RETHINKING THE "ROUGH SEX DEFENCE" IN CANADA: REPLIES TO SHEEHY ET AL.

KYLER CHITTICK, BRENDA COSSMAN, AND UMMNI KHAN*

This article critiques the arguments advanced by Elizabeth Sheehy, Isabel Grant, and Lise Gotell in their 2023 Alberta Law Review *article, "Resurrecting 'She Asked for It': The Rough Sex defence in Canadian Courts." Sheehy et al. trace a rise in both "rough sex" and "sex games gone wrong" defences in cases involving bodily harm and death in Canada and the United Kingdom, equating these defences to an updated version of the "she asked for it" defence. They argue that consent should not be a valid defence for bodily harm resulting from sexual activity unless such harm was unforeseeable, emphasizing that those engaging in violent sex acts should bear the risk of serious injury or death to their partners. Concurring with Sheehy et al. on the gravity of gender-based violence, this article problematizes their broad conflation of Bondage-Discipline, Dominance-Submission, and Sadism-Masochism or Sadomasochism (BDSM), rough sex, and sexual assault. Drawing primarily on queer theory, anti-carceral feminism, and the insights of BDSM subcultures, the authors argue — separately and among other points — that Sheehy et al.'s framing of "rough sex" perpetuates a carceral, paranoid, and partisan approach to sexual justice and stigmatizes BDSM practitioners, scapegoating them for failures in sexual assault prosecutions. Interrogating the limits of their position, this article advocates a more complex understanding of sexual consent, accountability, and harm.*

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I. INTRODUCTION — KYLER CHITTICK

"Rethinking the 'Rough Sex Defence' in Canada: Replies to Sheehy et al." responds to "Resurrecting 'She Asked for It': The Rough Sex defence in Canadian Courts," by feminist legal scholars Elizabeth Sheehy, Isabel Grant, and Lise Gotell, published in *Alberta Law Review* in 2023.[1] Sheehy et al. note an increase in "rough sex" and "sex games gone wrong" defences in criminal cases resulting in bodily harm and death in Canada and the United Kingdom.[2] They argue these defences are an updated "she asked for it" defence, concluding that "consent should never be a defence to bodily harm resulting from sexual activity unless that bodily harm was unforeseeable at the time it was inflicted."[3] Moreover, "those who assert the right to engage in violent sex should be responsible for bearing the foreseeable risk of causing serious injury or death to their sexual partners."[4] Viewed through queer theory, anti-carceral feminism, and the insights of Bondage-Discipline, Dominance-Submission, and Sadism-Masochism or Sadomasochism (BDSM) subcultures, Sheehy et al.'s perspective raises concerns. While the extreme cases of sexual assault they describe are chilling examples of gender-based violence, they conflate BDSM, rough sex, and sexual assault in ways that are overbroad, suggest a carceral, paranoid stance, and harm sexual minority communities by scapegoating BDSM practitioners as hindering successful outcomes for complainants in sexual assault trials.[5]

We respond to Sheehy et al. in this introduction and in respective replies by Brenda Cossman and Ummni Khan. Although we have previously published "sex-positive" feminist work,[6] we do not defend rough sex per se. Instead, we critique the "rough sex exceptionalism" that informs Sheehy et al.'s perspective. We have elected not to co-author an article from one perspective for various reasons. Firstly, Cossman has recently adopted a less

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1 Elizabeth Sheehy, Isabel Grant & Lise Gotell, "Resurrecting 'She Asked for It': The Rough Sex Defence in Canada" (2023) 60:3 Alta L Rev 651. The authors note that the use of "Sheehy et al." in the title, body, and explanatory footnotes of this article is for readability and ease of reference. All footnote citations to Sheehy, Grant, and Gotell's article include all three authors' names.

2 *Ibid* at 652–53.

3 *Ibid* at 653–54.

4 *Ibid*.

5 By "carceral feminism," I mean "the failure of mainstream feminist scholars and activists to adequately critique the criminal punishment system and the ways in which they advertently or inadvertently reinforce it": Chloë Taylor, "Anti-Carceral Feminism and Sexual Assault—A Defense: A Critique of the Critique of the Critique of Carceral Feminism" (2018) 34 Soc Philosophy Today 29 at 33. Here, I follow Eve Kosofsky Sedgwick's concept of "paranoid [critique]" — a "[hermeneutic] of suspicion" characterized by defensive posturing, an expository nature, the anticipation of bad faith, binary thinking, and the appeal to a "slippery slope" (Eve Kosofsky Sedgwick, *Touching Feeling: Affect, Pedagogy, Performativity* (Durham, NC: Duke University Press, 2003) at 123–52). This paraphrasing is almost identical to the definition of paranoid critique I offer in a recent book symposium (Kyler Chittick, "On the Cusp of Reparation and the Edge of Paranoia?," *Syndicate* (10 July 2024), online: [perma.cc/ST6Z-ACLK]).

6 Kyler Chittick, "Age-Verification Technologies and the Censorship of Online Pornography in Canada: A Critique of Bill S-210: An Act to Restrict Young Persons' Online Access to Sexually Explicit Material" (2024) Porn Stud 1 [Chittick, "Age-Verification"]; Brenda Cossman, "Feminist Fashion or Morality in Drag? The Sexual Subtext of the *Butler* Decision" in Brenda Cossman et al, *Bad Attitude/s on Trial: Pornography, Feminism, and the* Butler *Decision* (Toronto: University of Toronto Press, 1997) 107 [Cossman, "Feminist Fashion"]; Ummni Khan, *Vicarious Kinks: S/M in the Socio-Legal Imaginary* (Toronto: University of Toronto Press, 2014) [Khan, *Vicarious Kinks*].

"partisan" stance on law and sexuality in the age of #MeToo.[7] This "reparative" mode draws on Eve Kosofsky Sedgwick's queer theory, which advocates reading disparate objects and perspectives together, avoiding the reductions and polarizations that often mark feminist critique,[8] including those of #MeToo and the "feminist sex wars."[9] Conversely, Khan more squarely advances a kink-positive agenda. Her contribution differentiates BDSM from violence and rough sex, further challenging the idea that recognizing BDSM as lawful will necessarily impede sexual assault convictions. As a trio, we have shifting intellectual priorities not easily assimilable into one voice. To quote Oliver Davis and Tim Dean, our work is "neither exactly a dialogue nor yet a synthesis of what one might take to be our respective positions."[10] Although we share some of the same concerns about Sheehy et al.'s article, our experimental approach is not unlike what philosopher Mikhail Bakhtin described as "polyphony" — a crucible of diverse, independent voices and perspectives within a single text.[11]

As a Ph.D. candidate in political science, I encountered Sheehy et al.'s article while preparing for comprehensive exams in gender and politics. I was already familiar with Gotell's influential work in queer and sex radical feminist legal theory from the 1990s and 2000s,[12] which is valuable to my research on pornography and censorship in Canada.[13] I found the argument unconvincing that consent should never be a defence for causing foreseeable bodily harm in a sexual context. Throughout their article, Sheehy et al. fail to

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7 Brenda Cossman, *The New Sex Wars: Sexual Harm in the #MeToo Era* (New York: New York University Press, 2021) at 4–5 [Cossman, *MeToo Era*]. By less "partisan," Cossman means that she is no longer invested in the side-taking that characterized the feminist sex wars. Once firmly rooted in the "sex positive" or "sex radical" camp, she no longer sees it as productive to be associated with one "side" of these debates from the outset.

8 "Reparative critique" is the counterpart to paranoid critique. It endeavours to love and nurture its objects, to "confer plenitude" on them, and to adopt a less knowing and masterful intellectual stance that seeks both to know and understand the so-called "other side" (Sedgwick, *supra* note 5 at 123–52). A relatively recent contribution to feminist legal theory on the issue of consent and "rough sex" that I would categorize as reparative, or as trying to take all possible sides into account without resorting to caricature, is Jennifer Koshan, "Marriage and Advance Consent to Sex: A Feminist Judgment in *R v JA*" (2016) 6:6 Oñati Socio-Legal Series 1377.

9 Often abbreviated as the "porn wars" or the "sex wars," the feminist sex wars refer to the invective debates within the feminist movement from the early 1970s to the early 1990s on issues related to sex and sexuality. Two camps are generally invoked: "sex radical" or "sex positive" feminists who advocated a continuum of pleasure and risk, and "dominance" or "anti-pornography" feminists who emphasized women's subordinated role in society and how this unequal status is intensified and reinforced by BDSM, pornography, and sex work. For a historical take on the sex wars that complicates its ostensible divides: Lorna N Bracewell, *Why We Lost the Sex Wars: Sexual Freedom in the #MeToo Era* (Minneapolis: University of Minnesota Press, 2021). On the tensions between feminist and queer theory in and beyond law and the sex wars: Ian Halley, "Queer Theory by Men" (2004) 11:7 Duke J Gender L & Pol'y 7; Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton, NJ: Princeton University Press, 2006); Robyn Wiegman, "Dear Ian," (2004) 11:93 Duke J Gender L & Pol'y 93.

10 Oliver Davis & Tim Dean, *Hatred of Sex* (Lincoln, Neb: University of Nebraska Press, 2022) at x. Note that Khan and I have previously collaborated on alternative modes of academic writing (Peter Alilunas et al, "Porn and/as Pedagogy, Sexual Representation in the Classroom: A Curated Roundtable Discussion" (2021) 9:2 Synoptique 269).

11 Mikhail Bakhtin, *Problems of Dostoevsky's Poetics*, 2nd ed translated by Caryl Emerson (Minneapolis: University of Minnesota Press, 2013) at 21.

12 Lise Gotell, "Shaping *Butler*: The New Politics of Anti-Pornography" in Brenda Cossman et al, *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision* (Toronto: University of Toronto Press, 1997) 48; Lise Gotell, "Inverting Image and Reality: *R. v. Sharpe* and the Moral Panic Around Child Pornography" (2001/2002) 12:1 Const Forum Const 9.

13 Chittick, "Age-Verification," *supra* note 6 at 4.

demonstrate that sex can ever be entirely free from foreseeable risks, physical or emotional. This issue is especially important in discussions of BDSM and "rough sex," where risks are heightened, particularly when exploring unfamiliar fantasies or positions.[14] For example, if a couple tries biting or pinning, this might leave marks and one might be left feeling uncomfortable or used, but this does not mean that an assault has occurred or that the law must intervene. Perhaps they need better "aftercare," that is, the "caretaking that immediately commences at the [end] of [a sadomasochism (S/M)] scene, whereby the top takes care of [their] bottoming partner."[15] Moreover, Sheehy et al. critique strangulation as inherently dangerous and misogynistic, showing little understanding of sexual masochism or the irrational impulses in sex.[16] While it can be non-consensual or endured to please men, many women report engaging in it with same-sex partners and that it can be exciting.[17] In fact, rough sex can be a fleeting manifestation of desire or a lapse in affirmative consent not experienced as assaultive.[18] As Davis and Dean write,

> Sex may be the arena in which [one] do[es] not wish to be equal but to be dominated, to embrace subservience to another. Here it is a matter not just of attending … to the other's pleasure but of intensifying [one's] own through abjection and debasement…. [D]esire for sexual domination—for a hand squeezing the throat, for a smack to the face, or for an insistent pushing of boundaries—violates the liberal consensus that sex should be a performance of equality.[19]

In the cases discussed by Sheehy et al., "rough sex" was used as a defence, but the issue was not rough sex but sexual assault. While Sheehy et al. argue that rough sex complicates the question of consent, they themselves blur the line, as assault can occur in both rough and

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[14] Even when sex is affirmatively consensual and vanilla, something can always go awry. Drunk sex, thrusting too hard during penetration, and insufficient lubrication are physically risky. Moreover, anal sex — a basic form of sexual expression for gay and bisexual men (or MSMs) — is often said to increase the likelihood of fissures or seroconversion, particularly when unprotected, although its risks depend on factors like experience level and protection methods. Where does rough sex begin and end, exactly, and who decides? Who gets to weigh in here?

[15] Corie Hammers, "Reworking Trauma through BDSM" (2019) 44:2 Signs 491 at 501, n 3.

[16] With "irrational impulses," I make recourse to the "anti-social turn in queer theory," specifically the notion that we are "structurally nonsovereign in [ways that are] intensified by sex" and that sex constitutes an "encounter with the estrangement and intimacy of being in relation" (Lauren Berlant & Lee Edelman, *Sex, or the Unbearable* (Durham, NC: Duke University Press, 2014) at 5, viii). As queer legal scholar Katherine Franke argues, it is the "proximity to danger, the lure of prohibition, [and] the seamy side of shame that creates the heat that draws us toward our desires." (Katherine M Franke, "Theorizing Yes: An Essay on Feminism, Law, and Desire" (2001) 101:1 Colum L Rev 181 at 207). Work that falls under the ambit of the anti-social turn (or "queer negativity") closely follows the late psychoanalyst Leo Bersani's stark framing of sex (between gay men) as a dissolution of self and identity, merging both pleasure and pain in death-driven, ego-shattering encounters (Leo Bersani, "Is the Rectum a Grave?" (1987) 43 October 197 at 217). For a comprehensive overview of this literature: J Jack Halberstam, "The Anti-Social Turn in Queer Studies" (2008) 5:2 Graduate J Soc Science 140.

[17] Debby Herbenick et al, "What Is Rough Sex, Who Does It, and Who Likes It? Findings from a Probability Sample of U.S. Undergraduate Students" (2021) 50 Archives Sex Behavior 1183 [Herbenick et al, "What Is Rough Sex"].

[18] Here, I invoke psychoanalyst Avgi Saketopoulou's concept of "limit consent," a "nuanced negotiation of limits that belongs neither to the domain of activity nor to the sphere of passivity" that "facilitate[s] novelty and surprise": Avgi Saketopoulou, *Sexuality Beyond Consent: Risk, Race, Traumatophilia* (New York: New York University Press, 2023) at 3, 57. For a similar logic: Heidi Matthews, "#MeToo as Sex Panic" in Bianca Fileborn & Rachel Loney-Howes, eds, *#MeToo and the Politics of Social Change* (Cham, Switzerland: Palgrave Macmillan, 2019) 267 at 279–80.

[19] Davis & Dean, *supra* note 10 at 40.

vanilla contexts, and as they tacitly concede, the "rough sex defence" fails.[20] Cossman critiques this view as paranoid. Indeed, Sheehy et al.'s critique of the defence in *R. v. Barton*[21] was validated by the Court of Appeal of Alberta in 2024, which cited their work.[22] Bradley Barton, who attempted a "rough sex defence" for the killing of Cindy Gladue — a Cree woman and mother of three — had his defence rejected by the Court of Queen's Bench of Alberta in 2021 and by the Court of Appeal. As Cossman points out, the higher Court carefully examined consent in BDSM, ruling that consent is vitiated by harm that is "significant, long-lasting, or permanent" and interferes with a person's "integrity, health, or well-being."[23] The fatal injury inflicted on Gladue — a tear to her vaginal wall — was too severe to support a "rough sex" defence. This raises the question of why Sheehy et al. would seek to ban a defence that not only fails in Canada but could be valid in cases where consent to bodily harm was actually present or contestable.

When I first read Sheehy et al.'s article, I gleaned an anti-BDSM bias in their rhetoric and arguments. In particular, the use of scare quotes and the term "allegedly transgressive" to describe BDSM seemed dismissive.[24] Prompted by these observations, I reached out to Khan to discuss the article and gauge her interest in responding. Our discussions led to a collaborative effort to author a response, inviting contributions from other scholars, namely Cossman, who was enthusiastic about framing this article as a discussion with Sheehy et al. as well as between us as collaborators. As Khan notes, Sheehy et al.'s work stigmatizes BDSM practitioners as threats to gender equality before the law and endorses carceral feminist tactics that invoke the state as an impartial judge of sexual violence, ignoring its neglect of racialized, low-income, and sexual minority groups.[25] By projecting wider issues

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20 At no point in their article do Sheehy et al. point to a Canadian case where the "rough sex defence" led to an acquittal for sexual assault. Furthermore, in the cases surveyed by Sheehy et al. in which women survived their assault, the women "claimed that they did not consent to rough sex or, more often, to any sexual contact at all" (Sheehy, Grant & Gotell, *supra* note 1 at 666 [footnotes omitted]). In other words, irrespective of the accused's defence, the problem in these cases was that women did not consent, not that the sex was rough. However, as they state in their article, the "rough sex defence" has worked in cases in the UK (Sheehy, Grant & Gotell, *ibid* at 652).

21 2021 ABQB 603 (in this case, Bradley Barton was convicted of manslaughter in the death of Cindy Gladue. His defence that Gladue consented to "Fist Thrusting" was rejected. The Court ruled that Barton "knew or was willfully blind to the reality that Ms. Gladue never consented to his Fist Thrusting, with associated pain and damage to her body, because he never raised the matter with her at all" at para 24).

22 *R v Barton*, 2024 ABCA 34 at paras 178–79 [*Barton* ABCA].

23 *Ibid* at paras 181–82.

24 Sheehy, Grant & Gotell, *supra* note 1 at 656. To be clear, most scholars, including those within sex-positive feminism and queer theory, do not view BDSM as inherently transgressive or liberating. While some BDSM advocates have framed it in terms of personal empowerment or resistance, the notion that BDSM is universally positioned as liberatory is often overstated in critiques by anti-pornography and anti-BDSM feminists. Michel Foucault, a key precursor to queer theory, argued that sexuality operates within agonistic power dynamics, meaning that its resistance to power is always contextual and temporary. He famously critiqued the "sexual revolution" for conceptualizing sexuality in terms of liberation rather than interdependent power relations. Additionally, he saw "coming out" as a form of "reverse discourse" that, while challenging homophobia, remained entangled in the late-nineteenth century shift in which sodomy — previously understood as a "temporary aberration" of behaviour — was replaced by homosexuality as a distinct "species," a category solidified within juridical, medical, and psychiatric discourses (Michel Foucault, *The History of Sexuality, Volume I: An Introduction*, translated by Robert Hurley (New York: Vintage Books, 1990) at 43).

25 Khan elaborates on the carceral implications of Sheehy et al.'s position in her section of this article. For a comprehensive critique of carceral feminism's impact on racialized and low-income communities: Aya Gruber, *The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration* (Oakland, Cal: University of California Press, 2020). For an incisive critique of carcerality in 2SLGBTQ+ communities: Sarah Lamble, "Queer Necropolitics and the Expanding Carceral State: Interrogating Sexual Investments in Punishment" (2013) 24:3 L & Critique 229.

of sexual assault trials onto the BDSM community, Sheehy et al. portray these individuals as impeding feminist legal progress. Alarmingly, their recommendations — which they admit could harm sexual minorities and detract from sexual freedom — emerge as discriminatory laws, especially those used against men who have sex with men (MSMs), are being repealed after decades of constitutional challenges.[26] Therefore, just as the Canadian judicial system begins to confront its history of erotophobia, Sheehy et al. propose a new legal regime that echoes the old one — laden with potential bias and backed by the state's carceral agenda. While Khan concedes that banning the "rough sex defence" is unlikely to lead to major crackdowns on BDSM, there remains potential for overreach. The assumption that laws governing sexuality will not be used against sexual minorities or so-called "deviants" has long proven unjustified.[27]

Collectively, we aim to broaden the conversation about rough sex set out in Sheehy et al.'s article. We understand that their recommendations emerge from decades of feminist legal activism and that their primary motivation is to better the lives of women in an often violently heteropatriarchal society. While we disagree with them on several issues, our responses reflect a desire for nuance, especially where sex and sexuality are concerned, and for constructive and thoughtful dialogue. Although some aspects of Sheehy et al.'s work elicit strong reactions from us, and our responses are at times provocative, we aim to expand the discourse on rough sex and the law initiated by their article.

II. REGULATING "ROUGH SEX" REPARATIVELY — BRENDA COSSMAN

The debate over the role of consent in assault causing bodily harm and so called "rough sex defenses" is yet another site of what I have called the "new sex wars" — debates between feminists over the legal regulation of sex and sexuality that have been going on for 50 years. In my most recent book, *The New Sex Wars: Sexual Harm in the #MeToo Era*, I argued that these feminist debates — then and now — reflect deeper underlying divisions on questions of sexuality, consent, and the role of law.[28] Both sides make important (if at times exaggerated) arguments, particularly in relation to the "other" side, often representing opponents in terms more caricature than accurate. I further argued that it is time to find a way out of these seemingly intractable debates and suggested a reparative approach. In this

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[26] In recent years, there have been several efforts to "clean up" Canada's *Criminal Code*, RSC 1985, c C-46 by removing "zombie provisions" — that is, charges that are rarely used or have been ruled unconstitutional. This includes charges that have oppressed sexual minorities and have been found to violate equality rights enshrined in the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. After decades of *Charter* challenges that found it contravened equality rights based on age and sexual orientation, the anal intercourse provision contained in section 159 of the *Criminal Code* was repealed in June 2019 following the passing of Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, as enacted*, 1st Sess, 42nd Parl, 2019. For more on this, specifically the myth of Pierre Elliott Trudeau's 1969 "decriminalization of homosexuality": Tom Hooper, "Queering'69: The Recriminalization of Homosexuality in Canada" (2019) 100:2 Can Historical Rev 257. For a more moderate take: Brenda Cossman, "The 1969 Criminal Amendments: Constituting the Terms of Gay Resistance" (2020) 70:3 UTLJ 245.

[27] Christopher R Leslie, "Creating Criminals: The Injuries Inflicted by 'Unenforced' Sodomy Laws" (2000) 35:1 Harv CR-CLL L Rev 103; Joseph J Fischel, *Sodomy's Solicitations: A Right to Queerness* (Philadelphia: Temple University Press) [forthcoming in 2025].

[28] Cossman, *MeToo Era*, *supra* note 7.

section, I reflect on the debate over regulating "rough sex" as a site of these sex wars — more specifically, as representing a debate about BDSM, and explore how a reparative approach might provide some relief from the antagonism and *ressentiment* of these endless contestations.

Feminists have long contested the role and meaning of BDSM.[29] While the sex wars of the 1970s and 1980s were primarily focused on pornography, S/M (as it was commonly referred to at the time) and sex work were amongst the other contested issues. Radical feminists denounced S/M as a form of violence against women, while sex radicals insisted that S/M was a consensual sexual practice.[30] The current debate around regulating "rough sex" bears many of the features of these original sex wars. One side sees the emergence of the rough sex defence as a new way in which violence against women is being reframed and legitimated. The other side sees preventing consent defences as a risk to consensual, non-normative, sexual practices. These positions map, perhaps too readily, onto the old and new sex wars. On one side are the inheritors of radical feminism, who emphasize sex as a site of danger, women as victims, and law — particularly criminal law — as a central site for regulation and punishment. The other side are the intellectual inheritors of sex-positive feminism, with its emphasis on sex as a site of pleasure, of women as sexual agents, and law as potentially over-regulatory site of carcerality. These mappings can be overly reductive, erasing the nuances and shared commitments of the two sides. Indeed, the very frame of mapping the sex wars can inadvertently contribute to the very polarization of the positions that I ultimately argue against. I will try here to be attentive to the nuances of argument, and to the shared commitments, in suggesting a path to break out of the infinite regress of the sex wars.

As I acknowledged in my book, I am revisiting terrain in which my earlier interventions were categorically partisan. Much of my scholarship has been informed by sex positive and queer feminism, arguing, for example, against the deployment of obscenity law to regulate the alleged harms of pornography.[31] So, too, have I argued a sex-positive and queer pro-BDSM position.[32] As in my book, I return here to the debates around BSDM but with a different analytic sensibility that makes room for questions foreclosed by a "for or against" frame. I do not claim to have transcended my penchants, but I try to explore the regulation of sexuality and consent with more ambivalence, recognizing the claims of both sides, and seeking to read them beside each other.

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29 I return to review the sex wars in the context of BDSM below, but see generally Maneesha Deckha, "Pain, Pleasure, and Consenting Women: Exploring the Feminist Responses to S/M and Its Legal Regulation in Canada through Jelinek's *The Piano Teacher*" (2007) 30:2 Harv JL & Gender 425 [Deckha, "Pain and Pleasure"]; Lynn S Chancer, "From Pornography to Sadomasochism: Reconciling Feminist Differences" (2000) 571:1 Annals Am Academy Political & Soc Science 77 at 79; Sharon Cowan, "Criminalizing SM: Disavowing the Erotic, Instantiating Violence" in RA Duff et al, eds, *The Structures of the Criminal Law* (Oxford: Oxford University Press, 2011) [Cowan, "Instantiating Violence"].

30 Khan, *Vicarious Kinks*, *supra* note 6; Cossman, *MeToo Era*, *supra* note 7.

31 Cossman, "Feminist Fashion," *supra* note 6.

32 Brenda Cossman, "Sexuality, Queer Theory, and 'Feminism After': Reading and Rereading the Sexual Subject" (2004) 49:4 McGill LJ 847.

A. THE ROUGH SEX DEFENCE AND THE ROLE OF CONSENT IN ASSAULT CAUSING BODILY HARM

In their article, "Resurrecting "She Asked for It": The Rough Sex Defence in Canada," Sheehy et al. explore how the "rough sex defence" is being used in cases of sexual assault. They argue that there is a disturbing trend in which the defence is being used to argue that women enjoy violence as part of sex play, and thereby invites judges and jurors to either find that the complainant consented, or that the accused had an "honest but mistaken belief" that she consented. They reviewed Canadian case law between 1988 and 2021 to examine how courts are approaching the defence and identify several themes "including the role of pornography, the trivialization of bodily harm, the mischaracterization of strangulation, and how consent to some sexual activity undermines women's credibility."[33] They conclude that consent should be barred as a defence to assaults causing bodily harm unless the harm was unforeseeable when inflicted.

Sheehy et al. echo the concerns of other feminist scholars who have identified the rise of the rough sex defence. Elaine Craig has pointed to the rise of the defence in recent years, noting that the vast majority of reported sexual assaults that raised a rough sex defence had occurred in the last decade, in contrast to the reported cases from 20 years ago where the defence "was nowhere to be found."[34] But she also notes that "[v]irtually, all of the Canadian sexual assault case law in which claims about consensual S/M arise involve allegations that an accused engaged in sexual acts without the complainant's consent."[35] Craig cites Karen Busby's research showing that "Canadian case law sees women going to the police alleging violent sexual assaults, while their partners are raising the defence of consensual BDSM…. [T]he issue in all of the Canadian sexual assault cases is not the legal question: *can* they consent to BDSM? It is the factual question: *did* they consent to BDSM?"[36]

The cases that Sheehy et al. examine are also cases in which the issue was not whether the complainant could consent to rough sex, but whether they did in fact consent. They acknowledge that these are cases where there was in fact no consent. Why, then, do they see the solution to the rough sex defence to lie in barring consent as a defence to assaults causing bodily harm, when there was in fact no consent in these cases? It would seem for Sheehy et al. that removing consent as a defence to assault causing bodily harm would pre-empt these rough sex defences. They want to circumvent the interrogation into consent in an arena where these interrogations have gone very wrong. But focusing on capacity rather than consent not only misdiagnoses the problem in the rough sex cases. It veers into the sex wars terrain of BDSM, adopting a partisan approach, rather than one that would allow us to break out of the seeming intractability of the sex wars.

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33 Sheehy, Grant & Gotell, *supra* note 1 at 651.

34 Elaine Craig, "The Legal Regulation of Sadomasochism and the So-Called 'Rough Sex Defense'" (2022) 37:2 Windsor YB Access Just 402 at 403 [Craig, "Regulation of Sadomasochism"].

35 *Ibid*.

36 *Ibid*, citing Karen Busby, "Every Breath You Take: Erotic Asphyxiation, Vengeful Wives, and Other Enduring Myths in Spousal Sexual Assault Prosecutions" (2012) 24:2 CJWL 328 at 347 [emphasis in original].

B. BDSM SEX WARS

Feminist disagreement over BDSM can be tracked back to the sex wars of the 1970s and 1980s. The divisions over BDSM were born of the debates over pornography, which were a central focus of the sex wars.[37] Anti-violence against women activists began to focus on the representation of sexual violence, and the role of pornography, arguing that the demeaning and dehumanizing images contributed to women's oppression. Some of the anti-porn activism focused in on S/M imagery to exemplify pornography as violence against women. Early feminist S/M activists, notably Patrick Califia-Rice and Gayle Rubin — who would go on to publish key sex radical texts in the sex wars — were troubled by the conflation of S/M sexuality with violence against women. But their effort to engage the anti-pornography feminists was for naught. Radical feminist, anti-pornography feminism would become more entrenched in an anti-S/M position, and conversely, sex radicals also dug in, taking anti-porn feminists to task for their conservative, anti-sex positions.

While the battle lines had already been drawn, the brewing sex wars would ultimately explode at the 1982 Barnard Conference. The conference organizers sought to break the hold of anti-porn feminism on discussions of women's sexuality and sought to explore sexuality as a site of both pleasure and danger. While anti-pornography feminists were not invited, they showed up anyway. First, they campaigned to shut down the conference, and on the day of the conference, arrived in protest with leaflets condemning the conference as not only pro-pornography but also pro-S/M. The fallout of the Barnard Conference was that it further mobilized sex radical feminists, crystallized opposing viewpoints and political stances, and ultimately, led to the entrenchment of reductionist views on both sides. Radical feminists came to be seen as focusing only on sex as danger and women as victims of male sexual violence. S/M (like pornography and sex work) was seen as a form of male sexual dominance, and in focusing on women as victims of male sexual violence, consent was downplayed. Sex radicals, emphasizing sexuality as also a site of pleasure and women as sexual agents, saw S/M as a legitimate site of sexual exploration, and as sexual agents, foregrounded women's consent. For the former, S/M was violence, simpliciter. For the later, S/M was sex. In the polarized debates, any nuance of argument was lost. Radical feminists did not acknowledge that the other side also sought to reduce danger. Sex radicals dismissed the other side's attempt to create space for sexual flourishing through an affirmation of erotica.

While the sex wars, particularly around pornography, waned following the failure of the civil rights ordinance campaigns in the mid-1980s,[38] the underlying divisions were never resolved. Indeed, in the context of BDSM, the divisions remain alive and well. While BDSM has in recent decades gone more mainstream, and third-wave feminists tended to affirm a more sex-positive feminism that created space for sexual explorations, the legal regulation of BDSM remains fraught and divisive. Maneesha Deckha has argued that the polarity of those divisions has shifted. In reviewing the BDSM sex wars, then and now, she argues that the two sides now share more common ground. In reviewing an exchange about the regulation of

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[37] For a more detailed discussion of the BDSM sex wars: Khan, *Vicarious Kinks*, *supra* note 6.

[38] Feminist legal theorists and activists Catharine MacKinnon and Andrea Dworkin drafted civil rights ordinances in Minneapolis and Indianapolis in the early 1980s seeking to establish a legal framework for those harmed by pornography to sue its producers and distributors: Carolyn Bronstein, *Battling Pornography: The American Feminist Anti-Pornography Movement, 1976–1986* (Cambridge: Cambridge University Press, 2011) at 323–28.

BDSM between Cheryl Hanna and Monica Pa,[39] Deckha argues that the pro-sex/anti-sex dichotomy is no longer accurate (assuming that it ever was). Hanna, she argues, "explicitly affirms the pleasure of sexual experiences, including the pleasure derived from S/M by its practitioners, and she recognizes the moral agency of women even within a world heavily affected by gender traditions and other social forces."[40]

Similarly, Pa "does not prioritize the pursuit of sexual pleasure over all other considerations" and recognizes the need for "some legal limits on the pursuit of pleasure through pain."[41] Deckha concludes that in the current feminist debates about BDSM "both sides affirm the pleasures of sexual experiences, the nuances of sexuality, and the problematic totalizing tendencies of dominance feminism as well as the naïveté in celebrating all forms of S/M as resistance or empowerment."[42] Yet, there are nonetheless significant points of difference. As Pa identified in her exchange, "[f]or Hanna, S/M sex is consensual violence with sexual aspects, whereas I argue that S/M sex is consensual sex with potentially violent aspects."[43] Deckha concurs: the fundamental difference between the authors is that "Pa conceptualizes S/M as sex while Hanna maintains that it is violence."[44]

Sheehy et al.'s article on rough sex is located within this ongoing divide in a decidedly partisan manner. They themselves situate their discussion within the context of these sex wars, citing the two sides of the debate and the major players.[45] They allude to the arguments on the other pro-BDSM side, but quickly shut them down as decontextualized and failing to attend to the conditions of women's inequalities:

> While the case for individual liberty may be compelling at an abstract level, our case law review shows that the cases reaching the criminal courts do not involve "rough sex games gone wrong." Rather, they are overwhelmingly cases where complainants assert that they did not consent to any sexual contact at all.[46]

Sheehy et al. take neither the claims of the limitations on sexual agency nor the potential impact on BDSM communities seriously. Rather, they seem to dismiss them as not (as?) important. In their view, "much of the so-called 'pro-sex' critique mischaracterizes the cases where the rough sex defence is argued, ignoring how the assertion of a 'sex game gone wrong' defence can trivialize and distort severe forms of violence against women."[47] They turn instead to Hanna:

> In contrast to the often decontextualized emphasis on sexual agency, there are authors who, in our view, appropriately attend to the conditions of women's inequality as implicated in rough sex defence cases.

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39 Cheryl Hanna, "Sex Is Not a Sport: Consent and Violence in Criminal Law" (2001) 42:2 Boston College L Rev 239; Monica Pa, "Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex" (2001) 11:1 Tex J Women & L 51.

40 Deckha, "Pain and Pleasure," *supra* note 29 at 441.

41 *Ibid* at 442.

42 *Ibid*.

43 Pa, *supra* note 39 at 77.

44 Deckha, "Pain and Pleasure," *supra* note 29 at 442.

45 Sheehy, Grant & Gotell, *supra* note 1 at 655, note 19. For the debate in the US, see generally Hanna, *supra* note 39; Pa, *supra* note 39; Chancer, *supra* note 29; Robin Ruth Linden et al, eds, *Against Sadomasochism: A Radical Feminist Analysis* (East Paolo Alto, Cal: Frog in the Well, 1982).

46 Sheehy, Grant & Gotell, *supra* note 1 at 684.

47 *Ibid* at 654.

> Cheryl Hanna argues that decriminalizing the infliction of bodily harm because it occurs in a sexual context creates the potential for mistakes about the scope of consent and for deliberate abuse.[48]

While Hanna does not disavow BDSM practices in their entirety, she does ultimately elide BDSM with male sexual violence, and draws her lines accordingly. Sheehy et al., on the other hand, come much closer to a disavowal of BDSM, and the idea that women could ever willingly consent to it. Their intervention, while seeking to address a serious problem of the way in which rough sex defences are being used and abused in sexual assault trials, is ultimately another relatively reductionist volley in the 2.0 version of the BDSM sex wars.

C. TOWARD A REPARATIVE APPROACH

What if, instead, we take both sides of the debate seriously, and read them beside each other? There are, I would suggest, other authors that come closer to a reparative approach to the challenges raised by the rough sex defence for sexual assault complaints. Deckha's review of the BDSM sex wars could be seen as reparative in spirit, seeking to find a middle ground. She suggests that the two sides in the more recent sex wars have more in common than not. But, in also identifying the fundamental disagreements between whether BDSM should be seen as sex or as violence, Deckha does not choose between them, but holds them both in view. I would argue that she reads them beside each other and that she is not alone in doing so. Other scholars, like Sharon Cowan in the UK[49] and Kelly Egan in the United States,[50] have engaged in the debate in ways that seek to keep both BDSM as a legitimate sexual practice and the abuses of sexual assault trials in view.

I would also read Craig's work in a reparative light. Like Sheehy et al., she sees the proliferation of the rough sex defence as dangerous for women.[51] Yet, her recommendations for addressing the troubling ways in which the defence has been used goes in a very different direction. She closely examines how the rough sex defence has been used and abused by courts in the determination of both the *actus reus* and *mens rea* of sexual assault claims. Craig takes women's sexual autonomy seriously, alongside the need to protect women from oppressive, harmful sexual practices. Indeed, Craig affirms non-normative sexual practices and the rights of sexual minorities like those in the BDSM community.[52] Hers is not a position against BDSM. She focuses, instead, on what consent should and should not look like in the BDSM context. Her arguments are granular, rooted in the specificities of legal requirements of vitiation of consent (to which I will return). But in her close reading of cases, she suggests courts can and should do better in their understanding of consent.

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48 *Ibid* at 656.

49 Cowan, "Instantiating Violence," *supra* note 29; Sharon Cowan, "The Pain of Pleasure: Consent and the Criminalisation of Sado-Masochistic 'Assaults'" in James Chalmers, Fiona Leverick & Lindsay Farmer, eds, *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh: Edinburgh University Press, 2010) 126.

50 Kelly Egan, "Morality-Based Legislation is Alive and Well: Why the Law Permits Consent to Body Modification but Not S/M Sex" (2007) 70:4 Alb L Rev 1615.

51 Craig, "Regulation of Sadomasochism," *supra* note 34 at 404.

52 In other work, Craig has explored what limits can appropriately be placed on sexual liberty and has argued in favour of examining limitations in terms of risk, rather than normative assessments of good, bad, normative, or non-normative sex. See e.g. Elaine Craig, "Capacity to Consent to Sexual Risk" (2014) 17:1 New Crim L Rev 103 [Craig, "Capacity to Consent"].

Consent needs to do more of the work. The cases reviewed by Sheehy et al. are disturbing in the ways that courts and juries disregard women's credibility and find consent where it seems so blatantly obvious that none existed. These are cases where consent — or rather, its absence — should have been able to do all the work. We need to continue to challenge the sexist and misogynistic assumptions, the twin myths of women's consent, and the elision of some-consent-once-to-some-sex as a blanket consent to all sex, always and forever. These are not cases where we need the vitiation of consent to sexual assault causing bodily harm; these are cases where there was no consent to vitiate. Consent can and should do more work.

Yet, as Joseph Fischel has argued, consent cannot do *all* of the work, even in the BDSM context.[53] Consent is insufficient for adjudicating sex:

> [S]ome human practices on or with other humans, even those practices are superduper and affirmatively, enthusiastically consented to, should be impermissible because those practices are incompatible with humans' well-being and -doing in the world and incompatible with humans' capability to co-determine their sexual relationships, their sexual autonomy.[54]

His example is an extreme one: the German cannibal case in which the victim agreed to be sexually tortured, killed, and eaten. Consent obviously does not do the work here. Indeed, both Hanna and Pa agree that some regulation is required, imposing some legal limits on the role of consent in activities that cause bodily harm including BDSM, although they disagree on precisely where those lines should be drawn. Moreover, Canadian law is clear that there are circumstances when consent to assault and sexual assault can be vitiated.

If it is not consent all the way down, then the question is the legal threshold for vitiating consent. Hanna and Pa disagree on the threshold. Hanna argues that there should be no consent defence carved out for BDSM, while Pa, on the "pro-BDSM" side argues in favour of one. But this does not describe the nuance of their differences on the threshold for vitiating consent. Hanna argues that "the law should not allow consensual violence that results in *actual serious* physical injury outside of highly regulated contexts."[55] Pa argues that "the legislature [should] legalize private, consensual S/M sex that does not cause *grievous bodily injury or death.*"[56] The threshold for vitiating consent, then, is not "serious bodily injury" but "grievous bodily injury or death." For Hanna, BDSM should be treated the same as other assaults, and the defence only available if the assault did not cause serious or actual bodily injury. In contrast, Pa argues for a carve-out for BDSM based on grievous bodily injury or death. The difference in their positions vis-à-vis those limits of consent are not whether limits exist, but the legal basis of those limits: "[A]ctual, serious, [bodily] injury"[57] or "grievous bodily injury or death."[58] The distinction is based on the extent and seriousness of bodily harm. Their disagreement on the legal threshold — serious versus grievous bodily harm — in turn reflects their disagreement on the nature of BDSM. Hanna considers BDSM as violence, whereas Pa considers it sex. More specifically, Hanna considers it as violence with

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53 Joseph J Fischel, *Screw Consent: A Better Politics of Sexual Justice* (Oakland, Cal: University of California Press, 2019) at 23 [Fischel, *Screw Consent*].

54 *Ibid*.

55 Hanna, *supra* note 39 at 248 [emphasis in original].

56 Pa, *supra* note 39 at 81 [emphasis added].

57 Hanna, *supra* note 39 at 248 [emphasis omitted].

58 Pa, *supra* note 39 at 81.

sexual aspects, whereas Pa considers it with sex with potentially violent aspects.[59] The legal threshold that they each propose is tied up with the underlying anti- and pro-BDSM positions, respectively.

How, then, might a reparative approach to regulating BDSM negotiate these differences? Must a pro-BDSM position adopt a higher threshold, and an anti-BDSM position a lower one? Must they adopt a BDSM exception, or no exception, respectively? Let us consider the underlying objectives of each threshold. Those advocating the grievous bodily harm threshold are concerned that the lower threshold would capture a range of BDSM practices, ranging from those that result in bruising to scarring or branding. Those advocating the grievous bodily harm carve out to the vitiation of consent are seeking to provide a defence to BDSM practitioners in these contexts. Conversely, those advocating the serious bodily harm threshold with no carve out are concerned with protecting bodily integrity and exploitation. Rather than choose between them, how might we hold the objectives beside each other? A reparative approach needs to hold onto both the possibilities of consensual BDSM practices that result in some degree of bodily harm and the need for a limitation on capacity to consent to physical harms that we deem unacceptable. We need to hold sexual autonomy beside sexual exploitation, not simply choose one over the other.

What might this mean for the legal threshold? Must we choose between serious and grievous bodily harm? Some scholars who seek to affirm and legalize BDSM relationships, nevertheless, endorse a standard for vitiating consent that is not far off Hanna's threshold of serious bodily harm. Egan, for example, who argues for the legalization of BDSM, endorses a consent defence "should be available when assault charges stem from consensual SM activity, with certain limitations. Consent should not be available as a defence in cases involving serious physical injury; it should only be permitted for cases of lesser injury."[60] She adopts a definition of serious physical injury from the *New York Penal Law* as physical injury that "creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."[61] Egan's position suggests that the crucial question might not be choosing between serious and grievous bodily harm, but how the standard is itself defined. Indeed, her proposed definition of serious physical injury seems to come closer to a grievous bodily harm standard, notwithstanding the language. The threshold is not self-explanatory and suggests that we might consider how best to define serious bodily harm is a way that holds sexual autonomy beside sexual exploitation. Might the threshold of "serious bodily harm" be approached with a reparative sensibility that recognizes that some BDSM practices result in some degree of acceptable bodily harm and that other degrees of bodily harm are unacceptable?

I would suggest that the recent developments in Canadian law, particularly the decision of the Court of Appeal of Alberta in *Barton*, gesture toward just such an approach. But first, let me contextualize the decision within a brief overview of the approach taken by the Canadian courts to vitiating consent to bodily harm. There have been two legal issues: the standard of bodily harm, and the requisite mental element of intention. The Supreme Court of Canada, in the leading case of *R. v. Jobidon*, held that there could be no consent to assault

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[59] *Ibid* at 77.
[60] Egan, *supra* note 50 at 1640 [footnotes omitted].
[61] *Ibid* at 1640, n 199.

where the assault was intended to cause and caused non-trivial bodily harm, with exceptions for medical treatment, sports, stunts, and some body modification such as tattooing.[62] In *R. v. Welch*, the Court of Appeal for Ontario held that *Jobidon* applied to the sexual context, and that consent was not a valid defence to charges of sexual assault causing bodily harm that was *objectively foreseeable*.[63] The requisite mental element for intention to cause bodily harm was thereby extended to objective foreseeability. The Court described BDSM as demeaning and dehumanizing, as without social value, and therefore not coming within one of the exceptions from *Jobidon*. In *R. v. Paice*, the Supreme Court affirmed that *Jobidon* requires "serious [bodily] harm both intended and caused for consent to be vitiated."[64] The case made clear that the threshold was "serious bodily harm." But the question of the requisite mental element of intention did not arise since the trial Court had found actual intention. In subsequent cases, the Court of Appeal for Ontario moved away from the objective foreseeability of *Welch* and endorsed a subjective intention instead. In *R. v. Quashie*, the Court held consent could be vitiated only if the accused intended to inflict bodily harm and caused bodily harm.[65] There was no question of objective foreseeability in that cause, since it had been found that the accused had intended to cause bodily harm. But in *R. v. Zhao*, the Court specifically addressed and rejected the objective foreseeability threshold from *Welch*, establishing instead a subjective intention.[66] The case did not raise, and as a result the Court did not address, whether wilful blindness or recklessness would be included within this intention.

On the question of bodily harm, then, it is firmly established in Canadian law that the threshold is serious bodily harm. It is not the higher threshold that Pa and others have suggested as the BDSM exception: death or grievous bodily harm. On the question of the requisite mental element, the law is less clear. Actual intention to cause bodily harm, as well as wilful blindness and recklessness to causing bodily harm will vitiate consent. Objective foreseeability as a threshold, however, remains contested.

Now we can turn to the recent case of *Barton*, where the Court of Appeal of Alberta concluded that consent can be vitiated in the context of sexual assault causing serious bodily harm that was objectively foreseeable.[67] To be clear, however, *Barton* was not simply an affirmation of *Welch* and its negative view of BDSM. Rather, the Court in *Barton* was careful to affirm the value of BDSM sexual practices:

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62 [1991] 2 SCR 714 [*Jobidon*].

63 *R v Welch* (1995), 25 OR (3d) 665 (CA) [*Welch*] (although as Craig has persuasively argued, *Welch* involved non-consensual sexual violence; it was another in a long line of cases in which complainant did not consent. The Court did not need to consider whether consent was vitiated in the BDSM context, since there was in fact no consent). Craig, "Capacity to Consent," *supra* note 52 at 115–16.

64 2005 SCC 22 at para 18.

65 2005 CanLII 23208 (ONCA).

66 2013 ONCA 293.

67 *Barton* ABCA, *supra* note 22. In her section of this article, Khan provides a more detailed review of the *Barton* case, including its utterly appalling facts ad judicial proceedings. Cindy Gladue, a Cree woman and mother of three, was killed by Bradley Barton, who inflicted an 11-centimeter tear across her vaginal wall, leaving her to bleed to death. defence counsel raised the "rough sex defense." At the second trial for manslaughter, the trial Court rejected the defence and found Barton guilty. The Court of Appeal upheld the conviction, and in so doing, elaborated on the test for vitiating consent.

> Where choices are safe, sane, and genuinely consensual, mingling sensations of pain and pleasure does not give rise to policy concerns. Therefore, we reject any suggestion made in cases like *Welch* and *Robinson* that the intention to inflict pain might be a relevant threshold for vitiation.[68]

Indeed, the *Barton* decision suggests that the question of the attitudes toward BDSM and the threshold for vitiation of consent can and should be kept separate. The case adopts a lower threshold for the requisite mental intention, while not pathologizing or exceptionalizing BDSM. The Court also sought to clarify the threshold of serious bodily harm, rejecting "a low threshold that would capture minor bruises, scratches, or superficial wounds that heal in a few days without medical intervention."[69] The Court stated that the bodily harm needs to be "significant, long-lasting or permanent"; it must interfere "in a substantial way with the integrity, health, or well-being of a person."[70]

The *Barton* decision is a far cry from the standard advocated by Sheehy et al., who want a return to the full spirit of *Welch*. They argue that there should be no exception for BDSM; "that consent should never be a defence to bodily harm resulting from sexual activity unless that bodily harm was unforeseeable at the time it was inflicted."[71] They not only want the threshold for vitiation to be assault causing bodily harm that was objectively foreseeable, but they want to the threshold of harm to be bodily harm, not serious bodily harm. Moreover, unlike the Court in *Barton*, they see no value in BDSM that is worthy of legal protection. This is simply not the letter or spirit of the *Barton* decision, which I would suggest approaches a more reparative sensibility.

Barton offers a path forward for thinking about vitiating consent in a way that both affirms the possibilities of consensual BDSM practices and recognizes the need for a limitation of the capacity to consent to physical harms that we deem unacceptable. But the extreme facts in *Barton* — grievous bodily harm resulting in death — leave many issues unaddressed. More work needs to be done to better understand consent in the context of BDSM; indeed, as Sheehy et al. amply demonstrate, more work needs to be done to better understand consent in sexual assault cases more generally where rough sex defences are being deployed in contexts where there was no consent. Craig's work offers us a partial solution to understanding consent in the context of BDSM — it must be affirmative, specific, and contemporaneous.[72] Others have suggested that the Crown rely on BDSM experts, which could be of assistance in showing the consensual nature of some practices, and the non-consensual nature of so many of the "rough sex defenses."

Yet another approach makes analogies to sports, where there is an exception to assault causing serious bodily harm because of its social utility, but there are still limits. Fischel discusses the case of a hockey player who was violently punched and suffered a severe head trauma, but the Court held that consent only goes as far as the rules of the game.[73] A similar limitation in the sexual context could allow a consent defence to go only as far as the rules of the BDSM game. Though, the rules of the game approach does not deal with the problems

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68 *Ibid* at para 180.
69 *Ibid* at para 181.
70 *Ibid* at paras 181–82.
71 Sheehy, Grant & Gotell, *supra* note 1 at 654.
72 Craig, "Regulation of Sadomasochism," *supra* note 34 at 418–19.
73 Fischel, *Screw Consent*, *supra* note 53 at 23.

raised by Fischel, where individuals might actually agree to grievous bodily harm or death.[74] Fischel then argues for an entirely different approach. In his view, "serious bodily injury" and the "corporanormativity" on which it is based equates the seriousness of harm equated with physical harm risk in a way that is potentially underinclusive and overinclusive, failing to capture other harms.[75] He suggests a standard of autonomy and access rather than a higher standard in the language of bodily harm.[76] Indeed, consent could be a defence to serious bodily harm "provided the injury neither violates one's autonomy nor impedes one's access to the world, and provided we define autonomy not simply as personal choice but as a capability to exercise choice, to co-determine the contours of one's relationships, and to be and do in the world."[77] Fischel's approach may seem a far cry from the current criminal standards of consent and harm. It is. But it represents a creative rethinking of how and why we draw lines on sexual behaviour that is, and is not, justifiable.

Each of these approaches take the claims of both sides seriously; they hold sexual autonomy and sexual exploitation beside each other and try to find ways of creatively not having one simply trump the other. Each suggests ways out of the BDSM sex wars by refusing the dichotomies of those sex wars. Each is, I would suggest, an effort at regulating reparatively. Regulating reparatively refuses the either-or, "there is no alternative" thinking. There is always an alternative if we imagine it.

III. KINK DENIAL (OR WHY PERSECUTING A SEXUAL SUBCULTURE WILL NOT PROTECT WOMEN) — UMMNI KHAN

The article "Resurrecting "She Asked for It": The Rough Sex Defence in Canada" engages with a legitimate problem. BDSM has become increasingly normalized. This has created an opportunity for people accused of violating another's consent in the course of an injurious or fatal sexual encounter.[78] They can defend themselves by claiming the impugned conduct was a consensual "sex game gone wrong," "rough sex," "kink," "SM," "BDSM," or "50 Shades of Grey-inspired."

In their article, Sheehy et al. frame this problem as one of male violence against women. They argue that Canadian law should bar "consent as a defence where bodily harm, including serious psychological harm, is proven unless that harm was unforeseeable."[79] They also want to vitiate consent if strangulation is involved. The authors recognize this could theoretically send men to jail for doing things welcomed by their partners and offer justifications that include the following: (1) patriarchy and structural oppression render women's sexual autonomy a neoliberal myth; (2) most cases that come to the attention of law enforcement will involve women who report they did not consent; (3) allowing an accused to allege consent will expose the complainant to a harmful cross-examination process; (4) there is no social utility to allowing people to inflict foreseeable bodily harm on women; and (5) if

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74 *Ibid* at 25.
75 *Ibid* at 48–54.
76 *Ibid*.
77 *Ibid* at 53–54.
78 Sheehy, Grant & Gotell, *supra* note 1.
79 *Ibid* at 686.

society must limit the autonomy of sexual minorities to better protect women from injury or death, the price is worth it.

My contribution to this response article has five parts. In the first, I challenge the ways that rough sex cases are held out as exceptional and separate from the general problems involving sexual assault trials. The second part demonstrates how Sheehy et al. improperly conflate kink or BDSM, violence, sexual pathology, and rough sex. In so doing, they engage in what I will call "kink denial" — erasing kink culture, subjectivity, knowledge, and community. The third part contextualizes Sheehy et al.'s article as carceral feminist advocacy, which disproportionately harms racialized and low-income people, while legally and socially stigmatizing kinksters. The fourth section considers more effective responses to the legitimate problems Sheehy et al. identify with the "rough sex" claims. In this regard, I consider legal solutions that would better assist courts in differentiating consensual activities from criminal ones. I then cite empirical and expert literature that advocates for kink-informed education and public health responses. The fifth and final section considers the Court of Appeal of Alberta's 2024 *Barton* judgment, which cited Sheehy et al. with approval.[80]

A. ROUGH SEX EXCEPTIONALISM

Throughout their article, Sheehy et al. point out problems with framing rough sex practices as consensual, and the challenges that complainants face during a trial. Yet almost all of their concerns are general problems associated with sexual assault cases. While the authors exceptionalize cases that involve the defence claiming consensual rough sex, the issues they raise are not qualitatively different from their non-rough counterparts, and in my view, do not justify the exceptional carceral response they put forward.[81]

For example, at multiple junctures in their article, the authors argue women's sexual autonomy is a "myth."[82] Thus, even if a woman claims she consented to sex that entails bodily harm, this is not a genuinely free choice.[83] Usually, this is simply stated as a self-evident fact. At one point, they do cite a BBC study that found "rough sex" is common, but that 53 percent of the women surveyed said the acts were unwanted at least some of the time.[84] Sheehy et al. do not address the other 47 percent of respondents, nor do they cite academic studies finding that many people, including a majority of the surveyed women who have experienced rough sex, report enjoying it.[85] Additionally, and more to the point, the problem of unwantedness is not exclusive to rough sex. Many women (along with people of

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80 *Barton* ABCA, *supra* note 22 at paras 178–79.

81 For a similar critique of exceptionalism arguments in rough sex or "bogus BDSM" cases: Theodore Bennett, "A Fine Line Between Pleasure and Pain: Would Decriminalising BDSM Permit Nonconsensual Abuse?" (2021) 42:2 Liverpool L Rev 161.

82 Sheehy, Grant & Gotell, *supra* note 1 at 656.

83 *Ibid*.

84 *Ibid* at 653.

85 Herbenick, *supra* note 17; Rebecca L Burch & Catherine Salmon, "The Rough Stuff: Understanding Aggressive Consensual Sex" (2019) 5:4 Evolutionary Psychological Science 383; Bernard Gallagher et al, "Consensual Aggression and Violence During Sex in the General Population 'Rough Sex'): A Scoping (Literature) Review" in Hannah Bows & Jonathan Herring, eds, *'Rough Sex' and the Criminal Law: Global Perspectives* (Bingley, UK: Emerald, 2023) 9. This 2023 chapter would likely not have been available for Sheehy et al.'s review, but I include it here as it provides a helpful overview of the extant empirical literature on the topic.

all genders) consent or acquiesce to sex that is unwanted.[86] A recent study on the topic found that 51.6 percent of surveyed women had engaged in unwanted sex in the past year (while 37.6 percent of the surveyed men had done so as well).[87] Robin West argues that unwanted consensual sex disproportionately harms women physically, psychologically, and politically and can lead to "depression, a feeling of a lack of control, a diminution in felt autonomy and self-regard, and a host of related psychic ills."[88] Against this backdrop, the fact that some women consent to unwanted rough sex is unremarkable. It corresponds with the broader social phenomenon of women consenting to unwanted sex in general — a phenomenon that is troubling but is not generally seen as warranting criminal law responses.

Another issue is the question of consent. Sheehy et al. argue that those who oppose their position wrongly contextualize the issue as one of consensual sex. As they explain, in the alleged "rough sex" cases under examination, the women almost always stated they did *not* consent (although in a few instances, women started by saying they did not consent, then recanted those statements). But there is nothing exceptional about this. The same observation would apply equally to sexual assault cases where the defence alleges the complainant consented to non-rough sex. If a sexual interaction between adults is on trial in a criminal case, it stands to reason that it will usually involve a complainant alleging non-consent (or incapacity to consent). Those of us who critique the Sheehy et al. position do not claim that the "rough sex" cases that wind up in court will necessarily or usually involve situations where all parties state they consent. But there is no principled reason to distinguish rough from non-rough sexual assault cases on this point. In all sexual assault cases, there remains the possibility that a complainant is being untruthful or that an accused was reasonably mistaken about their consent. There is also the possibility that the police are informed about a consensual sexual encounter that causes injury through a third party witness, or because a recording of the event is brought to their attention. This happened in the precedent setting *R. v. Brown* case from England (and cited with approval by multiple Canadian courts), where five men were sentenced to jail terms for engaging in BDSM even though *all parties* stated the activities were consensual.[89]

Sheehy et al. assert there should be no consent to "rough sex" because of the trauma and harm of the cross-examination process. Yet again, this is not unique to "rough sex" cases. Craig's in-depth analysis of sexual assault trials reveals the psychological violence of cross-examinations, which is not solely explained by the adversarial nature of the process. There is strong evidence that some defence counsel regularly attempt to "whack the complainant," using aggressive, prolonged, and humiliating questions, and surreptitiously perpetuating rape

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[86] Lucia F O'Sullivan & Elizabeth Rice Allgeier, "Feigning Sexual Desire: Consenting to Unwanted Sexual Activity in Heterosexual Dating Relationships" (1998) 35:3 J Sex Research 234; Sarah A Vannier & Lucia F O'Sullivan, "Sex Without Desire: Characteristics of Occasions of Sexual Compliance in Young Adults' Committed Relationships" (2010) 47:5 J Sex Research 429.

[87] Maren Froemming, *The Relation of Unwanted Consensual Sex to Mental Health and Relationship Variables: The Role of Motivations* (PhD Dissertation, Graduate College of Bowling Green State University, 2020) [unpublished].

[88] Robin West, "Consent, Legitimation, and Dysphoria" (2020) 83:1 Mod L Rev 1 at 27; Robin West, "Consensual Sexual Dysphoria: A Challenge for Campus Life" (2017) 66:4 J Leg Educ 804.

[89] *R v Brown* [1993] UKHL 19 [*Brown*]. Cases that cite *Brown* approvingly include *Welch*, *supra* note 63. Other cases that either cite *Brown* approvingly (or that cite *Welch* citing *Brown*) include: *R v A(J)*, 2008 ONCJ 195 at para 16; *R v Hancock*, 2000 BCSC 1581 at para 69; *R v Cuerrier*, 1996 CanLII 8324 at para 70 (BCCA).

myths in the process.[90] This effectively puts the complainant on trial, and is experienced by many complainants as a "second rape."[91] While Sheehy et al. provide some horrific details of rough sex trials where defence counsel engage in misogynistic badgering, victim-blaming, and rape myth perpetuation, Craig's book reveals that this is endemic to all types of sexual assault trials, not just ones that include bodily harm.

As outlined above, many of the considerations cited in Sheehy et al.'s article — women's lack of sexual autonomy within patriarchy, the stated lack of consent in most prosecutions, and the traumatic nature of cross-examination — are issues of broad concern in sexual assault cases generally. Despite this, Sheehy et al. do not suggest eliminating consent from the analysis in all such cases — only those that involve "rough sex." Why is this? I suggest a close reading of Sheehy et al.'s work shows that they base their rough sex exceptionalism on a value-judgment about good and bad sex (or, in their terms, sex that has or lacks social utility).

A number of feminist and queer theorists have challenged this sexual hierarchy. Drawing on Rubin's work, Dipika Jain and Kimberly Rhoten suggest that:

> 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." This would allow for the possibility of consent within BDSM interactions, to the same extent that it is a possibility in other types of sex.[92]

Deckha has similarly suggested that postcolonial theory could help feminists rethink BDSM as a sexual subculture akin to regional cultures.[93] To some feminists, these "other" cultures may have customs that seem strange, distasteful, or harmful. But a postcolonial lens can help to de-exceptionalize kinky activities, encouraging critics to reverse their gaze and consider how normative society pressures women to engage in a number of "injurious" or "patriarchal" practices such as plastic surgery, sexist employment arrangements, or even marriage.[94] Deckha also argues that it is important to listen to the women who identify with, seek out, and enjoy kink. This project of defining kink on its own terms, and understanding its distinctions from other practices, will be taken up in the next part.

B. KINK, VANILLA, ROUGH SEX, AND SEXUAL ASSAULT

As stated in the introduction, I agree that BDSM has gained some level of social acceptability in the last few decades.[95] And while there are no clear benchmarks to measure

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90 Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal: McGill-Queen's University Press, 2018) at 41–42.

91 *Ibid* at 220.

92 Dipika Jain & Kimberly Rhoten, "A Queer-Feminist Analysis of BDSM Jurisprudence in Common Law Courts" (2022) 27:1 Berkeley J Crim L 87 at 135 [footnotes omitted].

93 Maneesha Deckha, "Pain as Culture: A Postcolonial Feminist Approach to S/M and Women's Agency" (2011) 14:2 Sexualities 129 at 134–35.

94 Feminists may not approve of these phenomena, but they are not campaigning to criminalize them.

95 Tristan Taormino, *The Ultimate Guide to Kink: BDSM, Role Play and the Erotic Edge* (Berkeley, Cal: Cleis Press, 2012); Ummni Khan, "Fifty Shades of Ambivalence: BDSM Representation in Pop Culture" in Clarissa Smith, Feona Attwood & Brian McNair, eds, *The Routledge Companion to Media, Sex and Sexuality* (Abingdon, UK: Routledge, 2018) 59.

changes in interest, current researchers and sexuality experts hypothesize that "rough sex" practices are becoming more prevalent, particularly among young people.[96]

However, the way that Sheehy et al. frame the relationship between rough sex and BDSM leads to confusion and problematic slippages. When BDSM is referenced, it is frequently undermined with the use of linguistic qualifiers: "[*F*]*ramed* as the practices of 'bondage, domination and sadomasochism'," [97] "*so-called* BDSM," [98] and "*allegedly* consensual BDSM practice."[99] Sheehy et al. further suggest that acknowledging that some women enjoy "being hurt" or are "stimulated by male violence" endangers women and "fuels pernicious pornographic scripts." [100] In addition, the authors employ the language of "sexual psychopathy" to pathologize rough sex, which Sheehy et al. have conflated with BDSM.[101]

In order to properly respond to Sheehy et al. and to clarify my own meaning, I will first provide a quick overview of BDSM and kink and its relationship to vanilla sex, violence, and the concept of rough sex. Kink, S/M, and BDSM all signify some form of power play and can be in reference to identity (for example, kinksters, BDSMers, spankos, and so on), community (which can be broad or specific to a kinky subset), or practice (which can range from fantasy to high-impact activities). Some common examples include constraint, hierarchical erotic dyads, role-playing, hitting with a hand or an instrument, fetishes, and pleasure in meting out or receiving consensual pain. For some, it is a fun diversion within an otherwise non-kinky or vanilla sex life. For others, kink forms a core part of identity and can be viewed as a sexual orientation.[102] While most people think of kink as an erotic practice, others understand it as a stand-alone activity, separate from their sex or romantic lives.[103] It is also important to note that some of the practices — often referred to as edgeplay — entail heightened physical or psychological risks or necessitate some form of injury, for example, bloodplay, whipping, piercing, or erotic asphyxiation.

There is a long history of pathologizing BDSM. However, contrary to Sheehy et al.'s suggestion that BDSM is indicative of sexual psychopathy, decades of empirical research have consistently demonstrated those who practice BDSM are not more prone to pathology

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96 Debby Herbenick et al, "'It Was Scary, But Then It Was Kind of Exciting': Young Women's Experiences with Choking During Sex" (2022) 51:2 Archives Sexual Behavior 1103 [Herbenick et al, "It Was Scary"]; Herbenick et al, "What Is Rough Sex," *supra* note 17.

97 Sheehy, Grant & Gotell, *supra* note 1 at 653 [emphasis added].

98 *Ibid* at 655 [emphasis added].

99 *Ibid* at 655–56 [emphasis added].

100 *Ibid* at 654, 685.

101 *Ibid* at 657, citing Susan SM Edwards, "Consent and the 'Rough Sex' Defence in Rape, Murder, Manslaughter and Gross Negligence" (2020) 84:4 J Crim L 293.

102 Caitlin Hart, *Born This Way? Is Kink a Sexual Orientation or a Preference?* (MA Thesis, Carleton University, 2020) [unpublished].

103 Brad J Sagarin, Ellen M Lee & Kathryn R Klement, "Sadomasochism Without Sex? Exploring the Parallels Between BDSM and Extreme Rituals" (2015) 1:3 J Positive Sexuality 50.

than the general population.[104] In a scoping review of the relevant literature, it was also found that "[f]eminist models, which imply that BDSM power dynamics are related to sexism, are also not supported."[105] On the contrary, some studies indicate BDSM practitioners demonstrate favourable psychological characteristics over the general population, including being less neurotic and more conscientious, and exhibiting lower rape-supportive attitudes.[106] Even the American Psychiatric Association, which has an unfortunate history of enforcing heteronormative, transphobic, and patriarchal norms has effectively depathologized consensual BDSM in its most recent guidelines.[107] Finally, there is burgeoning literature that supports the therapeutic use of kink, particularly for survivors of violence.[108]

While BDSM can be classified as a subculture, the line between kinky and vanilla *activities* is not necessarily clear-cut. For example, play wrestling, giving or receiving hickeys, scratching, or dirty talk can all be classified as either vanilla or kinky, depending on the context and how the participants themselves define the act.

The line between kink and assault, however, *is* clear-cut.[109] The first is consensual, the latter is not.[110] Kinky people literally and figuratively wrote the book (in fact, many books) on the centrality of consent within their subculture.[111] This fact is reflected in the subculture's evolving slogans, including "Safe, Sane, and Consensual" (SSC); "Risk-Aware Consensual Kink" (RACK); "Personal Responsibility Informed Consensual Kink" (PRICK); and "the 4 Cs" (Caring, Communication, Consent, and Caution).

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104 Peggy J Kleinplatz & Charles Moser, eds, *Sadomasochism: Powerful Pleasures* (Binghamton, NY: Harrington Park Press, 2006); Charles Moser & Peggy J Kleinplatz, "Conceptualization, History, and Future of the Paraphilias" (2020) 16:1 Annual Rev Clinical Psychology 379; Sloane Ferenchak, *De-Pathologizing BDSM: Towards an Integrated Kink-Affirmative Acceptance and Commitment Therapy Model* (PhD Dissertation, Widener University, 2022) [unpublished]; Ashley Brown, Edward D Barker & Qazi Rahman, "A Systematic Scoping Review of the Prevalence, Etiological, Psychological, and Interpersonal Factors Associated with BDSM" (2020) 57:6 J Sex Research 781; Ummni Khan, "Sadomasochism in Sickness and in Health: Competing Claims from Science, Social Science, and Culture" (2015) 7:1 Current Sexual Health Reports 49.

105 Brown, Barker & Rhaman, *ibid* at 807.

106 Andreas AJ Wismeijer & Marcel ALM van Assen, "Psychological Characteristics of BDSM Practitioners" (2013) 10:8 J Sex Medicine 1943; Kathryn R Klement, Brad J Sagarin & Ellen M Lee, "Participating in a Culture of Consent May Be Associated with Lower Rape-Supportive Beliefs" (2017) 54:1 J Sex Research 130.

107 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5-TR*, 5th ed, Text Revision (Washington, DC: American Psychiatric Association, 2013); Bernard Andrieu, Claire Lahuerta & Asia Luy, "Consenting to Constraint: BDSM Therapy After the DSM-5" (2019) 84:2 L'Évolution Psychiatrique e17; Edward Shorter, "Sexual Sunday School: The *DSM* and the Gatekeeping of Morality" (2014) 16:11 Am Medical Assoc J Ethics 932.

108 Cory J Cascalheira et al, "Curative Kink: Survivors of Early Abuse Transform Trauma Through BDSM" (2023) 38:3 Sexual & Relationship Therapy 353; Richard A Sprott, "Reimagining 'Kink': Transformation, Growth, and Healing Through BDSM" (2024) J Humanistic Psychology 987; Hammers, *supra* note 15.

109 Eva Jozifkova, "Consensual Sadomasochistic Sex (BDSM): The Roots, the Risks, and the Distinctions Between BDSM and Violence" (2013) 15:9 Current Psychiatry Reports 392.

110 Cara R Dunkley & Lori A Brotto, "The Role of Consent in the Context of BDSM" (2020) 32:6 Sexual Abuse 657; Bennett, *supra* note 78.

111 slave david stein Under the Guardianship of Master Steve of Butchmann, "Safe Sane Consensual" (2002), online: [perma.cc/9BJQ-DS22]. Darren Langdridge & Meg Barker, eds, *Safe, Sane, and Consensual: Contemporary Perspectives on Sadomasochism* (New York: Palgrave Macmillan, 2007); Anne O Nomis, "The history of SSC (Safe Sane Consensual) vs RACK (Risk-Aware Consensual Kink)" (8 February 2018), online (blog): [perma.cc/3SFN-FWNB].

The SSC framework was developed in the 1980s by New York and Chicago gay S/M activists. Importantly, one of its leading proponents, david stein (who chose to have his name in lower caps), would later clarify that "safe" did not mean risk-free, but rather referred to the need for technical know-how when doing tricky activities like whipping or bondage.[112] SSC helped to initiate new players into the norms of the community and to distinguish true dominants from assaultive opportunists. RACK was coined by kink expert Gary Switch and can be understood as a clarification of the SSC norms.[113] As Switch has emphasized, all sex — indeed all activities — carry risk. Ethical play requires informed consent to the risks. PRICK emerged around 2009 and emphasized the need for participants to understand and take responsibility for the activities and risks they had agreed to.[114] More recently, DJ Williams et al have suggested a new framework for BDSM, the 4Cs: caring, communication, consent, and caution.[115] While retaining the centrality of risk-awareness (through "caution"), there is also an emphasis on negotiation, discussion, and an ethics of care.[116] Importantly, the one word you find in all of these credos is consent.

Another important kink strategy to ensure consent is the use of a pre-established signal, which communicates that a participant wants to discontinue or slow down.[117] Because BDSM can entail role-playing reluctance or non-consent, words or phrases that would normally be used to halt an activity — "no," "stop," or "I don't like this" — may be part of the pleasure of the scene. Instead, a different word is used, like "red," to convey that the activity must cease. Alternatively, safe gestures can be deployed and are particularly helpful during breath play or if one of the players is gagged.

While BDSM credos and practices foster mutuality, meaningful consent, and risk-awareness, it is important not to idealize kink. Sexual assault, intimate partner violence, and consent violations of all kinds happen within BDSM contexts, just as they do in non-BDSM encounters.[118] However, from a BDSM subcultural perspective, if consent was not established or an activity continues after the use of a safe signal, then the activity has transformed from kink to assault.

The specificity of the BDSM subculture and its ethical norms stands in stark contrast to the broad and amorphous concept of rough sex. Studies have found that researchers and sexual actors have multiple and sometimes conflicting understandings of the latter term.[119] Some definitions of rough sex focus on particular behaviours (like spanking, choking, or hair-pulling), while others are more descriptive of the quality of the sex (vigorous, aggressive, passionate, violent or, of course, rough).

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112 See generally O Nomis, *supra* note 106.
113 Gary Switch, "Origin of RACK: RACK vs. SSC," online: [perma.cc/55QU-ECHN].
114 Kinkly, "Personal Responsibility, Informed Consensual Kink," online: [perma.cc/ZD5H-FK73].
115 DJ Williams et al, "From 'SSC' and 'RACK' to the '4Cs': Introducing a new Framework for Negotiating BDSM Participation" (2014) 17 Electronic J Human Sexuality.
116 *Ibid*.
117 Taormino, *supra* note 90.
118 Dunkley & Brotto, *supra* note 105 at 674.
119 Dubravka Svetina Valdivia et al, "Meanings of Rough Sex Across Gender, Sexual Identity, and Political Ideology: A Conditional Covariance Approach" (2022) 48:6 J Sex & Marital Therapy 579.

Though particular activities or intensities can be categorized as either rough sex or BDSM, it is helpful to keep the two arenas distinct. As Dubravka Svetina Valdivia et al. have observed:

> Rough sex may share some features with bondage and discipline, dominance and submission, and sadism and masochism (BDSM); however, rough sex appears to be defined largely by sexual behaviors and their characteristics whereas BDSM is more often defined in ways that address consent, pain, power exchange, and shared beliefs about the experience.[120]

Bennett further distinguishes the "wild and unpredictable" image of rough sex from "BDSM activities [which] are … actually a highly controlled set of practices governed by clear and identifiable cultural standards of behaviour."[121]

Thus, for the purpose of my analysis, it is important to distinguish unplanned rough sex activities from BDSM. The empirical research suggests that "rough sex" frequently happens within the context of problematic heterosexual interactions that follow "sexual scripts."[122] In such scripts, men are the aggressors, women the gatekeepers.[123] Sexual activity happens spontaneously, without discussion about desires, limits, safe words, and so on. This is the exact opposite of the BDSM frameworks of SSC, RACK, PRICK, and the 4Cs, which foreground pre-planned, informed consent and assume nothing about what will happen during an encounter.

Thus, kink should be distinguished from unmitigated violence, pathology, and unplanned rough sex. If we now return to Sheehy et al.'s article, it becomes clear that their analysis rests on kink denial, erasing crucial differences between rough sex practiced by people unaware or uninterested in kink ethics, and kinky activities practiced by people committed to BDSM norms, where consent is at the crux. This kink denial then leads them to suggest a punitive and stigmatizing solution to the problems associated with the "rough sex" narrative in sexual assault trials — one that is overbroad and will unnecessarily criminalize consensual BDSM.

C. CARCERAL, LEGAL, AND STIGMA REPERCUSSIONS

Throughout Sheehy et al.'s work, there is a continual refrain that the "safety of women" requires the criminalization of rough sex. Presenting a utilitarian perspective, Sheehy et al. posit that vitiating consent to rough sex will ensure that accused men will face more serious charges, prosecutors will win more convictions, and offenders will deservedly face more punishment. They take for granted this will help protect women from sexual violence. In this way, Sheehy et al.'s article represents a carceral feminist intervention.

Carceral feminism signifies the stance that widening the category of criminal behaviour and enhancing punishments will reduce gender-based violence.[124] Carceral feminism is thus a subset of the "tough-on-crime" ideology. While many feminists in this camp continue to

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120 *Ibid* at 580.

121 *Bennett*, *supra* note 78 at 173.

122 Herbenick et al, "What Is Rough Sex," *supra* note 17.

123 Kathryn Rittenhour & Michael Sauder, "Identifying the Impact of Sexual Scripts on Consent Negotiations" (2024) 61:3 J Sex Research 454 at 455.

124 Elizabeth Bernstein, "Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns" (2010) 36:1 Signs 45.

address structural issues in their other work, they operate under the assumption that punishing individual "bad" actors is a key part of a larger strategy to ensure a safer society for women.[125] Ignored is extensive research showing punitive policies are not effective at deterrence, eradicating violence, or getting at its roots, including in relation to sexual violence.[126] Instead, such policies contribute to mass incarceration, putting more people — disproportionately Indigenous, Black, racialized, and low-income people — into institutions where sexual violence is rampant and normalized.[127] As Constance Backhouse states in an ardent plea to feminists to find alternatives to prison sentences for sexual assault:

> [P]risons are breeding grounds for cruelty, hatred, disease, self-mutilation, and suicide. Prisons are institutions that are filled with fear, illness, and caustic brutality themselves. If prisons are designed to make our society safer, they fail abysmally since they turn out offenders who are more dysfunctional, more prone to criminal activity, than before.[128]

Interestingly, at one point in the article, Sheehy et al. "acknowledge that there are legitimate concerns about the use of criminalization strategies to combat violence against women, especially given the racist thrust of carceral punishment."[129] Yet, the second half of this sentence reveals their carceral logic, as they add that "much of the so-called 'pro-sex' critique mischaracterizes the cases where the rough sex defence is argued, ignoring how the assertion of a 'sex game gone wrong' defence can trivialize and distort severe forms of violence against women."[130] This rhetoric rests on a false dichotomy. Instead of responding to the critique that combatting gender-based violence through criminalization reinforces racist targeting, investigation, and sentencing, Sheehy et al. suggest that divesting from carceral solutions is at odds with taking violence against women seriously. They postulate a zero-sum game. Yet, as Angela Davis et al state:

> [R]adical feminists of color have historically troubled gender essentialism, forging over time a collective political consciousness of gender violence as always also shaped by racism, class bias, transphobia, heterosexism, and so on. This genealogy resists mainstream histories of anti-violence movements that continue to center whiteness and carceral responses.[131]

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[125] Angela Y Davis et al, *Abolition. Feminism. Now.* (Chicago: Haymarket Books, 2022).

[126] Mariame Kaba, *We Do This 'Til We Free Us: Abolitionist Organizing and Transforming Justice*, ed by Tamara K Nopper (Chicago: Haymarket Books, 2021); Lydia Risi, *Rethinking the Criminalization of Sexual Violence: The Limits of the Criminal Justice Paradigm* (MA Thesis, Concordia University, 2022) [unpublished]; Anthony N Doob, Cheryl Marie Webster & Rosemary Gartner, "The Effects of Imprisonment: Specific Deterrence and Collateral Effects" (2014), online (pdf): [perma.cc/V774-4P9T]; INCITE! Women of Color Against Violence, eds, *Color of Violence: The INCITE! Anthology* (Durham, NC: Duke University Press, 2016).

[127] Chloë Taylor, *Foucault, Feminism and Sex Crimes: An Anti-Carceral Analysis* (New York: Routledge, 2019); Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Halifax: Fernwood, 2017); Aya Gruber, "Reckoning with Carceral Feminism in the Fight to End Mass Incarceration," *The Emancipator* (27 June 2023), online: [perma.cc/T6Y9-6RPM].

[128] Constance Backhouse, "A Feminist Remedy for Sexual Assault: A Quest for Answers" in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 725 at 734.

[129] Sheehy, Grant & Gotell, *supra* note 1 at 654.

[130] *Ibid*.

[131] Davis et al, *supra* note 119 at 76.

In other words, the movement to reduce or eliminate carceral strategies — led by Women of Colour feminist activists — shows that racial and gender justice are indivisible.[132]

In addition, criminalizing some forms of BDSM entrenches the deviant status of practitioners, and thus has broader legal, discriminatory, and stigma repercussions. For example, kinksters face blatant discrimination in a variety of legal contexts, including employment, child-custody, and housing.[133] Research has also shown that kinksters suffer external and internalized stigma, which affects their mental health while creating barriers to access therapeutic assistance.[134] The approach suggested in Sheehy et al.'s article would likely contribute to these problems. Further, if anti-kink feminists actually want kinksters to go to the police when they experience consent-violations, criminalization strategies may be counter-productive. Kinky people are already reluctant to report sexual violence to the police because of concerns related to police harassment, victim-blaming, slut-shaming, being outed, and skepticism that police will properly differentiate between BDSM and sexual assault.[135] This last fear — of course — would be fully realized if consensual kink is collapsed with sexual assault.

D. EDUCATION NOT CRIMINALIZATION

In this section, I advocate for a holistic and intersectional response to the problematic use of the "rough sex" narrative in sexual assault cases. In particular, I will sketch out some ideas related to legal, educational, and public health interventions.

In a 2021 essay, Craig tackles the exact dilemma identified by Sheehy et al., but without exceptionalizing "rough sex" cases, rendering women's sexual agency a "myth," or denying the existence of BDSM.[136] She starts by drawing on empirical literature that validates the existence of S/M, and acknowledges a "substantial minority of the population" engages in the practice.[137] In relation to S/M in the context of a sexual assault case, Craig's close-text analysis reveals failures in the *application* of our current laws, rather than inherent flaws in the laws themselves. For example, some judges misconstrue the doctrine of affirmative consent and the prohibition of implied and advance consent. As Craig states, a broad agreement to an S/M-themed encounter does not alter the legal requirement that consent to specific sexual acts — whether rough or gentle — must be affirmative. Craig further draws on BDSM experts to establish that affirmative consent is consistent with kink ethical

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132 Mimi E Kim, "From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration" (2018) 27:3 J Ethnic & Cultural Diversity in Soc Work 219; Davis et al, *supra* note 119.

133 Susan Wright, "Discrimination of SM-Identified individuals" (2006) 50:2/3 J Homosexuality 217; Larry Iannotti, *I Didn't Consent to That: A Secondary Analysis of Discrimination Against BDSM-Identified Individuals* (PhD Dissertation, The City University of New York, 2014) [unpublished]; Jain & Rhoten, *supra* note 87.

134 Caroline C Boyd-Rogers & Geoffrey B Maddox, "LGBTQIA + and Heterosexual BDSM Practitioners: Discrimination, Stigma, Tabooness, Support, and Community Involvement" (2022) 19:4 Sexuality Research & Soc Pol'y 1747; Ashley A Hansen-Brown & Sabrina E Jefferson, "Perceptions of and Stigma Toward BDSM Practitioners" (2023) 42:23 Current Psychology 19721.

135 Noam Haviv, "Reporting Sexual Assaults to the Police: The Israeli BDSM Community" (2016) 13:3 Sexuality Research & Soc Pol'y 276; Cierra Raine Sorin, *Fifty Shades of Consent: Gender and Anti-Violence Work in the BDSM Community* (MA Thesis, University of California Santa Barbara, 2018) [unpublished]; Boyd-Rogers & Maddox, *supra* note 128.

136 Craig, "Regulation of Sadomasochism," *supra* note 34 at 402.

137 *Ibid*.

frameworks. As stated above, the BDSM subculture prioritizes consent and explicit communication about included and excluded activities, and how a scene can be halted. Thus, while Sheehy et al. advocate for legislative change or a Supreme Court of Canada precedent that would effectively criminalize some forms of BDSM, Craig's analysis arguably suggests it would be more effective to educate judges to properly apply *existing* sexual assault doctrine to cases involving S/M or "rough sex."

Bennett also advocates for education and the use of expert witnesses to help lawyers, judges, and juries understand the meaning and specificity of BDSM consent practices and distinguish genuine BDSM from "bogus BDSM" or non-consensual rough sex.[138] Among other things, he provides a list of inquiries that can be used to test a claim of BDSM, such as whether negotiations were conducted, if safe words were used, and whether limits were set.[139] These types of suggestions acknowledge the existence of the BDSM subculture, and respect women's sexual autonomy (complicated though it may be by social forces). They also have the added advantage of *not* expanding the criminal net, thereby *not* contributing to the further racialization of institutional punishment.

It is important to note the BDSM community has itself acknowledged the issues raised by fabricated "rough sex" narratives and joined the search for effective solutions. For example, in conjunction with kink-aware scholars, doctors, and therapists, the community has searched for ways to help law enforcement distinguish consensual kink from assault. Of note is a recent collaboration in the US between the American Law Institute and the National Coalition for Sexual Freedom, an advocacy group that supports those who engage in alternative sexual or relationship lifestyles.[140] This joint effort has produced a set of guidelines entitled Explicit Prior Permission (EPP).[141]

In 2022, the EPP guidelines were integrated into the Model Penal Code, which is used in the US to assist state legislatures in updating and rationalizing their own criminal statutes.[142] The relevant section decriminalizes consensual force, threats, or restraint if permission was provided beforehand that was explicit and specific to the activities, and a safe word or gesture was chosen that participants could use to halt the activities.[143] It is important to note that while most BDSM activities would be effectively legalized by this section, certain hardcore BDSM activities (for example, those that would cause or risk serious injury) might still be criminalized. What is particularly promising from an anti-stigma perspective is that the Moral Penal Code's commentary legitimates "sadomasochistic practices" and "BDSM" and distinguishes them from sexual assault. This is a huge and affirming victory for the BDSM community.

Public health professionals, educators, kink experts, and harm-reduction scholars are also grappling with the apparent rise of "rough sex" and the potential attendant risks. But unlike

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138 Bennett, *supra* note 78 at 163, 180.

139 *Ibid* at 172.

140 David J Ley, "Criminal Charges and Consensual Kink" (2 June 2023), online: [perma.cc/6NNY-M2DC].

141 *Ibid*.

142 Erin Murphy, "Article 213 of the American Law Institute's Model Penal Code" in Tatjana Hörnle, ed, *Sexual Assault: Law Reform in a Comparative Perspective* (Oxford: Oxford University Press, 2023) 185.

143 *Ibid* at 213–14.

Sheehy et al., who essentially want the criminal law to enforce blanket abstinence from "rough sex," these researchers turn to education. As decades of research have shown, sexual abstinence policies are not effective.[144] Instead of stopping the behaviour, they simply make it riskier, as people continue to engage, but with less access to harm-reduction and pleasure-supportive information.

As stated above, recent research suggests that rough sex is quite prevalent, and a study of undergraduate students found that most practitioners report enjoying it.[145] But as with all sex, there are risks, including purposeful or unwitting consent violations, unwanted activities, psychological distress, and physical harm. Interestingly, some researchers have turned to kink education as a harm-reduction strategy. For example, Herbenick et al.'s in-depth study of rough sex states that "[f]urther examination into the BDSM principles around safety, communication, consent, and care can serve as a template for college and university professionals for educating their students about consent."[146] Another review essay considers the practices of rough sex on campuses, and argues health professionals should differentiate between rough sex or BDSM and sexual violence and "consider how the definition and practice of consent in the BDSM community could benefit campus consent education efforts."[147] In other words, kink's emphasis on mutuality, explicit communication, and safety can enhance sexual consent education, whether for rough, gentle, or BDSM activities.

Finally, let us consider the heightened and immediate risks associated with erotic choking or breath play — activities Sheehy et al. rightly identify as giving rise to particular concerns.[148] Herbenick et al.'s study of internet articles about erotic choking and strangling found many problems, including how-to pieces that perpetuate gendered scripts, convey misinformation, and most troubling, understate the risks, which can include serious injury or death. Interestingly, Herbenick et al criticize these articles for their *lack* of BDSM competency: "[A]lthough BDSM was often mentioned, few articles addressed values or strategies that are commonly upheld in BDSM circles such as being risk-aware, acquisition of technical skill, examination of power dynamics among partners, and trying higher risk behaviors only when sober."[149]

There is a similar recognition of the value of risk-awareness and BDSM frameworks in Herbenick et al.'s study of young women's experiences with erotic choking. While the authors found that most of their interviewees reported positive feelings ("pleasure, excitement, intimacy, caring and enhanced emotional connection with partner during sex"),

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144 The Society for Adolescent Health and Medicine, "Abstinence-Only-Until-Marriage Policies and Programs: An Updated Position Paper of the Society for Adolescent Health and Medicine" (2017) 61:3 J Adolescent Health 400.

145 Herbenick et al, "What Is Rough Sex," *supra* note 17 at 1183–95.

146 *Ibid* at 1193.

147 Heather Eastman-Mueller, Sara B Oswalt & Joleen M Nevers, "Sexual Diversity on College Campuses: Using a BDSM Framework to Discuss Consent" (2023) 71:3 J Am College Health 660 at 662.

148 Sheehy et al. insist that the proper term for this action is "strangling." Presumably, this term conveys the violence that they think inheres in the practice of erotic asphyxiation. While they may be correct in terms of the strict dictionary definition, the term "strangling" in this context is ideological and misleading. In practice, people who do this activity tend to use the terms choking or breath play. I suggest we take our cue from practitioners, and I posit it is helpful to differentiate between consensual and non-consensual activity breath play (Sheehy, Grant & Gotell, *supra* note 1 at 654).

149 Debby Herbenick et al, "'Don't Just Randomly Grab Someone's Neck during Intercourse!' An Analysis of Internet Articles about Choking/Strangulation During Sex" (2023) 49:1 J Sex & Marital Therapy 41 at 50.

others found choking to be "not pleasurable, uncomfortable, scary or … part of a partner's pleasure rather than their own."[150] The authors suggest sexuality educators must learn about the practice and create effective harm-reduction curricula. This would include explaining the risks of choking, so people can make informed decisions about whether to experiment. But for those who choose to engage, it would also mean providing explicit information on effective communication and how to mitigate the risks, including through safe words and safe gestures. [151] Significantly, toward the end of the article, Herbenick et al suggest that "[s]ubsequent research might examine the benefits of being connected to BDSM/kink communities in terms of supporting sexual play that is more risk-aware, informed, and incorporates specific forms of consent, safe words/gestures, and aftercare."[152]

Finally, kink experts have provided crucial information about potentially higher risk activities like choking. For example, Lola Jean, a sex educator, kink expert, and mental health professional has written articles and created an educational video on the practice. One of the important issues that Jean addresses is the different types of "chokes" and their relative risks. For example, fantasy chokes pose little risk, as the pleasure comes from role playing strangulation and not restriction of breath or blood flow. Breath chokes — and even more so, blood chokes — entail significantly higher risk, and Jean emphasizes the need for extensive education before attempting them. But if all erotic choking is criminalized, experts like Jean would be more vulnerable to censorship. This would suppress crucial, harm-reducing information. For example, there may be those who simply want the fantasy choke, but are unaware of the differences, so agree to a breath or blood choke, entailing unnecessary and unwanted risks. And for those who do want to engage in more risky choking, access to training on how to mitigate the risks can reduce chances of harm.

E. *R. v. Barton*

In January of 2024, the Court of Appeal of Alberta released its decision in the *Barton* case, which involves a defendant claiming the "rough sex defence."[153] It is beyond the scope of this article to analyze all its implications for the kink community. Instead, I will briefly consider the judgment's citation of Sheehy et al.'s article, its discussion of BDSM and "rough sex," and its articulation of the doctrine that vitiates actual or apparent consent to sexual activity that causes injury. While the facts of the case are not germane to the legal doctrine in question, they are atrocious and should be kept in mind when considering the Court of Appeal judgment and the policy implications.

On 19 June 2011, Cindy Gladue, a Cree woman and mother of three, was killed by Bradley Barton, a white male who inflicted an 11-centimeter tear across her vaginal wall which led to her death. Barton had agreed to pay Gladue for sexual services. Barton was charged with murder. A notorious issue from the first trial was the unprecedented use of Gladue's actual vagina, which had been removed from her body, as evidence in the courtroom. Both defence and Crown counsel also continually used problematic language when referring to Gladue, which exploited discriminatory stereotypes about Indigenous

[150] Herbenick et al, "It Was Scary," *supra* note 91 at 1112.
[151] *Ibid* at 1119.
[152] *bid* at 1120.
[153] *Barton* ABCA, *supra* note 22.

women.[154] At the first trial, Barton was acquitted of murder, and the lesser included offence of manslaughter, by a mostly male and completely non-Indigenous jury.[155]

This brief description does not capture the brutality of the killing or the subsequent violence of the Canadian legal system.[156] The case represents a gross injustice at the intersection of anti-Indigenous racism, misogyny, male violence, legal complicity, and the dehumanization of sex workers. The case also implicates the legacy of colonialism, and the Canadian state's culpability and failure to meaningfully respond to the crisis of missing and murdered Indigenous women, girls, and 2SLGBTQIA+ people.[157]

This decision was appealed and at a second trial, Barton was convicted of manslaughter. In 2024, the Court of Appeal of Alberta upheld this conviction. In their reasoning, the Court draws on Sheehy et al.'s article to respond to the defence's claim that vitiation of consent to injurious sex would interfere with sexual freedom. In particular, the court cites Sheehy et al.'s empirical evidence that cases involving a "rough sex defence" feature male accused injuring mostly female victims, who almost always report they did not consent to the injurious sex.[158] I have already provided my response to this issue — that these facts simply fit within the pattern of all sexual assault cases, that criminalizing injurious sex can have discriminatory ripple effects on the kink community in other legal and social arenas, and that there remains the possibility (as with all sexual assault cases) that a complainant is being untruthful, or that a defendant was reasonably mistaken about their consent. Nonetheless, the point is taken that a vitiation of consent to activities that cause bodily harm is unlikely to result in legions of consenting kinksters being charged and convicted. In other parts of their judgment, the Court diverges from Sheehy et al.'s kink-denial ideology. For example, the Court provides a supportive definition of BDSM as a "range of high-risk sexual activities," emphasizes the importance of mutual pleasure and communication, and recognizes the community's prevailing "safe, sane and consensual" motto.[159] The Court also de-exceptionalizes kink, finding that "[l]ike any other consensual sexual activity, consensual BDSM activity has social utility."[160] This statement differs from Sheehy et al.'s work, which only considers BDSM as a cover for violence, and states that "there is no social utility in causing foreseeable bodily harm to women."[161] From the Court's perspective, there is indeed social utility in allowing women, or anyone, to consent to activities that cause bodily harm, so long as the bodily harm is not deemed serious.

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154 See generally *R v Barton*, 2019 SCC 33 (Factum, Interveners: Institute for the Advancement of Aboriginal Women and Women's Legal Education and Action Fund Inc).

155 Krystalline Kraus, "No Justice No Peace: Honouring Cindy Gladue" (30 March 2015), online: [perma.cc/TJQ7-J4N8].

156 Caroline Fidan Tyler Doenmez, "The Unmournable Body of Cindy Gladue: On Corporeal Integrity and Grievability" in D Memee Lavell-Harvard & Jennifer Brant, eds, *Forever Loved: Exposing the Hidden Crisis of Missing and Murdered Indigenous Women and Girls in Canada* (Bradford, ON: Demeter Press, 2016) 111.

157 *Ibid*.

158 *Barton* ABCA, *supra* note 22 at para 178.

159 *Ibid* at para 175. It should be noted that in my view BDSM does not necessarily entail "high risk" activities. Much BDSM is physically mild or does not involve force at all.

160 *Barton* ABCA, *supra* note 22 at para 175.

161 Sheehy, Grant & Gotell, *supra* note 1 at 686.

A few paragraphs later, the Court makes another kink-positive observation and breaks from previous judicial stances on the subject of pain:

> It is open to adults to seek sexual experiences without judgment. Where choices are safe, sane, and genuinely consensual, mingling sensations of pain and pleasure does not give rise to policy concerns. Therefore, we reject any suggestion made in cases like *Welch* and *Robinson* that the intention to inflict pain might be a relevant threshold for vitiation.[162]

This is a welcome validation for pain-seeking kinksters. It also diverges from Sheehy et al., who disavow the possibility of women genuinely enjoying pain or "being hurt."

The Court then makes some astute observations that differentiate ethical BDSM from the catchall "rough sex" claims that come in front of the court. This stands in contrast to the rhetorical slippages found in Sheehy et al.'s work. The Court further clarifies that apparent consent to "rough sex" does not supersede the legal requirement that there must be contemporaneous consent to each sexual activity, and that implied, advance, or blanket consent is invalid.[163] While I grant that there are some BDSM edge players who do, indeed, agree to activities that may run afoul of this principle (for example, those who choose not to use safe words), Canadian affirmative consent doctrine accords with the position of most BDSM spokespeople and sexual health experts, as noted above.

Finally, it is worth comparing how the Court delineates the conditions that would vitiate consent to injurious sex to what Sheehy et al. advocate for. The Court states:

> [A]pparent consent to sexual activity will be vitiated at common law where (i) the activity in question caused significant bodily harm, meaning any hurt or injury that interferes in a substantial way with the integrity, health, or well-being of a person, but excluding injuries such as a cut or bruise that would normally heal within a few days; and (ii) the accused intentionally touched the complainant intending to cause significant bodily harm, being wilfully blind or reckless to causing significant bodily harm, or in such a way that significant bodily harm was an objectively foreseeable result.[164]

While Sheehy et al. call for vitiation of consent to sex that causes bodily harm that is objectively foreseeable, the Court stipulates that it must be "serious" bodily harm. This raises the threshold. However, the Court's definition is open to interpretation. What would count as interfering with the integrity, health, or well-being of a person in a "substantial way"? Furthermore, their exclusion of a "cut" or "bruise" that would normally heal in "a few days" seems somewhat under-inclusive. Indeed, a hickey — which can occur in the context of non-rough or non-kinky sex — will typically take a week or two to completely heal.[165] But I assume the Court is not about to criminalize such a common adolescent pastime. Thus, while the qualifier "serious" helps to restrict what kinds of injuries will vitiate consent, in application, much will depend on judicial interpretation of words like "serious" and "substantial." While Sheehy et al. also advocated that vitiation of consent to bodily harm

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[162] *Barton* ABCA, *supra* note 22 at para 180.
[163] *Ibid* at para 177.
[164] *Ibid* at para 5.
[165] Adrienne Santos-Longhurst, "How Long Do Hickeys Last?" (12 October 2018), online: [perma.cc/NX9K-FLZS].

should include "serious psychological harm" and activity involving "strangulation," the Court did not comment on these issues.

Ultimately, I understand the Court's decision to be one that affirms the validity and utility of kinky activity (including extracting pleasure from pain), properly distinguishes Barton's vicious behaviour and claims of "rough sex" from the consent-focused ethical norms of BDSM culture, and lays down a vitiation test that — though somewhat ambiguous — accords with what many in the kink community would support.[166]

F. CONCLUSION

Let us return to the title of the article, "Resurrecting "She Asked for It": The Rough Sex Defence in Canada." Sheehy et al. suggest that to legally recognize a woman's capacity to consent to rough sex or kink "reinforces misogynist stereotypes about women 'asking for it.'"[167] With respect, I believe the authors misconstrue the critique of this harmful myth about implied consent. The patriarchal judgment that "she asked for it" suggests a woman *effectively* consents to sex (or that it is reasonable if a man believes she did) if she engages in supposed "provocative" behaviour, which can include flirting, consuming alcohol, or wearing revealing clothing. Importantly, legitimate criticisms of the "she asked for it" claim do not discount a woman's consent (whether to rough or kinky, or gentle or vanilla sex) if she *literally* asks for it.

Indeed, it seems Sheehy et al. perpetuate another myth: that women who genuinely want sex are solely interested in gentle or non-kinky forms. Throughout the article, Sheehy et al. suggest that a woman who states she enjoys kink, including sexual submission, pain, bottoming, higher-impact, or higher-risk activities, has been compelled to lie, suffers from false consciousness, or is a figment of the patriarchal, pornographic, "pro sex" imagination.[168] In so doing, they collapse BDSM, rough sex, and sexual assault into one category. Such kink denial has been common in one branch of feminism for many decades.[169] Yet, as empirical literature has shown, and as the burgeoning, global kink community demonstrates, many women — and people of all genders — seek out and enjoy sexual interactions that involve power play, fantasy, and force, which can include activities that carry risk of foreseeable injury. In some cases, as with belting or intense spanking, the injury or pain (or as some kinksters call it, the strong sensation) is key to what is desired.

Of course, in sexual assault cases, an accused may testify that a complainant explicitly consented to rough sex or kink when they did not. And as Craig's article on rough sex reveals, judges may fail to properly apply affirmative consent doctrine. But these issues are not unique to cases with rough sex claims or kink contexts. Craig's in-depth study of sexual assault trials reveals broad problems that need education or updated rules that will apply to sexual assault cases across the board.

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166 National Coalition for Sexual Freedom, "Consent Counts" (7 August 2019), online: [perma.cc/H4K4-JPYU].

167 Sheehy, Grant & Gotell, *supra* note 1 at 654.

168 One could also interpret Sheehy et al. as suggesting that women who do enjoy BDSM from the submissive side have a responsibility to keep this pleasure private, so as not to "reinforc[e] misogynistic stereotypes" (*ibid*).

169 Khan, *supra* note 6.

Scapegoating BDSM for the problems that plague sexual assault trials is not going to protect women, or anyone, from the risks of purposeful, reckless, or foreseeable consent violations, whether with rough or gentle sex. Instead, disallowing consent to sex that foreseeably causes non-serious injury will criminalize a sexual subculture, amplify discrimination against BDSMers, divert more funds and resources to punitive systems, and increase the incarceration of already marginalized populations. Instead of sex-based value-judgments, carceral faith, and rough-sex abstinence policies, we need pragmatic, harm-reduction strategies. In this regard, BDSM norms offer a helpful model to assist the judicial system in differentiating sexual assault from consensual sex, and to foster affirmative consent through sex education. Contrary to what Sheehy et al. may suggest, the growing interest in BDSM is not exacerbating the risks of rough sex — it may actually be part of the solution.