charter challenge.[98]

As noted in the quoted passage above, the government moved swiftly to enact Bill C-72, which was passed by mid-1995.[99] This government bill introduced section 33.1 of the *Criminal Code*, eliminating the *Daviault* defence of extreme intoxication for assaults or other offences which interfere with the bodily integrity of other people. Section 33.1 reads:

> (1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).
>
> (2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously

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96 Martha Drassinower & Don Stuart, "Nine Months of Judicial Application of The *Daviault* Defence" (1995) 39 CR (4th) 280 at 282–83.

97 Christopher P Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (Vancouver: UBC Press, 2004) at 32–33, 115. The Women's Legal Education and Action Fund (LEAF) did not intervene in *Daviault*.

98 Drassinower & Stuart, *supra* note 96 [footnotes omitted]. For a further discussion of public reaction and the policy debate that followed the *Daviault* judgment (including several editorial cartoons published in the wake of the decision), see Robin Room, "Drinking, Violence, Gender and Causal Attribution: A Canadian Case Study in Science, Law and Policy" (1996) 23 Contemporary Drug Problems 649.

99 Parliament explicitly justified the enactment of Bill C-72 (*Criminal Code*, *supra* note 12, s 33.1) in a lengthy preamble which made explicit reference to the vulnerability of women and children to violence. The preamble read, in part:

> WHEREAS the Parliament of Canada is gravely concerned about the incidence of violence in Canadian society;
>
> WHEREAS the Parliament of Canada recognizes that violence has a particularly disadvantaging impact on the equal participation of women and children in society and on the rights of women and children to security of the person and to the equal protection and benefit of the law as guaranteed by sections 7, 15 and 28 of the *Canadian Charter of Rights and Freedoms*;
>
> WHEREAS the Parliament of Canada recognizes that there is a close association between violence and intoxication and is concerned that self-induced intoxication may be used socially and legally to excuse violence, particularly violence against women and children.

Bill C-72, *An Act to amend the Criminal Code (self-induced intoxication)*, 1st Sess, 35th Parl, 1995, Preamble (assented to 13 July 1995), SC 1995, c 32.

> controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.
>
> (3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.[100]

Section 33.1 operates to create a statutory bar to the defence of extreme intoxication to the general intent offences of assaults (including sexual assaults) and other offences which interfere with bodily integrity. However, it remains a matter of contention whether section 33.1 is constitutionally valid.

The constitutionality of section 33.1 has been considered by the lower courts at least nine times. However, the Supreme Court of Canada and several Courts of Appeal have, thus far, declined to decide the constitutional validity of this section of the *Criminal Code*.

The nine lower courts which have considered section 33.1 are unanimous in holding that it violates sections 7 and 11(d) of the *Charter*.[101] The reasoning behind these holdings is essentially similar to the reasoning in *Daviault*. This is because, in essence, section 33.1 essentially enacts as legislation the common law rule barring a defence of extreme intoxication for general intent offences which interfere with bodily integrity. *Daviault* had revised this common law rule due to its inconsistency with the *Charter*.[102] Thus, it is unsurprising that the courts would view section 33.1 as infringing *Charter* rights.

There are at least four significant violations of central tenets of the criminal law which result from section 33.1.[103] First, section 33.1, in essence, substitutes the intention to become intoxicated for the *mens rea* of the criminal offence itself.[104] Second, section 33.1 imposes what appears to be an absolute liability upon the accused, holding him guilty even if he is able to show that he acted involuntarily. This offends "a basic tenet of our criminal law that only those who act voluntarily with the requisite intent to commit an offence should be punished by criminal sanction."[105] As Stuart writes, with respect to a conviction where the accused was intoxicated, "[t]he conviction here, despite the positive DNA match, indeed looks very much like absolute liability which the Supreme Court has so firmly decided cannot be constitutional where there is a threat to the liberty interest, even in the case of regulatory offences."[106] Third, the provision also violates the principle of contemporaneity

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100 *Criminal Code*, *supra* note 12, s 33.1.

101 *R v N(S)*, 2012 NUCJ 2, 2012 CarswellNun 3 (WL Can) at para 9 [*N(S)*]; *R v Fleming*, 2010 ONSC 8022, 2010 CarswellOnt 10662 (WL Can) at paras 18, 24, 34–35 [*Fleming*]; *R v Dow*, 2010 QCCS 4276, 261 CCC (3d) 399 at paras 113, 116 [*Dow*]; *R v Cedeno*, 2005 ONCJ 91, 195 CCC (3d) 468 at 479 [*Cedeno*]; *R v Jensen,* [2000] OJ No 4870 (QL) (Sup Ct) at paras 5–6 [*Jensen*]; *R v Dunn* (1999), 28 CR (5th) 295 at paras 21, 36 (Ont Ct J (Gen Div)) [*Dunn*]; *R v Brenton* (1999), 180 DLR (4th) 314 (NWT SC) [*Brenton*]; *R v Vickberg* (1998), 16 CR (5th) 164 at para 84 (BCSC); *R v Decaire*, [1998] OJ No 6339 (QL) at paras 7–8 (Ct J (Gen Div)) [*Decaire*].

102 *Dow*, *ibid* at para 110, citing *Brenton*, *ibid* at para 53.

103 David Paciocco, "The Legacy of *Daviault*: Part I The Constitutionality of Bill C-72" (1995) 2 Sexual Offences L Reporter 105. See also Andrea Onn, "Self-Induced Intoxication: Balancing Principles of Justice and Responsibility" (1996) 23:4 Contemporary Drug Problems 687.

104 This is in marked contrast with the Canadian law with respect to consent: consent to become intoxicated is not consent to any sexual act. Even consent to one sex act does not imply consent to any other act.

105 *Dow*, *supra* note 101 at para 108.

106 Don Stuart (2005), annotation to *Cedeno*, *supra* note 101, available in 2005 CarswellOnt 1185 (WL Can) (Ct J).

between *actus reus* and *mens rea*; that is, the accused does not possess the requisite guilty mind when the actual offence (assault) is committed. Finally, the threshold *mens rea* required by section 33.1 is likely less than the constitutional minimum *mens rea*: the objective foreseeability of consequences for conduct that is a marked departure from the norm.[107] Consequently the provision violates section 7 of the *Charter*.[108]

Similarly, section 33.1 of the *Criminal Code* has been repeatedly held to violate section 11(d) of the *Charter*. The Crown is required to prove beyond a reasonable doubt both the *actus reus* and *mens rea* of the offence in order to satisfy the presumption of innocence.[109] Section 33.1 allows an accused to be convicted even where there exists reasonable doubt as to the voluntariness of the action, an essential element of the *mens rea* and *actus reus* of the offence. Thus, section 11(d) must also be violated by this provision.[110]

While the lowers courts are in agreement that section 33.1 of the *Criminal Code* violates sections 7 and 11(d) of the *Charter*, there is disagreement whether the provision is saved by Section 1.[111] This issue has been considered five times by lower courts in Ontario (thrice in Superior Court and twice in provincial court) and once each by courts in British Columbia, Quebec, the Northwest Territories, and Nunavut. The courts in British Columbia, Quebec, and Nunavut upheld section 33.1 as saved by section 1 of the *Charter*. In four out of the five judgments in Ontario and the judgment from the Northwest Territories, the courts found that section 33.1 could not be saved by section 1. The provision was upheld as constitutional in *N(S)*, *Dow*, *Vickberg*, and *Decaire*; and was ruled unconstitutional in *Fleming*, *Cedeno*, *Jensen*, *Dunn*, and *Brenton*.[112]

In assessing the constitutional validity of the impugned provision under section 1,[113] some scholars have noted the importance of the characterization of the objective.[114] A more significant beneficial impact can be used to justify more serious infringements of *Charter* rights than a narrower, less important benefit.

For example, in upholding section 33.1, the Court in *Dow* wrote:

> Indeed, this Court considers that the goals aimed for by section 33.1, namely violence in society and accountability for crimes, are not only sufficiently important in the case at bar, but also belong to those which, "once asserted, can be simply accepted by the Court as *always* pressing and substantial in any society that purports to operate in accordance with the tenets of a free and democratic society."[115]

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107 Paciocco, *supra* note 103.
108 *Supra* notes 80, 101.
109 *Charter*, *supra* note 80, s 11(d); *Dow*, *supra* note 101 at para 114.
110 *Supra* notes 80, 101.
111 *Charter*, *supra* note 80, s 1.
112 *Supra* note 101. The Saskatchewan Court of Queen's Bench, while not directly addressing the question of the constitutional validity of section 33.1 did briefly consider the controversy in *obiter* in *R v BJT*, 2000 SKQB 572, 200 Sask R 42 at paras 27–29.
113 *R v Oakes*, [1986] 1 SCR 103. The legislative objective must be pressing and substantial. The means must be proportional, satisfying the following conditions: (1) rational connection, (2) minimal impairment, and (3) proportionality between the salutary and deleterious effects (*ibid* at 138–40).
114 Kelly Smith, "Section 33.1: Denial of the *Daviault* Defence Should be Held Constitutional" (2000) 28 CR (5th) 350 at 360–62.
115 *Dow*, *supra* note 101 at para 132, citing *R v Bryan*, 2007 SCC 12, [2007] 1 SCR 527 at para 34 [emphasis in original].

In *Dow*, the Court particularly emphasizes the role of section 33.1 in protecting women and children from violence and furthering their equality interest.[116]

Similarly, in *Vickberg*, the Court identified significant goals which the impugned section addressed:

> Clearly, the context in which this s. 1 analysis unfolds is that of the effects of intoxicated violence in Canadian society. I am in agreement with Crown Counsel that violence in society and accountability for criminal behaviour are indeed pressing and substantial concerns, concerns to which Parliament has responded by enacting s. 33.1. I accept further the evidence presented to Parliament that women and children are disproportionately represented among the victims of intoxicated violent offenders, and that s. 33.1 purports to enhance the equality interests of women and children, which too is a concern of sufficient importance to warrant this legislation. Following the decision in *Daviault*, … Canadians spoke out loudly to let law-makers know their view that intoxication, in any degree, should not provide an excuse for offenders who commit or threaten acts of violence against others. The preamble to Bill C-72 (which enacted s. 33.1) identifies Parliament's concern about violence in our society. I am persuaded that the mischief which s. 33.1 is aimed at correcting arises from pressing and substantial concerns about violence and criminal responsibility.[117]

Given the characterization of the legislative objective as being significant and far-reaching, it was substantially easier for the Courts in *Dow* and *Vickberg* (as well as *N(S)* and *Decaire*) to justify the infringement of the section 7 and 11(d) rights of the accused.[118]

In contrast, the legislative objectives were framed differently in the cases where section 33.1 was found to be unconstitutional.[119] Instead of furthering the protection, particularly of vulnerable individuals, from the significant harms of alcohol and violence, in cases where the provision was struck down, it was framed as merely removing a defence from the accused, at significant cost to the principles of fundamental justice. For example, the Court in *Dunn* writes:

> My view, as stated above in respect to society's interests, is that the legislation's real objective is significantly less "pressing and substantial" than its stated objective. I find that the real objective of the section is the removal of a defence from intoxicated automatons who have acted violently against another individual. I do not minimize the value of protecting victims nor the benefit of legislation directed at reducing intoxicated violence; but, comparing s. 33.1's limited real objective and impact to the loss of a principle of fundamental justice, I conclude that the section's objective does not warrant overriding a *Charter* right or freedom.[120]

Given the narrow framing of the benefit of section 33.1 — merely to deprive the accused of a difficult to establish defence — the Court in *Dunn* concluded that the negative impact of section 33.1 on the rights of the accused could not be justified. In Ontario, section 33.1 is currently held to be unconstitutional.[121] However, this conclusion relies upon Superior Court precedence; there has not been a Court of Appeals decision on this issue.

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116 *Dow*, *ibid* at paras 126–27.
117 *Vickberg*, *supra* note 101 at para 92 [references omitted].
118 Smith, *supra* note 114, *Dow*, *supra* note 101; *Vickberg*, *ibid*; *N(S)*, *supra* note 101; *Decore*, *supra* note 101.
119 See the text accompanying note 112.
120 *Dunn*, *supra* note 101 at para 41.
121 *Cedeno*, *supra* note 101 at 479.

In fact, the Supreme Court of Canada has now repeatedly declined opportunities to consider the constitutional validity of section 33.1 of the *Criminal Code*.[122] Notably, in *Bouchard-Lebrun*, the Supreme Court noted the question of the constitutionality of section 33.1, but declined to weigh in, writing: "But the appellant raises no arguments regarding the constitutionality of s. 33.1 [of the *Criminal Code*] which means that only the interpretation and application of that provision are in issue."[123] Without the intervention of the appellate courts, disagreement on the constitutionality of section 33.1 is likely to persist in the lower courts.

VII. AN APPLICATION OF THE LAW

Now that the current law of sexual assault and intoxication has been discussed, let us apply it to the motivating example of Jake and Josie. The example provides minimal details, but should illuminate the inconsistencies in Canadian law.

To refresh, Jake and Josie both drink heavily. They engage in intercourse. Let us assume that both Jake and Josie lack the capacity to consent as a result of their alcohol consumption. Let us assume they both token consent; that is, communicate their consent (although this consent, of course, is not legally valid). Let us assume that they engage in an activity where both can be said to be touching each other, such as mutual kissing, mutual fondling, sexual intercourse that they both actively engage in. Neither one is unconscious.

Because Jake and Josie lacked the capacity, neither one gave legally valid consent. There is a prima facie case that each of them is the victim of sexual assault under Canadian law. Josie feels violated and goes to the police to report the crime.[124] Josie becomes the complainant. Jake becomes the accused.

While legal sexual contact is symmetrical, both parties consent to each activity, the criminal law of sexual assault is decidedly asymmetrical. The *actus reus* of sexual assault is made out. Sexual touching occurred. There was no consent, because, while Josie signalled her consent, she lacked the necessary capacity.

The *mens rea* too is likely made out. Section 33.1 bars Jake from using his intoxication as a defence. If he successfully challenges the constitutionality of section 33.1, he can avail himself of the *Daviault* defence. However, it requires an extreme level of intoxication and an additional evidentiary burden, due to the shift in onus. Thus, while his ability to make decisions was severely hampered by his level of intoxication — he might have been unable to appreciate the difference between right and wrong[125] — he was able to form the minimal level of intent required for a general intent offence. He might also have had an honest belief in Josie's consent, since she seemed enthusiastic at the time. However, he is statutorily barred from relying upon this belief if it arose due to his intoxication or if he failed to take

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122 See *R v Daley*, 2007 SCC 53, [2007] 3 SCR 523; *R v Bouchard-Lebrun*, 2011 SCC 58, [2011] 3 SCR 575 [*Bouchard-Lebrun*].

123 *Bouchard-Lebrun*, *ibid* at para 28.

124 Josie went to the police, because statistically, women are more likely to report sexual assault than men. As Walklate, *supra* note 70 notes, "Rape has been studied primarily as something that men do to women" (*ibid* at 119).

125 *Patriquin*, *supra* note 64 at para 20.

reasonable steps to ascertain whether Josie consented. Given his state of intoxication, it is quite possible that Jake will be unable to rely upon his mistaken belief in consent.

Therefore, from the perspective of substantive law, Jake is likely to be found guilty of sexual assault. Jake is criminally liable for all of the events. Josie is absolved of any responsibility (due to her incapacity to consent).

An attempt may be made to justify this distinction on the basis of which party initiated the sexual contact, or which party was the sexual aggressor. If Jake initiated the sexual contact, would the state be justified in imposing a criminal sanction solely on him? Assuming he was the recipient of some sexual touching — that is, some force was applied to him, no matter how slight — then his actions, in initiating the sexual contact, cannot relieve his partner of criminal liability under a consistent application of Canadian law. In the *Ewanchuk* framework, were Jake to complain, his actions would be a non-verbal communication of his consent.[126] However, it has already been assumed *ex ante* that Jake lacked the capacity to consent at the relevant time. Therefore, his communication of his consent must not be legally valid.

Further, the accused — Jake in this case — cannot rely on a defence that he did not initiate the sexual contact, that he was not the sexual aggressor. Provided he engaged in any touching of his partner, no matter how slight, the Crown has proven the *actus reus* of the offence: sexual touching without consent.[127] The fact that the accused did not initiate sexual contact with their partner does not negate the elements of the offence.

However, we assumed symmetry in this interaction — Jake was similarly incapable of consenting to the sexual contact. As a result, Jake could file a valid criminal complaint against Josie. Thus, one possible result is that both Jake and Josie could be criminally charged. This is unlikely to occur in practice, however. Men are significantly more likely to be charged and prosecuted with sexual assault than women.[128] "[S]exual violence is something that men perpetrate against women."[129] There is an expectation that men are perpetrators and women are victims.

Beyond these expectations, the criminal process itself arguably reinforces the roles. The process of accusation and arrest is inherently dehumanizing and significantly impacts how the accused is viewed by others.[130] The labels affixed to individuals often have far-reaching impacts.[131] The categorization of the individual as suspect/accused/perpetrator makes it

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126 *Ewanchuk*, *supra* note 28 at paras 29–30.

127 *Ibid* at para 29.

128 See e.g. Abbey, "Alcohol-Related Sexual Assault," *supra* note 9 at 118; Michael Plaxton, *Implied Consent and Sexual Assault: Intimate Relationships, Autonomy and Voice* (Montreal: McGill-Queen's University Press, 2015) at 227, n 5.

129 Walklate, *supra* note 70 at 135. Walklate is referring specifically to feminist perspectives on sexual violence; however, the view that men are primarily responsible for sexual violence is well established (*ibid* at 118–43).

130 See e.g. Brian Steels, "Forever Guilty: Convict Perceptions of Pre and Post Conviction" (2009) 21:2 Current Issues in Criminal Justice 242 at 247–48.

131 See e.g. Terri A Winnick, "Another Layer of Ignominy: Beliefs About Public Views of Sex Offenders" (2008) 41:1 Sociological Focus 53. For a popular discussion of the importance of labelling on social perception, see Adam Benforado, *Unfair: The New Science of Criminal Injustice* (New York: Broadway Books, 2015) at 3–25. For a mechanism by which labelling can even impact subsequent criminality, see Jón Gunnar Bernburg, Marvin D Krohn & Craig J Rivera, "Official Labeling, Criminal Embeddedness,

difficult to conceive of them as simultaneously a victim.[132] Further, the categorization of individuals in the sexual encounter determines the questions that must be addressed and therefore investigated: (1) did the complainant consent, and (2) did the accused possess the necessary *mens rea*? Whether the accused consented (or was legally incapable of consenting) is not required by the Canadian legal analysis of sexual assault. Thus, the law, in practice, affords unequal protection to the bodily and sexual integrity of the two actors.

VIII. INTENT, CONSENT, AND INTOXICATION

In its current state, Canadian law around mutual voluntary intoxication and sexual assault is inconsistent with the fundamental tenets of our justice system: it cannot be reconciled with our stated commitment to protect the sexual integrity of both parties to a sexual encounter. Further, the requirements of the current criminal law conflict with the proposition that an individual must be morally culpable for their wrongful act.

In discussing intoxication and consent, Alan Wertheimer provides a useful typology of claims. Of particular relevance to this discussion are the *intoxication* (and *impermissibility*), *responsibility-entails-validity*, and *consistency* claims.[133]

In essence, Canadian law embraces the *intoxication* claim identified by Wertheimer. It is impermissible to have sex when intoxicated.[134] Consent is granted because the fundamental capacity to grant consent is undermined by the intoxicated state.[135]

This proposition enjoys significant support. For example, Joan McGregor writes: "The fact that a victim was drunk or high on drugs should naturally lead to the conclusion that she was not consenting, as she was incapable of voluntary consent."[136] Similarly, Laurence Thomas writes that "it is axiomatic that consent is rendered void if obtained from a person while he is in, for instance, an utterly inebriated state."[137]

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and Subsequent Delinquency: A Longitudinal Test of Labeling Theory" (2006) 43:1 J Research in Crime & Delinquency 67.

132 By the 1980s, the dominant image of the sex offender in the popular conscience was of a monster; imagining someone as a monster makes it difficult to simultaneously imagine them as a victim. Conversely, recognizing someone as a victim makes it difficult to simultaneously attribute to them a category which is labelled as "monster": Leon, *supra* note 7 at 17–24.

133 Alan Wertheimer, *Consent to Sexual Relations* (Cambridge: Cambridge University Press, 2003) at 232–33. Wertheimer distinguishes 5 claims in total:

1. *Impermissibility claim*: it is not permissible for A to engage in sex with B as a result of B's intoxicated consent.
2. *Intoxication claim*: B's intoxication undermines her capacity to give valid consent, thus rendering it impermissible for A to engage in sex with her.
3. *Responsibility claim*: if B's intoxicated state is self-induced, she should be responsible for her behaviour while intoxicated.
4. *Responsibility-entails-validity claim*: if B is responsible for her intoxicated behaviour, the consent she gives while intoxicated should also be valid.
5. *Consistency claim*: if individuals are held criminally liable for actions undertaken while intoxicated, then B's intoxicated consent should also be valid (*ibid*).

134 Assuming the threshold of intoxication required by Canadian law is met.

135 Wertheimer, *supra* note 133 at 231–32.

136 Joan McGregor, *Is It Rape? On Acquaintance Rape and Taking Women's Consent Seriously* (Aldershot: Ashgate, 2005) at 146–47.

137 Laurence Thomas, "Sexual Desire, Moral Choice and Human Ends" (2002) 33:2 J Social Philosophy 178 at 183.

On the other hand, some scholars argue that the *intoxication* claim should be jettisoned in favour of the proposition of individual responsibility and the validity of consent while intoxicated. For example, Heidi Hurd argues that "[o]n pain of condescension, we should be loath to suggest that the conditions of responsibility vary among actors, so that the drunken man who has sex with a woman he knows is not consenting is responsible for rape, while the drunken woman who invites sex is not sufficiently responsible to make such sex consensual."[138]

In this line of reasoning, the drunken man is morally equivalent to the drunken woman. If he is entirely responsible for the consequences of his drunken actions (the rape), why should she not be responsible for the consequences of her actions (giving consent)?[139]

Susan Estrich would argue that the argument that responsibility should be transferred to intoxicated individuals, particularly women, is mistaken. She points out that we do not put the burden of risk on "to people who walk alone on dangerous streets at night and get mugged, or people who forget to lock their cars or leave the back windows of their houses wide open."[140]

Wertheimer argues that the analogies used by both Hurd and Estrich are vulnerable to attack. For Estrich, Wertheimer argues, the problem arises because the people in her examples are not necessarily morally blameless. Consider an individual who borrows a car. They are still morally responsible to the person from whom they borrowed the car if it gets stolen as a result of their carelessness. This moral responsibility does not, however, expunge the responsibility of the thief. However, in the case of consent to sex, one of the two individuals engaged in the act must be responsible (either the person who grants intoxicated consent, or the one who receives it).[141]

A further problem for Estrich is the transformative impact of consent. Unlike the victims of the other crimes, the hypothetical sexual assault victim is signalling her consent. That is, the crimes in her analogy are unambiguously crimes, whereas the determination of criminality in the case of sexual assault turns on consent.[142]

Hurd's analogy is also vulnerable to attack. As Wertheimer argues, and this is true in Canadian law, the requisite mental capacity to form intent for criminal wrongdoing is significantly less than the requisite mental capacity to consent. That is, you require greater mental capacity to consent than to intend to commit a crime. To consent to sexual relations, under the tests outlined in *Daigle* and *Patriquin*, an operating mind is required, capable of moral choices and an understanding of the sexual nature of the actions.[143] In contrast, the mental capacity required to commit the crime of sexual assault is merely the ability to intend to touch.[144] Wertheimer cites several justifications for this discrepancy:

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138 Heidi M Hurd, "The Moral Magic of Consent" (1996) 2:2 Leg Theory 121 at 141.
139 This argument is similar to those made in the non-academic settings quoted above: see *supra* notes 4–5.
140 Susan Estrich, "Palm Beach Stories" (1992) 11:1 & 2 L & Philosophy 5 at 10.
141 Wertheimer, *supra* note 133 at 245.
142 Hurd, *supra* note 138 at 123–24. Hurd refers to consent as functioning to "make an action right when it would otherwise be wrong" and grant "another a right to do wrong" (*ibid* at 123).
143 *Daigle* SCC, *supra* note 60; *Daigle* CA, *supra* note 63; *Patriquin*, *supra* note 64.
144 *Ewanchuk*, *supra* note 28 at para 41.

> While an agent's responsibility for criminal wrongdoing applies solely to the way in which we respond to the agent herself, an agent's (valid) consent transforms what it is permissible for *others* to do. It is arguable that such transformations require a deeper expression of the agent's will than the intentions required for culpability for wrongdoing. In addition, whereas C is not in a position to avoid the effects of B's harmful act, it is relatively easy for A to avoid the effects of B's consent and thus we can more easily justify shifting the burden from B to A.[145]

Although these arguments seem plausible in general, their application to the specific issue of mutual intoxication creates problems. Consider the agent who engages in sexual relations that may be criminal. They face not simply the ordinary risks of sex (pregnancy, disease, and so on) but also the risk of criminal sanction. Criminal sanction, in a very significant way, transforms what is permissible for others to do to the agent.[146] The consequences of engaging in potentially unlawful sex seem more serious (and detrimental) than those from merely consenting to sex. This seems to agitate towards a requirement for greater mental capacity, not less. Consider also: where both A and B are intoxicated, it may be difficult for either A or B to avoid the effects of the other's consent.

In contrast to those who favour *impermissibility* or *responsibility-entails-validity*, Wertheimer argues for a more permissive approach. This approach he argues will allow for greater positive and negative autonomy for women.[147]

Wertheimer does, in passing, address the question of mutual voluntary intoxication. He writes:

> Can we say that B's intoxicated consent is *not* morally or legally valid, but that A is responsible for taking advantage of B's intoxicated consent if he is intoxicated? The short answer is — yes. … Similarly, we can say that when A becomes intoxicated, he culpably puts himself at risk for having sex with a woman who gives consent because she is intoxicated. Does this mean that men would bear a greater burden for intoxication than women? Yes, no, and perhaps, so what? Yes — men may bear a greater legal and moral burden from intoxication; no — because women would continue to bear greater physical and emotional burdens from intoxicated sexual relations; so what? — because even if men do bear greater burdens for intoxicated sexual behaviour, the asymmetry may well be justified."[148]

Wertheimer sees no problem philosophically with holding men responsible for their drunken acts while simultaneously relieving women of responsibility (by holding their consent to be invalid). He would shift all of the liability in the drunken encounter to the male party (in a heterosexual interaction).

In contrast to Wertheimer's claim, the fundamental principle of Canadian sexual assault law is the protection of the agency and bodily integrity of all members of society. As the Supreme Court wrote in *Ewanchuk*, "[s]ociety is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who

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145 Wertheimer, *supra* note 133 at 244 [footnotes omitted] [emphasis in original].
146 Consider, for example, the employment discrimination that offenders face.
147 Wertheimer, *supra* note 133 at 257.
148 *Ibid* at 255–56.

touches one's body, and how, lies at the core of human dignity and autonomy."[149] This principle supports an egalitarian law of sexual assault which strives to protect the autonomy of both individuals engaged in the sexual activity.

Hurd's consistent proposal provides one avenue by which this objective could be achieved. It would entail a recognition that intoxicated individuals are responsible both for the criminal wrongs they commit but also for the legal consent that they grant. It also addresses the issue of an intoxicated individual's difficulty in assessing the capacity of their prospective partner. However, this conceptualization of the criminal law results in a significant problem: the voluntariness problem associated with section 33.1 of the *Criminal Code* remains. That is, an accused could be convicted of an offence for which he acted involuntarily.

Instead, it may be better to increase the scope of the defence of intoxication, while maintaining that intoxication renders one incapable of consenting. This move would address the issue of voluntariness. An intoxicated accused, who was acting involuntarily as a result of their intoxication, would have a defence against criminal liability. While a minimal voluntariness requirement would be protected through the reinstatement of the *Daviault* defence, it may be preferable to expand the requirement of intent further.[150]

Establishing a single threshold for intentionality and consent would ensure that individuals convicted of sexual assault appreciate the consequences of their actions. Furthermore, it would help to remedy the anomaly whereby the accused could form criminal intent for an activity that he did not consent to. This would eliminate the situation where both parties could be prosecuted if they signalled consent but lacked capacity. By effectively rendering consent and intent interchangeable, the sexual assault law would ensure that the consent of all individuals (including those who stand accused) is meaningfully addressed in the criminal justice process. However, this fuller conception of intent would necessarily lessen the protection of citizens against the actions of the intoxicated.

Another proposal which has significant merit is the abandonment of the common law and statutory rules on intoxication. Instead, the accused would be able to introduce evidence of his intoxication in order to negate an element of the offence, such as the *mens rea* voluntariness requirement. This approach to intoxication is used in Australia, New Zealand, and South Africa.[151] It eliminates the separate defence of intoxication, instead focusing on whether the intoxication negates an element of the crime. This has the additional benefit of simplifying the law, while also bringing it into line with fundamental principles of criminal justice.[152]

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149 *Ewanchuk*, *supra* note 28 at para 28.

150 This would contradict the artificial distinction which has been drawn between specific intent offences (where intoxication is a defence) and general intent offences (where only extreme intoxication is a defence if not precluded by section 33.1).

151 Dimock, *supra* note 6 at 17.

152 *Ibid*.

Regardless, it is clear from the evidence that the laws of sexual assault are failing to protect the autonomy and bodily integrity of all members of society while respecting the due process rights of the accused.[153] In this context then, reform of the law is warranted. Furthermore, the continuing evolution of social views towards sexual activity will continue to drive change in this domain.

[153] Consider, for example, that men are more likely to binge drink than women: see Health Canada, "2012 Survey," *supra* note 13. This would suggest that they may also be more likely to engage in sexual activity while incapable of consenting (it may be, however, that the propensity to engage in sexual activity while intoxicated differs markedly and systemically between men and women). Notably, a study of British Columbia post-secondary students found that men were more likely to report being taken advantage of sexually while intoxicated: McCormick et al, *supra* note 26. However, men constitute only a small minority of alcohol-facilitated sexual assault complaints. While men are socially conditioned not to regret sexual encounters, *ex post* feelings are irrelevant to the question of whether valid consent was given at the time.