A Queer-Feminist Analysis of BDSM Jurisprudence in Common Law Courts

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forms of trauma, physical assault, child abuse, and contains descriptive information about infliction of physical pain and other forms of violence.

In this Article, we explore the ways in which the legal system engages with litigants who practice bondage, discipline and domination, and submission and sadomasochism (BDSM), examining salient case law and legislation from the United Kingdom, Canada, and the United States. Despite gains in social acceptance of the sexual practice, we find that BDSM participants in criminal and family law courts are predominantly viewed as sexual deviants deemed worthy of moral censure and legal punishment. Criminal courts within all three jurisdictions have held that certain BDSM activities amount to violations of assault and battery laws. This is particularly true for those activities that the courts perceive as risking "serious" or "non-trivial" injury. As a result, even though the relevant battery and assault laws were not written with BDSM activities in mind, the courts nevertheless conflate certain sexual, pleasurable activities with criminalized non-pleasurable violence. Further, family law courts in the United States and Canada have denied adult parents who participate in consensual BDSM their full rights to child custody, finding that persons who engage in such court-determined "immoral" activities lack sufficient legal capacity to parent. These judgements indicate that court-operationalized censure against BDSM reaches beyond the fundamental issue of sexual autonomy to other aspects of a litigant's legal and social personhood, including their parental status.

This Article reviews family law and criminal law cases in which litigants engaged in consensual BDSM activity and identifies common themes in judicial reasoning. We find that many of the courts' decisions are premised upon the following: sexual prejudices against same-sex sexual behavior, assumptions regarding BDSM as non-normative sex, and a hierarchical ranking of types of sex or sexual activities according to morality and social acceptance. Throughout our analysis, BDSM is perceived as socially undesirable conduct and disreputable to those desiring or engaging in the behavior. We conclude by reimagining and reconsidering several of these cases from the perspective of queer-feminist theories. A queer-feminist perspective considers varied sexual activities without preference, positively views women's engagement and

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pleasure in sexual activities, and considers BDSM as part of such benign diversity. We explore how the facts of these cases might be reinterpreted through queer and feminist theories on sexual diversity, potentially leading to opposite, or at minimum, more sex positive holdings.

INTRODUCTION

Bondage, discipline and domination, and submission and sadomasochism, or BDSM, which involves a diversity of desires and behaviors, may be understood as a "range of sexual preferences that

generally relate to enjoyment of physical control, psychological control, and/or pain."[1] For some, this sexual preference is incorporated fully into the person's lifestyle and even engenders the community(ies) they participate in, whereas for others it is seen as an infrequent tool to "spice things up" in the bedroom.[2] Regardless of whether a participant experiences BDSM as a lifestyle, hobby, or singular play session, such "play" as it is termed, is "rife with political, social, and sexual implications."[3]

Practices within BDSM are highly varied in nature, including but not limited to physical restrictions like chains, bondage and handcuffs; the administration of pain, through practices like spanking, caning or whipping; humiliation through verbal means or gagging; and other categories related to specific sexual behaviors.[4] Therefore, popular culture's showcasing of specific examples of BDSM forms only the tip of the spectrum, as there is a wide range of practices encompassed within the term, and a correspondingly wide range of degrees of pain and power play of different kinds experienced and meted out by willing participants.

In recent years, BDSM has featured increasingly in mainstream popular culture. With shows like Netflix's *Bonding*[5] and many others appearing in mainstream media, it seems as though kink is virtually omnipresent in the social imagination.[6] BDSM-positive films such as the *Secretary*[7] (a film depicting a consensual, loving BDSM relationship between a secretary and her employer) from 2002 and the more recent *Fifty Shades of Grey* trilogy[8] have swept box offices across the United

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[1] Ali Hebert & Angela Weaver, *An Examination of Personality Characteristics Associated with BDSM Orientation*, 23 CANADIAN J. HUM. SEXUALITY 106, 106 (2014).

[2] *See* Staci Newmahr, *Rethinking Kink: Sadomasochism as Serious Leisure*, 33 QUALITATIVE SOCIO. 313 (2010); Elena Faccio et al., *Forbidden Games: The Construction of Sexuality and Sexual Pleasure by BDSM 'Players'*, 16 CULTURE, HEALTH & SEXUALITY 752 (2014).

[3] STACI NEWMAHR, PLAYING ON THE EDGE: SADOMASOCHISM, RISK, AND INTIMACY 8 (2011).

[4] Joe Magliano, *The Surprising Psychology of BDSM*, PSYCH. TODAY (Feb. 5, 2015), https://www.psychologytoday.com/us/blog/the-wide-wide-world-psychology/201502/the-surprising-psychology-bdsm.

[5] BONDING (Netflix 2019).

[6] Darren Langdridge, *Voices from the Margins: Sadomasochism and Sexual Citizenship*, 10 CITIZENSHIP STUD. 373, 374 (2006).

[7] SECRETARY (Lionsgate Films 2002).

[8] FIFTY SHADES OF GREY (Focus Features 2015), FIFTY SHADES DARKER (Focus Features 2017), and FIFTY SHADES FREED (Focus Features 2018). The trilogy has grossed over $1.325 billion, making it the fourth highest grossing R-rated franchise of all-time.

States.[9] Where is it all coming from and what does it mean? According to *Bonding's* lead protagonist, Tiff—a psychology graduate student by day and Dominatrix by night—dominatrix work is ". . . just about sexual liberation."[10]

But who are the people who practice BDSM? From the gaze of Netflix's hit series *Bonding*, we see a wide variety of Americans practicing and buying engagement from a dominatrix, forms of bondage-sadomasochism, including elderly men dressed in leather, submissive CEOs of major companies with humiliation kinks, and bodybuilders who adore Mistress May's domination.[11] The series portrays BDSM through a positive, albeit, largely white and class-privileged lens, showing that participants are just "normal" people with "normal" lives, many with kids and spouses. As Tiff said, "We all have our kinks. It's fine."[12] Similarly, in the hit film *Professor Marston and the Wonder Women*, which grossed over $700,000 in its opening weekend, BDSM is portrayed as a liberating behavior that unfairly attracted the ire of mainstream society in the 1920s.[13] The movie explores the initial origins of the Wonder Woman, which drew heavily from Marston's interests in polyamory, bondage, and domination. The movie follows Marston's career, as well as the two women he had polyamorous relationships with, showing BDSM as a healthy component of their relationship, with banter that explores the relationship in a casual manner. The film shows BDSM in a continuously positive light, with all characters expressly desiring to engage in the BDSM behavior. Further, these sexual activities are depicted as a loving extension of the relationship of the characters.

The growing trend of BDSM in popular media corresponds to the overall growing trend in popularity and popular acceptance of BDSM practices in numerous countries. For example, a 2005 study by Durex of forty-one countries found that 20% of those surveyed (n=317,000) utilized blindfolds, masks, or other kink-related tools at least once.[14] However, despite BDSM's increasing presence in popular culture and individual engagement,[15] sexual conduct involving certain forms of

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[9] *Secretary* grossed $9.3 million worldwide, and the first *Fifty Shades of Grey* film earned an astounding $569.7 million worldwide.

[10] *See* BONDING, *supra* note 5.

[11] *Id.*

[12] *Id.*

[13] PROFESSOR MARSTON AND THE WONDER WOMEN (Boxspring Entertainment 2017).

[14] DUREX, GIVE AND RECEIVE: GLOBAL SEX SURVEY RESULTS 14 (2005).

[15] Margot D. Weiss, *Mainstreaming Kink: The Politics of BDSM Representation in U.S. Popular Media*, 50 J. HOMOSEXUALITY 103, 104 (2006).

consensual BDSM is still indirectly criminalized by law in most of the United States, as well as Canada and the United Kingdom.[16]

In general, most jurisdictions do not expressly outlaw BDSM but instead disallow consent as a defense to charges of battery (i.e., committing physical violence to a partner), thereby criminalizing sexual activities involving consensual physical force.[17] Further, several jurisdictions prosecute those individuals who were on the receiving end of the "battery" (e.g., submissives) as accomplices to their own assault, counterintuitively finding such individuals culpable of the consensual physical force applied to their bodies during sexual activities. A study conducted in 2008 by the National Coalition for Sexual Freedom found that 37.5% of respondents felt that they had experienced some sort of harassment, violence, or discrimination based on their sexual minority status, including BDSM or, if applicable, had experienced discrimination against their BDSM-related business.[18]

Persons engaging in BDSM not only have interactions with the criminal justice system, but family law as well.[19] In Canada, courts may perceive a parent's consensual BDSM activity as a damning blight on their character and it is often used as evidence against them in child custody disputes.[20] For example, in *Nova Scotia v. A.C.*, the Supreme Court of Nova Scotia expressly focused on the sexual preferences—consensual BDSM activities—of the mother in denying her custody, despite the fact that there were more than sufficient grounds to deny parental rights based on other, far more salient factors (e.g., the neglect of the children).[21] Further, the court's dicta reveal an assumption that such

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[16] *See* Robert B. Ridinger, *Negotiating Limits: The Legal Status of SM in the United States*, 50 J. HOMOSEXUALITY 189 (2006); Daniel Haley, *Bound by Law: A Roadmap for the Practical Legalization of BDSM*, 21 CARDOZO J.L. & GENDER 631 (2015).

[17] *See* Theodore Bennett, *A Fine Line Between Pleasure and Pain: Would Decriminalising BDSM Permit Nonconsensual Abuse?*, 42 LIVERPOOL L. REV. 162, 164 (2021); Mika Galilee-Belfer, *BDSM, Kink, and Consent: What the Law Can Learn from Consent-Driven Communities*, 62 ARIZ. L. REV. 511, 513–14 (2020).

[18] Susan Wright, *Second National Survey of Violence & Discrimination Against Minorities*, NAT'L COAL. FOR SEXUAL FREEDOM 5, 10 (2008), https://ncsfreedom.org/wp-content/uploads/2019/12/Violence-Discrimination-Against-Sexual-Minorities-Survey.pdf.

[19] Ummni Khan, *Kinky Identity and Practice in Relation to the Law*, *in* RESEARCH HANDBOOK ON GENDER, SEXUALITY AND THE LAW 360, 362–78 (Chris Ashford & Alexander Maine eds., 2020) [hereinafter Khan, *Kinky Identity*].

[20] *See, e.g.*, Marty Klein & Charles Moser, *SM (Sadomasochistic) Interests as an Issue in a Child Custody Proceeding*, 50 J. HOMOSEXUALITY 233 (2006).

[21] Nova Scotia (Minister of Cmty. Servs.) v. A.C., [2003] N.S.J. No. 184 (Can. N.S. S.C.) (QL).

sexual "deviance," or BDSM activities are dangerously contagious, potentially infecting all those surrounding the behavior or living in the home. Such a presumption thereby assumes that a child is polluted or harmed by their mere interaction with a parent that engages in BDSM, even if all behavior is hidden from the child or conducted outside of the home.[22] Similarly, in the United States, a parent's BDSM activities may be taken as evidence of parental incompetence in child custody disputes, though this heavily depends on the child custody law of the jurisdiction as well as judicial discretion.

In this highly contentious background to BDSM, this Article seeks to investigate the legal system's treatment of BDSM persons in Canada, the United Kingdom, and the United States. These jurisdictions, due to similarities in their social, medical, and legal history regarding BDSM, offer opportunity for apt evaluative comparison. These three countries have been chosen for this Article as they show significant litigation pertaining to BDSM, where BDSM-related activities have been considered the basis for charges of assault causing bodily harm, irrespective of consent.[23] Further, the common test, referred to as the "Hicklin Test" which was historically used in the United Kingdom and later adopted in the United States and Canada to determine whether a text was "obscene," renders BDSM representation and erotica as "particularly vulnerable to being interpreted as obscene" in these jurisdictions.[24] Canada, the United Kingdom, and the United States have different legal structures in terms of criminal law, but all three countries are commonly based on a model of secular liberal democracy, and also share a heritage of common law, which provides a common basis for comparative analysis exercises.

Beginning with a summary of the history—medical, social, and political—of BDSM, as a sexual activity as well as political act, Part I highlights the involuted nature of engaging in these sexual, societally-censured acts. Throughout history through present day, institutions perceive BDSM as socially undesirable and disreputable to those desiring or engaging in the behavior. Part II presents salient family law and criminal law cases involving consensually practicing defendants of BDSM or litigants from the three jurisdictions. In addition, Part II introduces several recent cases impacting BDSM practices outside of

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[22] *Id.*

[23] In Canada, see R. v. Welch (1995), 25 O.R. 3d 665 (Can. Ont. C.A.); in the United States, see People v. Samuels, 250 Cal. App. 2d 501, 511, 516 (1967); in the United Kingdom, see R. v. Brown [1994] AC 212.

[24] Khan, *Kinky Identity*, *supra* note 19, at 364.

family and criminal law. Though none of the reviewed jurisdictions explicitly outlaw BDSM, the practice falls under legal censure through the unanimous denial of participants' rights to consent to physical force, even in sexual interactions. In order to narrow the inquiry to the judiciary's disparate treatment of BDSM as compared to the hegemony of non-BDSM, or "normative sex," this Article limits its gaze to only cases in which the litigant(s) testified that they had consented to the activity. As such, recent cases wherein an individual(s) dies as a result of their involvement in physical force-based sexual activities have been excluded, since consent there cannot be established nor verified.

Part III chisels out, from the myriad of seemingly divergent family law and criminal law cases on BDSM, common themes amongst all three jurisdictions in judicial reasoning, finding that many of the courts' decisions are premised on homophobia or a preference for heterosexual sex, assumptions regarding BDSM as non-normative sex, and a hierarchical ranking of types of sex or sexual activities. Part III concludes by reimagining and reconsidering several of these cases from a queer theory informed perspective. This perspective views varied sexual activities without preference, positively views women's engagement and pleasure in sexual activities, and considers BDSM as part of such diversity. We explore how the facts of these cases might be reinterpreted through the queer and feminist theories on sexual diversity, testing the ways in which the cases do (or do not) arrive at differing conclusions when utilizing queer-feminist theory.

This Article seeks to frame legal understandings around gender, sex, and sexuality in the context of BDSM practices using queer theory as a framework. Queer understandings of gender, sex, and sexuality could positively influence jurisprudential interpretations of BDSM practices to reflect the lived experiences of BDSM participants, offsetting judicial and legal biases against the perceived deviancy of these practices. This Article seeks to challenge present ideas of normative or "good" sex, using queer theory to redefine meanings of consent in BDSM practices and combat historical (and prevailing) judicial stigmas that lean towards the criminalization and victimization of BDSM participants, and to bring BDSM within the scope of societally supported sexual practices.

I. BDSM AND SOCIAL HISTORY

BDSM has a long history of interactions with the legal and medical professions. As early as the nineteenth century, such conduct was

originally termed and immediately pathologized.[25] The phrase sadomasochism (S/M) was coined based off of two notable literary figures, Marquis de Sade and Leopold von Sacher-Masoch.[26] The first edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM) included a diagnosis for sexual deviation, explicitly making sexual sadism a mental illness.[27] The following edition, the DSM II released in 1968,[28] similarly included sexual deviancy, elaborating at a much longer length on the definition. In general, with each new edition, the amount of text devoted to describing the diagnosis of sexual deviance increased. However, in 1994, the DSM-IV changed its definition and stated that acting on a sadomasochistic desire was no longer a mental disorder.[29] And, in 2000, the DSM-IV-TR explicitly stated that sadomasochistic tendencies or conduct are not in and of themselves evidence of a mental illness but rather such conduct or desire must cause "clinically significant distress or impairment of functioning" in order to constitute a mental illness.[30]

The medicalization of BDSM is a social fascination, evidenced by

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[25] UMMNI KHAN, VICARIOUS KINKS: S/M IN THE SOCIO-LEGAL IMAGINARY 26 (2014) [hereinafter KHAN, VICARIOUS KINKS].

[26] *Id.*

[27] *Id.* at 38–39.

[28] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM-II 44 (1968):

> This category is for individuals whose sexual interests are directed primarily toward objects other than people of the opposite sex, toward sexual acts not usually associated with coitus, or toward coitus performed under bizarre circumstances as in necrophilia, pedophilia, *sexual sadism*, and fetishism. Even though many find their practices distasteful, they remain unable to substitute normal sexual behavior for them. This diagnosis is not appropriate for individuals who perform deviant sexual acts because normal sexual objects are not available to them.
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> 302.0 Homosexuality
> 302.1 Fetishism
> 302.2 Pedophilia
> 302.3 Transvestism
> 302.4 Exhibitionism
> 302.5 Voyeurism
> 302.6 Sadism
> 302.7 Masochism
> 302.8 Other sexual deviation.

(emphases omitted and added).

[29] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM-IV 529 (1994).

[30] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS TEXT REVISION DSM-IV-TR 573 (2000).

an ever-increasing tendency to describe and elaborate on the conduct that is deemed deviant in nature. Expressing and exposing the "truth" of BDSM appears to be its own pleasure. This appears to be in line with a Foucauldian view of pleasure, noting that there is "pleasure in the truth of pleasure, the pleasure of knowing the truth, of discovering and exposing it, the fascination of seeing and telling it, of captivating and capturing others by it, of confiding it in secret, of luring it out into the open–the specific pleasure of true discourse on pleasure."[31] Despite societal disgust with BDSM as abject and degrading, discussions of BDSM have been quite prolific indeed, gaining serious social prominence during what has been termed, the 1970s and 80s "Sex Wars."[32] During that time, there was a shift in the discussion from seeing BDSM as a mental illness to a political, anti-feminist choice.[33]

During the Sex Wars, feminist debates flourished on gender and sexuality, including sadomasochism, pornography, sex work, and monogamy among others. Lesbian sadomasochistic conduct was one of the most intensely contested issues, with many notable feminists arguing that persons engaged in such conduct were merely replicating and reinforcing patriarchal, heterosexual dynamics.[34] For example, in 1980, the National Organization for Women published the organization's Resolution on Lesbian Rights, condemning sadomasochism and pornography as fundamentally contradictory to lesbian rights.[35] Several famous feminists including Susan Griffin and Andrea Dworkin outspokenly criticized BDSM practices as violence against women.[36] In 1982, Catharine MacKinnon published a series of groundbreaking articles on dominance feminism,[37] which included MacKinnon's seminal

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[31] MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: VOLUME I at 71 (Robert Hurley trans., Vintage Books 1st ed. 1978).

[32] KHAN, VICARIOUS KINKS, *supra* note 25, at 54; *see also* Laura Guy, *Sex Wars Revisited*, APERTURE (Feb. 28, 2017), https://aperture.org/blog/sex-wars-revisited/.

[33] *See* VARDA BURSTYN ET AL., WOMEN AGAINST CENSORSHIP (Varda Burstyn ed., 1985).

[34] Elise Chenier, *Lesbian Sex Wars*, GLBTQ ARCHIVE (2004), http://www.glbtqarchive.com/ssh/lesbian_sex_wars_S.pdf.

[35] *Id.*

[36] *See* Susan Griffin, *Sadomasochism and the Erosion of Self: A Critical Reading of* Story of O, *in* AGAINST SADOMASOCHISM: A RADICAL FEMINIST ANALYSIS 184 (Robin Ruth Linden et al. eds., 1982); ANDREA DWORKIN, WOMAN HATING (1974).

[37] *See* CATHARINE MACKINNON, FEMINISM UNMODIFIED (1987); CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF STATE (1989); Catharine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982); Catharine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983).

argument that sexuality was truly the linchpin of gender inequality.[38] As the argument went and continues in part today, sadomasochism is antithetical to women's rights and gender equality as all female and male sexuality is already rooted in dominance and submission, representing the larger social and political inequalities.[39]

Thus, lesbian women who engaged in such conduct became traitors of the women's movement. As Katherine Davis stated, sadomasochistic sex between feminist lesbians is "a scary skeleton hidden in the corner of our otherwise cleaned up closets."[40] In many ways, abstracted and politicized feminist conceptions of what constituted good, feminist sex appears to have dominated even over the feminist sexual-participant themselves. And, for many radical feminists at the time, such as Catharine MacKinnon, the feminist ideals held even the power to re-interpret a woman's given consent to certain types of sex, finding that women could not truly provide meaningful consent to bad, antifeminist sexual interactions, such as being submissive. As Lisa Duggan pointed out, such radical feminist theories logically lead to a perverse flip of rape culture; that in cases of BDSM sex "she says yes but really she means no" as no reasonable woman could consent to such alleged degradation.[41] In the eyes of radical dominance feminism of the time, a woman's consent to BDSM sex was imaginative at best and self-subjugating at worst.[42]

Beginning in the mid-1980s, the rise of queer theory and sex positive feminism began to take center stage. In 1984, Gayle Rubin published "Thinking Sex: Notes for a Racial Theory of the Politics of Sexuality," challenging radical feminism as the dominant lens by which to explore sexuality.[43] Rubin instead called for a separation between

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[38] MACKINNON, FEMINISM UNMODIFIED, *supra* note 37, at 5 ("[T]he mainspring of sex inequality is misogyny and the mainspring of misogyny is sexual sadism.").

[39] *Id.*; *see also* Sheila Jeffreys, *Heterosexuality and the Desire for Gender*, *in* THEORISING HETEROSEXUALITY 75 (Richardson ed., 1996).

[40] Katherine Davis, *Introduction: What We Fear We Try to Keep Contained*, *in* COMING TO POWER: WRITINGS AND GRAPHICS ON LESBIAN S/M (3d ed. 1987).

[41] LISA DUGGAN & NAN D. HUNTER, SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE 7 (1995).

[42] *See, e.g.*, Cheryl Hanna, *Sex is Not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. REV. 239 (2001) (taking for granted that S/M is about violence when she states in the first line of her article, "[i]n sadomasochism, sex and violence intersect, becoming intertwined and indistinguishable").

[43] Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267 (Carole S. Vance ed., 1984), *as reprinted in* 1992, https://www.ipce.info/library_3/pdf/rubin_thinking_sex.pdf [hereinafter Rubin, *Thinking Sex*].

gender and sexuality when evaluating the politics of sexual conduct.[44] Two years prior, Rubin directly addressed the issue of BDSM behavior in "The Leather Menace: Comments on Politics and S/M,"[45] arguing that sexual minorities, particularly BDSM participants, experience a lack of social acceptance and have limited rights.[46] Further, BDSM practices were, according to Rubin, erroneously prosecuted under assault laws, and this policing of BDSM attacked and criminalized the gay community.[47]

In 1990, Judith Butler published "Gender Trouble: Feminism and the Subversion of Identity,"[48] establishing post-modern feminism and queer theory. Butler asked that gender be interrogated as an effect of power, concluding that gender should not be used as the sole standpoint from which to evaluate the merits or ills of certain types of sexual conduct. This critique was staunchly at odds with radical feminism, which had held "women" as the subjecthood from which to examine the goodness or harms of sex.[49] Although a more thorough discussion of the social and political meanings of sexual dominance, submission, and patriarchal systems of power is beyond the scope of this paper, such conduct seems quite political. As Carol Hanisch continues to remind us, even today, "the personal is political."[50]

Despite the demonstrable rise in the social acceptance of certain non-normative sexual practices, such as same-sex, premarital, and interracial sex, BDSM nevertheless continues to lie far afield from the safety of legal protection. In Part II, we critically evaluate the legal positionality of BDSM practices through a review of the judicial discourse of BDSM in three Global North jurisdictions—the United States, the United Kingdom, and Canada—within family law and criminal law. This Article finds negative judicial dispositions towards consensual BDSM activities, are often founded on grounds of homophobia or a preference for heterosexual sex, assumptions regarding BDSM as non-normative sex, and the devaluation of non-normative sexual acts between partners, whether cis-heterosexual persons or otherwise.

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[44] *Id.*

[45] Gayle Rubin, *The Leather Menace: Comments on Politics and S/M*, *in* COMING TO POWER: WRITING AND GRAPHICS ON LESBIAN S/M (SAMOIS, 1982).

[46] *Id.*

[47] *Id.*

[48] JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 3–6 (1990).

[49] *Id.*

[50] Carol Hanisch, *The Personal is Political*, *in* NOTES FROM THE SECOND YEAR: WOMEN'S LIBERATION (1970).

II. BDSM IN THE COURTS: AN ANALYSIS OF FAMILY AND CRIMINAL LAW BDSM JURISPRUDENCE

The jurisprudence around BDSM in Canada, the United States and the United Kingdom centers around two legal frameworks, namely those of family law and criminal law. The family law framework consists of legislations around marriage, divorce, and in the context of BDSM-related jurisprudence, around child custody. Family law cases in these three jurisdictions involve judicial decisions pertaining to custody of and visitation with children, with the practice of BDSM being considered a relevant factor in such adjudication. The criminal law framework, on the other hand, deals with certain physical acts that fall within BDSM practices, where judicial decisions center around constructions of consent to BDSM acts, as well as corresponding criminalization and victimization of BDSM participants who mete out pain and receive pain, respectively.

A. Family Law

In litigation involving custody of or visitation with children in the United States and Canada, parents who testified that they consensually[51] practice BDSM are consistently viewed as legally incapable of caring for their own children. Psychological evaluations are routinely ordered by the court and the psychologists' expert opinions are often closely relied upon in courts' findings against parents who participate in BDSM. Even though BDSM is not expressly criminalized,[52] courts still pathologize individuals who practice BDSM, especially in cases related to family law. This is clear in the Canadian case of *Nova Scotia v. A.C.*[53] and in the American case involving child custody in the background of an S/M relationship,[54] elucidated henceforth.

1. Canada

Case law from Canada demonstrates a court tendency to expose, discuss, and demean a litigant's BDSM practices in judicial judgments, even in cases where such information is irrelevant or unnecessary. This

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[51] As the subject lies beyond the scope of the present inquiry, this Article does not explore the labyrinthine concept of "consent" in general, nor as applicable to the specifics of BDSM interactions, including power and dominance. Instead, this Article limits its review of applicable cases to those in which the litigants themselves testified as to their consent (and often, desire) to engage in the BDSM practices reviewed by the court.

[52] *See infra*, Part II.B.

[53] Nova Scotia (Minister of Cmty. Servs.) v. A.C., [2003] N.S.J. No. 184 (Can. N.S. S.C.) (QL).

[54] Klein & Moser, *supra* note 20.

has the effect of unnecessarily criminalizing participants for their engagement in BDSM as deviants, even when such practices are not directly related to the facts of the case. For instance, in *Nova Scotia v. A.C.*,[55] the Supreme Court (Family Division) judge spent a considerable portion of the court's decision dwelling upon the sadomasochistic tendencies of the respondent, A.C., who is a mother to two children. In this case, the litigant's sadomasochistic interests influenced the court's judgment of their parenting capabilities. The respondent, twenty-nine years old at the time of trial, had entered into a relationship with J.C. sometime in 1994 and already had two children, aged 12 and 10, from previous relationships.[56] The respondent was aware that J.C. had a record of sexual assault on minors, including his niece, and the Children's Aid Society of Halifax had informed her that he was a pedophile.[57] The respondent was still intent on continuing with the relationship and eventually marrying him.[58] Justice Dellapinna noted that:

> What has been described as deviant sexual behavior between J.C. and A.C. commenced immediately after the Agency ended its involvement. This behavior involved extreme sadomasochism, bondage, and eventually bestiality and the involvement of third parties including prostitutes. Initially, A.C. was placed in the submissive role but gradually J.C. came to prefer that she play the dominant role.[59]

The respondent testified that her children were never exposed to the couple's sexual practices.[60] However, Justice Dellapinna opines that their residence was small, and the activities took place over a long time, which would make it unlikely that the children were unaware of what was happening behind closed doors.[61] From 1994 onwards, the couple had multiple interactions with child protection agencies as J.C. had been observed physically disciplining the children, including with an electric cattle prod.[62]

In February 2002, an investigation disclosed that both children had missed several days of school and were often unclean and smelling of cat urine.[63] The investigation also found that the children were being

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[55] *A.C.*, [2003] N.S.J. No. 184 (Can. N.S. S.C.) (QL).
[56] *Id.* at 3.
[57] *Id.*
[58] *Id.*
[59] *Id.* at 4.
[60] *Id.*
[61] *Id.*
[62] *Id.* at 1.
[63] *Id.*

physically abused and that the residence was uninhabitable.[64] The Court granted a "five day" order on February 14, 2002 and a so-called "30 day" interim order on February 26, 2002, with the Minister obtaining interim care and custody of the children.[65] On May 10, 2002 the court found the children to be in need of protective services in accordance with Section 22(2)(k) of the Children and Family Services Act.

Thereafter, at the first disposition hearing on August 8, 2002, the court granted a temporary care and custody order to the Minister, referring the couple and the children to a parental capacity assessment that included psychological testing. Upon receipt of the assessment and psychological consultation reports, the Minister put forward a plan for permanent care.[66] The respondent opposed this application and contended that although she had failed her children, she was determined to improve her circumstances and become a better parent, and was opposed to any further contact between the children and J.C.[67]

In July 2002, a psychologist, Valorie Rule, met with the couple as part of a parent capacity assessment.[68] Rule's report noted that the respondent had told her that "bestiality" occurred both in a shed outside the home as well as within, but she was unsure if the children had ever witnessed it.[69] Moreover, the respondent offered varying explanations for why she had been engaged in these acts: she had been placed in a trance, she was forced, J.C. had threatened suicide if she did not comply, and lastly, she just "wanted someone to love her."[70] However, Rule's report stated that it is likely the respondent consented to the sexual acts with J.C.[71] Finally, Rule concluded that the respondent had done her best for the children, but it was not good enough, especially since she had failed to protect them from exposure to "deviant" sexual activities.[72]

Justice Dellapinna went on to narrate the respondent's circumstances after her children were taken away for their protection.[73] She was described as having relationships with at least three different men, holding several low-paying jobs, and receiving social assistance.[74]

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[64] *Id.*
[65] *Id.* at 2.
[66] *Id.*
[67] *Id.*
[68] *Id.* at 5.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* at 6.
[73] *Id.* at 10.
[74] *Id.*

The judgment noted the respondent's assertion that she had received no sexual gratification from sexual acts with J.C. and that she had no intention of engaging in such activities in the future.[75] She also agreed to continue counselling and expressed a desire to be reunited with her children.[76] Yet, Dellapinna also noted that the respondent continued to put the responsibility for "deviant behavior" on her husband and did not truly acknowledge her failure to protect her children.[77] Moreover, Dellapinna refused to accept the respondent's contention that her children did not witness any of the sexual acts.[78] She then observed that the respondent had always exercised some degree of control in her relationships and did not believe that she was a changed person.[79] Thus, the court ruled that she was not competent to care for her children and rejected an order for permanent custody.[80]

It is clear from an analysis of the case that the court insisted on examining the sexual proclivities of the litigant, despite this being an unnecessary inquiry. The facts of *A.C.* present a clear picture of child abuse and neglect, regardless of evidence of the respondent engaging in consensual sadomasochistic activities with her husband, J.C.[81] Those facts alone (e.g., abusive discipline behavior, maltreatment of children) would be sufficient to deny A.C.'s access to and custody of her children.[82] Yet, the court insisted on examining the sexual proclivities of the respondent as a relevant factor to assess her capacity to parent. Further, despite A.C.'s testimony that the children never witnessed the sexual activities of A.C. (or J.C.), the court concluded this was not possible given the longevity of A.C.'s sexual practices and the small home of the litigants. This implies that the court could not conceive of long-term BDSM practices, even behind closed doors, as sufficiently private to occur in a home with children. The effect of such case law is the unjustified stigmatization of BDSM sex on a larger scale.

Case law from Canada can be juxtaposed with jurisprudence from the United States from around the same time, where courts have adjudged the fitness of BDSM participants to be parents, in the context of custody cases. The following section outlines the facts and judicial reasoning of

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[75] *Id.*
[76] *Id.*
[77] *Id.* at 14.
[78] *Id.*
[79] *Id.* at 15.
[80] *Id.* at 16.
[81] *Id.* at 1–2.
[82] *Id.*

a landmark case outlined in Marty Klein and Charles Moser's article,[83] and goes on to compare the circumstances in both cases that led to denial or limitations imposed on child custody, on grounds of BDSM practices.

2. United States

Case law from the United States shows that the practice of BDSM is vilified by some courts, finding that BDSM participants are deviants who are unfit to be around their children without significant court-imposed limitations. The common belief that S/M involves violence or abuse has resulted in physical assault, abuse, and historical discrimination against individuals who engage in the practice.[84] Further, when BDSM-practicing individuals are brought before legal authorities, it is common for them to be diagnosed with mental disorders such as paraphilic disorders (where people cannot control their behaviors) as opposed to consensual paraphilia, where individuals participate in consensual sexual sadism, masochism, fetishism, and transvestic fetishism.[85] This occurs commonly in child custody and divorce cases, where persons identifiably engaging in S/M are often denied or allowed limited custody and visitation rights by family courts, as they are considered "unfit" due to their sexual behaviors.[86]

Wright states that the first step to de-pathologizing "consensual alternative sex" is to differentiate between sexual behaviors, or consensual paraphilia, from actual paraphilic disorders which are quite rare in nature—after which, defining "clinically significant distress" as a point of consideration for legal authorities is important.[87] In several custody cases, social workers, advocates, and judges have looked at the DSM, which states that "distressed or impaired" is a marker of mental illness, and without considering the context, presume that parties to the case are mentally ill, when in reality they may simply be distressed on

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[83] Klein & Moser, *supra* note 20. The facts of this case are taken from KHAN, VICARIOUS KINKS, *supra* note 25 and from Klein & Moser, *supra* note 20. Marty Klein was consulted as an expert witness in the case. Ummni Khan notes that she was unable to locate this case in any of the electronic databases and believes that it went unreported. Klein and Moser's article had changed the names of all parties to protect their confidentiality.

[84] Susan Wright, *Discrimination of SM-Identified Individuals*, 50 J. HOMOSEXUALITY 217 (2006) [hereinafter Wright, *Discrimination of SM-Identified Individuals*].

[85] Susan Wright, *Depathologizing Consensual Sexual Sadism, Sexual Masochism, Transvestic Fetishism, and Fetishism*, 39 ARCHIVES SEX BEHAV. 1229 (2010) [hereinafter Wright, *Depathologizing Consensual Sexual Sadism*].

[86] Wright, *Discrimination of SM-Identified Individuals*, *supra* note 84.

[87] Wright, *Depathologizing Consensual Sexual Sadism*, *supra* note 85.

account of the proceedings.[88] Further, such authorities have been seen to "speculate that if the individual gave up their BDSM practices, then their life wouldn't be in disarray, so clearly they must be suffering a mental disorder because their sexual behaviors are obligatory or 'obsessive'" in nature.[89]

While the *Nova Scotia v. A.C.*[90] decision must be understood in the context of demonstrable child abuse, an American case[91] demonstrates how BDSM activities are sufficient to deny child custody without any additional evidence of child mistreatment. The decision came down in 2003, around the same time as the *A.C.* decision. The facts of the case are detailed below.

Mr. Jones and Ms. Smith were a heterosexual couple that an expert witness described as being in an intense sadomasochistic relationship. Smith had an 11-year old son, Ed, born after 19 years of a prior marriage.[92] Klein consulted as an expert witness in the case, and Klein's colleague Moser noted that one of the reasons Smith divorced her husband was their frequent disagreements about her interest in BDSM.[93] As this case went largely unreported, the evaluation by Klein and Moser provides a window into the facts of the case.[94] Due to a congenital physical problem, Ed suffered from fecal impaction which had caused him pain on several occasions.[95] Jones worked as a medical technician. With permission from Smith and her son, he inserted a gloved and lubricated finger into Ed's rectum and relieved the impaction.[96] It was noted that Smith supervised the procedure and Ed did not express feeling violated. Rather, Ed expressed gratitude for being relieved of the pain.[97] However, Smith's ex-husband was furious and accused Jones of child sexual abuse; a formal investigation was launched shortly thereafter.[98]

The court appointed Dr. Blair, a clinical and forensic psychologist, to evaluate all the individuals and determine if the dis-

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[88] *Id.*
[89] *Id.*
[90] Nova Scotia (Minister of Community Services) v A.C., [2003] N.S.J. No. 184 (Can. N.S. S.C.) (QL).
[91] Klein & Moser, *supra* note 20.
[92] Klein & Moser, *supra* note 20, at 233, 237.
[93] *Id.* at 235.
[94] *Id.* at 233–42.
[95] *Id.* at 236.
[96] *Id.*
[97] *Id.*
[98] *Id.*

impaction constituted child abuse.[99] Dr. Blair was also asked to determine the parental fitness of all the adults. He concluded that the fecal disimpaction was not abuse.[100] Yet, despite the lack of any need to continue with a further evaluation of the facts, Dr. Blair testified as to the deviant S/M interests of Smith and Jones.[101] Although Dr. Blair admitted Ed had good relationships with all three adults and that he displayed no social or psychological problems, Blair expounded upon Smith and Jones' sexual behavior.[102] Blair diagnosed Jones with "sexual sadism" and Smith with "sexual masochism."[103] Klein and Moser noted that neither individual met the DSM-IV criteria for their respective diagnoses and that no parenting deficits are associated with individuals who actually do meet the criteria for either diagnosis.[104] Additionally, they stated that Blair's report made no indications as to the health and welfare of the minor or whether it was affected by the couple's involvement in BDSM.[105] Finally, Dr. Blair decided—potentially based on his prejudices and lack of education on the topic, as no evidence in support of such findings was offered—that Jones would develop pedophilia and molest Ed if the custody arrangement was not altered.[106]

Following this recommendation, the court imposed various additional limitations on Smith's visitation rights with her son. The court also imposed a complete ban on any contact between Ed and Jones and required that Jones vacate his own residence whenever Ed visited his mother. As Klein and Moser point out, this was an "additional note of cruelty" to Jones' loss of contact with a child he had been step-parenting.[107] The court further ordered Smith to attend thirty psychotherapy sessions on domestic violence and stated that refusal to do so would be held against her in any future legal proceedings. She was also required to hire only attorneys trained in domestic violence cases to represent her son's rights in court.

The court's directions are paradoxical in that they seem to treat Smith as a domestic violence victim in need of services and support while simultaneously severely curtailing her custody and access to her son. This

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[99] *Id.*
[100] *Id.*
[101] *Id.* at 237.
[102] *Id.* at 236–37.
[103] *Id.* at 237.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.* at 240.

has a potentially counterproductive effect, as imposing child custody restrictions for domestic violence victims may likely deter such victims from seeking help in the first place, for fear of losing access to their children. This case is evidence that the psychological and psychiatric fields may at times be complicit with the law in rendering participants of BDSM as unfit and potentially abusive parents.

The above jurisprudence of courts from Canada and the United States shows that child custody and visitation have hinged on so-called deviant practices of parents (namely, BDSM practices), which are considered a relevant factor for courts to determine custody and visitation terms, even in situations where there is no discernible child abuse or neglect. The following section adds to the jurisprudence around BDSM, by examining how courts construe physical force that can be an essential component of some BDSM practices, as well as consent in BDSM sex.

B. Criminal Law

In criminal law, across all three jurisdictions (the United Kingdom, Canada and the United States) there is an overwhelming trend amongst courts to construct the recipient of physical force in BDSM activities as a passive victim, the person(s) identified as dominant as an abuser, and any consent given by the "victim" as dubious or negligible. Cases from the United Kingdom, Canada, and the United States illustrate the limitations of mainstream understandings of pain and its relationship to physical assault, as well as consent when contextualized in BDSM activities.

1. The United Kingdom

The United Kingdom has placed limits on sexual consent to BDSM activities and has sought to categorize persons who engage in BDSM practices where there are elements of pain as either assaulters or victims. The limitations of judicial understandings of assault and consent can be seen through the cases of *R. v. Brown*,[108] *R. v. Wilson*,[109] and *R. v. Emmett*.[110]

a. R. v. Brown

In the United Kingdom, the seminal *R. v. Brown* case[111]

[108] R. v. Brown, [1994] 1 AC 212.
[109] R. v. Wilson, [1997] QB 47 (C.A. Crim. Div.).
[110] R. v. Emmett, [1999] EWCA (Crim) 1710.
[111] *Brown*, [1994] 1 AC 212.

(colloquially known as the Spanner case, after the name of the investigation) elucidates the law's desire to categorize BDSM as violence rather than sex and unveils the flawed legal reasoning for doing so.[112] The facts of the case relate to a group of five homosexual men, who engaged in sadomasochistic acts with each other in private spaces.[113] None of the participants in the videos had ever complained to the police or even required medical care as a result of participating in the activities shown in the videos.[114] The participants engaged in BDSM together for a substantial period of time and freely consented to the activities.[115] The activities happened to be uncovered by an unrelated police investigation,[116] which led to the discovery of a number of videotapes depicting consensual same-sex BDSM activities between the men.[117] One year after the discovery, the police claimed that they were in possession of snuff films[118] and launched a murder investigation, Operation Spanner. The police eventually learned that all the men were willing participants, none suffered any injuries requiring medical attention, and none died as a result.[119] Nevertheless, assault charges were brought against all five men under the Offences Against the Person Act of 1861 (Offences Act).[120] The lower court ruled that consent was not an eligible defense to charges of battery and issued sentences ranging from fines to imprisonment for four and half years.[121] Some of the defendants appealed to the High Court and then finally to the House of Lords. The final decision was delivered in 1993 and the convictions were upheld.[122]

In *Brown*, the defendants were charged with causing "actual bodily harm" under Section 47 of the Offences Act as well as "unlawfully and maliciously" wounding or inflicting "grievous bodily harm" upon another person under Section 20 of the Act.[123] The prosecution also

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[112] Sarah Beresford, *Lesbian Spanners: A Re-appraisal of UK Consensual Sadomasochism Laws*, 37 LIVERPOOL L. REV. 63, 68 (2016).
[113] *Brown*, [1994] 1 AC 212.
[114] *Id.* at 11.
[115] *Id.* at 3.
[116] *Id.* at 7.
[117] *Id.*
[118] Snuff film is a genre that purports to show scenes of actual murders.
[119] *Brown*, [1994] 1 AC 212.
[120] *Id.* at 3.
[121] *Id.* at 18.
[122] The case was then taken up to the European Court of Human Rights (ECtHR), which ruled in 1997 that a state is entitled to regulate private activity where issues of health, safety, and morality are at stake. *See* Laskey, Jaggard & Brown v. United Kingdom, App. Nos. 21627/93, 21826/93, 21974/93, 24 Eur. H.R. Rep. 39 (1997).
[123] Offences Against the Person Act 1861, 24 & 25 Vict. c. 100, § 20 (UK): "Whosoever

accused the submissive partners of aiding and abetting in the crime of being assaulted by giving their consent to the BDSM activities.[124] The court viewed the defendants as aggressors who had intentionally inflicted violence upon the "victims" despite their consent, and occasioned bodily harm.[125] Throughout this judgment, the court carved out socially acceptable exceptions, wherein consent would be accepted by the court as a valid defense to causing bodily harm: tattooing, surgery, and violent sports.[126] BDSM, however, was not included among them. Lord Templeman expressed disdain and social censure of BDSM, in saying that the sexual activities committed by the defendants were "unpredictably dangerous and degrading"[127] and that "[p]leasure derived from the infliction of pain is an evil thing."[128] The court noted the group's use of a safe word as evidence of the defendants' awareness of the risk of physical violence and, therefore, culpability.[129]

Lord Templeman, in his opinion, observed that the principle of bodily autonomy cannot be the sole, or even primary, consideration to guide policy decisions.[130] Moreover, he expressly stated that sadomasochism is concerned with violence and that the practices of the men under trial "were developed with increasing barbarity and taught to persons whose consents were dubious or worthless."[131] Templeman's strongest objections stemmed from the age of the "victims," whom he claimed were introduced to sadomasochism before the age of 21.[132] He further concluded that the defendants used alcohol and drugs to obtain consent, that the victims had no control over the situation, and that there were obvious dangers of injury and blood-borne infections, like HIV, of which the defendants were aware.[133] According to Templeman, BDSM encounters involve cruelty by sadists and degradation of victims (masochists), and consent is not available as a defense for these baseless

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shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of [an offence] . . . and shall be liable . . . [to a maximum penalty of five years imprisonment]."

[124] Ingrid Olson, *Asking for it: Erotic Asphyxiation and the Limitations of Sexual Consent*, 4 JINDAL GLOB. L. REV. 171, 179 (2012).

[125] *Brown*, [1994] 1 AC 212, 6.

[126] *Id.* at 4, 29.

[127] *Id.* at 6.

[128] *Id.* at 7.

[129] *Id.* at 6.

[130] *Id.* at 5–6.

[131] *Id.* at 6.

[132] *Id.*

[133] *Id.*

activities that "breed and glorify cruelty."[134]

Similar reasoning was used by both Lords Jauncey and Lowry in their respective opinions in *Brown*.[135] Jauncey argued that, except in regulated sports, injuries should not be allowed to be inflicted where they might result in a breach of peace.[136] Further, he stated that consent can be used as a defense when the charge is assault at common law, but not when actual bodily harm is occasioned.[137] Jauncey, like Templeman, spent considerable portions of his decision discussing the fact that the defendants were homosexuals, that wounds that cause a person to bleed can result in the transmission of HIV, and that this case must be decided with the public safety in mind.[138] Lowry went further, and stated that sadomasochistic homosexual activities "cannot be regarded as conducive to the enhancement or enjoyment of family life or conducive to the welfare of society."[139] He reasoned that any relaxation in the enforcement of Sections 20 and 47 of the Offences Act would encourage these (homosexual) practices and allow the participants to operate with impunity.[140]

Lords Mustill and Slynn presented dissenting opinions, but even these are invested in dehumanizing and demoralizing the practice of BDSM as well as the defendants. Mustill stated that the defendants' behavior, though "worthy of censure,"[141] involved no aggression or animosity and that the recipients of the injuries made no protests. In addition, he contended that even if the conduct of the defendants is repulsive, the state should not interfere in the rights of an individual to live a private life—provided a balance is struck between the interests of the individual and the interests of the public at large.[142] Finally, Mustill claimed that he does not advocate for the decriminalization of sadomasochistic conduct, yet he also does not consider the acts in this particular instance to be offenses under criminal law. Lord Slynn likewise stated that consent cannot always be a defense to any act that one person does to the other, but the line between whether or not consent should be allowed as a defense depends on the gravity of the injury, allowing

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[134] *Id.*
[135] *Brown*, [1994] 1 AC 212.
[136] *Id.* at 7.
[137] *Id.* at 7–8.
[138] *Id.* at 11.
[139] *Id.* at 17.
[140] *Id.*
[141] *Id.* at 18.
[142] *Id.* at 22.

consent as a defense for all lesser injuries.[143] In this case, he argued, consent was given and "[a]stonishing though it may seem, the persons involved positively wanted, asked for, the acts to be done to them."[144] Moreover, Slynn highlighted the fact that all the acts were done in private and all the participants were adults. He concluded that if these acts were to nevertheless be considered offenses, it would be an invasion of privacy.[145] As far as public policy on consent and BDSM is concerned, Slynn was content to leave the decision up to the legislature, which had yet to issue explicit law on this topic, stating that for now, the convictions should be set aside.[146]

Given that the majority held in favor of maintaining the convictions, it is clear that, particularly for gay men, there is no legal defense of consent to sadomasochistic harm under English law.[147] The rejection of the principle of bodily autonomy in a case where consent is undisputed—explicitly by Lord Templeman in his opinion—is also a clear indication of the judiciary's rejection of BDSM in general, and of homosexual sadomasochism in particular. Lord Templeman's opinion not only allotted considerable discussion to the erasure of submissive consent based on the presumed perverseness of BDSM activity, but also revealed disgust towards men who have sex with men in such a manner.

As legal scholar Susan Schmeiser highlights, courts have generally reasoned that the consent given by the masochist is "pure illusion or delusion, since no reasonable person—no autonomous, rational male subject—would deliberately invite sexualized violence."[148] However, the judiciary's approach to sadomasochism within the matrimonial home, as seen in the cases of *R. v. Wilson*[149] and *R. v. Emmett*,[150] has not followed quite the same course of legal decision-making as *Brown*'s[151] treatment of non-monogamous homosexual BDSM activity.

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[143] *Id.* at 31.
[144] *Id.*
[145] *Id.*
[146] *Id.* at 32.
[147] *Brown*, [1994] 1 AC 212.
[148] Susan R. Schmeiser, *Forces of Consent*, *in* STUDIES IN LAW, POLITICS AND SOCIETY 11 (2004).
[149] R. v. Wilson, [1997] QB 47 (C.A. Crim. Div.).
[150] R. v. Emmett, [1999] EWCA (Crim) 1710.
[151] *Brown*, [1994] 1 AC 212.

b. R. v. Wilson

The case of *R. v. Wilson* highlights the differential and arguably arbitrary treatment of BDSM as a crime.[152] On May 14, 1994, Alan Wilson used a hot knife to brand his initials on his wife Julie's buttocks.[153] The wife's skin became infected as a result of the branding and she then sought medical attention.[154] The doctor who treated Julie's skin reported the matter to the police and prosecutors then accused Wilson of assaulting his wife and charged him under Section 47 of the Offences Act.[155] Wilson stated that his wife wanted a tattoo of his name on her buttocks and, not knowing how to tattoo, he used a knife to brand the letters instead.[156] He argued that ". . . it was done for love. She loved me. She wanted me to . . . put my name on her body" and that they had mutually decided he would use a hot knife on her.[157]

At trial a year later, neither Wilson nor his wife produced any evidence.[158] The statement of the doctor who had examined Mrs. Wilson was read out to the jury and it noted bruising around the burn.[159] The presiding judge ruled that the Crown Court was bound by the *Brown*[160] precedent—which held that consent is not a defense when bodily harm is inflicted upon a person—and directed the jury to convict.[161] The case was appealed and eventually decided by a three-judge bench in February of 1996.[162] The Court of Appeal first distinguished the facts of the case from *Brown*, noting that Mrs. Wilson not only consented to the branding, but in fact instigated it.[163] The court then observed that "the appellant's desire was to assist her in what she regarded as the acquisition of a desirable piece of personal adornment" and that the facts of the case were akin to a person desiring and receiving a nostril or tongue piercing.[164]

Subsequently, the court noted that the decision in *Brown*

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[152] *Wilson*, [1997] QB 47.
[153] *Id.* at 747.
[154] *Id.*
[155] Offences Against the Person Act 1861, 24 & 25 Vict. c. 100, § 47 (UK): "Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable . . . to be kept in penal servitude."
[156] *Wilson*, [1997] QB 47.
[157] *Id.* at 748.
[158] *Id.* at 749.
[159] *Id.*
[160] R. v. Brown, [1994] 1 AC 212.
[161] *Wilson*, [1997] QB 47, 749.
[162] *Id.* at 747.
[163] *Id.* at 749.
[164] *Id.* at 750.

recognized certain exceptions, including tattooing, to the proposition that consent is not a defense to a charge under Section 47 of the Offences Act.[165] The court further observed that neither public policy nor public interest demanded that Wilson's actions be brought within the ambit of criminal law, because it was consensual activity in the privacy of the matrimonial home.[166] The court thus allowed Wilson's appeal and quashed his conviction.[167]

The ruling in *Wilson*[168] stands in stark contrast to *Brown*.[169] In *Wilson*,[170] the submissive's desire and consent, though outside the ambits of social normalcy, were considered and given significance whereas the submissives in *Brown*[171] were seen as tricked at a young age into perverse homosexual behavior, disallowing the existence of their consent or any desire to engage in the conduct. Though all participants in sexual activity in both cases were legal adults, only the court in *Wilson*[172] described Julie Wilson (the submissive wife) as such. In contrast, the court in *Brown*[173] described the submissives involved as "youths." In doing so, the court's infantilizing disclosure overlooked the "youths'" autonomy in making choices and consenting to engagement in sexual activity. Furthermore, the court contrasted the branding in *Wilson*[174] with the sadomasochistic activities in *Brown*,[175] finding that the latter was done for sexual gratification, but the former was just merely a non-sexual form of tattooing or piercing.[176] This was in spite of the fact that Julie Wilson had originally asked for the initials to be tattooed on her breasts—commonly, the buttocks and breasts are "classic erogenous zones."[177] Nevertheless, the Court of Appeal discounted this and referred to the branding as a mere "personal adornment."[178] While it may appear that the heterosexual marital identity of the defendant (or submissive) is the primary determining factor in a court's decision on the legality of a BDSM

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[165] *Id.* at 747.
[166] *Id.* at 750.
[167] *Id.*
[168] *Id.*
[169] R. v. Brown, [1994] 1 AC 212.
[170] *Wilson* [1997] QB 47, 747.
[171] *Brown*, [1994] 1 AC 212.
[172] *Wilson*, [1997] QB 47.
[173] *Brown*, [1994] 1 AC 212, 6.
[174] *Wilson*, [1997] QB 47, 747.
[175] *Brown*, [1994] 1 AC 212.
[176] *Wilson*, [1997] QB 47.
[177] Khan, *Kinky Identity*, *supra* note 19, at 238.
[178] *Wilson*, [1997] QB 47, 750.

interaction, this is not always the case. In *R. v. Emmett*,[179] discussed below, a heterosexual couple was living together and even got married during the trial. However, even the argument of privacy within the private, conjugal home was not accepted by the court.

c. R. v. Emmett

The case of *R. v. Emmett* illustrates the lengths that some courts will go to find that consent was not a material factor to defend such BDSM practices. Stephen Emmett and his partner had been cohabiting for about four months and were involved in an "energetic and very physical sexual relationship,"[180] which included sadomasochistic activities. Between January and February 1999, Emmett was convicted by the Crown Court at Norwich of two counts of "assault occasioning actual bodily harm" under the Offences Act and sentenced to nine months of imprisonment. Sometime after the prosecution began, the couple married.[181] Emmett appealed the conviction, and the case was decided by the Court of Appeal on 18 June 1999.[182]

On appeal, the court observed that the evidence upon which the lower court's decision was based had ironically not come from Emmett's wife, but instead from the doctor who examined her injuries. The first incident involved a sexual activity wherein Emmett covered his partner's head with a plastic bag and tightened it with a ligature; while she was covered, Emmett engaged in oral sex.[183] The judgment noted that Emmett lost track of what was happening to his partner, but as soon as he realized she was in distress due to the lack of oxygen, he immediately removed the bag from her head.[184] The decision was unclear as to whether she lost consciousness.[185] The following day, at his insistence, she went to the doctor who found subconjunctival hemorrhages in both eyes and bruising around the neck.[186] No treatment was prescribed and the eyes healed within a week.[187]

The next incident occurred a few weeks later.[188] During sexual

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[179] R. v. Emmett, [1999] AII ER (D) 641.
[180] *Id.* at 2.
[181] *Id.* at 1.
[182] *Id.*
[183] *Id.* at 1–2.
[184] *Id.* at 2.
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.*

activity, Emmett poured lighter fuel on his partner's breasts and set them on fire with her consent.[189] She suffered a burn which became infected.[190] Once again, at Emmett's insistence, she went to the doctor who initially thought it was a third degree burn that would require skin grafts.[191] However, by time of the hearing, he accepted that he had overestimated its seriousness as it had healed completely without any scarring.[192] Due to the "nature of the injuries and the degree of actual or potential harm,"[193] the Crown Court held that it would be proper for criminal law to intervene in this situation. Although Emmett repeatedly explained that all sexual activity was initiated only after discussion and complete consent from his partner, the court followed the *Brown* precedent[194]—that consent could not form the basis of defense.[195]

Emmett's defense before the Court of Appeal proceeded on two grounds. First, he relied on *Wilson*,[196] which had excluded from the purview of criminal law certain consensual sexual activities within the matrimonial space.[197] Recall in *Wilson,* discussed above, that the court found there was "no logical difference" between tattooing and the branding of initials on someone's body.[198] However, the court rejected this argument and distinguished the physical injuries in *Emmett*[199] from the branding that occurred in *Wilson*[200] after concluding that the injuries were much more severe in *Emmett* (e.g., "an excruciating painful burn" that required medical attention, asphyxiation).[201] Second, Emmett argued that the involvement of criminal law in this situation was a breach of Article 8 of the European Convention on Human Rights (ECHR),[202] as

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[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] R. v. Brown, [1994] 1 AC 212.
[195] *Emmett*, [1999] AII ER (D) 641, 2.
[196] R. v. Wilson, [1997] QB 47.
[197] *Emmett*, [1999] AII ER (D) 641, 3–4.
[198] *Id.* at 4.
[199] *Id.*
[200] *Wilson*, [1997] QB 47.
[201] *Emmett*, [1999] AII ER (D) 641.
[202] European Convention on Human Rights art. VIII, Nov. 4, 1950, 213 C.E.T.S. 11:
Right to respect for private and family life.
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the

the sexual activity had been carried out in the privacy of their own bedroom.[203] The court, however, referred to *Brown*,[204] holding that the conduct of the accused had gone beyond the permissible limit of risk, regardless of the location where it occurred.[205] Hence, the court dismissed the appeal and upheld Emmett's conviction.[206]

Crucially, Emmett did not spend any time in jail, as his sentence of imprisonment was suspended at trial.[207] Further, the presiding judge noted in the judgment that Emmett and his partner were married,[208] which was likely to have been considered a mitigating factor in the sentencing process. In contrast, the convicted persons in *Brown* served multiple-year sentences even though all persons involved in the activity had consented and none required any medical attention.[209] The stark difference in sentencing between the two cases raises questions on the role of marital status in such court decisions. Heteronormativity seems to bring some legitimacy to practices otherwise deemed uncivilized or perverted.[210] While the primary factor contributing to the court's decision appears to be the extent of the injuries that occurred, the sexual orientation and marital status of the participants to the BDSM activity also appears to play a significant role in the court's decision-making process.

In conclusion, in cases within the United Kingdom, consent to BDSM-related injuries becomes evidence of a subversion of an individual's will, indicating an unsoundness of the mind.[211] This means that no rational person can consent, as consenting to physical harm is deemed illogical, thus establishing a tautology. If a person consents, the person is not rational and therefore, they lack capacity to consent.[212]

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economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[203] *Emmett*, [1999] AII ER (D) 641.

[204] R. v. Brown, [1994] 1 AC 212.

[205] *Emmett*, [1999] AII ER (D) 641.

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Brown*, [1994] 1 AC 212.

[210] *See* Rubin, *Thinking Sex*, *supra* note 43.

[211] Schmeiser, *supra* note 148, at 12.

[212] *See* Jeffreys, *supra* note 39, at 86. This view aligns with the view of radical feminists who believe that "under the conditions of hetero-patriarchy sexual contracts will always be necessarily unequal," between men and women at least. And furthermore, these conditions may well be internalized and replayed in sadomasochistic relationships such that SM "eroticises the crude power difference of gender which fuels heterosexual desire, reinforcing rather than ending it."

In all aforementioned cases, the courts counter the argument that consent is a defense to injury by emphasizing the physical dangers of sadomasochism. Yet, in the two cases where the recipients actually required some medical attention—*Wilson*[213] and *Emmett*[214]—the defendants were either acquitted or had their sentences suspended, whereas in *Brown*[215] where none of the participants had any lasting injuries, the court at every level primarily upheld the convictions on grounds of protecting the public interest. This inconsistency suggests that the sexual orientation and marital status of BDSM participants are mitigating factors in the prosecution and sentencing of BDSM-related cases.

2. Canada

Canada has also placed limits on sexual consent to BDSM activities, thereby limiting one's sexual autonomy.[216] We can trace those limits through the cases of *R. v. J.A.*,[217] *R. v. Butler*,[218] and *R. v. Price*.[219]

a. R. v. J.A.

In the case of *R. v. J.A.*, a man was convicted for performing sexual acts with a partner when she was unconscious as a result of consensual erotic asphyxiation.[220] Despite the couple having a history of consensual BDSM sex, as well as the "victim" testifying that she had consented to the asphyxiation as well as the sexual acts, the court glossed over this salient context.[221] Instead, the court found that she could not have consented to sex while she was unconscious.[222] In this case, during the course of sexual relations, the appellant J.A. placed his hands around the throat of his partner, K.D., whose hands were tied up, and choked her until she lost consciousness.[223] When she regained consciousness approximately three minutes later, J.A. was inserting a dildo into her

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[213] R. v. Wilson, [1997] QB 47 (C.A. Crim. Div.).
[214] R. v. Emmett, [1999] EWCA (Crim) 1710.
[215] R. v. Brown, [1994] 1 AC 212.
[216] *See* Olson, *supra* note 124; R. v. Jobidon, [1991] 2 S.C.R. 714 (Can.); R. v. Welch (1995), 25 O.R. 3d 665 (Can. Ont. C.A.).
[217] R. v. J.A., [2011] 2 S.C.R. 440 (Can.).
[218] R. v. Butler, [1992] 1 S.C.R. 452 (Can.).
[219] R. v. Price, [2004] B.C.J. No. 814 (Can.).
[220] *J.A.*, [2011] 2 S.C.R. 440, 5.
[221] *Id.* at 8, 12.
[222] *Id.* at 12.
[223] *Id.* at 5.

anus.[224] He removed it soon after she awoke, and the couple proceeded to have sex.[225] K.D. testified that she consented to the choking and that she had lost consciousness before when they had experimented with asphyxiation.[226] Two months after the incident, K.D. reported to the police that she consented only to the choking and not to the sexual activity afterwards.[227] However, she later recanted this allegation, stating that she had only made the complaint because J.A. had threatened to seek sole legal custody of their son.[228] The trial court convicted J.A. of sexual assault, but the Court of Appeal set aside the conviction.[229] Ultimately the Supreme Court restored the conviction for sexual assault by a 6-3 majority.[230]

The main issue before the court was whether someone can perform sexual acts on an unconscious person if consent was given prior to being rendered unconscious.[231] According to the Canadian Criminal Code, as well as the jurisprudence of the court, consent must be ongoing and conscious.[232] Laying out the legal framework for sexual assault, the court stated that both *mens rea* and *actus reus* must be proven.[233] The *actus reus* is proven if the accused has touched another person without consent, and the *mens rea* of the offense is proven either if the accused knew that the person was not consenting to the sexual act or if they were willfully ignorant to the absence of consent.[234]

The appellant argued that K.D. had the right to provide advanced consent to unconscious sexual activity, drawing on the analogy that common law recognizes the capacity of doctors to perform surgeries on unconscious patients.[235] However, the court rejected this argument and stated that the rules governing medical practice are different from those that regulate consent to sexual acts.[236] The court further argued that such consent was invalid because when the complainant was unconscious, she had no way of knowing if her partner had exceeded the bounds of her

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[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *Id.* at 5–6.
[230] *Id.* at 13.
[231] *Id.* at 6.
[232] *Id.* at 7.
[233] *Id.* at 8–9.
[234] *Id.* at 6–7.
[235] *Id.* at 11.
[236] *Id.* at 12.

consent.[237] Ultimately, the majority judgment noted that consent to sexual acts (but not medical procedures, thus distinguishing them) requires "a conscious, operating mind, capable of granting, revoking or withholding consent to each and every sexual act."[238] Furthermore, the court held that it is not sufficient if the accused believes that the complainant has given consent—reasonable steps to ascertain ongoing consent must be taken.[239] This, the court concludes, is impossible when a person is unconscious.[240] In sum, the court officially held that advance consent is not tantamount to actual legally required consent for sexual activities.[241] Thus, the court upheld the appeal by the Crown and restored the appellant's conviction.[242]

The dissenting opinion in the judgment relied on the principle of bodily autonomy, stating that "complainant in this case, said yes, not no."[243] As the judges noted, K.D. and the appellant mutually agreed to render her unconscious through asphyxiation and to engage in sexual acts while she remained in that unconscious state.[244] Moreover, the dissent emphasized that the Criminal Code and its provisions relating to sexual assault and consent do not exist to "'protect' women against themselves by limiting their freedom to determine autonomously when and with whom they will engage in the sexual relations of their choice."[245] The dissenting judges rightly pointed out the absurdity of that consequence and, hence, did not accept the prosecution's argument.[246]

The case of *R. v. J.A.*[247] is important in building discourse around whether BDSM acts involving unconsciousness can still be consensual in nature. In this case, even though one of the participants was unconscious, she had consented earlier to her partner asphyxiating her, as well as to undertaking sexual acts with her in that unconscious state. Although it cannot be said that prior consent is always sufficient to consent to all later sexual acts, it is important to consider whether prevailing normative notions of consent are enough to preserve the agency and safety of participants in BDSM practices that entail asphyxiation or unconsciousness.

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[237] *Id.*
[238] *Id.* at 10.
[239] *Id.*
[240] *Id.*
[241] *Id.* at 9–10.
[242] *Id.* at 13.
[243] *Id.*
[244] *Id.*
[245] *Id.* at 14, 18.
[246] *Id.* at 18.
[247] *J.A.*, [2011] 2 S.C.R. 440.

b. R. v. Butler

In *R. v. Butler*,[248] the appellant, Donald Victor Butler, had opened a video store called the Avenue Video Boutique in Winnipeg, Manitoba.[249] The store allowed the renting and selling of "hard core" videotapes and magazines, sexual paraphernalia, and had a sign outside that stated "Avenue Video Boutique: a private members only adult video/visual club. Notice: if sex-oriented material offends you, please do not enter. No admittance to persons under 18 years."[250] On August 21, 1987, the police raided the appellant's store bearing a search warrant and seized all the store's inventory, subsequently charging the appellant with selling obscene material, possessing obscene material for the purpose of distribution, possessing obscene material for the purpose of sale, and exposing obscene material to public view, contrary to Canada's obscenity laws.[251]

In this case, the court found that the selling of BDSM pornographic videos was socially unconscionable under Canada's obscenity laws and denied that sexual pleasure could be derived by such behaviors.[252] In upholding the country's contested obscenity provisions of Canada's Criminal Code, the court applied the community standards test, asking whether the Canadian "community" would accept such BDSM behavior.[253] The court's answer was in the negative, relying on radical feminist opinions on pornography and equating consensual BDSM with the dehumanization of those who choose to participate in such activities.[254] The court professed to eschew, in dicta, any interest in policing sexual morality but, rather, purported to take the stance of retributive gender justice, arguing that to encourage or allow violence in sex would perpetuate women's inequality.[255] However, the case is riddled with statements condemning consensual BDSM activity as immoral and subhuman regardless of the participant's gender.[256]

Justice Sopinka, writing for the majority, likened BDSM to "sex which is degrading or dehumanizing."[257] As analytic philosophy of law

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[248] R. v. Butler, [1992] 1 S.C.R. 452 (Can.).
[249] *Id.* at 5.
[250] *Id.*
[251] *Id.*
[252] *Id.* at 6.
[253] *Id.* at 6, 12.
[254] *Id.* at 6–7, 13.
[255] *Id.* at 13–14.
[256] *Id.* at 14.
[257] *Id.* at 16.

scholar Les Green aptly phrased it, the court "fashioned the silk purse of harm prevention out of the sow's ear of moralism,"[258] whereby the court's own morals on sexual activity are repackaged and sold as preventive measures to protect participants, particularly women participants. The court explicitly denied that human bodies can experience pleasure from pain, thereby dehumanizing persons who do not fit this normative statement: "They are exploited, portrayed as desiring pleasure from pain, by being humiliated and treated only as an object of male domination sexually, or in cruel or violent bondage."[259] Dressed up in the cloak of gender equality, the case is an example of "sexual morality in drag."[260]

c. R. v. Price

The case of *R. v. Price*[261] involved a defendant charged with obscenity—not assault or battery—for producing BDSM films. The accused had created, published, and distributed films, which depicted a range of violent sexual activity—for instance, one video, entitled "Rage" involved a man urinating into a woman's mouth and using her head to scrub a toilet.[262] The court's decision in the case illuminates whether consent is a defense to consensual BDSM activities in Canada. The court found that consent was a defense only if contemporary community standards show community tolerance of the activity.[263] Before ruling, the court allowed the defendant to submit proof of local and national BDSM organizations and groups as evidence of community tolerance.[264] The court noted the changing nature of the standard; that as society changes, so do the types of activities for which consent is a justifiable defense for participation in the activity.[265] It remains to be seen how Canadian courts will address the applicability of the standard to consensual BDSM activities within the country as societal acceptance and knowledge of BDSM changes over time.

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[258] Leslie Green, *Pornographies*, 8 J. POL. PHIL. 27, 29 (2000).
[259] *Butler*, [1992] 1 S.C.R. 452, 13 (Can.).
[260] BRENDA COSSMAN & SHANNON BELL, BAD ATTITUDE/S ON TRIAL: PORNOGRAPHY, FEMINISM, AND THE BUTLER DECISION 108 (1997).
[261] R v. Price, [2004] B.C.J. No 814 (Can.).
[262] *Id.* at 7.
[263] *Id.* at 10.
[264] *Id.* at 9.
[265] *Id.* at 10.

3. United States

a. People v. Samuels

The case law in U.S. courts deals with differential notions of consent, often dependent on the types of participant-BDSM activities. *People v. Samuels* was the first case to ever address consensual BDSM in America.[266] The California court found the defendant, who made BDSM films for contribution to the Kinsey Institute, guilty of assault.[267] In the case, Samuels made several films featuring himself whipping another man, including one where the man had been strung up, and at the time Samuels sent the films to be developed, the film company alerted the authorities of the same.[268] Samuels was charged with assault through force likely to cause bodily harm.[269] He stated that he had placed a request for volunteers to participate in his films, and the man had responded to the same, agreeing to be a volunteer.[270] Further, Samuels stated that he was not whipping the man with as much force as it seemed, and that the wounds seen on the body of the man had been cosmetically applied.[271]

The court found that the "consent of the victim is not generally a defense to assault or battery, except in a situation involving ordinary physical context for blows incident to sports such as football, boxing or wrestling,"[272] thus finding that the nature of the activity determines the legitimacy of consent. Further, the court questioned a reasonable person's ability to consent to BDSM conduct, finding that "[i]t is a matter of common knowledge that a normal person in full possession of his mental faculties does not freely consent to the use upon himself of force likely to produce great bodily injury."[273] Thus, the court found that the person who gave consent to the assault in the BDSM films could not and did not give true, legal consent and held that the defendant had assaulted them.

b. People v. Jovanovic

In December 1999, a New York Appellate Court delivered a relatively positive judgment on the legality of a sadomasochistic encounter that involved kidnapping and alleged sexual assault in *People*

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[266] People v. Samuels, 250 Cal. App. 2d 501 (1967).
[267] *Id.* at 11.
[268] *Id.* at 5.
[269] *Id.* at 6.
[270] *Id.* at 7.
[271] *Id.* at 5.
[272] *Id.* at 9.
[273] *Id.* at 10.

v. Jovanovic.[274] The trial court, applying the rape shield law, redacted several portions of e-mails between the complainant and the appellant, Jovanovic, wherein the complainant had detailed her sexual fantasies, including her interest in snuff films as well as aspects of her previous sadomasochistic relationships.[275] The jury then convicted the appellant on charges of kidnapping, sexual abuse, and assault.[276] The appellate court overturned this judgment and held that the rape shield law, which restricts admissibility of evidence that the complainant has engaged in prior sexual activity, either with the accused or any other person, had been misapplied by the lower court.[277]

In the summer of 1996, the complainant and the appellant had the first of several interactions in an online chat room.[278] They soon began meeting in person and discussed, among other things, pagan rituals, complainant's submissive tendencies, the occult, and snuff films.[279] They continued their conversations through e-mail and by November had started to discuss the details of making a snuff film.[280] The complainant purportedly expressed an interest in "a tall dark dismember-er."[281] From November 20 to 22, they corresponded over e-mail.[282] The complainant eventually gave her phone number and address to the appellant and they talked over the phone for approximately four hours that night.[283] The appellant invited her to see a movie and she gave him her dormitory address, where he arrived to pick her up at 8:30 p.m. on November 22.[284] The complainant testified during trial that she had trouble being assertive and that, although she did not want to go to his apartment after the movie, she agreed anyway.[285]

At his apartment, they watched movies depicting violent sexual behavior and had a long conversation that ended with a discussion of good and evil.[286] At this point, the complainant stated that the appellant

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[274] People v. Jovanovic, 700 N.Y.S.2d 156 (1999).
[275] *Id.* at 7.
[276] *Id.* at 3.
[277] *Id.*
[278] *Id.* at 4.
[279] *Id.*
[280] *Id.*
[281] *Id.*
[282] *Id.* at 4–5.
[283] *Id.* at 5
[284] *Id.*
[285] *Id.*
[286] *Id.*

directed her to take off her sweater and pants.[287] She complied, and he tied down her arms and legs.[288] He then brought out a candle and poured hot wax on her stomach and vaginal area, during which the complainant claimed she was screaming at him to stop.[289] Sometime later, the appellant penetrated the complainant's rectum and caused her intense pain.[290] She next remembers waking up on Saturday and, later that evening, fought him off and ran outside the apartment.[291] The complainant stated that she went back to her dormitory and spoke to one of her friends about the events that had transpired.[292] On November 24, she received an email from the appellant in which he informed her that she left her gold chain in the apartment and closed it with "I hope you managed to get back all right."[293] The complainant replied asserting that she had "never been so happy to be alive"[294] and that she felt "purged by emotions, and pain."[295] They continued online communications after this incident.[296]

Due to the trial court's decision to redact several portions of these e-mails, the jury was presented with the narrative of a vulnerable college girl being seduced by a "deviant and devious male assailant" and a sexual assault involving painful practices.[297] The appellate court also noted that the exclusion of these messages resulted in an imbalance that rendered the appellant unable to challenge key aspects of the complainant's testimony.[298] The lower court ruled these messages inadmissible due to the jurisdiction's rape shield law.[299] However, the appellate court stated that the inclusion of messages would not be proof that she was a sadomasochist; rather, their importance laid in the fact that they conveyed her desire to engage in S/M activities with the appellant in particular.[300] Significantly, the court relied on the right of cross-examination and held that the appellant's Sixth Amendment right was violated due to his

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[287] *Id.*
[288] *Id.*
[289] *Id.* at 5–6.
[290] *Id.* at 6.
[291] *Id.*
[292] *Id.*
[293] *Id.*
[294] *Id.*
[295] *Id.*
[296] *Id.*
[297] *Id.*
[298] *Id.* at 6, 13.
[299] *Id.* at 3.
[300] *Id.* at 12–13.

inability to confront the complainant about the fantasies she had detailed in her e-mails to him, as well as her interest in exploring BDSM with the defendant.[301] Thus, the court ruled that the conviction should be reversed and remanded for a new trial.[302] Surprisingly, the majority decision in *Jovanovic* made no moral judgments regarding the sexual fantasies and practices of either the appellant or complainant.[303] However, as legal scholar Monica Pa argues, the judiciary adopts an extremely infantilizing approach to the "victims" of BDSM, dehumanizing the participants and removing the sexual and pleasure aspects of the behavior.[304] If BDSM were treated equally to normative forms of sexual interactions, the defense of consent would be available to those accused of assault.[305]

The jurisprudence in the family and criminal law spheres in the United Kingdom, the United States, and Canada shows that despite burgeoning popular understandings of BDSM and kink as valid sexual behaviors and preferences, rather than pathologies, courts still adopt biased notions of the practices as well as their participants, which often have grave implications for litigants in disputes. The judicial biases that underlie BDSM practices and participants manifest in limitations on child custody and visitation in the context of family law, and in the realm of criminal law, can lead to the prosecution of dominant BDSM participants as assaulters or criminals.

C. Recent Case Law and Future Directions

Prior jurisprudence has set the stage for largely unfavorable legal approaches to BDSM and consent within these practices, which is gradually changing through more recent court judgments and observations. This is illustrated through an overview of several recent cases on consensual BDSM activities that lay outside the primary scope of this paper (e.g., perceptions of the BDSM participating parent), but are nevertheless reviewed below as they have a bearing on potential future directions of BDSM case law. Some of these cases mark a clear evolution in jurisprudence, especially relating to notions of consent within BDSM sexual activities.

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[301] *Id.* at 12.
[302] *Id.* at 14.
[303] *Id.* at 3–14.
[304] Monica Pa, *Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex*, 11 TEX. J. WOMEN & L. 51 (2001).
[305] *Id.*

a. *Mosley v. United Kingdom*

In the 2011 case of *Mosley v. United Kingdom*, the European Court of Human Rights examined a case in which the litigant sought a declaration that the United Kingdom had failed its positive obligations to protect the litigant's privacy.[306] The initial cause for the suit gave rise when News of the World published an article and video, titled "F1 Boss has Sick Nazi Orgy with 5 Hookers."[307] The content covered the sexual activities of former motoring racing chief Max Mosley, describing him as a "secret sadomasochistic sex pervert" and asserting that Mosley's sexual practices were a form of Nazi-role play.[308] Mosley brought suit against the newspaper and was awarded damages by the U.K.'s High Court after the court found no evidence of a Nazi element to the sexual activities and that the newspaper had knowingly published "intrusive coverage of someone's sex life."[309] The judgment acknowledges that BDSM between adults is consensual sex that should be treated like any other type of consensual sex between adults. In fact, the court noted multiple times the consensual nature of the BDSM conduct, finding that consenting adults have a reasonable expectation of privacy regarding their sexual activities regardless of its "unconventional" nature.[310]

Further, in an earlier decision on the same case by the lower Queen's Bench Division, the court explicitly noted the need to treat adult consenting actors equally regardless of the type of sex they are engaged in: "[A]nyone indulging in sexual activity is entitled to a degree of privacy, especially if it is on private property and between consenting adults, whether paid or unpaid."[311] The court merely remarked on the unusual facts of the case but noted that there is nothing "landmark" about the decision as it is the same exact application of an already established rule, thus treating BDSM sex in largely the same regard as if the tape had been of normative sex.[312]

b. *R. v. Brown*

R. v. Brown showed how the court can characterize dominant BDSM participants as being abusive, submissive participants as passive victims, and treat the consent provided for BDSM activities as suspect in

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[306] Mosley v. United Kingdom, App. No. 48009/08, 53 Eur. H.R. Rep. 30 (2011).
[307] *Id.* at 5.
[308] *Id.*
[309] *Id.* at 8.
[310] *Id.*
[311] Mosley v. News Group Newspapers Ltd, [2008] EWHC 1777 (QB), 15.
[312] *Id.* at 34.

nature, bringing the activities within the ambit of the criminal legal framework.[313] This has the effect of BDSM being categorized as violence by the law, rather than as sex.[314] However, the law on consent has evolved since then, evidenced by the cases of *R. v. Wilson*[315] and *R. v. Emmett*,[316] which has formed the basis for more favorable treatment of non-monogamous BDSM gay activity.

The European Court of Human Rights, though agreeing with the allocation of damages, found that the United Kingdom did not breach its duty of privacy by failing to force newspapers to notify those whose personal lives would be impacted by a forthcoming publication.[317] The court said that to do so would immeasurably chill effective journalism.[318] The lack of prejudice against non-normative, consensual sex on the part of both the U.K.'s High Court as well as the European Court of Human Rights is worthy of note and may indicate similarly favorable decisions—ones that treat BDSM participating litigants and normative litigants equally—in the future.[319]

c. *Hayes v. Vancouver Police Board*

As further evidence of a changing legal approach to BDSM, the recent case of *Hayes v. Vancouver Police Board* shows the potential of BDSM as a protected "sexual orientation."[320] Hayes was denied a chauffeur permit by the City of Vancouver's Police Board, and, upon such denial, Hayes brought a suit arguing that he had been unfairly discriminated against on the basis of his identity as a pagan and S/M "sexual orientation."[321] Hayes argued that, rather than BDSM participation being a blight on one's character, engaging in and desiring such practices constitutes a sexual orientation, making such engagement potentially worthy of legal protection from discrimination.[322] In 2006, the British Columbia Supreme Court found that BDSM did not constitute a "sexual orientation," and the Court of Appeals concurred.[323] However, Hayes appealed to the Human Rights Tribunal, and, though the Tribunal

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[313] R. v. Brown, [2004] 1 AC 212.
[314] *Id.*
[315] R. v. Wilson, [1997] QB 47 (C.A. Crim. Div.).
[316] R. v. Emmett, [1999] EWCA (Crim) 1710.
[317] *Id.*
[318] *Id.*
[319] *Id.*
[320] Hayes v. Vancouver Police Board (No. 2), 2010 B.C. H.R.T. 324.
[321] *Id.* at 1.
[322] *Id.*
[323] *Id.* at 2.

ruled against Hayes, the court did so only after finding that there was no evidence that the permit had been denied on the basis of Hayes' practice of BDSM.[324] Therefore, the question of whether BDSM constitutes a sexual orientation was moot. However, the Tribunal notably assumed that BDSM *could* constitute a sexual orientation when examining the evidence and issuing their decision.[325] The Tribunal, then, left the door open on whether BDSM practices could in the future fit within the legal ambit of an orientation.

In summary, our review indicates that courts in the United Kingdom, Canada, and the United States appear generally to reimagine and recharacterize the receiving participants in sadomasochistic activities as passive victims, legally incapable of providing meaningful consent. The following section intertwines jurisprudence on BDSM with queer theory, which can reframe notions around these practices, as well as the perceived "roles" of participants in BDSM sex beyond conventionally framed ideas that they are either dominant criminals, or passive victims.

III. THE COURTS, BDSM, AND QUEER THEORY

After the detailed examination of family and criminal jurisprudence in the previous section, this section of the Article excavates common themes from the cases, as discoverable by route of donning a queer-feminist lens. Though the facts and the country's jurisprudence vary considerably among the cases, several commonalities are nevertheless present, including, the evident influence of the injury triad and the utilization of tautologous logic on the question of consent in BDSM. The following section below examines the origins and meaning of queer theory, which can be used to uncover judicial themes and biases that reinforce heteronormativity and serve to "other" non-normative practices, such as BDSM.

A. Uncovering Judicial Themes Through A Queer Theory Lens

Queer theory is a critical method or lens of looking at sexuality, emerging as "an impulse to question, problematize, or even disclaim the very idea of a fixed, abiding notion of identity."[326] The process of "queering" means to reverse and destabilize heteronormativity.[327]

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[324] *Id.* at 3.
[325] *Id.*
[326] SAMUEL A. CHAMBERS, THE QUEER POLITICS OF TELEVISION 13 (2009).
[327] Nick Rumens, *Sexualities and accounting: A queer theory perspective*, CRITICAL PERSP. ACCT. (2015), https://doi.org/10.1016/j.cpa.2015.05.003.

Gaining momentum in the 1990s, queer theory has interrogated the essentialist and social constructivist debate, which seeks to understand whether homosexuality has existed throughout history or whether it has been constructed within history.[328] Queer theory acknowledges the binaries around which the world has been constructed, seeking to understand the ways in which these categorical norms constrain the messiness and diversity of life, gender, and sexuality.[329] Sarah Ahmed contributes to queer theory by proposing a "queer phenomenology," which "reveals how social relations are arranged spatially, how queerness disrupts and reorders these relations by not following the accepted paths, and how a politics of disorientation puts other objects within reach, those that might, at first glance, seem awry."[330] The term "queer" itself, has been used to "other, to marginalize and oppress non-normative sexualities,"[331] and the reclamation of the term can "empower the attribution of sexualities and genders that do not ascribe to the culturally intelligible heterosexuality or two binary genders to queers, and in doing so, undertake a critical anti-normative project."[332] Scholars like Jeff Weeks situate sexuality as inherently subject to social organization, which should not be positioned as a "primordially natural phenomenon" but as "a product of social and historical forces."[333]

The social organization of sexuality creates its own hierarchy of oppression and injustice as elucidated in Gayle Rubin's radical theory of sex, whose erotic pyramid places marital, reproductive and heterosexual sexuality at the top, with the most "despised sexual castes" including trans persons and, notably, sadomasochists.[334] Individuals who fall lower on the pyramid are automatically presumed to have mental illness, a tendency for criminality, disreputable behavior, and limited social and physical mobility—making sex a "vector of oppression" that cannot be

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[328] *See, e.g.*, CHAMBERS, *supra* note 326.
[329] FOUCAULT, *supra* note 31, at 83.
[330] SARA AHMED, QUEER PHENOMENOLOGY: ORIENTATIONS, OBJECTS, OTHERS (Duke University Press, 2006).
[331] Eleanor Currie, *'SOGIE Human Rights': How is the European Court of Human Rights Shaping Queer Emancipation*?, U. LJUBLJANA (2019), https://repository.gchumanrights.org/bitstream/handle/20.500.11825/1084/Currie.pdf?sequence=1&isAllowed=y.
[332] Ratna Kapur, *The (Im)possibility of Queering International Human Rights Law*, *in* QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS 132 (Dianne Otto ed., 2017).
[333] JEFFREY WEEKS, SEXUALITY 6 (3d ed. 2003).
[334] Rubin, *Thinking Sex*, *supra* note 43, at 12.

linked to or understood by "class, race, ethnicity or gender."[335] For Foucault, sexuality presents a paradox as it is "controlled, named and subjected to surveillance as it entered the domain for public debate," leading sexually outlawed groups to protest.[336] Therefore, to challenge social categories and gender ideologies, the basic social system that is based on "binary oppositions"—such as male/female, heterosexual/homosexual, mind/body, nature/culture—must be challenged, along with the challenge to heteronormativity upon which queer theory is based.[337]

Viewed through a queer theory lens, several themes emerge from the court cases on BDSM discussed above, regardless of the case's national origin. First, the injury triad, a term coined by Janet Haley, is prominent within several of the cases.[338] The triad relies on three tenets: female injury, female innocence, and male immunity from harm. In other words, the triad assumes that, in sexual scenarios, women are innocent victims and men are either the aggressors or, at the very least, incapable of being harmed by women.[339] In several of the above cases concerning consensual BDSM interactions, the courts frame women participants as victims, as if they have been injured, even when these women testified to the contrary. For example, in the case of *R. v. J.A.*, there was no actual admissible evidence provided to the court indicating that the complainant (a woman) did not consent to the BDSM activity engaged in with the defendant (a man).[340] A prior video of the complainant stating that the defendant had assaulted her was deemed inadmissible after she said she had lied.[341] The court, instead, ignores the fact that the complainant admitted to consenting to the interaction and labels her as a battered woman—a subjecthood the court believes is incapable of consent due to duress. By cloaking her in the garb of victimhood, her legal capacity and sexual agency were dismissed by the court.

Similar efforts to place women into the victim narrative were conducted by the lower court dispositions in *People v. Jovanovic*,[342]

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[335] *Id.* at 160–61.

[336] Pushpesh Kumar, *Queering Indian Sociology: A Critical Engagement* 25 n.6 (Jawaharlal Nehru University, Working Paper No. 14-7, 2014), https://www.jnu.ac.in/sites/default/files/u63/Pushpesh.pdf.

[337] BUTLER, *supra* note 48, at 197.

[338] Janet Halley, *The Politics of Injury: A Review of Robin West's* Caring for Justice, 1 UNBOUND 65, 78 (2005).

[339] *Id.*

[340] *J.A.* [2011] 2 S.C.R. 440, 17 (Can.).

[341] *Id.* at 5.

[342] 700 N.Y.S.2d 156, 170 (1999).

where the court withheld evidence of the complaint's lengthy discussions with the defendant, laying out the terms of her desired sexual interaction with the defendant and instead, painting the complainant as a vulnerable young woman who was sexually assaulted by an experienced deviant man.[343] In the case of *R. v. Emmett*, the court explicitly withheld evidence of a woman participant's sexual agency in an ongoing BDSM relationship with her male partner, despite her testifying to the fact that both partners discussed each activity prior, and that she had agreed to each interaction.[344] Indeed, the very nature of how the case arose symbolizes the injury triad. The complainant was not a participant in the BDSM activity but rather the woman participant's physician whom she consulted as a result of the injuries received from the sexual interaction.[345] The physician testified as to the woman's injuries but not to her explanations of how they occurred, nor to her involvement in the interaction,[346] thereby painting a bleak picture, one colored by injury and largely devoid of pleasure, the ongoing sexual interaction, and romantic relationship between the woman participant and the man defendant as a cohabiting couple.

Second, the logic by which courts across all three jurisdictions have prohibited consensual BDSM conduct is tautologous, has potentially deleterious downstream effects for the concept of consent, and blurs the line between sexual violence and consensual BDSM interactions. In all the cases above, the courts have taken the approach of prohibiting the use of consent as a defense to engaging in the activity in lieu of directly prohibiting the activities outright. The argument is as follows: a rational person cannot consent to physical violence in a sexual context and therefore, the person who consented to such conduct cannot be rational; thus, their consent is not legally valid and is immaterial to the question of whether they were assaulted. This logic is tautologous and would amount to disallowing anyone from safely consenting to and engaging in this type of sexual activity at any time, without fear of legal ramifications. In sum, this logic leads us to a place where consent cannot and does not exist in BDSM interactions and, therefore, every submissive's yes becomes a no. There is legally no difference. The courts "confuse the distinction between unbridled sadism and the social sub-culture of consensual fetishism."[347] Consent, it follows, is multiplicitous, with the truth of its

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[343] Schmeiser, *supra* note 148, at 25.
[344] R. v. Emmett, [1999] EWCA (Crim) 1710.
[345] *Id.* at 1–2.
[346] *Id.* at 1.
[347] Anne McClintock, *Maid to Order: Commercial Fetishism and Gender Power*, 37 SOC.

meaning varying between the courthouse and the bedroom. Here, the court's truth, so to speak, is that BDSM is either always non-consensual, or at the very least, always un-consentable.

From a queer perspective—which dispels of the notion that deviant, or rather, non-normative sexual practices are unworthy of protection or existence—the current legal stance produces untenable, tangible effects for the BDSM community. The legal marginalization of BDSM hinders the community's ability to seek resources, such as medical care for injuries consensually received during play,[348] and also complicates a BDSM participant's ability to seek legal redress for non-consensual sexual assault. The courts' degradation of consent sits in stark contrast to the BDSM community's own proliferation of standards for consent and safety. In fact, research shows that the BDSM community places high importance on consent, supporting credos such as Risk-Aware Consensual Kink (RACK) and Personal Responsibility Informed Consensual Kink (PRICK). It is not uncommon to have dungeon masters (i.e., a person who is responsible for the safety of participants at BDSM events) or other types of security at BDSM events to ensure that personal safety is prioritized. In many ways, BDSM "may be the most responsible form of sex because you have to talk about it. You have to articulate exactly what you do and do not want to happen before anything starts."[349] To the BDSM community, an individual engaging in conduct without consent is not engaged in BDSM but sexual violence.[350] In the BDSM culture, consent is definable and essential.[351]

However, in the legal system, any and all BDSM conduct is prohibited, so consent is immaterial. Courts, like the one in *R v. J.A.*, explicitly disregard the importance of consent within the BDSM community, finding that consent safeguards are "rare, if perhaps non-existen[t], in the sexual arena."[352] In other cases, the courts perversely associate defendants' attempts to protect their sexual partner's agency and ability to consent as evidence of the intent to harm their partners. In

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TEXT 87 (1993).

[348] Morgan Schumann, *Pain, Please: Consent to Sadomasochistic Conduct*, 3 U. ILL. L. REV. 1177, 1185 (2018).

[349] Lee Jacobs Riggs, *A Love Letter from an Anti-Rape Activist to Her Feminist Sex-Toy Store*, *in* YES MEANS YES: VISIONS OF FEMALE SEXUAL POWER & A WORLD WITHOUT RAPE 113 (Jaclyn Friedman & Jessica Valenti eds., 2008).

[350] Benjamin C. Graham et al., *Member Perspectives on the Role of BDSM Communities*, 53 J. SEX RSCH. 895 (2016).

[351] *Id.*

[352] R. v. J.A., [2011] 2 S.C.R. 440, 11 (Can.).

Brown,[353] Lord Templeman found that "[t]he dangers involved in administering violence must have been appreciated by the appellant because . . . each victim was given a code word which he could pronounce when excessive harm or pain was caused." Here, the court found the defendant's use of a safe word—a word BDSM participants can say at any moment if they wish to stop an activity and withdraw consent—as evidence against them, concluding that the defendants appreciated the risks to their partners and were therefore culpable of battery.

Using a queer theory lens, we see that, in the cases above, there is little to no room for litigant sexual diversity within the courts. As revealed by the above analysis, the courts have a demonstrable tendency to assume that there is good and bad sex, and that the bad sex (e.g., sex outside the community standards, in the case of Canada) cannot be consented to and must be regulated by the State. Based on the above cases, we see courts assume that it is the normative viewer, embodied by the court itself, that is best fit to determine the value or harm of BDSM conduct. The impact of Mary Douglas' theory of polluting power—that as a person is polluted, they are "always in the wrong"—is present within these cases.[354] When kinky sex is equated to immorality, the participant becomes bad, wrong, and worthy of punishment. As a result, the participant's agency is immaterial.

Furthermore, the courts associate non-normative sex with increased risk, allowing only normative sexual practices to legally exist, thereby limiting sanctioned sexual diversity. The court dicta indicated that BDSM is somehow too risky to allow within society even though all sex, including non-BDSM sex, involves risk. Choosing which risks to highlight reflects the court's interpretive power. However, such seemingly neutral judgements based in logical risk calculations are tainted by judicial notions of sexual normativity. Additionally, the societal risks of BDSM the courts identify are perceived as more urgent than the threat to sexual freedom. In *R. v. J.A.*, the court created a strawman out of the alleged risk of sexual partners violating their partners' wishes while they are unconscious during consensual sex in which they explicitly agreed to losing consciousness.[355] The court highlighted the potential victimhood of a willing unconscious partner, stating that they "cannot meaningfully control how [their] person is being touch[ed], leaving [them] open to

[353] R. v. Brown, [1994] 1 AC 212, 6.

[354] MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO 114 (1966).

[355] *J.A.*, [2011] 2 S.C.R. (Can.).

abuse." [356]

However, as the dissent rightly pointed out, the law already criminalizes unwanted sexual conduct via rape and sexual assault laws.[357] Therefore, nothing is gained from indirectly criminalizing BDSM activity involving consensual erotic asphyxiation and advance consent through battery laws. This is also apparent in *Brown* where the court referred to BDSM sex as a form of "cruelty" and expressly associated BDSM sex with intentional or reckless harms, including the risk associated with HIV and AIDS.[358] The Court stated "[t]he victims were degraded and humiliated, sometimes beaten sometimes wounded with instruments and sometimes branded . . . There were obvious dangers of serious personal injury and blood infection."[359]

The criminalization of unwanted sexual conduct, namely BDSM practices as well as participants who engage in such practices by the law through normative jurisprudence indicates a pressing need for legal and judicial reimagination of BDSM and its legality. The following section draws on queer theory to envisage how such reimagination can take place in an actionable manner in courts.

B. A Judicial Reimagining of BDSM

The mechanisms through which the courts' assumptions regarding sexual heteronormativity and hierarchy serve to criminalize and exclude BDSM participants from family law protection, especially homosexual BDSM participants, provide a road map for how to reimagine BDSM from the standpoint of the judiciary.[360] In queer theorist Gayle Rubin's theory of the charmed circle, sex exists in a societal hierarchy of norms.[361] Some sexual activities are seen as good or better and other types as bad. Sexual conduct that is bad lies outside the bounds of acceptable societal norms. Bad types of sexual activity are viewed as shameful and abject. This disgust response limits a person's ability to engage in the activity without societal repercussion, often through the limiting penal power of criminal law. As feminist philosopher Martha Nussbaum summarized, "Disgust has been used throughout history to exclude and marginalize groups of people who come to embody the dominant group's

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[356] *Id.* at 12.
[357] *Id.* at 20.
[358] *Brown*, [1994] 1 AC 212, 14.
[359] *Id.* at 15.
[360] MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW 14 (2004).
[361] Rubin, *Thinking Sex*, *supra* note 43, at 12.

fear and loathing of its own animality."[362]

Thus, shame attached to the body and bodily activities is a coping mechanism, or veil, to avoid considering or seeing our own bodies, mortality, and animality. The "boundaries of our bodies" and our ability to fully consider them and explore them as a site of pleasure or pain then places a limit on sexuality, as well as persons and groups of persons whose sexuality or sexual practices diverge from the allowable norms.[363] This theory, applied to BDSM, explains the normative conclusion of the courts: BDSM is a *bad* type of sexual activity evoking social disgust; those who engage in it are worthy of societal exclusion; and society is justified in limiting the activity and punishing those who fail to comply.

Operationalized concepts, including pollution, disgust, and sexual hierarchy that are highlighted in queer theory, serve to prevent the judiciary from seeing the full picture of BDSM—including heavy community importance placed on consent, as well as one type of benign sex amongst a wide variety of types without moral judgement, etc. The role of queer theory in promoting a comprehensive understanding of these concepts reveals a means for exculpating BDSM from legal non-recognition, through expanding the judicial imagination of kink in the courtrooms.

C. BDSM Viewed through a Queer Positive Lens: Bringing Kink Back into the Judicial Imagination

This section brings in principles of queer theory to view BDSM, with the aim of bringing and mainstreaming kink and BDSM practices within the judicial imagination. Queer theory supports an egalitarian view of sexual diversity without the need for interrogating the morality of the activity.[364] Queering the law, in essence, would require an honest review and questioning of legal assumptions rooted within normative understandings of sex, gender, and sexuality.[365] Applied to BDSM, the practice would become, in the judicial mind, merely one type of sexual activity in a large spectrum of diverse activities and preferences.

Sexual diversity allows for a radical approach to sex, including BDSM sex, providing for the judicial imagination a more "anthropological understanding of different sexual cultures."[366] This

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[362] NUSSBAUM, *supra* note 360.

[363] WILLIAM IAN MILLER, THE ANATOMY OF DISGUST (1997).

[364] FOUCAULT, *supra* note 31; Rubin, *Thinking Sex*, *supra* note 43.

[365] JANET E. HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2006).

[366] Rubin, *Thinking Sex*, *supra* note 43, at 15.

would allow for the possibility of consent within BDSM interactions, to the same extent that it is a possibility in other types of sex. With no sexual activity being adjudged as inherently good or bad but merely part of a spectrum of varieties, BDSM would exist on the same level as normative, procreative, heterosexual sex.

Queer theory, as opposed to radical feminist theory, applied to BDSM cases, allows for a judicial exploration of BDSM's criminality and legality unmuddied by a myopic focus on women, sometimes as victims, thereby freeing courts to consider BDSM sex without the constraints of the injury triad. If judges are permitted to examine sex outside of these confines, even the order and timing of activities can be examined (e.g., advanced consent, withdrawal of consent), as can the normative requirement that desire must always lead to pleasure.[367] By allowing for more freedom of thought beyond gender and sex, BDSM may be brought into the judicial imagination of permissible sex.

Below, BDSM criminal and family law jurisprudence is reimagined through the eyes of a feminist-queer, sex positive judge. How might a feminist, queer-positive judge examine an assault and battery case against a defendant for engaging in a BDSM sexual interaction? What about a child custody dispute in a family court involving a parent or guardian who engages in BDSM? Assuming that legal consent was given and proven in these situations, would a queer theory framework alter a judge's decision? If so, in what ways?

Let us review the facts of the English criminal law case, *R. v. Brown*,[368] utilizing a queer theory framework. In the case, several men engaged in homosexual BDSM interactions that were video-taped; the video tapes were later discovered by the police; and on such basis, assault charges were filed against the defendants.[369] At trial, the defendants testified that they and their sexual partners had consented to these activities.[370] Despite the evidence, the court found that consent was not a valid defense to battery charges and ruled against both the defendants for assault and the participants, for aiding and abetting their own assault.[371]

The court's holding rested on two key conclusions: that BDSM is worthless violence and societally unacceptable cruelty, and that BDSM

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[367] JUDITH HALBERSTAM, IN A QUEER TIME AND PLACE: TRANSGENDER BODIES, SUBCULTURAL LIVES 8 (2005) ("[H]egemonic constructions of time and space are uniquely gendered and sexualized.").

[368] R. v. Brown, [1994] 1 AC 212.

[369] *Id.* at 3.

[370] *Id.*

[371] *Id.* at 3–4.

amongst homosexuals increase the chances of HIV and AIDS contraction. In contrast, if a judge were to apply a queer theory framework that disavows the sexual hierarchy of good and bad sex and resists the favoritism afforded to heteronormative sexual interactions and relationships, *Brown*[372] may have come out quite differently. A queer-positive judge would be unlikely to equate BDSM sexual interactions with violence. Within a queer framework, instead of viewing BDSM as a physical activity, akin to sports or tattooing, the potential sexuality of the interaction would be the foremost point of inquiry. A queer-positive judge would be capable of imagining BDSM as merely another type of sex within the spectrum of benign sexual diversity. Furthermore, in noting that BDSM is societally considered as deviant or abnormal, a queer-positive judge may also be capable of viewing BDSM as a stigmatized sexual practice minority group. As such, the first finding from the court would likely be rejected by a queer-positive judge.

The second finding of the court—that BDSM amongst homosexuals should be disincentivized by the law due to the practice's potential to increase the chances of HIV contraction—would likely be flat out rejected by a queer positive judge. Even though homosexual sex was legal in the country at the time of the judgement, the court took a stance that was firmly against homosexual intercourse. Relying on heteronormative principles favoring heterosexual normative sex, the court associated gay men with disease and found that, due to the risks the court attached to the defendants' sexual orientation, the defendants should be disallowed from engaging in BDSM intercourse. A queer-positive judge—applying a framework that does not favor heteronormativity and assumes a non-hierarchical perspective on sexual behaviors—would have found the defendants and participants not guilty in *Brown*. As numerous queer scholars have noted of *Brown*,[373] the court's findings prioritizing the importance of disease transmission over sexual liberty would likely have the effect of recriminalizing homosexual interactions within the United Kingdom. The State's stated interest in reducing HIV transmission could, if unchecked, award an exceptional degree of policing power over homosexual interactions, potentially masking state sexual prejudice against same-sex sexual conduct. A queer-positive judge, espousing an egalitarian sex, gender, and sexual orientation framework, would likely eschew expanding the State's policing powers over sexual behaviors for a sexual orientation minority group.

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[372] *Brown*, [1994] 1 AC 212.
[373] *Id.*

When we examine the facts of *A.C.*,[374] the Canadian child custody dispute, under a queer-feminist lens, we see similar deviations regarding the court's reasoning despite coming to the same holding. In brief, this case addressed the capacity of mother A.C. to continue having custody over her two children.[375] At trial, considerable evidence indicating child abuse was entered (e.g., children smelling of urine at school, the use of a cattle prod for child chastisement) as was the fact that A.C.'s live-in partner at the time had a history of sexual assault on minors.[376] Yet the court devoted the majority of its attention to the consensual BDSM relationship between A.C. and J.C., finding that, on the basis of A.C.'s engagement in "deviant behavior," she was not competent to care for her children.[377] A queer-positive judge would likely also deny A.C. custody of her children but based on strikingly different reasoning. The original judge relied heavily on A.C.'s sexual preferences and history with J.C. as the primary basis for denying custody despite overwhelming and sufficient evidence of child abuse and neglect. A queer-feminist judge, viewing BDSM as within a benign spectrum of sexual diversity, would likely find A.C.'s engagement in BDSM activity irrelevant to the case. There was no evidence that A.C. and J.C. had inappropriately engaged in BDSM practices in front of the children. Yet the original court found that parents engaging in BDSM, even in privacy, were essentially committing child abuse. The court assumed that the parents did not hide the activity from the children and that merely engaging in it within the same house would somehow harm the children. A queer-positive judge would merely view it as part of A.C.'s sexual preferences and not relevant to the issue of A.C.'s moral character or capacity to parent. In sum, a queer-positive judge would also deny child custody to A.C. but on the basis of the overwhelming amount of evidence of child abuse presented to the court.

CONCLUSION

As explored above, the legal systems in several countries are currently grappling with whether to limit litigants' sexual and non-sexual (e.g., right to parent, employment) rights in order to promote certain charmed, normative sexual behaviors. Civil and criminal judgements from the United States, Canada, and the United Kingdom are littered with statements attempting to explain away the diversity of consensual adult

[374] Nova Scotia (Minister of Cmty. Servs.) v. A.C., [2003] N.S.J. No. 184 (Can. N.S. S.C.) (QL).
[375] *Id.*
[376] *Id.* at 3.
[377] *Id.*

sexual conduct, labelling all such practices as exceptional, deviant, and existing outside of social normativity. The court frames such sex as outside the bounds of the "majority," thereby "weav[ing] a cultural tale based on a notion of oneness of one culture that is fixed and timeless."[378] The person who engages in sexual behavior outside cultural boundaries does so at the peril of behaving beyond the protection of the court. Their voices, testifying to consent in supposed "deviant" sexual behavior destabilizes the idea that there is only one way to have sex and disrupts the notion of sexual hierarchy. Though speak out as they may, such sexual minorities, such as BDSM participants, are inevitably silenced by court depictions of their sexual agency or through actual criminal confinement. In several of the cases described above, we see defendants and even complainants stating that they had consented to BDSM activities, yet the courts either denied that they had said yes (in the case of *R.* v. *J.A.*[379]) or claimed that they *ab initio* lacked the capacity to do so. How, then, may such silenced sexual minorities speak? And, more importantly: How may they be heard?

Queer theory and the law could have a productive relationship. In utilizing queer understandings of gender, sex, and sexuality, the judicial imagination could come to correctly perceive BDSM practices and truly hear BDSM participants. By urging judges to uncover biases—both within themselves and the law—favoring heteronormative, monogamous, cis-gendered relationships, or sexual interactions, they can be encouraged to consider queer concepts like egalitarian sexual diversity. In challenging the legal and social definitions of what constitutes "good" or societally-supported sex, queer theory may breathe consent-ability back into BDSM cases, allowing BDSM to be as consent-able as normative sexual interactions.

With increased acceptance and awareness of BDSM practices, the legal rejection of BDSM conduct as intolerable sexual deviance is likely unsustainable. The line between consensual adult BDSM interactions and consensual adult body piercings or medical procedures already appear to be blurring. Further, we see overall trend towards legalization of a variety of sexual and relationship practices that were once outlawed (e.g., the use of contraception, anal sex, interracial marriage, same sex marriage, etc.). With changing times comes changing laws. Who is deemed capable of

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[378] RATNA KAPUR, EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM 87 (2005).

[379] R. v. J.A., [2011] 2 S.C.R. 440 (Can.).

saying yes or no, and to which acts, is a shifting normative subject.[380] Someday, perhaps in a time of a queer-BDSM positive judiciary, BDSM participants will be allowed to say yes.

[380] Jordana Greenblatt, *"Cruelty is Uncivilized": Consent, BDSM, and Legal Recognition of the Civil(ized) Subject, in* NEGOTIATING NORMATIVITY 175–88 (Nikita Dhawan et al. eds., 2016).