THE CHANGING INTERPRETATION OF CONSENT IN CANADIAN JUDICIAL DECISIONS WITHIN BDSM SEXUAL ASSAULT CASES

by

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Abstract

The current study examines judicial discourse about BDSM activities within decisions rendered in Canada during the past 20 years. A recent uprise in popular culture representation has resulted in a greater uptake of Bondage/Discipline/Dominance/Submission/Sadism/Masochism (BDSM) in the sexual lives of Canadians. Little research to date has been completed to analyze the implications that the uprise may have on the legal system when BDSM cases are presented. In particular, the legal system is being tasked with interpreting many different consent standards through the narrow affirmative-based definition found under Section 273.1 (1). The current study employed a qualitative analysis of all Canadian criminal court cases and appeals available in legal software that dealt with the issues of consent and BDSM (n=23) over a 20-year time frame. The study found that judges must interpret 4 different types of consent found within sexual relationships: affirmative consent, advanced consent to unconscious acts, consent to bodily harm and mistaken consent. Finally, the current study found that the way judges interpreted BDSM consent standards reflects a wider shift in governance from legal moralist thinking to a neoliberal paternalist governance.

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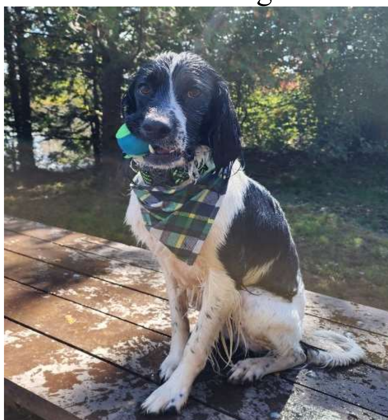

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Chapter 1: Introduction

While there is evidence of power-based sexual relations as early as the 19th century B.C. (White, 2016), the existence of what is now known as BDSM relations became solidified as a subculture post World War II with the popularization of gay subcultures and leather communities. Although it is widely known by the acronym BDSM, it represents a wide variety of human sexual expressions: "Bondage and Domination/ Dominance and Submission/Sadism and Masochism (or Sadomasochism)" (Pitagora, 2013, p. 1).While BDSM practices may include different sources of pleasure and pain, the importance of consent is emphasized throughout all activities.

The current legal definition of consent found under section 273.1(1) of the *Criminal Code* is "the voluntary agreement to engage in the sexual activity in question"; this definition of consent represents an affirmative consent standard. The definition of affirmative consent as seen above in Section 273.1 (1) became law in 1992. This legislative response under Bill C-49 in 1992 demanded more effective legal protection in sexual assault cases (Vandervolt, 2012). In particular, the bill pointed to the lack of a definition of consent in Canadian law resulting in a precedent-based definition of consent from case law. This allowed that the accused only had to prove that a complainant *may* have consented to sexual activity; ultimately making consent *implied* within sexual encounters. In codifying a concrete definition of consent to sexual acts, Vandervort (2012) argues that the legal definition of consent "now affirms individual rights to self-autonomy and self-determination and creates a unique set of well-defined and nondiscretionary reference points to anchor legal analysis of the facts in sexual assault cases" (pp.7, 2012).

Notwithstanding consent legislation that was said to affirm individual rights to autonomy, the 2011 case of *R. v. JA* resulted in some women questioning whether they could truly have autonomy under affirmative consent legislation. In particular, the 2011 Supreme Court of Canada case used affirmative consent legislation to find that women could not consent in advance to acts that would happen to them after being rendered unconscious through erotic asphyxiation (*R v JA*, 2011). While the majority decision from the Supreme Court of Canada justified such a decision by stating it was to protect women's autonomy, many practitioners of erotic asphyxiation, a BDSM practice, argued that the decision removed their autonomy to chose to practice BDSM sex (Khan, 2016). The current project falls into the debates regarding the status of autonomy that results through affirmative consent standards, using a thematic analysis methodology in which concepts of neoliberalism, sexual autonomy, legal moralism and legal paternalism are explored.

1.1 Research question and objectives

My main research question when entering my data was as follows: *How have different consent standards of BDSM practitioners been interpreted in BDSM-related sexual assault cases in Canadian judicial decisions?* In answering this question, the current project has three objectives. First, I hope to reveal what is going on in the sexual assault judicial decisions in relation to BDSM consent, and if any change has happened since adaptations of BDSM have permeated mainstream popular culture. Second, I want to situate the place of BDSM consent standards and protocols, such as safe words and scene negotiations, within other consent standards seen in Canadian law. Finally, the main objective of this research is to best explain the status of sexual autonomy within judicial decisions on this matter.

1.2 Chapter outline

The current thesis is comprised of 7 chapters; including this introductory chapter that provides the scope of the topic and highlights research questions and objectives. In chapter two, the literature review will give background information on the topics of sexual assault law, consent, rape culture, BDSM and the perceptions of BDSM within a series of institutions.

Theoretical concepts will be discussed in the third chapter. Most importantly, the concept of sexual autonomy will be defined as the key concept upon which the thesis is centred. Furthermore, this chapter will highlight important legal principles that played a role in making sense of my data. Finally, chapter three contextualizes the criminal justice system in a neoliberal society and discusses the impact of neoliberalism on judicial discourse and sexual assault laws. In the fourth chapter, the epistemology and ontology found within a thematic analysis methodology are explored. Furthermore, chapter four carefully explains the process of data collection and the importance of judicial discourse analysis. Finally, it provides a blueprint of my data analysis process and highlights the levels of coding seen in thematic analyses.

The fifth chapter reports on the findings of the study and highlights the themes that emerged throughout the thematic analysis process. In particular, the results highlight four types of consent found throughout the dataset: affirmative consent, mistaken consent, consent to bodily harm and advanced consent to unconscious acts. The discussion of such consent standards continues into Chapter 6, where the results are highlighted through the pre-existing theoretical concepts that guided the project. Finally, the conclusion of my thesis, found in the seventh chapter, provides a summary of the current project. Additionally, the conclusion discusses the implications and limitations of the results. The thesis ends with an argument for better sexual education practices that can encompass key consent principles exemplified within BDSM scenes.

1.3 A note on the language used

Throughout the current study, gender-based language may be used to refer to the accused as a male and the complainant as a female; this was the case for multiple reasons. Firstly, 94% of the accused in 2014 sexual assault cases were male, while 87% of all complainants identified as female (Allen, 2018). These statistics are consistent with the genders found in the current study, as all of the accused in the cases were male, and all but one of the complainants in the case were female. In addition, the language used in this study follows a pattern found in the research on this area, wherein complainants are gendered as female and accused as male. Notwithstanding the gender-based language used in the current study, it must be acknowledged that sexual assault and violence transcends gender. The 2019 General Social Survey on Canadian safety found that 9 per 1,000 males experienced sexual victimization within the year preceding the survey. This is in comparison to the 50 per 1,000 female rate found in the same survey.

Furthermore, the current thesis uses the word ‘complainants’ to describe those who experienced violence, and “accused” for those who were accused of perpetrating violence. Not only is this consistent with the language used in the court cases, it also avoids placing labels on the individuals whose lives were impacted by these cases. In particular, a 2023 study by Sattler et al. found that only 53% of women who experienced violence identified with the labels victim (9%) or survivor (44%). Furthermore, while many cases may reveal victimization, many verdicts change on appeal, and a complainant facing a non-guilty verdict may also still feel victimized by the experience. In using the language of the complainant and accused, those assumptions about both parties can hopefully be minimized.

Finally, the current study uses the term BDSM throughout to encompass a broad range of activities. While some of the activities will be highlighted within the literature review, there

are other instances where a judge may have used the term to describe an act that may not be considered BDSM to some. The choice to stick with the term BDSM throughout was not only to be consistent and minimize confusion when differing acts were being discussed but also because "BDSM" has been identified directly from the community as a safe term to use in the description. Derogatory and prejudicial language towards BDSM activity and practitioners was minimized throughout the thesis as best as possible while maintaining the viewpoint of the author of the literature and the judges in the decisions. Additionally, this thesis discusses several BDSM acts and sexual lifestyles that may be unfamiliar to the average reader. Because of the complicated language, I have added a glossary in Appendix C that can explain some of the acts.

Chapter 2: Literature Review

The objective of this thesis is to examine the way consent is conceptualized within BDSM-related sexual assault cases in Canadian jurisprudence. In order to situate the current study, this literature review will provide an examination of consent, rape culture and BDSM, as understood within the context of the Canadian legal system context. Consent is described under the *Criminal Code of Canada* (1982) in *Section 273* as an agreement to engage in a certain activity. Furthermore, rape culture refers to beliefs found throughout society that normalizes sexual violence (Buchwald et al., 1994); while BDSM is used as an umbrella term for a broad range of sexual activities that are considered risky and unconventional in society (Turley et al., 2017). The concepts of consent, rape culture and BDSM are important to the current project as these three concepts are all commonly found within Canadian judicial decisions in sexual assault cases that arise from BDSM encounters.

In order to better contextualize the current project within these pre-existing concepts, the literature review chapter begins by providing a brief description of the history of sexual assault law in Canada, and the Supreme Court of Canada cases that have influenced the modifications of laws into their current state. Furthermore, the current *Criminal Code* definition of consent will be discussed, along with the defence that can be used when non-consensual sexual contact is proven. Moreover, rape culture will be explained to demonstrate how myths and standards of “ideal victims” influence society into placing blame onto complainants for their involvement in the sexual act. To end, the current chapter defines the acts that encompass BDSM activity, the characteristics found within such acts, and the prevalence of such acts within society. Additionally, the consent standards found in BDSM will be highlighted to demonstrate the contrast between such standards and those found within the Canadian Criminal Code. Finally,

the current chapter ends with a discussion on how BDSM is represented in medicine, popular culture and legal fields.

2.1. The Legal History of Sexual Assault in Canada

The legal history of sexual assault in Canada can be traced to the context of English common law ideals adopted by Canada as a commonwealth country (Jackson, 2013). When prosecuting any crime in this context, it is important to note two things, in particular when studying how sexual assault is legislated. First, common law is a system of rules based on precedent, thus lower courts must follow the precedent set by higher courts. Secondly, crimes that are prosecuted under common law are not against the victim as an individual, but rather viewed as being committed against the state or "Crown", often referred to as a breach of the peace (Holmes, 1991).

When the first Canadian code was enacted in 1892, sexual violence against another person was prohibited under rape laws found in section 266 that outlined the following:

> 266. Rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent, or with consent which has been extorted by threats or fear of bodily harm, or obtained by personating the woman's husband, or by false and fraudulent representations as to the nature and quality of the act.
>
> 2. No one under the age of fourteen years can commit this offence.
>
> 3. Carnal knowledge is complete upon penetration to any, even the slightest degree, and even without the emission of seed. (*The Criminal Code, 1892)*

In the original law, which evolved over time, a woman could not be raped by her husband. This gave men full freedom to use their wives sexually and disallowed women's autonomy over their

sexual decisions once married. Secondly, penetration was required in order for the *actus reus*[1] to be proven. The requirement of penetration to be present for an act to be considered rape meant that all other sexual acts, such as digital penetration and groping, could be done without consequences and were not considered sexual assaults.

Almost 100 years later, in 1982, the *Criminal Code* was amended, and the offence known as rape underwent a name change and became sexual assault (Randall, 2010). Bavelas and Coates (2001) note that the legislation at this time had multiple purposes. First, the name change from "rape" to "sexual assault" was done to emphasize the violent nature of the offence by using the word "assault". Second, the new legislation of sexual assault broadened the categories of what can be considered violent sexual behaviors to cover more than just forced vaginal intercourse by a penis. Furthermore, Bavelas and Coates (2001) note that the legislation sought to allow unwanted sexual touching and unwanted oral sex to be considered sexual assault and make the law gender-neutral to signify that sexual assault can be a crime against men. Finally, the new sexual assault laws required people to gain consent for sexual acts from anyone, including their spousal partner, meaning men no longer had free sexual reign over their wives.

Currently, the *Criminal Code* divides sexual assault laws into a three-tiered model found in Sections 271 to 273. Section 271 (level 1) is the most common sexual offence seen in criminal courts (Johnson, 2012) and encompasses the following:

271 Everyone who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of

[1] The actus reus, or the 'guilty act' refers to the physical elements of a crime.

not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or

(b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.

Section 271 refers to so-called “minor” sexual assault; this involves offences in which minor injuries or no injuries occur during the offence. The second level, found in section 272 (level 2), is entitled “sexual assault with a weapon, threats to a third party, or causing bodily harm”, the acts that fall under this section are noted as:

272 (1) Every person commits an offence who, in committing a sexual assault,

(a) carries, uses or threatens to use a weapon or an imitation of a weapon;

(b) threatens to cause bodily harm to a person other than the complainant;

(c) causes bodily harm to the complainant;

(c.1) chokes, suffocates or strangles the complainant; or

(d) is a party to the offence with any other person

Finally, aggravated sexual assault (section 273, level 3) is the most severe of the offences and includes any sexual violence that wounds, maims or endangers the victim's life:

273 (1) Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.

The degree of sexual assault, in turn also has an impact on sentencing. Level 1 sexual assault, found in section 271, has a sentence range from no jail time to 10 years in prison (*Section 271(a)*). Level 2 of sexual assault, found in section 272, has a minimum sentence of 4 years in prison and can range up to 14 years depending on the circumstances and presence of weapons (*Section 272(2)*). Finally, level 3 sexual assault, found in section 273, has a minimum sentence of 5 years in prison and can be extended to a sentence of life in prison if deemed necessary (*Section 273(2)*).

2.1.1. Reported Rates of Sexual Assault

The Statistics Canada data from 2021 on crime statistics indicate that there were 34,242 reported incidents of sexual assault in the year 2021. Most reported assaults fell under level 1, meaning there were minor to no injuries to the complainant (*n*=33,521). Of the 34,242 reported sexual assaults, only 10,960 of the reports would end in a charge being laid on the accused (32%). Reasons for a report not ending in a charge can include the complainant recanting their statement, the accused leaving the country or dying, or the police finding the crime to be "unfounded", meaning that there was a lack of evidence to prove the incident took place. Unfounded reports in sexual assault cases faced scrutiny in a 2017 investigative report whereby it was found that 1 in 5 sexual assault allegations in Canada were dismissed as unfounded; these rates that are twice as high as unfounded rates for physical assault and significantly higher than those of any other violent crime (Doolittle, 2021). Unfounded cases and their sheer numbers indicate the difficulty in pursuing sexual assault convictions through the courts. The funnel of attrition, as found for Australia for 2005 in Figure 1, illustrates how many sexual assaults get thrown out at each stage of criminal justice processing in that country (Gelb, 2007).

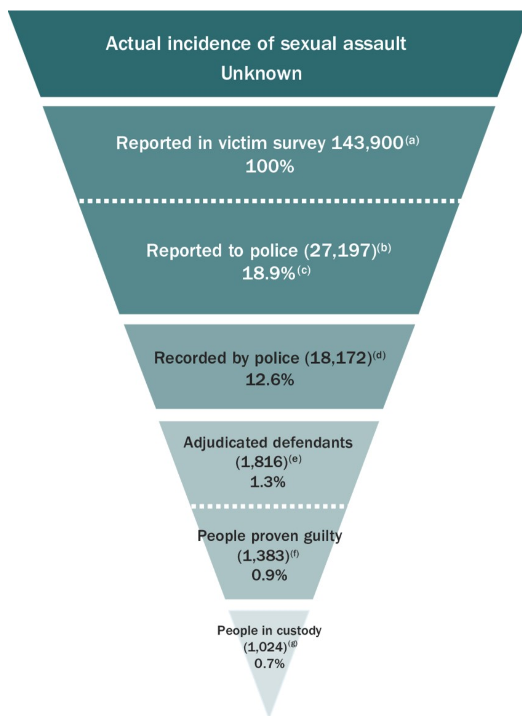

Figure 1: Example of Attrition Funnel (Gelb, 2007)

While unfounded rates and the funnel of attrition demonstrate one problematic aspect of sexual assault charge and conviction rates, Johnson's research demonstrates that the classification of charges is another (2012). In particular, Johnson found that sexual assaults are often charged at level 1 as they are seen as insufficiently violent to warrant a higher charge of level 2 and 3 assault. This is despite the fact that 19% of sexual assault complainants in her study characterizing their assaults as violent enough to warrant a charge constituting bodily harm. The 2021 statistics follow this same pattern, of the 10,960 people charged with sexual assault that year, 95% (n= 10461) were charged under level 1 (Section 271), of the *Code*, while 4% (n=400) were charged under level 2 (section 272) and only 1% were charged with level 3 (section 273). The relatively greater number of charges under level 1 reflects the trend found in Johnson's (2012) study that police minimize violence experienced by women.

The numbers seen in 2021 are also the highest reported sexual assaults since 1998. This upward trend in report rates since 2017 in particular could be interpreted as due to the fact that victims feel more comfortable reporting the crime when it occurs, rather than the fact that more people are actually being sexually assaulted. This trend may also be a result in part of the #MeToo social movement where victims became empowered to report their victimization in 2017 (Moreau et al., 2019). However, Johnson (2012) and other feminist criminologists report that sexual assault is and continues to be the most under-reported and under-prosecuted violent offence in Canada. A study done by Conroy and Cotter (2017) examined why victimization surveys[2] in 2014 found that less than 5% of cases of sexual assault were reported to the police. Over 70% of the victims in the General Social Survey (herein GSS) reported that the crime was too minor and not worth taking the time to report. Additionally, 67% remarked that sexual assault is a personal matter they handled informally (Conroy and Cotter, 2017).

2.2. Consent

Consent is a key concept that underscores both the *actus reus* and *mens rea* of sexual assault, the two components that must be proven beyond a reasonable doubt to convict a person of a criminal offence. In Canadian criminal law, the *actus reus* (or the act of the crime) of sexual assault is established by showing that (1) the act was forceful, (2) of a sexual nature, and (3) was not consensual; while the first two components are objectively determined, the component that deals with consent is determined from the subjective viewpoint of the complainant. (*R. v. Ewanchuk*, 1999). Once that is established, the *mens rea* (the guilty mind or intent to commit the criminal act) is the intention to touch while being aware of, or being willfully blind or reckless

[2] Victimization surveys find higher rates of victimization then police rates because the responses are given anonymous.

to, the victim's lack of consent. Due to consent being the focal point of both the *actus reus* and *mens rea* of sexual assault offences, it requires further articulation here.

The current legal definition of consent found under section 273.1(1) of the *Criminal Code* is "the voluntary agreement to engage in the sexual activity in question"; this definition of consent represents an affirmative consent standard. In lay terms, affirmative consent is a consent model in which "yes means yes" (Diehl, 2015). More specifically, Vandervort explains that affirmative consent represents a "communicated voluntary agreement" (pp. 402, 2012). The "communicated" aspect of affirmative consent required the agreement to be communicated explicitly and unambiguously through words or conduct; while the word "voluntary" aspect means that the consent cannot be gained through coercion or fear. Finally, Vandervolt explains that the word "agreement" represents the specificity of the consent, meaning that the consent only applies to a specific thing and is not a broad agreement to all acts.

As stated in the introduction, affirmative consent standards became law in 1992 as a result of feminists demanding more effective legal protection in sexual assault cases. Following the codification of affirmative consent standards in 1992, a series of cases shaped how these new standards were interpreted in the law (Vandervort, 2012). First, the case of *R. v M. (ML)* in 1994 clarified that non-resistant conduct/submission is not consent under affirmative consent standards. Next, the case of *R. v. Park* (1995) confirmed that not saying "yes" to sexual acts is the equivalent of saying "no". Furthermore, in *R. v. Esau* (1997) the court found that if consent is unclear, one must abstain from sexual conduct until proper affirmative consent is clear; unclear consent cannot be used as a defence within the new standards of affirmative consent. The final case that would clarify the legislation would be *R. v. Ewanchuk* (1999). In addition to solidifying the decisions in the cases above, the decision in *Ewanchuk* made it clear that consent cannot be

implied within sexual encounters, it must be explicit. This historic decision at the turn of the 21st century made Canada one of the only nations to adopt an affirmative consent model.

Legal scholars widely praised the affirmative consent model as it clearly defined sexual assault and distinguished acceptable behaviours from criminal behaviours (Gottell, 2008; Halley, 2016;). Notwithstanding the fact that legal scholars are in favour of affirmative consent as it effectively takes the onus off the victim to prove they resisted, there are other sexuality scholars (Edwards et al., 2022; Jozkowski et al., 2014) who believe that affirmative consent standards represent a criminal justice system ideal, and consent is rarely used affirmatively in sexual encounters. For example, Edwards et al. (2022) found that most consent is implied within sexual encounters of university students through body language and a lack of resistance, rather than consent being given verbally and affirmatively (i.e., saying yes) as found in consent legislation.

2.2.1. Consent to bodily harm

A further area of consent case law that is relevant to a discussion of sexual assault has to do with the parameters surrounding consent to bodily harm. The current rules surrounding consent to bodily harm are based on the decision found in R. v. *Jobidon* (1991). The court in *Jobidon* vitiated consent between adults causing bodily harm to each other during a fight; within this decision was a clarification on what constituted bodily harm: “any hurt of injury to the complainant that interferes with the health or comfort of the complainant that is more than mere transient or trifling in nature” (*Jobidon*, 1991). Pa (2001) states that when a physical injury occurs, no consent defence is available as the conduct breaches the peace, therefore giving the state a compelling interest in punishing the behaviour. Because the breach of peace is against the state rather than the individual in question, the individual cannot consent to the injury inflicted against the community.

Although consent is vitiated in instances where bodily harm occurs, both the decision in *Jobidon (1991)* and consent scholars (Pa, 2001; O'Regan, 2021) point to the fact that there can be exceptions to this general rule where public policy deems it worthy to protect a socially desirable activity. There is currently only one recognized situation where an individual may consent to bodily harm in Canada and that is through sports (O'Regan, 2021). Weinberg (2016) argues that for sports to become an exception to the rule of bodily harm, a decriminalization process occurred whereby four conditions needed to be present: (1) an organized group who participates in a similar activity, (2) a shared legal consciousness, (3) an established set of rules that conform to a Weberian legal-rational authority and (4) a social context where the activity is not too morally forbidden (p.6). Because violence in sports, such as MMA fighting, has met all four conditions of social decriminalization, practitioners of sports are thus allowed to use consent as a defence to an act causing bodily harm.

2.3. Honest but mistaken belief defence

Consent is not an easy concept to navigate. This is evident in the criminal justice system through the presence of the "honest but mistaken belief in consent" defence (herein referred to as the mistaken belief defence). The mistaken belief defence challenges the *mens rea* of the act of sexual assault and is raised in instances where a man thought the woman consented when she said she did not. What this means is that even though the accused did touch the victim non-consensually, they lack the *mens rea* required for conviction as they honestly believed that the person was consenting. The first Canadian case to affirm this defence was *R. v. Pappajohn* (1980), in which the Supreme Court of Canada found that one could honestly and reasonably mistake actions for consent, resulting in a mistake of fact. Within a mistake of fact defence, an accused asserts that they did not have the necessary intent as defined in the *mens rea* to commit a crime as they misunderstood a particular fact (*R v Prue,* 1979). This is different than a mistake of

law defence when an accused argues they did not have the proper *mens rea* to commit a crime because they didn't understand the law. As sexual assault is an offence that needs proof of *mens rea* for conviction, this mistake of fact defence of mistaken belief is a valid defence and is often raised in such cases.

While the decision in *Pappajohn* allowed for the honest mistake of fact to be used as a defence to rape[3] charges, *Seaboyer (1991)* clarified this defence and Parliament later changed the *Criminal Code* by adding section 273.2 where belief in consent is not a defence when:

> 273.2 the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where:
>
> (a) the accused's belief arose from
>
> > (i) the accused's self-induced intoxication,
> >
> > (ii) the accused's recklessness or wilful blindness, or
> >
> > (iii) any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;
>
> (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or
>
> (c) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.

The section above, known as the "reasonable steps" provision, is essential. It requires that the person who raises the mistaken belief defence to a sexual assault demonstrate that they took reasonable steps to ascertain that the complainant was consenting (Randall, 2010). The mistaken

[3] The term rape is used here as the *Pappajohn* decision was made prior to the legislative language change in 1983.

belief defence is one of the last remaining parameters in sexual assault legislation that victim support advocates acknowledge may be a barrier to women coming forward to report a sexual assault (Prochuk, 2018). This is due in part to the defence continuing to be used to prove that the man didn't really intend to rape the women, thus shifting the blame of the incident onto the victim. These results can be interpreted as a part of a broader social phenomenon of rape culture in which rape is normalized and seen as prevalent in everyday society.

2.4. Rape Culture

Rape culture is defined by Buchwald et al. (1994) as the complex set of beliefs found in society that normalizes sexual violence against women and encourages male aggression. Because sexual violence against women is consequently normalized within this context, sexual violence is seen as inevitable. Doolittle notes that rape myth acceptance and ideal victimization standards are the "oxygen" that keeps rape culture alive in society (2019).

2.4.1 Rape Myth Acceptance and the Twin Myths

Rape myth acceptance (herein 'RMA') is a well-researched area within sexual assault literature dating back to the second wave of the feminist movement in the 1970s. In one of the first articles published on rape myths, Burt (1980) described them as "prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists" (pp. 127). The *Criminal Code* currently recognizes two myths that are in fact prohibited, these are known as the "twin myths". These myths have to do with the complainant's past sexual experience, and the idea that it makes it more likely that a woman consented on the occasion in question, and the other is that a past sexual history undermines a victim's credibility as a witness to her own victimization through sexual assault (Dufraimont, 2019). These myths were resoundingly rejected, and their rejection was officially codified in 1992 with the passing of rape shield laws that make up section 276(1) of the *Code*. Section 276(1) states:

> **276 (1)** In proceedings in respect of an offence under section 151, 152, 153, 153.1 or 155, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant
>
> > **(a)** is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
> >
> > **(b)** is less worthy of belief.

Furthermore, the twin myths were further protected in 2018 when section 276(2) was amended to read:

> 276(2) . . . evidence shall not be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject matter of the charge, whether with the accused or with any other person, unless…the evidence
>
> a. is not being adduced for the purpose of supporting an inference described in subsection (1)
> b. is relevant to an issue at trial; and [sic]
> c. is of specific instances of sexual activity; and
> d. has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

The goal of adding these safeguards to the law surrounding the admissions of sexual history was to prevent their use in trials in a way that would prejudice the complainant. The addition of the

twin myth safeguards into legislation was important as researchers have found that RMA is a significant predictor of victim-blaming within the criminal justice system (Sleath and Bull, 2012). The same 2012 study done by Sleath and Bull found that rape myths also differ depending on the relationship between the perpetrator and victim. In particular, the study found that police officers were more likely to blame a woman if she was assaulted by an acquaintance ($M = 6.53$) than if she was assaulted by a stranger ($M=6.87$), meaning police officers are more likely to believe a woman if a stranger raped them. The results of this study demonstrate the close relationship between rape myths and the notion of "ideal victims".

2.4.2. "Ideal victim" narratives

Similar to rape myths, the notion of an "ideal victim" narrative plays a crucial role in determining who is believed when considering victims of sexual assaults. Randall (2010) describes ascertaining the "ideal victim" as a credibility assessment that happens after an assault to undermine the credibility of women who deviate too far from societal notions of who is an authentic victim. This notion of an "ideal victim" is built through media conceptualizations which often include rape victims as females attacked by strangers, who demonstrate clear signs of resistance through injuries. Furthermore, in such instance, a victim would be incredibly distressed by the incident and be expected to report the assault to the police immediately. Finally, this victim would be consistent, self-disciplined, and rational in court when detailing the incident in a clear and consistent manner (Gotell, 2002).

Credibility assessments are necessary in sexual assault cases as the victim and perpetrator are most often the only witnesses to the incident (Randall, 2010). Randall argues, however, that the credibility of victims is often calculated through comparison to what an "ideal victim" may look like, discrediting many sexual assault survivors who do not fit the narrow mould. In her analysis, Randall found that the people who often face backlash for not fitting "ideal

victimization" standards are sex workers and women married to the assailant, as society tends to believe that the man's right to the body is assumed in these positions. Additionally, Larcombe (2002) notes that in a justice system with neoliberal values, the key behaviors that a victim must demonstrate include consistency, rationality and risk avoidance. Any victim who does not display all three characteristics would be considered to have bad character and thus would not be a credible victim, from a legal perspective.

The myths attached to rape culture are most evident in criminal trials over sexual assaults; several studies have shown how influential rape culture is when dealing with cases of sexual violence in vignettes and mock trials. Lonsway and Fitzgerald (1994) found that in mock trials and vignettes, people often employed rape myth ideologies when administering lower sentences. Furthermore, a 2019 study done by Franiuk et al. found a direct correlation between the presence of rape mythologies and increased rates of acquittals in mock trial studies (Franuik et al., 2019). Dunkley and Brotto express how BDSM practitioners do not fit the mould of an "ideal victim" as they belong to a stigmatized community due to non-conventional sexual norms. Sheff (2020) underlines how sex-negativity in the criminal justice system and kinkphobia may also play a role in excluding BDSM practitioners from being seen as proper victims under the law.

2.5. BDSM

So far, this literature review has touched upon topics of sexual assault, the Canadian law and rape culture in Canada. In addition to these subjects, a concrete understanding of BDSM is necessary in order to contextualize the current thesis topic, which addresses questions of consent in sexual assault cases before the courts where there is evidence of BDSM. The complicated nature of BDSM will be explained in the following sections. First, the acronym itself will be broken down and explained in detail, followed by a discussion of the characteristics that are

found across all BDSM activity. Furthermore, the consent parameters found within ideal BDSM encounters will be highlighted, and this section will end with a discussion on the representation of the acts in many mainstream institutions (e.g., medical, legal etc…).

2.5.1. BDSM practices

As previously outlined, BDSM is an acronym that represents a wide variety of human sexual expression including: "Bondage and Domination/ Dominance and Submission/Sadism and Masochism (or Sadomasochism)" (Pitagora, 2013, p. 1). Weiss (2015) breaks down BDSM practices by the letters into simple explanations. Firstly, the "B" stands for bondage, the practice of consensual restraining of a partner for sexual pleasure; the vast range of bondage techniques include Japanese rope bondage, suspension bondage, or encasement bondage (Weiss, 2015). The D in BDSM, as well as the S, represents two different practices. Firstly, the D stands for discipline. Discipline is the BDSM practice that entails the Dominant person setting rules that the submissive obeys; when one of the said rules are broken, punishment is used as a means of disciplining. In most cases, the discipline is done through spanking, however other means of discipline such as whipping, may be used as well (Alberts, 2019). Furthermore, "D" is also used alongside the first "s" to represent Domination and submission. Weiss emphasises that in "D" play, the act is centered upon an erotic power imbalance and sexual role play; examples of this practice may include master/slave play, erotic humiliation, shaming and cuckolding.

Within D/s play, it is not uncommon for scenes to include no physical contact or sensation, as unlike the other forms of BDSM, D/s practices may extend outside of erotic play to structure the overarching relationship of the parties. Finally, SM is used together to describe sadomasochist play; however, practitioners of this practice use SM or S/M to avoid the pathologizing of S&M and Sadomasochism. Weiss describes SM/Sadomasochism as a more explicit physical practice, also called sensation or pain play; here, sensation is used to create a

desirable experience for those involved (2011). SM play can range from very mild, such as playing with feathers or fur, to very intense, such as whipping or testicle torture. While some practices include physical stimulation, some include psychological stimulation, and others include a combination of both (Weiss, 2011). Turley et al., (2017) note that BDSM is often used as an umbrella term for a range of sexual or erotic activities that can be considered 'kinky' or unconventional in society. Although the letters of BDSM represent a wide variety of acts, there are characteristics of BDSM play that can be seen across the practices.

2.6. Characteristics of BDSM Play

Due to misrepresentation in popular culture and sociopolitical representations, many have a vague understanding of what entails a BDSM relationship as they associate it simply with sex. Although sexual relationships may play a role in BDSM, Townsend (1983) demonstrates there is more to it and describes six characteristics of what is embodied within a BDSM scene[4]. The first is a power exchange in the form of Dominance and submission. Second, painful stimuli are inflicted and are experienced as pleasurable; third, there is often role-playing and/or fantasy; and fourth, some may use forms of humiliation or degradation of the submissive player. Fifth, Townsend found evidence for the incorporation of fetishistic elements that occur in BDSM scenes and lastly, there is often a use of ritualistic activities.

BDSM scenes are often heavily negotiated when done correctly, much research has found that scenes are often scripted based on collaborative communication on an agreed-upon sexual script (Pitagora, 2013). A general characteristic of negotiations about BDSM behaviors and expectations is that it takes place outside of the BDSM scene; instead, practitioners negotiate play while they are within their everyday roles in a non-BDSM context (Drdova and Saxonburg,

[4] A scene is contextualized as "defined periods of time during which participants engage in a series of [BDSM] activities" (Sagarin et al., 2009, pp.187).

2014). Furthermore, the negotiation may also include expectations around aftercare, in this instance, aftercare refers to the process by which the immediate needs of the practitioners- such as hydration, sustenance, silence, physical contact, etc…- are met proceeding the BDSM scene (Bennett, 2020)

The negotiations of sexual scripts often take place between two main roles. Those who have control or will administer the pain during the scene are referred to as Top/Sadist/Dominant, while those who receive pain infliction are referred to as the bottom/masochist/submissive (Nunes and Pereira, 2021). The styling of the words through capitalizing Dominant positions and non-capitalized words for submissive positions is in clear reference to the engagement of power dynamics. Finally, a third role can also be taken, that of the 'switch/switcher', an individual who moves freely between the roles of Dominant and submissive depending on the partner or scene (Nunes and Pereira, 2021). Contrary to popular belief, another characteristic commonly seen in BDSM negotiations is that the submissive person is the one who initiates and choreographs the sexual encounter (Pa, 2001). While interviewing practitioners of BDSM, Brame et al. (1993) reported that one practitioner said "ultimately, the submissive controls the scene totally, unless she's with a total nut" (pp. 78). The power given to the submissive to choreograph the encounter ensures that all members of the scene are satisfied with the sexual script.

2.7. BDSM and consent

Given the subject of this thesis, it is important to situate the discussion of BDSM within the framework of consent, as there are variations on how this word is understood within this context. The emphasis on consent has been identified as a core feature of BDSM that separates safe BDSM practices from abusive ones (Boyd-Rogers et al., 2021; Fanghanel, 2020; Sprott, 2020). In a recent meta-review, the BDSM community was identified as a potential exemplar of what an "ideal culture of consent" may look like, given the community's emphasis on verbal and

non-verbal consent (Muelenhard et al., 2016). Proper consent within BDSM practices encompasses three elements that will be discussed below: levels and conditions of consent, models of consent and safe words.

2.7.1. Levels of consent

Researchers Dunkley and Brotto (2020) found that consent in BDSM relations can be broken down into three levels: (1) surface consent, described as a basic 'yes' or 'no; (2) scene consent, involving the practitioners' negotiating parameters of the scene, and (3) deep consent, which involves the bottoms mental capacity to use a safe word. Athanassoulis (2002) explains that three conditions must be met in a BDSM scene for consent to be valid: (1) consent should represent the agent's self-interest, (2) consent must be freely given and (3) consent must be given voluntarily and knowingly. Thus, the choice to consent should be under the agent's control and the agent should understand what the consent is about. Because of the importance of consent, contemporary BDSM practitioners have developed models of consent to be followed as statements of lawfulness.

2.7.2. Models of Consent

In an effort to protect and legitimize contemporary BDSM activities in the 1980s, the BDSM community conceptualized a consent model that acted as a statement of lawfulness, separating consensual activities from crime and sexual paraphilias classified in psychiatric manuals (Nunes and Pereira, 2021). The most widely studied model of BDSM consent is the Safe, Sane and Consensual model (Pitagora, 2013). The SSC model necessitates that all activities are done safely, that all participants are of sound mind in their conduct, and that all participants provide consent. By contrast, other practitioners of BDSM have developed the Risk Aware Consensual Kink (RACK) model of consent as they felt that the use of the word "sane" in the SSC model perpetuated negative stereotypes towards the community (Pitagora, 2013). Finally,

Williams et al. (2014) introduced the Caring, Communication, Consent and Caution model (the 4 C's) in response to practitioners feeling like SSC and RACK left out important aspects of communication and caring. No matter the model used by a practitioner, these models all encompass the key characteristics of what must be present for consent to be freely given. Among the models are shared values of awareness, safety, consensual acts, and communication. Additionally, the parameters of each model have consistent references to the importance of safe-words and safe-gesture mechanisms.

2.7.3. Safe words

Unlike other sexual interactions, BDSM practices have a mechanism that signifies the end of consent: safe words (Dunkley and Brotto, 2020). Nunes and Pereira (2021) define safe words as an agreed-upon signal(s) between practicing parties that is/are activated through words or gestures in order to interrupt the practice when a player reaches their physical or psychological limit. The use of a safe word enables BDSM practitioners to engage in scenes that would otherwise seem non-consensual while using the word during play overrides all power dynamics and signals the wish to withdraw consent from the activity and terminate the scene (Dunkley and Brotto, 2020). The word is a strategic element employed in power relations and empowers the submissive as a subject to hold the final word and control the acceptable limits for each session (Nunes and Pereira, 2021). Of significance is that once a safe word has been used, a continuation of the scene becomes a non-consensual act of sexual assault.

2.8. BDSM prevalence

The complication of studying BDSM prevalence rates is evident in many studies. In particular, Bauer (2014) notes that there are no clear boundaries between BDSM practitioners and non-practitioners since the majority of the sexually active population employs some aspect of BDSM within their practices. One study quoted by Weiss (2015) found 65% of the general

population in Europe and the United States had BDSM-spectrum related sexual fantasies, desires or practical experiences. While a similar study by Holvoet et al. (2017) found a similar percentage to Weiss, in that 68.8% of the general population in Belgium had BDSM fantasies, while they also found that 22% of the population with fantasies have never acted upon them. In addition to the finding that 22% of people never acted upon fantasies, the study found that only 7.6% of their overall population identified as BDSM practitioners. Weiss (2011) explains that the difference between performing BDSM acts and being a member of the BDSM community is the mastery of the knowledge that consensual BDSM practices require.

In terms of the role of gender within sexual power positions of BDSM acts, a 2021 study by Boyd-Rogers et al. found that college-aged women endorsed slightly more positive attitudes and experience towards BDSM then college-aged men. One consistent finding across studies and populations is that women tended to have more fantasies surrounding sexual submission and masochism and are more likely to describe playing a submissive role; while men are more likely to report sexually Dominant fantasies (Boyd-Rogers, 2021). In general, however, a 2017 study found that submissive (9.5%) and masochist acts and fantasies (15.3%) were more common in the general Quebec population than Dominant (8%) and sadistic (11%) fantasies (Joyal and Carpentier, 2017).

Furthermore, a meta-analysis on the characteristics of BDSM demographics found that the majority of those who practice BDSM and identify as BDSM practitioners are white, well-educated and young (Brown et al., 2020). The same study found that BDSM practitioners are also more likely to report being in non-monogamous relationships and identify as non-heterosexual.

2.8.1. BDSM subculture

While many people may practice aspects of BDSM play, others see BDSM as a form of social community and subculture[5]. The rise of the internet in the late 1980's became a pivotal milestone in the evolution of the BDSM subculture as it provided platforms where people with the same sexual interests can easily spend time together and communicate in a virtual space (Drdova and Saxonburg, 2019). In addition to interacting together online on platforms such as fetlife, BDSM practitioners may also attend public spaces to perform scenes and socialize. These community spaces are called 'dungeons' or 'clubs' and the attendance is often recommended for those engaging in more severe BDSM scenes. BDSM dungeons often feature members of the BDSM community that ensure proper consent standards are being met by participants.

The main goal of the BDSM subculture is to develop norms for the behavior of its members and rules for playing to ensure safety. One basic golden rule developed by the subculture is the necessity of trying a particular practice as a submissive first, so that one is able to perform it safely later in a Dominant role (Drdova and Saxonburg, 2019). Additionally, members of BDSM subcultures may police certain practices known as "edgeplay". These "edgeplay" activities exist at the border of what is acceptable in BDSM culture and are characterized by a higher level of risk or a higher level of necessary technical proficiency; these activities may include playing with blood, fire and asphyxiation (Bennett, 2020). Within the BDSM subculture, it becomes obvious that activities are a highly controlled set of practices governed by clear cultural standards. Weiss (2011) explains that the commitment to BDSM as a form of social belonging is what differentiates BDSM subculture members from non-members.

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[5] *Subculture* refers to individuals who are a part of a group that is different from the Dominant culture or Dominant people in a particular part of society (Lennon, Johnson, & Rudd, 2017, p. 292).

Additionally, Drdova and Saxonburg (2019) state that the social context may play a role in determining whether people identify within the BDSM community.

2.9. Perception of BDSM

2.9.1. Medical and psychological perception

Amongst the first industries to express opinions about the BDSM community were medical and psychological industries. Simula (2019) tracked the process of medicalization of desire to the early 18th century, where medical and psychological studies identified BDSM as "abnormal and deviant" behaviour that needed to be explained and cured. Continuing through the 19th century and into the 1920's, sexologists and psychoanalysts such as Sigmund Freud and Wilhelm Stekel developed theories of Sadomasochism as troubling perversions and violent pathologies (Weiss, 2015)

Turley contends that early notions of perversion around BDSM rested on the logic of "natural sex"; based on the idea of sex as procreation and not sex as enjoyment (2015). The tension between sex for procreation and/or for pleasure resulted in the pathologizing of non-reproductive sexual enjoyment. In other words, Turley argues that the medical and psychological field thinly disguised moralism behind a veil of science when pathologizing BDSM activity as violent and perverted.

The pathologizing of said acts would continue with the inclusion of the definitions of these acts in the DSM-IV in 1994 . The Diagnostic and Statistical Manual of Mental Disorders (DSM) is a publication by the American Psychiatric Association (APA) that highlights classifications of mental disorders and their criteria. It is the main source for the diagnosis and treatment of mental disorders in the United States and worldwide. Within the DSM-IV, sexual sadism and sexual masochism were defined as psychopathological paraphilias, classifying BDSM alongside pedophilia and bestiality as sexual deviant arousal to atypical objects and

fantasies (Weiss, 2015). A small step towards medical and psychological acceptance of BDSM communities was seen in 2013 with the release of the DSM-V, when paraphilias such as proclivity toward BDSM would be distinguished from paraphilic psychological disorders This distinction resulted in BDSM being seen as problematic only in cases where there is severe distress related to sexual urges. The removal of BDSM from paraphilic disorders distinguishes it from criminal and problematic acts such as pedophilia and bestiality that are always considered a disorder, no matter how much distress is experienced by the patient (Weiss, 2015). While some argue that the DSM-V differentiation was a big step forward towards de-pathologizing non-normative sexual interests (Kreuger and Kaplan, 2012), most urge for a complete removal of non-criminal paraphilias from the DSM (Weiss, 2015; Turley et al., 2015). In particular, Turley et al. (2015) emphasize the need to de-pathologize BDSM in psycho-medicine as the opinions from that community tend to influence broader opinions of lay people which can negatively bias practices of BDSM.

2.9.2. Visibility, Popular Culture and BDSM

Another industry where BDSM exposure has increased in recent year is in the realm of popular culture. While BDSM has gained more popularity in the past few years for reasons to be discussed below, Pa (2001) contends that kink-imagery has proliferated niche markets of body piercing, tattoos, sex toys and BDSM tools for decades. Despite the visibility that the BDSM community has received, Weiss (2006) is quick to point out that visibility is not directly connected to acceptance and sexual freedom.

Additionally, Drdova and Saxonburg (2019) argue that the visibility of BDSM is ultimately connected to damaging stereotypes about BDSM practitioners. For example, film and television draw upon and perpetuate the malevolent stereotypes of BDSM enthusiasts as rapists and murderers (Turley, 2015), most notable exemplified by the playing of Patrick Bateman from

American Psycho as a sadistic serial killer.[6] The portrayal of sadists as brutal murderers who cannot control their urges is in direct contrast with a 2006 study by Connolly that found people interested in BDSM had comparable test scores to a general population on a psychopathology test that comprised scales of personality disorders, psychological sadism and masochism, Obsessive Compulsive Disorder and Post Traumatic Stress Disorder.

Pa (2001) argues that the damaging stereotypes present in the media are a result of cultural curiosity around BDSM stemming from the “desire to ogle at deviant sexual behavior”, rather than the wish for social acceptability. Because of the voyeuristic motives of popular culture in depicting BDSM, Beckmann (2009) remarks that media coverage ignores the importance of negotiating consent in BDSM. As a result of failing to stress the open and communicative atmosphere of BDSM negotiations, representations of consent normalize patriarchal violence and represent practitioners of BDSM as people who enjoy violence (Drdova and Saxonburg, 2019).

One of the most notable franchises to misrepresent consent standards in BDSM was the British-American film trilogy series based on the “Fifty Shades of Grey” novels by English author E. L. James. Not only is the “Fifty Shades of Grey” the most widely known popular culture representation of BDSM, but sales of 125 million hard copies and e-books in 2015 makes it one of the best-selling books of all time (Drdova and Saxonburg, 2019). The story of protagonists Anastasia and Christian would become even more widely known as it was transformed into a series of Hollywood films, thus giving the franchise a significant influence on the mainstream view of BDSM. While the success of the franchise ended in immense visibility

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[6] Throughout the novel and movie of American Psycho, the main character Patrick Bateman kills men, women and animals for seemingly sadistic sexual pleasure as the murders are often done during or just after sexual activity.

of BDSM, Tsaros (2013) notes that the representation of BDSM was commodified and problematic.

The representation of BDSM within the "Fifty Shades of Grey" franchise was problematic for its representation of agency, consent and motivations of those engaging in BDSM (Tsaros, 2013). Firstly, the main submissive in the film, Anastasia, misrepresents agency as something that should be tossed away to please the wishes of her lover; Tsaros explains that this perpetuates the notion that female sexual agency is necessarily pathological and disavowed within the film. Second, the desire in popular culture representations of sex in "getting off as quickly as possible" disallows important consensual negotiations to be shown. In leaving out the underlying consensual practices that occur before a BDSM scene, the franchise relays a message that BDSM is about a woman's desire to be violated. Finally, the "Fifty Shades of Grey" franchise communicated the idea that people are motivated to engage in BDSM because of past traumatic events and abnormal mental states (i.e., self-hatred, being asocial, depression) (Drdova and Saxonburg, 2019). Much of this representation goes against the study of BDSM practices, where it is viewed as a way to express ones sexuality and strengthen mental health.

2.9.3. Mainstream feminism on BDSM

For a variety of reasons, the place of BDSM sexual relationships is so contested within feminist agendas that it was one of the main debates featured within the "feminist sex wars" of the 1970's and 80's (Weiss, 2015). Weiss states that the reason for this debate was that radical feminists see BDSM play as a "replication of patriarchal, imperialist and racist forms of power inequality" (2015, pp. 4). Because of the perpetuation of power inequality being generated by BDSM acts, feminists saw BDSM as incompatible with their agenda (Turley, 2015).

This fundamental disagreement led to the separation of feminism into two camps: anti-BDSM, anti-porn, "femme feminists" against pro-sex, and sex liberationist feminists, who were

often associated with queers and lesbians (Weiss, 2015). The first camp, identifiable as sex-negative feminists, found that consent should not be permissible to BDSM as it allows men to physically act out their internalized hatred towards women. At the same time, they found that being a submissive within a BDSM scene is symptomatic of self-hatred and homophobia; this argument also rejected lesbian acts of BDSM (Turley, 2015).

2.9.4. Legal Perceptions of BDSM

Legal perceptions of BDSM raise fundamental questions about the nature of consent. The review of case law by Pa found that consent was never allowed as a defence in the context of those engaging in BDSM sex being prosecuted for criminal sexual assault in the United States (Pa, 2001). Furthermore, the study found that judges condemned BDSM in four main ways throughout the case law. First, judges delivered harsher sentencing to BDSM-related cases than to average sentences handed down in other sexual assault sentencing. Second, judges would employ poor statutory interpretation when making decisions on cases based on cases with different facts; for example, judges would use legal interpretations found in domestic violence cases to sexual assault matters. Third, judges were homophobic in their definitions and deliberations around BDSM. Lastly, judges employed a pop-psychology approach throughout their legal discourse, as their words reflected stereotypes propagated in the media. Pa (2001) explains that the perception of BDSM in jurisprudence reflects the justice system's intolerance for sexual difference and a misunderstanding of key aspects of BDSM.

In studying how BDSM is conceptualized within the law, Khan (2016) notes that jurisprudence reflects societal views that sexual activity is special, thus requiring specific regulations based on morality; she coins this notion as "sexual exceptionalism" that stems from a conservative religious standpoint. Within the same argument is the view that sexual pleasure holds no worth within a society's value system, thus making sexual desire unnecessary. This is

also known as sex negativity. Khan argues that by using sexual exceptionalism and sex negativity, judges have been allowed to single out the risks and harms of BDSM without acknowledging the pleasure and interests of those who practice it (2016). In so doing, judges have created a “protectionist law” that has excluded the agency of BDSM practitioners. The use of protectionist law to exclude BDSM from legal activity is seen as a direct result of moralism infecting jurisprudence (Pa, 2001; Khan, 2016)

Additionally, Pa (2001) and Bennett (2020) note that criminal justice system interpretations of BDSM often reveal ignorance of the acts, resulting in misinterpreting consensual acts as violence. Pa (2001) explains that criminal prosecutors often confuse the presence of traditional symbols and language of violence, utilized in theatrical and simulation power relationships in BDSM play as the presence of real dominance and exploitation (Pa, 2001). Because of this, much jurisprudence associates BDSM with violence rather than pleasure, sexuality and expression.

Furthermore, Bennett (2020) explains that there is an argument that is made against BDSM being widely accepted in law as defendants would minimize or excuse their liability for non-consensual abuse by claiming it was BDSM. Bennett argues that the “bogus BDSM” argument stems from a fundamental lack of understanding about BDSM. Distinguishing between BDSM and ‘Bogus BDSM’ would take a simple inquiry into the negotiations that took place, the limits that were set, the consent model and safe word agreed upon, and training of conventions and practices within the community (Bennett, 2020). Bennett argues that liberation of BDSM ideals within the criminal justice system is needed to provide better education to the judiciary and others as well as provide a better experience for BDSM-related cases in court.

2.10. Conclusion

Due to the progressive law reforms in Canadian criminal law as seen in affirmative consent standards and protections against the twin myths highlighted above, the Canadian criminal justice system has never been so aware and preventative regarding the impact of rape culture within the law as it now seems to be. However, notwithstanding the progression towards eliminating rape culture, there remains little research on how the laws of affirmative consent and the mistaken belief defence are used in cases of sexual assault dealing with BDSM activity, which has very different consent standards. While there is existing literature in the realm of sexual consent in BDSM legal cases (e.g., Khan, 2015; Pa, 2001), this thesis attempts to fill a gap in the literature as it will examine all of the publicly available decisions over a specified time period to track the changes in judicial decisions that have taken place in Canada. In doing so, pre-existing legal concepts will be used to show how the importance of sexual autonomy has shifted through time within law. The next chapter on theoretical concepts will serve to highlight pre-existing theoretical and conceptual framework that helped contextualize my data.

Chapter 3: Conceptual Framework

The objective of this chapter is to present the conceptual framework for this study. Specifically, to understand how consent is treated in legal decisions around BDSM practices, the conceptual framework of (sexual) autonomy will be used, in addition to considering the status of autonomy within multiple legal frameworks. Furthermore, the data from the study will also be situated within the framework of neoliberalism to better contextualize the legal underpinnings of these concepts.

3.1. (Sexual) autonomy

The easiest way to understand the concept of autonomy is to return to the Greek meaning of the term, auto (self) and nomous (rule or law); put simply, the concept of autonomy is the idea of self-rule or self-law (Legrand & New, 2015). Feinberg explains autonomy in four ways in his 1989 book *The Moral Limits of the Criminal Law Volume 3: Harm to Self,* which outlines how autonomy can be conceptualized: a capacity, a condition, an ideal, and a right. Primarily, autonomy as a capacity examines the ability to make one's own decisions. For example, Feinberg (2015) states that even in an ideal world where autonomy is seen as a right and condition, it would not apply to infants as they do not have the capacity to make choices (pp. 28). Secondly, Feinberg describes autonomy as also a condition; hence someone may have the capacity to be autonomous, but that person may be under a condition that does not allow them to practice their autonomy, such as in the case of slavery. Furthermore, Feinberg notes that autonomy is seen as an ideal; in such instances, even someone who will use their autonomy to break the law can envisage their autonomy as an ideal condition. Finally, Feinberg mentions that autonomy is often seen as a right. The sovereign right to self-determination is frequently used to describe this final version of autonomy.

The current project aims to examine the status of the right to a specific type of autonomy in Canadian criminal law: sexual autonomy. Sexual autonomy is simply an extension of autonomy that looks at self-regulation and decision-making within the specific context of sexual activity. Tsaros (2013) explains that sexual autonomy touches upon the capacity to act in a way that leads to accomplishing a set goal; acts of sexual autonomy may include defining sexual needs, deciding what activities one might engage in, and the ability to stop such activities freely. Returning to Feinberg's conceptualization of autonomy as a condition, it is important to note that certain conditions can constrict sexual autonomy. The status given to sexual autonomy often fluctuates depending on the political party in office or the moment in time historically, similar to other mores and values around sexual activity. Feinberg notes that the status given to autonomy in the law can be categorized under three legal principles: the harm principle, legal paternalism and legal moralism. These concepts will be explained in detail as they relate to autonomy in the law and sexual autonomy. In particular, each legal principle contends that the law should restrict personal and sexual autonomy in specific instances; however, the difference between them is for what purpose this autonomy should be restricted. The purposes of each principle, as well as the implication they have on the freedom of sexual autonomy, will be outlined next.

3.2. Legal Theoretical Concepts

An individuals' right to autonomy often arises as a field of contestation in both government and legal debates; this is also consistent with Feinberg's ideas about the status given to autonomy in the law. First, the harm principle will be outlined to highlight the liberal ideal of autonomy only being restricted when it is to prevent harm to others. Next, legal paternalism will be presented as a spectrum of control the government may have over someone's autonomy to prevent self-harm. Finally, a discussion of legal moralism will be presented as the most restrictive legal principle, in which the government restricts autonomy based on a moral code.

While this section discusses the principles as distinct, they are often used together in government policy and practice. Throughout time and place, the weight given to each principle will also fluctuate depending on the ideals of the government. As an example, legal morality is currently behind the recent criminalization of abortion in the United States, while the same procedure is legal in Canada due to the government in place valuing freedom over that aspect of medical autonomy.

3.2.1. Harm Principle

The best-known principle regarding the limit of the law was conceptualized by John Stuart Mill's essay *On Liberty* when he outlined the harm principle: "The only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others" (Mill, 1859, pp. 1). Mill's arguing that the harm principle is the only valid principle that can determine invasions of liberty and freedom. Under the harm principle, individuals have the right to almost limitless autonomy because the only decision they cannot make is to harm others. In fact, the harm principle finds that depriving a person of opportunities to use autonomy is considered a form of harm (Raz, 1988).

The main area of contention within discussions of the harm principle is regarding what counts as harm. The best answer to this debate for the current project is found within Feinberg's interpretation of harm(s) as "it refers to setbacks to others' interests that are also wrongs." (Feinberg, 1984, p. 31). Within this definition, Feinberg three ways in which someone can setback one's network of interests:

1. she may modify circumstances to make it difficult for one to satisfy competing interests;
2. she may reduce the degree to which prudential interests are protectively diversified; or

3. she may directly impair one's welfare interests to make it difficult for one to pursue one's ulterior interests. (Feinberg, 1984, p. 31)

Furthermore, while it is important to recognize that the setback of others is also wrong, not all invasions of interests are wrong, as actions can invade someone's interests justifiably (Feinberg, 1984, p. 35). For example, outbidding someone on a house may qualify as a setback of one's interests, but it is not wrong and is justifiable. In defining wrongs, Feinberg describes "indefensible (unjustifiable and inexcusable) conduct [that] violates the other's right" (pp. 35). In the example above, outbidding someone is thus not considered wrong as they do not have a proprietary right to the house.

Notably, the harm principle limits intrusions of autonomy to only "harm to others" (Turner, 2014). Feinberg explains that harm to oneself is exempt from the harm principle on the principle of *volenti non-fit injuria*, often interpreted as "nothing is to count as harm to a given person that he has freely consented to" (Feinberg, 1971, p. 5). Because of the *volenti* maxim, self-inflicted or consented-to harm cannot count as harm at all, as the coercion required to prevent such harm would harm the person's liberty even more so than the good it would produce. Furthering this argument, the harm principle contends that individuals know themselves and their interests better than anyone, making outside coercion on personal harm self-defeating (Feinberg, 1971). Mill's interpretation of the *volenti maxim* thus should be read as firmly rejecting moralism and paternalism as legitimate bases for legal coercion (Turner, 2014)

3.2.2. Legal paternalism

While most legal scholars condemn ideas of morality when discussing law, paternalism is seen as justifying state coercion to protect individuals from self-inflicted harm (Feinberg, 1971). Legal paternalism was first coined by Feinberg (1971) when referring to the specific lawmaking form of paternalism enacted by governments that protects people from self-harm through

legislation; an example of such a law is how suicide was once illegal (Trabsky, 2022). LeGrand and New (2015) highlight that an act of paternalism has a twofold intention: (1) to address a failure of judgment by an individual, (2) to address the failure to further the individual's own good.

Important to the definition of legal paternalism is that it is essentially protecting the individual from themselves, not from others. For example, legal paternalism would support multiple criminal prohibitions of acts where people hurt themselves, such as in cases of self-mutilation, suicide, and the use of drugs (Feinberg, 1987). Additionally, Feinberg (1971) states that legal paternalism can be argued when harm itself is not present, but the possibility of future harm exists and is beyond an average level of probability of harm to oneself; an example of this legal paternalism would be the banning of the sale of tobacco products to those under the age of 19. Although the individual themselves may not see their acts as harmful or increasing harm, legal paternalism states that the government knows the interests of the citizens better than the citizens know themselves (Feinberg, 1971).

As paternalism takes a general stance of limiting the actions of individuals through coercion, there is a notion related to this that individuals should not have unlimited freedom. However, the question of how much paternalism should infringe on autonomy depends on the perspective of the person acting on it. Legal paternalism often include a spectrum of paternalistic actions, ranging from soft to hard paternalism. Feinberg advocates for soft paternalism, arguing that the state should only be given the right to prevent a person from self-harm because the conduct is nonvoluntary or when intervention is necessary to establish whether the conduct is voluntary (1987). A relevant example is in the two-party case: Feinberg explains that "soft

paternalism would permit B to agree to an arrangement with A that is dangerous or harmful to B's interests, if but only if B's consent to it is voluntary" (Feinberg, 1989, p. 7).

On the opposite end of the spectrum, hard paternalism contends that the state is justified in protecting a person against his will from the harmful consequences of their entirely voluntary choices. Feinberg explains that hard paternalism justifies overruling free and informed consent in the abovementioned case to disallow B to agree to the arrangement with A. Because hard paternalism enforces values and judgments on people, it is often confused with legal moralism.

3.2.3. Legal Moralism

One of the oldest ways of thinking about the law and how it should regulate society is through the conceptualization of legal moralism. Lord Devlin (1965) coined an often-used definition of legal moralism when he stated that certain conduct that is immoral in common standards allows a society a "*prima facie* right to legislate" it (pp. 11). More simplistically, Feinberg describes legal moralism as the thought that "it can be morally legitimate to prohibit conduct on the ground that it is inherently immoral, even though it causes neither harm nor offence to the actor or to others" (1984, pp. 27). Here, the main difference between legal moralism and legal paternalism is that it prohibits conduct based on harm, while no harm needs to be present from a legal moralistic perspective to engender prohibition. Current-day examples of laws based on legal moralism include animal abuse laws. This is because, technically, abusing an animal does not harm oneself or an agent of the state under the harm principle. However, it is morally wrong behaviour and is thus prohibited by law.

While describing something as immoral is a valid reason for it to be criminalized from a legal moralism perspective, Lord Devlin outlined a series of factors that may restrict the law from banning an immoral action. Legal moralists stress the defeating factors of

privacy and liberty in restricting the criminalization of immoral acts (Devlin, 1965). Firstly, Devlin notes that legal coercion of immoral activities in intimate and private relationships, such as private sexual relations, is not likely to remedy any immorality. Second, legal moralistic thinking tolerates the maximum freedom possible that is consistent with the integrity of society. One exception that fits both these characteristics and thus defeats the *prima facie* case of legal moralism, according to Devlin, is consensual homosexual sexual activity in private (1965). Of importance is that the conditions that can defeat a *prima facie* imposition of legal coercion based on immorality are flexible and subject to change through the evolution of societal norms and the importance of privacy and freedom.

As stated above, legal moralism and legal paternalism are often used in tandem. In some cases, the two principles are not distinct; an immoral act that may harm oneself can be prohibited based on legal paternalism and legal morality. Another one of the main reasons for the confusion between the two is that they both restrict autonomy. While legal paternalism advocates overriding a person's consent and morality when the act may harm themselves, Lord Devlin advocates using legal moralism in overriding consent to enforce moral values (Tur, 1985). While legal moralism may be used in tandem with paternalism, restricting autonomy under the guise of morality places legal morality in stark contrast with the harm principle and liberty, as Mills (1856) outlined.

3.3. Canadian Law as Neoliberalist

Neoliberalism is a term coined in the 1930s by economist Friedrich Hayek to describe the phenomenon of economic deregulation, the promotion of competitive markets and the shift away from welfare states to minimize taxation and promote individual responsibility (O'Malley, 2018). While neoliberalism has most often referred to regarding economic decisions within

liberal governments, Foucault (2007) notes that neoliberalism has expanded into a political ideology representing a mode of government that prioritizes economic incentives rather than direct coercion. Through this conceptualization, Cahill et al. (2018) argue that neoliberalism can be seen as a shift in government where social terrain is organized "through an economistic governmental matrix which is, in turn, structured around the presupposition that agents are calculatively rational and receptive to incentive" (Cahill et al., 2018, p. 4). From this perspective, neoliberalism theory can be more broadly applied to areas of government other than economics, including the law and criminal justice system.

The way neoliberal theory manifests within law and jurisprudence continues to be a growing area of studies using neoliberalism. Despite the novelty of examining neoliberalism in law, Grewal and Purdy contend that neoliberalism in law refers to the revival of classical economic liberalist doctrines in a time where there is an ongoing battle between market economies of capitalism and the non-market values of democratic legitimacy (2014). Within this battle, neoliberalism emphasizes market-mimicking approaches in jurisprudence, prioritizing market-modelled concepts of efficiency and autonomy (Grewal & Purdy, 2014). Implementing market approaches in jurisprudence has resulted in a series of anti-regulatory policies that sees people as consumers who should enjoy unfiltered consumer choice (Grewal & Purdy, 2014). In addition, consumers are seen as able to self-manage risk-based practices concerning criminality, therefore emphasizing the neoliberal economist preference for prevention over cure (O'Malley, 2018).

3.3.1. Neoliberalism and Sexual Assault Laws

In applying neoliberal theory to the objective of this thesis, it is beneficial to look at Gotell's pragmatic interpretation of how sexual assault laws and judicial decisions have also perpetuated neoliberal ideals. Gotell is a leading feminist scholar who argues that affirmative

consent legislation and current sexual assault laws are a product of neoliberalist government in Canada. She explains that people are now seen as "normative sexual subjects who interact within a transactional sexual economy" (Gotell, 2008, p. 866). For example, Gotell explains how strict affirmative consent standards increased the "price" of coercive sex, thus persuading sexual actors to refrain from rape. Using such an example, Gotell argues that normative sexuality has been infused with entrepreneurial logic, resulting in cost-benefit analyses used within sexual "transactions." She argues that neoliberalism in sexual assault law has manifested in two ways: the individualization of responsibility onto sexual subjects who actively manage risks and the decontextualization of sexual assault from systemic sexual violence (Gotell, 2010)

Gotell's (2010) argument that sexual interaction has been reconceived as an economic transaction situates sexual assault legislation within the broader neoliberal turn in law described by Grewal and Purdy (2014). As sexual interactions are reconstructed as economic transactions, actors within the sexual marketplace are expected to show behaviours that mimic the market citizen of neoliberalism (Gotell, 2010). Within this market citizenship, good sexual citizens are considered rational economic actors who assume responsibility for their actions and actively manage the risk of sexual assault and criminalization (Gotell, 2008). The transition to a neoliberal way of looking at sexual interactions has resulted in the production of subjects tasked with diligently practicing risk management in their sexual practices (Gotell, 2010). Critical criminologists (e.g., O'Malley, 2018 & Gotell, 2008) argue that seeing sexual interactions from within a risk management framework thus centres self-discipline within crime prevention strategies; "the promotion of safe-keeping and private prudentialism are mechanisms for individualizing and privatizing crime control, shifting the problem of crime away from the state and onto would-be victims." (Gotell, 2008, p. 878). In addition to centring risk management and

self-discipline as crime prevention strategies, reconstructing sexual assault as an individual problem has resulted in sexual assault law being decontextualized from the systemic nature of sexual violence.

In seeing sexual interactions as an economic transaction between private individuals, Gotell argues that sexual assault legislation has decontextualized the systemic nature of sexual violence. While the second wave of feminist activists successfully inserted sexual assault into politics as an imminent social problem that required government intervention, Gotell notes that the emergence of neoliberalism over the past decades has resulted in sexual violence being depoliticized and erased from political agendas (Gotell, 2010). Gotell argues that depoliticizing sexual violence as part of a neoliberal movement toward seeing victims as individuals has effectively excluded the systemic constructions linking crime to context. This point by Gotell is tied to Pemberton's argument that harm has been reconstructed as a violation of individual freedom. Seeing violence as a violation of one's freedom neglects the socially situated nature of subjects within their broader contexts. This re-privatization and individualization of violence has resulted in much legal jurisprudence that does not consider the use of sexual assault as a mechanism for sustaining gendered power relations and has thus resulted in feminist anti-violent activists being excluded from policy networks and law reforms (Gotell, 2007; 2008; 2010).

While Gotell and other feminist legal scholars argue that the removal of feminist agendas is a negative side effect of neoliberalist agendas, it is important to note that several sexuality legal scholars (for example Khan, 2016; Turley, 2015; Pa, 2001) argue that mainstream feminism is inherently sex-negative and thus BDSM is often excluded from a feminist agenda. Because of the contention between feminist and BDSM activists, the removal of feminist politics from policy consideration in neoliberalism may not have necessarily hurt BDSM activists who argue

for liberating sexual autonomy. Although the argument from Khan and others indicated that BDSM practitioners may have benefitted from removing a feminist agenda through neoliberalism, the current thesis is one of the first studies to examine the place of BDSM practitioners in a potential neoliberal governance.

3.3.2. Neoliberalism and Legal Principles

To date, little research has been completed on legal paternalism, moralism and the harm principle within a neoliberal theoretical framework. The little research that does exist points to the harm principle being the predominant legal principle used within neoliberal governance. Pemberton explains that the harm principle is favoured within neoliberalism because neoliberal discourse constructs harm as negative liberty (2015). In other words, harm is conceptualized as "coercive interventions that interfere with the pursuit of individual freedoms" (Pemberton, 2015, p. 2). Because harm is constructed as an interference of freedom, it falls under the neoliberal agenda that seeks to protect freedom and liberty.

Additionally, neoliberalism is inherently liberal, meaning that the tenants of neoliberalism involve giving the greatest responsibilities to citizens as possible to manage within a transactional economy. Giving citizens as much freedom and responsibility as possible echoes the basis of the harm principle; John Mills stated in his essay *On Liberty* that the only exception to civilian freedom should be preventing harm to others (Mill, 1859, p. 1). While Mill never spoke directly about how the harm principle fits within neoliberalism, he was an outspoken advocate for neoliberal economics, emphasizing the need for private properties and "the market" over socialist government control (Henry, 2010). Mill's liberal ideal of as much freedom as possible from the law is also seen within early neoliberal texts that hope the neoliberal theory can limit the role of public law (Blalock, 2014).

While the harm principle is the predominant principle seen within neoliberalism, Whitworth (2016) and Schram (2015) offer valuable insight into the current role of paternalism within neoliberal theory. In particular, Schram (2015) argues that an academic focus on neoliberalism often neglects the neoconservative political agenda that advocates for hard paternalism. Whitworth refers to neoliberal and paternalist policy convergence as a "twin thrust" of legislation that encompasses what he has called neoliberal soft paternalism (2016). In particular, Whitworth explains that through neoliberal governance, subjects are seen as rational actors that self-manage risk economies. Notwithstanding, policymakers still acknowledge that some rational people can make the wrong decision, thus requiring government intervention to restructure incentives to enhance their freedom of choice. Government intervention is seen as an aid to improve self-selected outcomes of rational individuals rather than be coercive over liberty interests; however, government intervention can still be viewed as an act of paternalism nonetheless. Schram (2015) argues that this model is currently being adopted across institutions, and neoliberal forms of privatization are joining soft paternalist policy tools to create a flexible but strict approach to managing subjects. This "twin thrust" of neoliberal paternalism has resulted in paternalism being present within neoliberalism but is more so viewed as a tool to improve choice rather than restrict it.

While the harm principle and paternalism have become embedded within neoliberal governance, Blalock (2014) suggests that the neoliberal measures and values of the market being used to govern citizens through state control has resulted in morality-based legislations being usurped by economic principles such as transactional economies. In particular, Blalock (2014) speaks on the new status of morality within neoliberal legal regimes as a factor an individual must consider during a market-inflicted cost-benefit analysis. Rather than placing moralism

directly into legislation, a subject's morality becomes their responsibility: "moral autonomy is measured by capacity for 'self-care'—the ability to provide for [her] own needs and [her] own ambitions" (Brown, 2006, p. 42). To put it simply, morality has become the responsibility of the subject to monitor within an economic transaction rather than a factor considered in state control.

3.3.3. Sexual autonomy in neoliberalist times

Although neoliberalism is an increasingly popular theory for study across many disciplines that examine governmental power, there continues to be little research on how a such a concept in government may impact sexual autonomy. Within her widespread critique of neoliberalism, Gotell makes few references to the state of sexual autonomy. Most notably, Gotell states that the current definition of consent under Section s. 273(1) transformed consent into "'something that a woman does and freely chooses to do, not something that men fanaticize or choose for her'" (McIntyre, 2000, p. 76). Through transforming consent into a choice rather than a coercive practice, Gotell notes that the elaboration of affirmative consent standards in Canadian law has resulted in sexual autonomy being given increased weight within the law. While Gotell is correct in this interpretation, BDSM practitioners may feel a decrease in sexual autonomy through affirmative consent standards as their definition of consent differs from these legally bound definitions. In situating the current legal system within a neoliberal theory, this thesis will examine how the sexual autonomy of BDSM practitioners is viewed within judicial decisions and can be extended to a broader conversation on how the sexual autonomy of BDSM practitioners is seen within neoliberalism.

3.4. Conclusion

The current chapter highlighted the concept of sexual autonomy and the theory neoliberalism, and other legal principles often seen in jurisprudence studies. Given that autonomy in sexual decisions is one of the centre points of the current analysis, it is important

first to understand how each legal principle aims to control and limit autonomy. In particular, the harm principle argues that personal autonomy should be honoured in all cases except when harm is committed to others. At the same time, legal paternalism contends that autonomy can be restricted if it is in the best interest of one's health and safety. Finally, legal moralism is the view that common moral standards should be the basis for which the government can restrict autonomous freedom. All three legal principles discussed will provide a framework for understanding the case decisions used as data for this thesis. Importantly, discussions of the legal principles within the context of neoliberalism helps to situate current governmental and legislative control over sexual autonomy in Canada. In doing so, the current project will identify how legal principles interact with neoliberal ideals within the context of sexual autonomy. The next chapter will highlight the method encompassing this analysis, along with the data selection and analysis.

Chapter 4: Methods

4.1. Introduction

The principal goal of this research project is to explore how judges view and make meaning of issues of consent in BDSM-related criminal cases in Canada. Qualitative methods, particularly thematic analysis, were used to analyze the data through data-driven strategies not attached to a pre-existing theory. In this chapter, the methodological approach used to answer my research question will be detailed; namely, the research question is: *How have different consent standards of BDSM practitioners been interpreted in BDSM-related sexual assault cases in Canadian judicial decisions?* This chapter first highlights the data collection process in gathering caselaw used for this analysis. The characteristics of the collected cases will be presented, followed by an explanation of the thematic analysis methodology. Finally, the data analysis process employed will be highlighted.

4.2. Data Collection

The dataset I will use for the present research paper is judicial decisions in BDSM-related sexual assault criminal court cases. In using criminal case law to analyze judicial decisions, the project falls under legal analytics. Legal analytics is a growing field of legal studies described by McGill and Salyzyn (2021) as the process of obtaining data in case documents and analyzing the data to provide insights into the behaviours of individuals and organizations that occupy the litigation ecosystem (pp.7). Under such analytics, analyses can be divided into three categories. The first is descriptive analytics, "which focus[es] on 'gathering, organizing, tabulating and depicting data'"; the second is predictive analytics, "where data is used to 'predict future courses of action'" and the third is prescriptive analytics "which offers 'recommendations on future courses of action'" (McGill & Salyzyn, 2021, p. 6). The current project falls into the

first of the three categories, descriptive analytics, as this research aims to highlight what is occurring in Canadian courts.

While the principal goal of my project is not to predict or prescribe where the law is going, McGill and Salyzyn emphasize that all legal analyses can result in improvement and education in developing areas of legal studies. As discussed in the literature review chapter of this thesis, societal views on BDSM activity have been changing over the past decades to include greater awareness and participation in such activities, thus making it crucial that judges have a concrete understanding of the laws surrounding BDSM play. My analysis aims to provide better insight and transparency into judges' decisions to allow members of the BDSM community and legal researchers in this area to understand their status in the Canadian criminal justice system.

In pursuit of completing a legal analysis, the first step in my data collection process was to find court cases to analyze. Cases for analysis were found using QuickLaw and CanLII case law software; no set time frame was used in search parameters, although cases were limited to those that occurred during the time of the internet. The first search on QuickLaw for cases that referred to “BDSM” and “Consent" yielded 71 cases. These cases were analyzed for the following exclusionary material: pornography charges (no consent), offences against a child (no consent), not sex-related (i.e., “kinky” water supply company and consent to contracts), BDSM was not mentioned in the case material (i.e., was briefly mentioned in footnotes or references), BDSM was mentioned less than three times. This search left 10 cases for analysis. The same search for “BDSM” and “Consent” was done in the CanLII software, which yielded six unique cases after exclusion. During the initial examination of cases to look for exclusionary materials, I noticed that judges often referred to BDSM activity as “kinky sex” rather than using the acronym and that many judges used the word bondage. In searching the terms “kinky” and “consent” in

CanLII, 11 unique cases were found that did not appear in the initial searches of BDSM cases; no new cases were found in QuickLaw. Finally, a search for "bondage" and "consent" was done in CanLII, which generated 14 new cases not found in the previous searches; once again QuickLaw provided no other unique cases. Altogether, this resulted in 41 cases for initial analysis, where 3 were appeals of decisions, and 38 were unique trials. Importantly, the thematic analysis process that will be highlighted later in the chapter resulted in the removal of 21 cases and the addition of 3 cases. A list of cases exported from each search can be found in Appendix A.

4.3 Case demographics

The data collection process and subsequent removal and addition of cases through the coding process resulted in 23 cases being used for final analysis. The distribution across provinces demonstrated that Ontario was overrepresented in the data, as 61% of the cases (n=14) were from that jurisdiction. Alberta was also represented with 17% of the cases (n=4), and British Colombia with 13% (n=3). The remaining two cases included one case from Nova Scotia and one that fell under the Supreme Court of Canada; it is of note that the incident in that case also happened in Ontario. In terms of years, the earliest case found was from 1995, while the latest case was from 2022. In addition, 30% of the cases (n=7) were decided within the past five years (2018-2023). The years 2013-2017 and 2008-2012 represented 26% of the cases (n=6), and the remaining 17% occurred before 2007 (n=4).

Of the 23 cases, 61% (n=14) were trial decisions, while the remainder (n=9) were appeal decisions, eight of which were at the provincial level, and one at the Supreme Court of Canada. Within these cases, there was a wide variety of charges identified. A breakdown of the charges in each case can be found in Appendix B. However, overall the charges included: sexual assault, sexual assault causing bodily harm, assault, unlawful confinement, uttering death threats, sexual

assault with a weapon, rendering someone unconscious to aid in a sexual assault, assault causing bodily harm, breach of probation, threatening bodily harm, choking to overcome resistance, breaking and entering to commit sexual assault, mischief, assault with a weapon, child pornography, possession of cocaine, trafficking cocaine, production of marijuana for sale, human trafficking, procuring sexual services, advertising sexual services, using a firearm to commission an offence, aggravated assault, possession of an unauthorized firearm, possession of cocaine, disobeying orders of conduct and obstruction of justice.

The breakdown of the decisions was as follows: the trial decisions included eight guilty verdicts and five not-guilty verdicts. The remaining trial decision was someone who received both guilty and not guilty verdicts on related charges. Five of the appeals were dismissed, while two were allowed; the remaining appeal cases included one case that was allowed for something irrelevant to the thesis and one that was allowed but later reversed at the Supreme Court of Canada level.

All but one of the cases (96%) was a heterosexual relationship, and the other case (4%) was a homosexual relationship between two men. These findings are not representative of the findings by Brown et al. (2020), who found that most of those who participate in BDSM play identify as non-heterosexual. While the statistics in the current caseload did not follow the social trend, the relationships between the parties followed the norm, wherein people are more likely to be sexually assaulted by someone they know (McMahon, 2010). Namely, 65% of the cases (n= 15) included a prior relationship between the parties in marriage or friendship. Notably, one of those cases included a couple “collared,” a BDSM term that signifies joining two people in a ceremony adjacent to marriage. The other 35% of the cases (n=8) included people who met on the same day as the incident. These individuals met through several means, i.e., dating app

meetups, going home with someone after a bar, or one case where someone purchased sex from a sex trade worker. The cases demonstrated the wide net that the term BDSM can apply to, as 24 different acts of BDSM were identified, including: belt whipping, anal sex, bondage (tying someone up with rope), threats of death during dirty talk, cutting with a knife, sex while unconscious from alcohol, erotic asphyxiation, rape roleplay, shaving pubic hair, biting, slapping, somnophilia, spanking, scarification, whipping with a hose, deep throat oral sex, fisting, blindfolding, caning, slapping, degrading talk, testicle torture, nipple play, gunplay. For more information on these acts, see Appendix C.

4.4. Thematic Analysis

The current project used thematic analysis to analyze the data. Thematic Analysis is a qualitative method used within social sciences for “identifying, analyzing and reporting patterns within data” (Braun & Clarke, 2006, p. 76). While many qualitative researchers have written in detail about the methodological roots of thematic analysis, the current project utilizes Braun and Clarke's "Using Thematic Analysis in Psychology" as a blueprint. In particular, the questions that Braun and Clarke (2006) believe should be considered when completing a thematic analysis project, were answered for the current project. The following section discusses the qualification of themes, descriptions of data, level of analysis, level of themes and epistemology to contextualize this research within the broader methodological area of thematic analysis.

4.4.1. What counts as a theme?

Braun and Clarke use the word "themes" to describe the patterns within a dataset (2006). As thematic analysis can be used on a broad range of subject matter and data, the patterns within the data differ in each project. Braun and Clarke note that this requires researchers to define and characterize what counts as a theme within the data, essentially to outline what patterns they are looking for. Theme qualification will depend on the dataset and the research question. Maguire

and Delahunt (2017) argue that not taking proper precautions in deciding what counts as a theme can result in the analysis being a summary of the data and not a report in which meanings are analyzed. Given that my thesis aimed to examine how BDSM and consent are portrayed in legal cases, my themes focused on the discourse patterns from those topics.

4.4.2. Rich description of the dataset or detailed account?

Furthermore, Braun and Clarke (2006) highlight two ways of describing thematic analyses. Firstly, some prefer to provide a detailed description of the entire dataset. While this way of description provides the reader with more context around the subject matter and the reader gets a sense of all the themes present within the dataset, it also loses some of the nuances that are found within a more detailed account as providing detailed accounts of a dataset is far too time-consuming and would be lengthy to read. Second, some prefer to give a detailed account of one or a few themes found within the dataset. Braun and Clarke (2006) advocate for the latter process to be used when a specific area of interest is observed within a dataset that may also encounter other themes and material irrelevant to the area in question.

Because court cases include many issues within a case, my analysis will fall into the second of the two types of accounts to provide a detailed account of a specific area. In particular, my analysis focuses primarily on BDSM and questions of consent within a dataset that may include many other legal topics, such as incest, sex work and domestic violence.

4.4.3. Inductive or theoretical analysis?

In addition to the account details mentioned above, Braun and Clarke (2006) note that thematic analyses may fall under an inductive or theoretical analysis. Frith and Gleeson (2004) identify inductive thematic analysis to be a bottom-up approach to the data in which the themes are strongly connected to the data. An inductive level of analysis requires the researcher to place aside pre-existing theoretical frameworks or interests to create a "data-driven" project (Braun &

Clarke, 2006, p. 83). While theoretical frameworks are placed aside, Braun and Clarke (2012, 2020) have repeatedly clarified that themes cannot "emerge" from the data. Instead, the researcher's epistemology and goals actively identify present and relevant themes to the research questions (Taylor & Ussher, 2001). In contrast to inductive analyses, a deductive or theoretical approach uses a pre-existing conceptual framework or codebook to analyze data in a "top-down" approach (Braun & Clarke, 2006).

Many scholars of thematic analyses (Braun & Clarke, 2020; Bryne, 2022) argue that inductive and deductive approaches are almost always used in tandem with each other, as a researcher can only partially separate their epistemological roots when conducting an inductive analysis. Because of this inherent bias, inductive researchers must acknowledge their epistemological roots to demonstrate the project's goals, expose the researcher’s aim, and how it may have impacted their inductive analysis. Furthermore, those completing a deductive analysis will still be using aspects of the data to apply to their pre-existing theory, meaning they still depend on their data for interpretation. With this being said, the current project is an inductive analysis rather than a deductive analysis. The main reason is that I did not enter my coding cycles with a theory in mind or pre-existing codebook. Instead, I focused on the two broader concepts of consent and BDSM and analyzed the language and contexts surrounding these concepts. While this was done through an inductive analysis, my epistemology, outlined below, along with my prior research experience in legal studies, allowed me to easily apply the deductive codes to themes surrounding pre-existing legal theories. Because of the application of inductive data into broader deductive frameworks, my project used both levels of analysis as outlined by Braun and Clarke (2006). Another example in which aspects of analyses are often mixed is when deciding how to present my themes.

4.4.4. Semantic vs latent themes?

Another decision that must be made when embarking on a thematic analysis project is to pick the level of meanings that will be analyzed within the data. Bryne (2022) describes semantic codes as the surface meanings of the data. In other words, the researcher presents what is written within the data, producing a descriptive analysis of the data in question. Additionally, a researcher may employ latent coding and themes, which goes beyond the descriptive level and unearths hidden messages or underlying ideologies that help shape the descriptive content (Bryne, 2022).

While I principally identify my project as performing a latent analysis, there will inevitably be aspects of the semantic description that will be presented in my findings. For example, my findings first highlight semantic descriptions through quotes and interpretations of judges in my data. A latent thematic analysis is only performed after presenting the semantic description, wherein hidden meanings and underlying legal theories are examined. This allows for both a detailed description and interpretation and allows me to represent the underlying epistemology guiding the project.

4.4.5. Epistemology?

Finally, Braun and Clarke (2006) emphasize the importance of acknowledging the epistemology that will guide the research project. Epistemology is vital within thematic analysis because the method was developed independent of a guiding theory, meaning that it can be applied to a range of theoretical and epistemological approaches. In particular, Braun and Clarke (2006) acknowledge two distinct epistemological positions for a thematic analysis: an essentialist/realist method, and the constructionist method.

Braun and Clarke (2006) describe essentialist/realist epistemology as aiming to report the experiences and realities of participants within a dataset and identify causal explanations using

methodological pluralism. The use of realism in the pursuit of causal explanations means that the ontology of such an approach is a belief that there are universal truths to be discovered within research studies (Madill et al., 2000). The ontology of realism finds universal truths to be uncovered; realism is often grouped with positivism as an approach that employs the scientific method to uncover causal explanations (Madill et al., 2000). The preference for causal explanations often results in a collaboration between quantitative and qualitative methods; thematic analysis can be used as a qualitative method in such a pursuit. Realist epistemology often removes the researcher's subjectivity from the method, thus resulting in an epistemology that advocates for simple reports and descriptions of experiences within the dataset (Braun & Clarke, 2006). Simple reporting means that a thematic analysis could be used to thematically divide participants' experiences into digestible content, using semantic analyses that report the basic meanings of experiences.

On the opposite end of the spectrum, the constructionist method examines how realities, meanings and experiences reflect societal discourses (Braun & Clarke, 2006). The use of constructionist thematic analysis can be done when the researcher takes the constructivist position that all knowledge is socially constructed. The ontology of constructivism contends that reality is the sum of individual perspectives and understanding each perspective can help better reflect the overall reality of a subject. Because of this, constructivism emphasizes the need for inductive research that operates without hypotheses or pre-existing theoretical frameworks to obtain a deeper understanding of the sample in question. The ontology above results in constructivist researchers having an epistemology that values gaining deep knowledge from a sample. In doing so, the researcher can examine the beliefs and perceptions of their participants to obtain a complete picture of reality. However, as constructivists, such researchers also

acknowledge that all researchers are inherently subjective as they inevitably bring their pre-existing biases and opinions into their interpretations (Madill et al., 2000). Additionally, constructivism does not allow for generalization, as the research goal will be to understand the reality of the sample in question.

The current project employs a constructivist method. The projects aim to analyze the sociocultural context of BDSM practitioners within the legal discussion around consent, and the structural conditions set in place by society to enable that context, are in line with a constructivist epistemology rather than realism. Of note, the current research project also sees the truth as socially produced and fluid, as the reality and truths of individuals are everchanging depending on the societal context in which they occur.

Positionality. As mentioned by Madill et al. (2020), contextualist researchers need to acknowledge their own biases and opinions that may impact their interpretations. Of particular importance to the current project is my positionality on feminist issues, due to the inherent influence feminist standpoints have on choosing theories and methodologies. As explained in the literature review, the fundamental disagreement about key tenants of feminism has ultimately resulted in a separation of feminism into two camps: (1) anti-BDSM, anti-porn, "femme feminists" against pro-sex and (2) sex liberationist feminists, who were often associated with queers and lesbians (Weiss, 2015). Personally, I began this project identifying with the sex liberationist feminists. Notwithstanding my personal views on the feminist debate, I approached the research project with the hope that anyone who reads it may feel represented, no matter what feminist camp they identify with. This was first and foremost done through acknowledging the tension between feminist camps on the issue of BDSM, and was most prominently seen within the discussion section, where I highlighted how the neoliberal turn of individualized

responsibility might be seen as both freeing autonomy to the sex-positive camp, and also enforcing victim blaming standards to the femme feminist camp.

My positionality on the subject was challenged when researching neoliberal interpretations of sexual assault, as Gotell was the prominent scholar researching this issue. I speak often in the introduction and literature review about the role that affirmative consent standards play in excluding BDSM consent from the law, and Gotell was one of the key experts that advocated for such standards to be placed in Canada. I found in using Gotell's work on neoliberalism and validating her perspective on individualized responsibility in my data, I was able to have a clearer picture of the role that neoliberalism may play in feminist issues. While my initial finding was that neoliberal legal interpretations may free autonomy for BDSM practitioners, using Gotell allowed me to see that it may also be done in tandem with marginalization and exploitation. The advantage of constructivist epistemology is that you are highlighting individuals' perspectives and realities, rather than enforcing your own positionality; therefore, the results of this thesis will demonstrate the argument for both femme feminist thought and sex liberation feminist. Overall, the positionality that I ended up taking in writing this thesis can be best represented the idea that "with freedom comes responsibility": there is some aspect of freedom for sex liberationist feminists, but it still needs to be acknowledged that this might reinforce ideal victimization standards that femme feminists advocate to be eliminated. All I can hope is that by using a contextualist epistemology, my project can demonstrate that in practice, the two sides of feminism can be used together to best represent the reality happening in the court rooms in Canada.

4.5. Data Analysis

The data analysis process was done following the blueprint of thematic analyses outlined by Braun and Clarke (2006). In particular, their 6-step process of thematic analysis was

completed. First, open coding was done to familiarize myself with the dataset and identify areas of interest within the data (Braun & Clarke, 2006). A second round of coding was completed to generalize the initial codes. The third step in Braun and Clarke's thematic analysis method was to search for themes within the generalized codes. Fourth, the themes were reviewed, and another read-through of the data ensured that all codes were present. The final two steps of the process include naming and defining the themes and writing the report. The first five steps mentioned above will be highlighted below in greater detail, while the sixth step encompasses writing this thesis.

4.5.1. Familiarize yourself with data

Braun and Clarke (2006) note that the first task in the thematic analysis is to familiarize oneself with the data. In the current project, this step was done using open coding in MaxQDA Plus (Version 22.0) Qualitative coding software. Familiarizing myself with the data included collecting case demographics and noting the common issues across cases. The demographic information collected on each case can be found in Appendix B. Through familiarization, I found that most cases were centred around two issues: (1) can a person consent to BDSM? (2) if yes, did the person consent to BDSM? Identifying the two issues above as central points of all the cases allowed me to analyze the two measures of BDSM and consent when generalizing initial codes.

4.5.2. Generating initial codes

Braun and Clarke note that when generating initial codes, it is essential to analyze the data to note what is in the data while considering what is important to you as the researcher (2006). Generating initial codes occurred through a separation of codes into four categories for analysis: (1) Definitions of consent, (2) meaning-making of consent, (3) definitions of BDSM, and (4) meaning-making of BDSM.

Both the definitions of consent and BDSM produced straightforward coding excerpts. The data identified as definitions of consent directly cited *the Criminal Code* subsection 273.1(1), highlighting the legal version of consent. Additionally, the coding category of "definitions of BDSM" only produced 11 codes; these codes were all similar in that they provided a general definition of BDSM activity from credible sources, both academically and from the kink community. The definitions of both consent and BDSM produced straightforward coding excerpts, while the codes from examining how meaning was made provided more substance and potential for themes. Consent-wise, I found that the codes from the meaning-making category demonstrated that the judges applied one definition of consent to many different scenarios or "types" of consent. For example, the same legal definition of consent was applied regardless of the situation, i.e., where someone was being cut through scarification or being penetrated while unconscious. The types of consent that the legal definition was applied to were all discussed differently throughout the cases, so I knew my themes would have to represent these interpretations found through coding.

Within the codes that fit the category of "meaning-making of BDSM," I found patterns in the data surrounding why BDSM was being brought up as a part of the case. The weight given by the judge to each reason for mentioning BDSM differed between cases. However, patterns were found about why some aspects of BDSM were more accepted than others. The emergence of patterns from codes surrounding consent and BDSM allowed me to move on to the third step of Braun and Clarke's (2006) thematic analysis, searching for themes.

4.5.3. Search for themes

Searching for themes through the codes gathered in initial coding was the third step of the coding process, as Braun and Clarke (2006) outlined. This step included taking the coded data gathered in initial coding and analyzing them to find commonalities. In particular, similar

segments related to particular types of consent were grouped thematically, while segments on BDSM were analyzed together. Such analysis led to 15 themes being identified within the data. Nine themes were centred on the interpretation of different consent standards: (1) affirmative consent, (2) mistaken belief consent, (3) advanced consent, (4) unconscious consent, (5) consent to bodily harm, (6) prior consent, (7) safe word consent, (8) non-verbal consent or body language consent, and (9) contract consent. Additionally, six themes that outlined the reasons for mentioning BDSM in the case were noted: (1) mistaken belief defence, (2) law vs freedom of sexual autonomy, (3) in relation to bodily harm, (4) the nature of relationships of parties in the case, (5) differing consent ideals, and (6) bias related to twin myths.

While categorizing codes into themes, two dataset problems emerged. First, I noticed that the sentencing decisions and applications under section 276 generated few codes. This resulted in a decision to exclude applications for 276[7] and sentencing decisions from further analysis. The reason for removing the 276 applications and sentencing decisions was twofold; first and foremost, they added too much volume to my data but were not generating a lot of valuable codes and excerpts. Second, the data in the cases were very focused on the cases themselves and did not speak to broader notions of BDSM and consent in the law. Judges often referred to BDSM as to why the application was being submitted but did not speak further on the topic.

The second issue of the dataset revealed through theme generation was a potentially significant case being omitted from the dataset. Many coded excerpts referred to a 1995 case of *Welch*, which was not included in my dataset. This led me to search in CanLii for the *Welch* case and discover that the 1995 case was not found in my primary search for cases due to the judge using outdated language to describe BDSM acts (i.e., sadomasochist). While it was assumed that

[7] Applications under 276 of the criminal code are brought forward to introduce evidence regarding sexual history into the trial.

the initial search had not generated all the cases on the topic, the exclusion of *Welch* motivated me to look through my dataset and ensure that any case mentioned in one of my initial cases was added to the dataset if it met the criteria for submission. Cross-referencing the caselaw in cases resulted in the addition of 3 cases being added to the sample: *Zhao* (2013), *Ashlee* (2006) and *Welch* (1995). The process of exclusion and addition in this step led me to have 23 cases left for analysis. Of these cases, 14 were convictions or acquittals, and 9 were appeal decisions. Extensive detail on the 23 cases I used in my final analysis can be found in Appendix B.

4.5.4. Reviewing themes

The third round of thematic analysis began with an initial coding of the three new cases added to the dataset. Those codes were then added to the pre-established themes in the second coding round. Once that process finished, themes were analyzed to see if all themes had enough data. Through this analysis, advanced consent and unconscious consent were collapsed into the category of advanced consent to unconscious acts. This was because both (4) unconscious consent and (3) advanced consent were themes dealing with the issue of consenting to an act before you go unconscious through sleep or asphyxiation, thus, the themes were dealing with the same kind of consent. Additionally, (6) prior consent, (7) safe word consent, (8) non-verbal consent or body language consent and (9) contract consent all collapsed into the theme of “mistaken consent.” The reason for collapsing these four types of consent into one “mistaken consent” category was that the themes did not have enough data but provided a rich representation when grouped. Additionally, all the types of consent were essentially mentioned as a reason for someone inferring consent, whether that was because they had a contract with the other person or because the person was demonstrating positive body language. The review of the themes resulted in four broad types of consent being identified: (1) affirmative consent, (2) consent to bodily harm, (3) advanced consent to unconscious acts, and (4) mistaken consent.

While reviewing my themes connected to consent demonstrated that categories should merge, I found my themes of BDSM to be very shallow and unrepresentative of the nuanced conversation about the topic in my cases. Reviewing the content of the themes was important because themes are supposed to represent higher-level theoretical constructs that encapsulate the meaning of many codes (Waeraas, 2022). In reviewing such themes, I sought to think more theoretically about the conversation occurring in the cases and the implications that talking about BDSM would have on the manner at hand and the law more generally. By going back to my literature review and reviewing the place of BDSM in the law, I realized that the explanation of the themes in the results required too much reliance on pre-existing literature. Instead, the results and discussion were more comprehensible when I focused solely on the interpretation of laws in the results and saved the themes surrounding BDSM acceptance for the discussion chapter. Altogether, the thematic analysis process outlined by Braun and Clarke (2006) led me to identify four high-order themes that best represented my data.

4.5.5. Defining and naming themes

The fifth phase of the thematic analysis process includes defining and naming the themes (Braun & Clarke, 2006). While naming the themes happened naturally throughout their development, Braun and Clarke (2018) encourage practitioners to think about how data can be organized that best helps the reader understand the shared meaning of the data. This encouragement resulted in me going back into my data to examine how each theme tied to the broader purpose of the thesis. The analysis of each theme allowed me to understand better the presence of my conceptual framework within the data, facilitating a smooth transition from my results to my discussion on such concepts. This step resulted in me reflecting on subthemes that could be used to ease the results data into my discussion on theory. Additionally, the reflection

on how best to tell the story of my results allowed me to understand that the argument I wanted to make in my discussion that analyzed a change throughout time required me to write each theme in a chronological order of cases throughout time, so those changes could be seen naturally in the results. Once these subthemes were established, the final step included writing results to represent my story.

4.6. Conclusion

This chapter highlights the approach used to analyze the data in this thesis. The epistemological roots of contextualization that led to the thesis using a thematic analysis method were highlighted. Furthermore, the current chapter outlined the five-step process of extracting and refining codes from the 23 court cases chosen for analysis. Finally, by asking the important questions set forth by Braun and Clarke (2006), the current project's use of thematic analysis was contextualized within the broad thematic analysis methodology currently employed in many research areas. The proceeding chapter, the results, will encompass the sixth step of the blueprint to a thematic analysis by Braun and Clarke as it will present the findings of the thematic analysis used to answer the research question: *How have different consent standards of BDSM practitioners been interpreted in BDSM-related sexual assault cases in Canadian judicial decisions?*.

Chapter 5: Results

5.1. Introduction

The objective of this chapter is to highlight the contents of several judicial decisions within Canadian law regarding questions of consent as they relate to BDSM over the last 20 years. In these instances, judges had to interpret issues of consent within BDSM cases. It became clear that there were distinct types of consent. First, the decisions provided clarification on the inclusion criteria of the affirmative consent standard, which is found under Section 273.1 of the criminal code and states the following: “the voluntary agreement of the complainant to engage in the sexual activity in question” (The Criminal code of Canada, 1982).

Next, the current chapter will analyze different consent standards seen in BDSM practices, and how judges interpreted such standards within the legal definition of consent. For instance, mistaken consent standards were often raised in cases when a mistaken belief defence was used. Additionally, questions were raised in the cases about whether an individual has the ability to consent to bodily harm in the context of BDSM play. Finally, judges interpreted if affirmative consent legislation permitted one to consent in advance to acts that would occur while unconscious.

5.2. Affirmative consent

The first type of consent used in a number of cases was the concept of affirmative consent. Affirmative consent standards were initially established through Bill C-49 in 1992, these standards are found in Section 273.1 of the *Criminal Code* that defines consent as “the voluntary agreement of the complainant to engage in the sexual activity in question” (*The Criminal Code of Canada*, 1982). Furthermore, the 1999 sexual assault case of *R. v. Ewanchuk* created a precedent around inclusion and exclusion criteria regarding the standards of affirmative

consent. The case law in the current dataset exemplified the parameters of this definition as well as the context regarding what is included and excluded from such a definition.

For example, in the case of *R v. JA* (2010) in discussing whether one could consent to unconscious acts, the appeal judge noted, “under s. 273.1(2)(e) of the Criminal Code, consent is an ongoing state of mind and is not irrevocable once given” (*JA*, 2010, para 49). Furthermore, the appeal judge expanded on this to note, “Relying on *Ewanchuk*, the majority noted that consent must be given to particular sexual activity at the time of the activity and that there is no defence of implied consent to sexual assault” (*JA*, 2010, para 49). Thus, affirmative consent is cemented as something that must be ongoing and not implied.

Furthermore, the decision in *R. v. Thompson* (2013) clarified the notion of implied within affirmative consent standards. In discussing the question of implied consent, Judge Campbell noted: “any belief that the accused may harbour that ‘silence, passivity or ambiguous conduct’ on the part of the complainant constitutes consent, is a mistake of law and provides no defence to a charge of sexual assault” (*Thompson*, 2013, para 15). This excerpt outlines three examples of conduct and explains what behaviours are omitted from affirmative consent standards: silence, passivity and ambiguous behaviour.

Finally, the case of *R. v. SRW* (2015) outlined what is required in sexual encounters in order to stop contact. The *actus reus* element of the offence of sexual assault was highlighted when the judge stated:

> the provision in question (s.273.1(2)(e)) establishes that the accused must halt all sexual contact once the complainant expresses that she no longer consents. This does not mean that a failure to tell the accused to stop means that the complainant must have been consenting. As the Supreme Court of Canada has repeatedly held, the complainant is not

> required to express her lack of consent for the *actus reus* to be established. Rather, the question is whether the complainant subjectively consented in her mind (*SRW*, 2015, para 64)

The importance of the definitions and exclusion criteria outlined above is seen in the following sections, in particular, where judges interpret affirmative consent standards when faced with consent that does not match the narrow definition set forth under Section 273.1. Importantly, the excerpts above demonstrate that the law only recognizes affirmative consent standards. In the following sections, the different consent standards will be seen, such as inferred and unconscious consent, however, it is important to note that the law ultimately rejects all other types of consent.

5.3. Mistaken consent and the mistaken belief defence

Mistaken consent, most evident in these cases, is a term used to explain many different types of consent in which the accused thought the complainant was consenting based on something other than affirmative words. Put differently, this indicated that body language or silence was used interpreted to mean consent. Within the current context, mistaken consent is represented as the core of the mistaken belief defence; a defence that an accused may use to claim he honestly but mistakenly believed the complainant was consenting when it was found she was not and was thus inferred, based on a particular behavior or action. Importantly, the mistaken belief defence can only be used once the actus reus has been proven, thus mistaken consent was used in the cases to argue that the defendant did not have the mens rea to commit an act of sexual assault. In other words, the defendants in these cases argued they had honest but mistakenly believed that the complainant was consenting based on a conversation or negotiation that they had made to use differing consent standards. Insight into how judges interpreted

mistaken consent in BDSM-related sexual assaults was evident in cases from 2011 until 2022, beginning with the case of *R. v. AP* (2011).

In the case of *AP,* an accused testified he mistakenly believed he thought his wife was consenting to sexual activity because the words she used to communicate non-consent in the current scenario were often used when the pair role-played as a daddy/daughter, therefore making him believe she was simply in role-playing character. The judge stated that other evidence proved:

> Clearly, this event was not a mere extension of the "teacher/student" or of the somewhat disturbing "daddy/daughter" manifestation of dominance and submissiveness which AP evidently favoured and claimed was regularly acted out with AB, who was always acting in the docile submissive mode. AB indicated, in particular, that during this event she was not merely submissive, but was totally overpowered. (*AP*, 2011, para 86)

Because of the clear evidence of violence within the case, the judge did not rule on a mistaken belief of consent that would have been plausible if it was a routine scenario.

In the case of *R. v. KDH* (2012) the judge rejected the mistaken consent standard in BDSM relationships in general. In particular, KDH claimed that he and the complainant engaged in contract consent, meaning that the accused provided the complainant with a written contract that stated she would be his sex slave. In the role of his sex slave, KDH claimed that she consented in advance to him having free access to her sexually whenever he wanted to, this is often referred to as "free use" in the BDSM community: "KDH was explicit in his testimony. When TM agreed to be a slave in a D/s relationship with KDH as master, she had consented to

his sexual requirement" (KDH, 2012, para 182-183). Judge Manderschield adamantly rejected the mistaken consent standard in cases of contract consent:

> sexual consent is an ongoing process and not a gate that, once opened, authorizes unlimited sexual contact and activity…That a person operates in a fetish or atypical personal context, such as a BDSM relationship, does not alter that person's obligations in relation to sexual misconduct. (KDH, 2012, para 184-185)

In rejecting the mistaken belief defence in this case, Judge Manderschield also rejected the possibility that someone may use a contract to achieve full authority over someone's body, thus, reinforcing existing affirmative consent standards in Canadian law.

In 2013, in the case of *R. v. Thompson* (2013), an 18-year-old girl had a relationship with a 40-year-old man and testified that he forced her to have BDSM-related sex without a condom. While she testified that the sexual relations might have been consensual with a condom, it was not in that instance as one was not used. While the complainant in this case had testified to being cautious regarding preventing pregnancy and STIs, her past behavior was used in this instance to infer consent to not using a condom in this scenario:

> The complainant agreed that her "bottom line" testimony was that, while she came to Toronto to have sex with the accused, she would not agree to sexual intercourse with him without a condom. That was her "line in the sand" given her fear of pregnancy and sexually transmitted diseases… The complainant was also questioned about the Centre of Forensic Sciences report that found the crotch area of the underwear she was wearing on the day of the alleged sexual assault to have semen stains containing a mixture of DNA from at least two different males. While the complainant testified that she had some memory difficulties, she agreed that she must have engaged in unprotected sexual

> intercourse with men on at least two occasions. She agreed that, accordingly, she must have crossed her "line in the sand" at least twice. (*Thompson,* 2013, para 43)

Therefore, the judge found "the complainant was simply not a reliable and trustworthy witness, and her key testimony was not supported or confirmed by any other evidence in the case." (*Thompson*, 2013, p. 5). Given the inconsisteny in past relationships, the complainant in *Thompson* had her past sexual transgressions with other men used against her in this instance to demonstrate that the accused may have believed she was consenting in the current context; resulting in a non-guilty verdict for the accused. While this case did use mistaken consent successfully, the defence was only successful because of the inconsistent behaviour from the complainant both within her testimony and within the scenario in question; the judge notes that the reason for his judgment was based on the fact that the complainant was inconsistent, rather than his belief in the accused's defence and testimony.

Both the cases of *R. v. BDN* and *R. v. SRW* in 2015 reject the idea that any behaviour may be used to infer consent. In *BDN*, the accused used prior sexual activity with the complainant to inform his belief in consent to the case in question. Judge Hockland denied that such an inference could be made:

> Moreover, the fact that bondage and role playing was sometimes part of their prior sex life does not make it reasonable for him to believe she was open to being tied up and whipped on this occasion. I am satisfied beyond a reasonable doubt that the accused had no belief, reasonable or otherwise, that the complainant was consenting to this attack (*BDN*, 2015, para 26)

Hence, Judge Hockland denied that one could use prior consent to bondage as an indication that they would want to be bound and whipped in the future; thus, disallowing the mistaken belief defence in this case.

Similar to *BDN*, in the case of *R. v. SRW* (2015), the judge denied that any consent not within the affirmative consent standards set out in *Section 273.1* could be given to sexual activity. In particular, the judge found that prior enjoyment of being hit with a wooden dowel was not sufficient for the accused to assume the complainant would want to be hit with a dowel again; he instead should have asked if he could hit her with said dowel during the encounter in question. In referencing *Ewanchuk*, Judge Abrams rejected mistaken consent given prior contact in the following quote:

> The jurisprudence of this Court also establishes that there is no substitute for the complainant's actual consent to the sexual activity at the time it occurred. It is not open to the defendant to argue that the complainant's consent was implied by the circumstances, or by the relationship between the accused and the complainant. There is no defence of implied consent to sexual assault. (*SRW,* 2015, para 66).

Once again, we can see that any consent standard that did not fit the narrow definition set forth by *Section 273.1* was adamantly rejected by the courts. In this case, the requirement in *Section 273.1* that the complainant must actively consent to the sexual activity was not met when he mistook her consent based on a prior sexual encounter.

Furthermore, Justice Savage in *R. v. Gardiner* (2017) also rejected a mistaken belief defence when not grounded in mistake of fact:

> Further, in a sexual assault case, if an accused's personal beliefs do not accord with the legal definition of consent, then his mistaken belief is not grounded in a mistake of fact, but in a mistake of law, which affords no defence. (*Gardiner*, 2017, para 18)

In this case, the applicant appealed his conviction of sexual assault as he felt he should have been allowed to use the mistaken belief defence of consent. In *Gardiner*, the judge specifically denied the mistaken consent defence because "the appellant does not say there was conversation that established rules and boundaries to the activities that ensued, such that, in this context, no could mean yes" (*Gardiner*, 2017, para 24). However, In the 2018 case of *R. v. Sweet* where Mr. Sweet attacked his then partner during an argument, Justice Marchand stated that the quote above in *Gardiner* at para 24 leaves open the possibility for establishing different rules in such instances:

> [the quote at Gardiner 24] leaves open the possibility that consenting adults may enjoy the personal autonomy to establish rules such as "no means yes". If so, in my view, this passage suggests a corollary requirement to establish an alternative "safe word" or other mechanism to ensure that each party is also able to maintain their personal autonomy to put an end to unwanted sexual activity. (*Sweet*, 2018, para, 141)

While the possibility is narrow and requires the establishment of a safe word, Justice Marchand established that mistaken consent standards could be used through the mistaken belief defence as a defence for sexual assault. The narrow possibility in this instance was not applicable to the case he was deciding upon, as it was found that no safe word was established in their relationship.

Within the year, the decision by Justice Marchand in *Sweet* would be affirmed in *R. v. Hunter* (2019), which was the first case that used the mistaken belief defence to allow for mistaken consent. In this case, the complainant, A.G., met with Mr. Hunter and S.D. to engage in a BDSM threesome. A.G. testified that while most of the actions during the threesome were

consensual, she revoked her consent when Mr. Hunter put his penis too far down her throat. While affirmative consent standards may contend that the person consenting must say yes to every sexual act, Judge Duncan found the accused in *Hunter* non-guilty as "neither of Mr. Hunter nor S.D. saw anything in A.G.'s words or actions that communicated that A.G. did not want to continue this activity" (para. 157). Instead of relying on the complainants' words or actions, Justice Duncan made this finding based, not on the complainant's words or actions but rather on evidence from the accused and witness (Hunter and S.D.), who believed that the complainant's body language inferred consent: "S.D. described A.G. as '… moaning and … normal sex sounds of …[a] healthy relationship sex kind of thing…' It was, she said, an 'enjoyable moan'" (para. 72). Moreover, the judge found that "He [Hunter] says that he did not hear the complainant say 'no' or otherwise communicate to him that she was not consenting to the last act of fellatio that she performed upon him" (para 159) to prove he thought she was consenting. Altogether, the complainant A.G.'s moans and lack of objection to the continued sexual activity was sufficient evidence for Mr. Hunter (and S.D.) to mistakenly infer she was consenting and thus resulted in a non-guilty verdict.

Following the decision in *Hunter*, several cases raised mistaken consent practices as part of the mistaken belief defence. In the case of *R. v. Gubbels* (2021), the accused argued that he mistakenly inferred consent based on a checklist of limits that the complainant provided in their BDSM relationship. Judge Mitchell stated: "I find that the defendant could have reasonably interpreted this abrasion and knife play as acceptable and within the complainant's soft limits if he had not been asked to stop and the complainant had not used the safe word 'red'"(*Gubbels*, 2021, para 75). Within this decision, Judge Mitchell allowed for standards of mistaken consent to be used when he found the defendant may have mistakenly believed the complainant was

consenting to the activity at bar due to pre-existing sexual parameters and a lack of objection through the available safe word.

Finally, in *R. v. Harnett* (2022), consent was deemed to have been given through prior conversation. In deciding on whether their brief discussion about a mutual interest in BDSM gave Mr. Harnett a mistaken belief that the complainant would consent to have her eyes covered during intercourse, Judge Renke stated:

> Mr. Harnett's testimony did not particularize types of bondage or domination activities discussed with the Complainant. In my opinion, the eye-covering, especially brief as it was, fell toward the mild boundary of the bondage and domination spectrum of conduct. Mr. Harnett could reasonably believe that this conduct would not fall outside the scope of what he and the Complainant had talked about (para. 312).

In finding that Mr. Harnett could infer that the complainant would like her eyes covered during sex, based on previous conversation relating to BDSM, this instance above demonstrates a greater willingness by courts to accept mistaken consent standards, particularly when the behavior is on the mild end of the spectrum of conduct. The judge further noted:

> "Giving full effect to sexual autonomy means that courts are not to decide whether sexual activity is "nice" or "normal," but strictly whether it was consensual. Where genuine, legally effective consent exists, unconventional sexual choices, even those that some might find offensive or questionable, should be protected" (*Harnett*, 2022, para 249).

What these cases illustrate is a change over time regarding acceptance by the courts of mistaken consent through the mistaken belief defence and a further nuancing of BDSM consent standards.

5.4. Consent to bodily harm

Several cases in the current project also challenged the application of consent laws to consent to bodily harm as part of BDSM practices. Given that most of these cases reflect charges

related to sexual assault causing bodily harm, the judges were challenged to interpret consent issues related to bodily harm. These decisions reflect how consent to bodily harm has evolved over the past 25 years.

In the earliest case, *R. v. Welch* (1995), Judge Griffiths interpreted the laws surrounding consent to bodily harm in a narrow manner, whereby he "refused to draw a distinction between an assault in the context of sado-masochistic sexual activity that resulted in bodily harm and an assault causing serious bodily harm. Consent was vitiated as a defence in both instances" (*Welch*, 1995, pp. 32). As a result, Griffiths found that no consent could be given to bodily harm during sexual activity: "it is suggested that hurting people is wrong and this is so whether the victim consents or not, or whether the purpose is to fulfil a sexual need or to satisfy some other desire" (pp. 34). Further, Griffiths justified this decision by saying that to allow such a defence would be to license another to commit a crime (pp. 18). The decision by Judge Griffiths would impose an objective standard regarding the intention to cause bodily harm, meaning that all bodily harm that occurred during sex was assumed to be intended to cause harm.

The objective standard of intention in Griffith's decision would be later criticized in *R. v. Robinson* (2001), a case wherein the applicant was appealing his conviction of sexual assault causing bodily harm arguing he did not mean to cause harm to the complainant. In his decision, Justice Rosenberg mentioned, "it would have been preferable had the trial judge made it clear that consent was no defence only if the appellant *deliberately inflicted pain* upon the complainant causing bodily harm as he had defined it" (*Robinson*, 2001, para 61, *emphasis added*). The change in consent vitiation would take 12 years to be implemented in *Zhao.*

The change was first seen in the case of *R. v. Zhao (2013),* an appeal case where the accused appealed his conviction of sexual assault causing bodily harm because the judge

mischarged the jury when he said that the jury did not have to prove he intended to cause bodily harm. In granting the appeal, Justice Tulloch stated:

> The test as articulated in the trial judge's charge posited that consent was vitiated if an accused applied force that could be reasonably apprehended to cause bodily harm and caused bodily harm in a sexual context. This is an objective test. In my view, the jurisprudence has signalled a shift toward a subjective standard to vitiate consent in the event bodily harm is occasioned. That is, consent will be vitiated only where the accused deliberately inflicted bodily harm or pain on the complainant. (*Zhao*, 2013, para. 85).

Thus, the objective evidence of bodily harm was re-interpreted as a subjective standard whereby the accused must have deliberately inflicted harm or pain to vitiate consent.

Following *Zhao*, the case of *R. v. KG* (2018) focused on whether the accused, KG, committed sexual assault causing bodily harm against his ex-partner when he hit her with a bamboo stick during a sexual encounter. The case of *KG* was unique as an expert witness on BDSM testified and spoke to the motivations and pleasures behind practicing consensual BDSM. They further explained the reasons and gratifications of both parties involved in BDSM activity:

> In this case, this Court could look at S.G.'s injuries and infer that no one would voluntarily agree to be injured in that manner. Ms. Zanin's evidence shows the other possibility -- the "more complete picture" -- that these injuries can arise from consensual activity (*KG*, 2018, Para 456).

In gaining a better understanding of the motivations and roles within a BDSM encounter, consent to bodily harm can be seen as an act done for pleasure rather than pain. Further, the judge found that the actions in question were completed during consensual sexual activities, thus resulting in the charges being dismissed.

In the case of *R. v. RW* (2020), the accused was successful in using consent as a defence against a charge of bodily harm in BDSM-related sexual charges. In this case, the accused testified that he caused bodily harm to the complainant's nipples and testicles due to trying to arouse the complainant. The parameters from *Zhao* were affirmed and formed the basis for a finding of not guilty. Here, the judge found that the act in question did cause bodily harm to the complainant: "as concerns bodily harm, I find that some of the injuries to E.V. meet the threshold as to what constitutes bodily harm as it is defined in section 2 of the *Criminal Code*" (*RW*, 2020, para. 42). However, at the same time, he found that the accused did not intend to cause the complainant bodily harm, per se: "even though I find that R.W. did indeed cause some bodily harm to E.V., I am not convinced beyond a reasonable doubt that he intended to do so" (*RW,* 2020, para 59). Justice Silverstein found no absence of consent beyond a reasonable doubt: "Since I am of the view that R.W.'s evidence might reasonably be true, I cannot find an absence of consent beyond a reasonable doubt." (*RW,* 2020, para 56). Ultimately, the charges were dismissed in this case.

Acceptance of consent to bodily harm was also seen in a case that resulted in a guilty charge. The judge in the case of *R. v. PO* (2021) distinguished violence from the practices of BDSM. In this case, the accused was found guilty of sexually assaulting his girlfriend on video with a gun in his hand. Judge Mandzuik, made it clear that his finding of guilt was not based on the violence but the lack of consent to said violence:

> "I do not question that individuals may engage in consensual acts such as these. These acts between these parties as shown in the videos and as characterized by AB (the complainant) in the EPS Interviews -- which are credible evidence - were not consensual" (*PO*, 2021, para 415).

The statements by Judge Mandzuik showed that he had separated the act in question from the consensual acts of BDSM; in divorcing the two, BDSM could be seen as an acceptable bhlegal practice when done consensually.

Finally, in the case of *R. v. Gubbels* (2022), the decision affirmed the new subjective interpretation surrounding interpretations of bodily harm and consent in these kinds of cases. Justice *Mitchell* in *Gubbels* stated that: "The focus of the analysis is whether the Crown has proven beyond a reasonable doubt the complainant's subjective lack of consent to the force applied and the defendant's knowledge of the complainant's lack of consent" (*Gubbels*, 2022, para 73). The focus on consent, in this case, had to do with knife play that caused the complainant to have the accused's name scarred on her chest. In this case, the inference was that bodily harm was subjectively used for pleasure, not pain, as noted by Judge Mitchell:

> "M.D. [the complainant] testified that she was not interested in pain for the sake of pain. She said that she enjoyed mild erotic pain in the context of BDSM play. She explained that if pain is inflicted in a setting that is not sexual, there is nothing about the pain she enjoyed." (*Gubbels*, 2022, para 79).

Because the knife play that caused her scars occurred in the context of BDSM play, the judge found that the accused scarred her in pursuit of sexual gratification and not pain, which allowed for questions of consent to be considered. Ultimately, the judge believed that that she did consent to the act, resulting in a non-guilty finding for the accused. The cases discussed thus far demonstrate the dramatic shift in how judges interpreted laws surrounding consent to bodily harm within the past 25 years.

5.4.1. BDSM as not having a generally approved social purpose

The cases above have demonstrated that bodily harm can vitiate consent in some instances. However, the precedent in *R. v. Jobidon* (1981) notes that exceptions could be made to

this rule in cases where the harm was caused for an approved social purpose. Examples of such exceptions included during sports, medical treatments, stunt performers and body modifications such as tattoos and piercings. Because this exception to consent to bodily harm was available for the activities above, judges in the current project also reflected on situating BDSM as an activity within such exceptions.

In this area, the cases discussed exceptions to consent vitiation, situating BDSM within the framework of having an approved social purposes. The first of these cases was *R. v. Welch* (1995), and in referring to past cast cases that outlined such exceptions, Judge Griffiths noted, "acts of sexual violence, however, were conspicuously not included among these exceptions" (*Welch*, 1995, pp. 33). Notably, Griffiths also addressed that there is one exception to sexual violence being exempted from consent exceptions:

> even very modest acts of beating of one adult by another, with the consent and indeed the active encouragement and pleasure of the person beaten, are only permissible if they can be brought under the equally obscure special case of religious mortification (*Welch*, 1995, pp. 28).

While Griffiths notes that this exemption is obscure, the mention of religious mortification as an exception to consent vitiation through bodily harm is important as it shows that not all sexual violence is seen as a disapproved social purpose. The distinction between sexual violence being accepted is thus not based on the sexual nature of the violence, but is more so based on the purpose of the act of sexual violence; religious purposes are exempt while the exemption is not granted for those who use violence for pleasurable purposes. The reason for excluding BDSM-related sexual violence as unacceptable but not religious violence is explained when Judge

Griffiths notes: "I am not prepared to invent a defence of consent for sado-masochistic encounters which breed and glorify cruelty" (*Welch*, 1995, pp. 23).

While the case decision in *Welch* found BDSM to be not generally accepted for social purposes, this case is almost thirty years old, and more recent cases reveal a shift in how judges are now viewing these acts. The more recent case of *R. v. KG* (2018) demonstrates this change. In *KG* an expert witness gave testimony on: "what motivates persons to engage in BDSM…the injuries that can arise from consensual activity [and] the norms and 'culture' of BDSM 'culture'" (*KG*, 2018, para 154). In allowing the expert witness, Judge Brown made a connection between hockey and BDSM as well as the roles experts in the fields may play in such cases:

> For similar reasons, Ms. Zanin's [the expert witness] evidence is also necessary. BDSM is a practice with its own culture and norms. Its practices and norms are not a matter of common knowledge. If this was, for instance, a case of injuries sustained during a hockey game, the defence would want an expert to opine on the norms and rules of hockey and common injuries that could be sustained during play. (*KG*, 2018, para. 457).

Although Judge Brown is not explicitly stating that BDSM is now a generally approved social purpose for acts causing bodily harm, his encouragement to educate himself and the court on the practices and norms of BDSM shows that it is being considered more acceptable in this way and may have a place in the law, similar to hockey.

Like Judge Brown in *KG*, Judge Duncan in *R. v. Hunter* (2019) referred to the rules and conduct that control BDSM activity. In discussing standards of negotiation that occur within a BDSM threesome, similar to the case at bar, the judge mentioned BDSM governance when he said:

> It is important to remember how this began. It was a plan that had been discussed previously and one that A.G. [the complainant] appeared to be interested in pursuing. She knew and agreed to participate in a BDSM governed sexual experience with two persons, in a place she had never been and with one person she had never met (*Hunter*, 2019, para 181)

Here, Judge Brown claims that BDSM is a governed play, inferring that the community has its own rules and regulations to follow. In discussing these rules that govern conduct, such as safe words and body language, Judge Brown concluded that the complainant had full authority to stop play whenever she felt like it. In delivering a non-guilty verdict on this basis, Judge Brown demonstrated that he used the rules of BDSM governance in his analysis and further established the social acceptance of such a community within the law.

Furthermore, the case of *R. v. Gubbels* (2022) previously discussed reflects the same acceptance of BDSM standards, culture and rules. In his ruling, Judge Mitchell gave extensive detail about the rules and lifestyle that the complainant and accused participated in and the knife play in question. He concluded by saying:

> This evidence suggests that these incidents were part of BDSM play and, thus, subject to the rules established by them including the complainant's boundaries with respect to hard and soft limits (*Gubbels*, 2022, para 75)

Judge Mitchell's allowance of BDSM regulations, paired with a not-guilty finding for the accused, who presented a defence of consent to bodily harm, demonstrates that BDSM was once again seen as an exception to the rule that all consent is vitiated when bodily harm was present.

5.5. Advanced consent to unconscious acts

While the earlier cases discussed thus far demonstrate a partial shift towards a greater acceptance of BDSM activities and practitioners by the courts, the cases dealing with consenting prior to/while unconscious showed the limits of judicial acceptance.

Judge Paperny, speaking for the majority in the appeal case in *R v Ashlee* (2006), was the first case to interpret affirmative consent laws in a scenario where the complainant may have given advanced consent to unconscious acts. In this case, the complainant was found unconscious on the street while the accused was fondling her breasts; the accused appealed his conviction stating that there was no evidence that the woman had not provided consent before her unconsciousness. In rejecting this argument from Mr. Ashlee, Judge Paperny declared why the laws surrounding unconscious consent are rigid, referencing affirmative consent standards found in *Section 273*:

> "[m]oreover, consent is an ongoing state of mind and is not irrevocable once given. This is stated explicitly in s. 273.1(2)(e) … the complainant is entitled to withdraw consent at any time… The issue with unconscious consent standards is then clear, there is no way to revoke consent while unconscious, thus going against the standards put forth in 273.1; this vitiates consent as the complainant is unable to revoke or consent to the activity through an ongoing state of mind" (*Ashlee*, 2006, para 25).

For these reasons, the majority of the court of appeal judges concluded in *Ashlee* that "consent to sexual activity, if it existed, does not remain operative after the consenting party lapses into unconsciousness" (*Ashlee*, 2006, para 27).

This same interpretation would be found in the decision of *AJ* (2008). The trial judge in the first of three *JA* cases in the dataset found that the complainant could not give advanced

consent to an act that would occur while she was unconscious. In particular, the complainant of the case in *JA* stated that prior to being rendered unconscious by erotic asphyxiation; she consented to JA continuing to have anal intercourse with her unconscious body. The case of *JA* is unique within the dataset as the complainant, his wife, testified that she did in fact consent to the acts. However, the Crown continued to pursue a charge of sexual assault against him. The trial judge, Justice Nicholas, found that one cannot consent to sex while unconscious as it is against the affirmative consent standards founded in *R. v. Ewanchuk* (1999):

> As such, it cannot be said that what happened while she was unconscious had been consented to; as mentioned above *Ewanchuk* mandates that there be consent to all sexual activity and we do not have a doctrine of implied consent even for situations such as this one based on my extensive review of the case law. (*AJ*, 2008, para 42)

Because JA was not using consent standards that aligned with affirmative consent legislation under Section 273.1 of the *Criminal Code*, he was found guilty of sexual assault, despite the complainant testifying she provided consent.

Ultimately, the case of *R. v. JA* wound up in the Supreme Court of Canada to settle if it is possible to consent to any sexual activity that happens while unconscious. Like Justice Paperny and Nicholas, Justice McLachlin (representing the majority) found the case centred on affirmative consent standards. McLachlin explained that vitiating advanced consent to unconscious acts is necessary due to the *actus reus* of sexual assault: "the *actus reus* has been committed if the complainant was not consenting in her mind while the touching took place, even if she expressed her consent before or after the fact." (*JA*, 2011, para 46). Because the *actus reus* is concerned with that what is happening at the exact moment of the touching, "[t]he only relevant period of time for the complainant's consent is while the touching is occurring… The

complainant's views towards the touching before or after are not directly relevant." (*JA*, 2011, para 46). As consent requires consciousness, the *actus reus* of sexual assault thus disallows anyone to consent to anything that happens while unconscious.

In addition to interpreting affirmative consent standards in a way that does not permit consent to occur prior to unconsciousness, McLachlin stated additional reasons why the majority felt it is impossible to consent to sexual activity while unconscious. For example, McLachlin argued, "Only one person really knows what happened during the period of unconsciousness, leaving the unconscious party open for exploitation" (*JA*, 2011, para 60). Additionally, McLachlin stated that this practice is risky for the person administering the act: "He, therefore, takes the risk that she may later claim she was assaulted without consent" (*JA*, 2011, para 49). For the reasons stated above, the majority in *JA* concluded that:

> The definition of consent for sexual assault requires the complainant to provide actual active consent throughout every phase of the sexual activity. It is not possible for an unconscious person to satisfy this requirement, even if she expresses her consent in advance. Any sexual activity with an individual who is incapable of consciously evaluating whether she is consenting is therefore not consensual within the meaning of the *Criminal Code.* (*JA*, 2011, para. 66)

As a result of this decision, it has restricted the defence of mistaken belief and essentially disallows consent under the law in cases of erotic asphyxiation and somnophilia.

At the same time *R. v. JA* was being heard at the Supreme Court, lower-level courts were deciding on a case that featured advanced consent to a sexual encounter in *R. v. Preuschoff* (2011). The case of *Preuschoff* (2011) involved a sex worker who accused a client of tying her to his bed while she slept and sexually assaulting her. Mr. Preuschoff defended his actions by

arguing that the complainant had consented to be woken up with sexual activity before she fell asleep. In ruling on the accused's guilt, the judge noted:

> I accept her evidence that she would never agree to bondage within the context of that scenario (my words, not hers). She was obviously street wise at that time and she recognized how vulnerable she would be if she agreed to let someone she had only just met an hour or two earlier to tie her up to his bed, in his residence. That would put a sex trade worker in a dangerous and terribly compromising position with one of her customers. (*Preuschoff*, 2011, para 32, emphasis added)

In this instance, Judge Gardner accepted that one could consent to be woken up to sexual activity. However, in this particular scenario, it was evident through the complainant's testimony that she did not: "[I can] say unequivocally that his evidence does not even raise a reasonable doubt. Accordingly, I find him guilty of both counts on the indictment" (*Preuschoff*, 2011, para 32). Because Judge Gardner found that there was no evidence of consent, the case did not comment on the decision in *JA* (2011) in which all advanced consent to unconscious acts is vitiated. Both *R. v. JA* and *R. v. Preuschoff* would be the final cases to touch upon the issue of advanced consent to unconscious acts as the precedent was clearly set in signalling vitiation to all consent through unconsciousness.

5.6. Conclusion

The preceding chapter has demonstrated a slight shift in attitudes towards BDSM play on the part of practitioners within the past twenty years in a number of Canadian judicial decisions. The case law has shown that BDSM is becoming a more socially approved activity. Next, the discussion chapter will examine the role of neoliberalism in transforming BDSM from an immoral act to one that can be seen as an exception to affirmative consent legislation under Section 273.1 of the *Criminal Code*. Additionally, the discussion chapter argues that the shift

from a moralism-ruled judicial system to a neoliberal judicial system has impacted the state of victim blaming and sexual autonomy within Canadian judicial decisions.

Chapter 6: Discussion

6.1. Introduction

The previous chapter highlighted that several legal decisions have occurred over the past 30 years regarding the changing nature of consent as interpreted through BDSM-related sexual assault cases. The present chapter connects the results to the conceptual framework, which frames the overall study of this thesis. First, I will argue that case law has evolved and now supports neoliberal ideas that appear to have permeated criminal law jurisprudence regarding consent in these practices. Second, I will situate these consent decisions on BDSM activities within the context of legal moralism and legal paternalism theories. Finally, I will conclude with a general discussion regarding what these changes to legal principles could mean for the status of the sexual autonomy of BDSM practitioners. Altogether, these arguments will highlight that the greater autonomy BDSM practitioners now have can be understood within the context of a so-called neoliberal legal regime in Canada.

6.2. Neoliberal presence in law

The overarching result of this research has revealed that consent standards have evolved to allow for a greater acceptance of alternative consent models. As the results indicate, the courts have established that in some BDSM cases, consent can indeed be given to bodily harm, and mistaken consent is acceptable within some BDSM activities. One possible reason for such an evolution may be the neoliberal turn prioritizing free will over governmental coercion. The case law in this project supported a greater presence of the neoliberal ideals within the two realms outlined by Gotell (2010): decontextualization of sexual assault from systemic sexual violence and increased discussion of the individualization of responsibility onto sexual subjects who actively manage risks.

The most prominent indicator of neoliberalism ideals concerning the current project can be understood as the decontextualization of sexual assault from gender violence. For context, Gotell argued that neoliberal governmentality has decontextualized the systemic nature of sexual violence from the crime of sexual assault, resulting in jurisprudence that does not consider the use of sexual assault as a mechanism for sustaining gender power relations. Within the current project, the argument by Gotell was evident in the changing nature of how judges referred to the submissives/women in the cases. The early cases regarding consent often referred to the submissives in the cases as "victims of abuse", as seen preDominantly in the cases of *Welch (1995)* and *JA (2011)*. For example, in *Welch* (1995), the judge contended that all women who practice BDSM are victims: "it is suggested that hurting people is wrong, and this is so whether the victim consents or not, or whether the purpose is to fulfil a sexual need or to satisfy some other desire" (para. 34). In stark contrast to this was a quote seen in the latter case of *Hunter* (2019) when the judge remarked on the active role that the submissive has in the sexual encounter. In this case, when describing the role that the complainant (submissive) had in signalling disagreement to sexual activity, Judge Duncan stated: "all agree that when a submissive does not agree to a specific activity then they are to use a safe word, if one has agreed to in advance, to stop the unwanted act" (*Hunter*, 2019, para 149). This can be interpreted as demonstrating that even though the submissive is being controlled and dominated in play, they still have the responsibility within the sexual transaction to signal their desire to stop the act(s) at any time. The shift in judicial discourse from viewing women within BDSM encounters as victims to viewing them as agents who have the right to exercise power within the sexual transaction is consistent with Gotell's (2010) argument and thus reflective of the individualization of responsibility and managing risk.

While Gotell (2010) notes that the decontextualization of gendered violence is problematic, the current thesis found that themes of exploitation and victimization were discussed in numerous cases to reject the consent standards of BDSM play and practitioners. As seen in *Welch* (1995), the judge used language that demonstrated the victimization and degradation of submissives in his rejection of consent for sadomasochist encounters:

> The violence of sado-masochistic encounters involves the indulgence of cruelty by sadists and the degradation of victims. Such violence is injurious to the participants and unpredictably dangerous. I am not prepared to invent a defence of consent for sado-masochistic encounters which breed and glorify cruelty. (Welch, 1995, p. 24)

It appeared that historically, as acts of BDSM became more accepted in the law (and in society, writ large), fewer women/submissives were described in these judicial decisions as victims of sexual exploitation and instead seen as rational sexual actors. In particular, consent to bodily harm became an acceptable practice within acts of BDSM. This finding is also consistent with feminist legal scholars Khan (2016), Turley (2015) and Pa (2001), who argue there is a contention between mainstream feminism and feminism that advocates for BDSM inclusivity. The conflict resides around the idea that women who practice BDSM are seen to be perpetuating gender violence ideals in the eyes of mainstream feminists. Therefore, neoliberalism may have played a positive role in contributing to ideas about sexual agency in law for BDSM practitioners.

The second half of Gottell's neoliberal argument (2010) focuses on the fact that the decontextualizing of laws from feminist agendas is also accompanied by the possibility that sexual interactions are reconstructed as economic transactions. In this way, sexual actors are viewed as acting within a marketplace to demonstrate rationality while actively engaging in risk

management in their sexual practices. Within the case law studied, the economic nature of sexual transactions was evident in interpreting mistaken consent standards. For context, mistaken consent means many different types of consent in which the accused thought the complainant was consenting based on something other than affirmative words. What was evident in this manner was a gradual transformation that increasingly permitted mistaken consent standards to be used within sexual encounters. Within this context, judges increasingly required that it was the sexual actors responsibility to ensure the mistaken consent was being established appropriately within transactions. For example, in *Sweet* (2018) the judge underscored the responsibility that consenting adults have in establishing a safe word as part of the cost-benefit analysis of the sexual economy:

> [the precedent] leaves open the possibility that consenting adults may enjoy the personal autonomy to establish rules such as "no means yes." If so, in my view, this passage suggests a corollary requirement to establish an alternative "safe word" or other mechanism to ensure that each party is also able to maintain their personal autonomy to put an end to unwanted sexual activity (*Sweet*, 2018, para, 141).

In addition to placing responsibility on the parties to establish a safe word, this decision also emphasized the submissive's responsibility in BDSM to use such a safe word where appropriate.

The greater responsibility placed on submissives within sexual transactions was also noted in Judge Mitchell's judgment in *Gubbels* (2022). This was evident through a discussion of the BDSM checklist that the complainant presented as evidence, which was taken to demonstrate the concept of a transactional sexual economy as the submissive generated a list that aided in the Dominant's cost-benefit analysis in sexual transactions going forward. When explaining the authority and responsibility of the submissive in stopping play at any time and setting

boundaries, the power differential between the parties becomes one based on transactions and cost-benefit analysis rather than exploitation and victimization. The possibility that submissives are seen to have more responsibilities within a sexual transaction is a result of the courts, in some instances, viewing them as rational actors instead of victims of gender-based violence. This shift is consistent with a neoliberal ideology that decontextualizes violence and places the onus on economic actors. Importantly, as discussed earlier, the rise of neoliberalism can be understood to affect the understanding of other related legal principles, such as legal moralism and paternalism, the impact of which will be discussed next.

6.3. Legal moralism

The overarching result of the current thesis is that consent standards have evolved over time to allow for a greater acceptance of alternative consent models, such as consent to bodily harm and mistaken consent within BDSM activities. One explanation for this transition could be the result of a de-emphasis on legal moralism in judicial decisions. Legal moralism has been defined by Feinberg (1984) as prohibiting acts based on the fact that they are immoral, even though the act may not cause harm or offence to anyone While the earliest case concerning BDSM demonstrated greater representations of legal moralist thinking, the latter cases in the dataset moved away from such thinking and toward more objective interpretations of consent, allowing consent standards seen in BDSM practices to be accepted in the law.

The way consent to bodily harm was interpreted in *Welch* (1995) can be understood as legal moralizing, as Judge Griffiths used such logic in a 3-step way. The first legal moralist step used to justify restricting autonomy was by identifying the act of consent to bodily harm for pleasure as immoral. Discourse included “there are certain standards of behavior or moral principles which society requires to be observed; and the breach of them is an offence not merely against the person who is injured, but against society as a whole” (Welch, 1995, p. 33).

Furthermore, Judge Griffiths extends this comparison of BDSM and morality when he noted: "If sadism is allowable, if consented to, then it is consent rather than moral conviction which polices the barrier between a society of would-be sadists and the kind of society most of us would like to inhabit." (*Welch*, 1995, pp. 34).

While Judge Griffiths in *Welch* addressed the immorality of BDSM explicitly, legal moralism was debated in a less direct manner in *R v. Robinson* by using language that historically exemplified immorality to describe acts of BDSM, with words such as "dehumanizing" and "cruelty". In *Robinson*, BDSM was pathologized through lawyers and judges making connections to malevolent popular culture representations of BDSM; the prominent example of this was when the lawyer referred to the case as a "bizarre, sadistic, albeit unsophisticated crime novel" (*Robinson,* 2001, para 39*).* The judge in this case described the acts of the accused as stereotypes whereby BDSM practitioners are portrayed as rapists and murderers who cannot control their sexual desires (Turley, 2015). Drdova and Saxonburg (2019) note that the attachment of BDSM practitioners to sensationalized sadistic characters results in pathologizing them as immoral, violent, and perverted.

After identifying BDSM as immoral, the early cases explained the role of the law in governing morals, similar to Feinberg's (1984) definition of legal moralism. One example of this was from *Welch* (1995) whereby Judge Griffiths explained that "even a tolerant, pluralistic society must enforce one fundamental residual moral value" (*Welch,* 1995, p. 33). While Griffiths did not specify the moral value that must be enforced, the attachment of this quote to a rejection of BDSM practices made it clear that BDSM could not be a part of such moral value. In labelling BDSM as immoral and positioning the law as the institution to control immorality, the quote by Judge Griffiths can be seen as positioning the law as having the *prima facie* right to

legislate, explained by Lord Devlin as the basis of legal moralism (1965). The final tenant of legal moralism that Lord Devlin notes is using such governmental power and *prima facie* right to legislate to override consent to enforce moral values (Tur, 1985).

Finally, as the early cases positioned BDSM against the moral standards that the law enforces, it became the responsibility of judges to make sure they disallow the behaviour to ensure "no one could 'license another to commit a crime'" (*Welch*, 1995, p. 18). Primarily, disallowing consent based on morality was evident within strict interpretations of the consent defence to sexual assault causing bodily harm from early cases. In forbidding someone to consent to bodily harm because the behaviour is considered immoral, the judges in the earlier cases demonstrated a form of legal moralism. While evident in early decisions, the transition to neoliberal thinking was found to have lowered the impact of such thinking in later court decisions.

6.3.1. Removal of legal moralism from jurisprudence

While the preceding section focused on how legal moralizing was evident in the discourses of earlier decisions, a thematic analysis is also concerned with what is not said in the text (Lester et al., 2020). Consequently, legal moralism may have been slowly eroded historically in judicial decisions surrounding cases of BDSM-related sexual assault. In particular, the results of discussions around legal moralism appear strangely absent in the latter cases. By contrast, concepts that Lord Devlin recognized as defeating factors of legal moralism, liberty and privatization (Devlin, 1965), received more attention.

A lack of discussion on morality in recent cases could be indicative of its diminished relevance in the judgements of judicial officials across later BDSM-related cases. The lack of such language from judicial discourse after 2011 points to a decrease in the presence of legal moralist thinking being used within the decision-making process of judges. While no case

outright rejected legal moralist thinking, *R. v. Zhao* (2013) may have touched on the issue when Judge Tulloch mentions, “In light of how the law has developed, it is doubtful that *Welch* remains good law even in cases involving sado-masochism” (*Zhao*, 2013, para 98). While this case does not particularly address the legal moralism aspect of Griffith’s decision in *Welch*, the case does state that the laws that have such a legal moralist foundation are out of date; one may infer that this means the moral standards that such laws are rooted in may too be obsolete.

Additionally, it is important to note that concurrent with judges decreasing the space they gave in their decisions to moralism, they also began giving more space to the principles of liberty and privatization. For example, it can be argued that the judge in *Harnett* (2022) was in fact emphasizing liberty when he stated that people should have the right to practice unconventional sexual interests: “Where genuine, legally effective consent exists, unconventional sexual choices, even those that some might find offensive or questionable, should be protected” (para 249). Additionally, Gotell (2010) argues that the privatization of sexual violence is manifested through decontextualizing sexual violence and placing responsibility onto the person within the scenario to manage risk; both of these manifestations of privatization were evident above in the section on neoliberalism. Discussions of liberty and privatization are important as the results and conceptual framework chapters have demonstrated that the privatization of sexual acts as individualized responsibility and the liberty of autonomous, self-managed risk-takers are two of the fundamental pillars of a neoliberal society (O’Malley, 2018).

More importantly for the argument of legal moralism, Lord Devlin states that the two principles highlighted above are also the defeating factors of legal moralist reasoning: liberty and privatization (Devlin, 1965). Because market-modelled concepts of privatization and autonomy are prioritized within neoliberal society, it can be argued that this has weakened the argument for

the existence of morality-based law around issues of consent. A macro-level analysis of the state of moral-based crimes, including such issues as marijuana consumption and medical assistance in dying being decriminalized, indicates a movement away from moral-based laws in favour of market-modelled privatization and liberty (Trabsky, 2022). By emphasizing the need for privacy and liberty, both critical threats to legal moralism, it can be argued that the results of the current thesis have confirmed Blalock's (2014) theory that neoliberal ruling and legal moralism are incompatible.

Overall, the results demonstrated that the incompatibility of legal moralism and neoliberalism resulted in a more subjective interpretation of consent to bodily harm. The decision in *Zhao* (2013) in which the judge found that “consent will be vitiated only where the accused deliberately inflicted bodily harm or pain on the complainant” (*Zhao*, 2013, para 85) was the first instance to demonstrate the possibility of excluding moralism from such consent interpretations. The ruling in *Zhao* changed the question from whether one *could* consent to whether one *did* consent, a change that most likely would not have happened under legal moralism. In changing the question from whether the act was immoral to whether it was done to cause harm, the judges shifted away from legal moralism considerations. In particular, the shift moved towards governing through the harm principle, in which acts must be criminalized if they harm others. However, while a move towards neoliberal thinking was evident in the discussions surrounding legal moralism, the interpretations surrounding advanced consent to unconscious acts[8] in the results reveals that discussions of legal paternalism remain. This topic will be analyzed in the proceeding section.

6.4. Legal paternalism

[8] which has not changed.

While the law may have changed in some ways, the results of this analysis also demonstrated stagnant interpretations surrounding advanced consent to unconscious acts (herein unconscious consent). One explanation for such resistance to change could be due to the fact that judicial rationalizations around unconscious consent were considered under legal paternalist principles rather than via legal moralism. For context, legal paternalism was first introduced by Feinberg (1971) as the lawmaking enacted by governments that protect people from self-harm through legislation. While the legal principles are manifestly different, the steps in establishing legal paternalism are almost identical to legal moralism: the only difference between the two is that for paternalism to be manifest it must address an act that is classified as harmful to the self, instead of immoral. Subsequently, legal paternalism places itself as the gatekeeper of safety and thus disallows the right to autonomy to participate in that act to protect oneself from self-harm. Regarding BDSM-related consent, the rejection of unconscious consent can be interpreted as a result of soft legal paternalism.

The principle of legal paternalism was evident within the current dataset when judges would ascertain that the act consented to may be harmful to the person. This could be argued to be most evident when judges connected unconscious consent to the notion of violence. Judge Nicholas in *AJ* (2008) demonstrated such a notion when he explained:

> Defence urges me to reject the Crown's plea that I take a proactive approach for policy reasons and set a precedent to spare other citizens from "untold harm, devastating long term injury and even fatalities" and that I should not be seen to "indirectly sanction continued recklessness by this accused as well as anyone else who engages in this undoubtedly dangerous practice" I agree. (*AJ*, 2008 para 28, emphasis added)

Within this quote, Judge Nicholas uses adjectives such as "recklessness" and "dangerous" to describe the act of erotic asphyxiation performed by *JA*. Nicholas also states that BDSM causes harm, injury and fatalities and while that can be true if it is not performed correctly, the case at bar was not dealing with any of those consequences in question.

The connection between BDSM practices and violence continues to be explicitly seen in *AJ* (2008) when Judge Nicholas contends:

> "There is no evidence to support the assertion that sado-masochistic activities are essential to the happiness of the appellants or nay other participants but the argument would be acceptable if sado-masochism were only concerned with sex, as the appellants contend. In my opinion sado-masochism is not only concerned with sex. *Sado-masochism is concerned with violence*" (*AJ*, 2008, para 16, emphasis added)

Not only does likening BDSM to violence show a blatant disregard for the caring aspects of the activities that may happen throughout and in aftercare, it also demonstrates a form of paternalism on Nicholas part.

By labelling something as harmful, legal paternalism requires Parliament to control what an individual can and cannot consent to. The role of the law under a legal paternalist regime was made explicitly clear in this case when Judge Nicholas explained:

> The court acknowledged that such limits [preventing unconscious consent] on the freedom of adults may seem 'paternalistic, a violation of individual self-rule'. However it concluded that our law does have such limitations because 'criminal law is paternalistic, to some degree- top down guidance is inherent in any prohibitive rule" (*AJ*, 2008, para 12).

The preceding quote demonstrates a rationalization on the part of the judge for limiting adults' freedom in order to keep society safe. The power that is given to the court in this position could also be seen in *Ashlee* (2006) when Paperny expressed: "Parliament's words and intention are clear: no still means no, whether expressed by the complainant or by Parliament" (para 42). Here, the paternalistic ideal is that a higher power, such as the government, can limit autonomy and such a power to ban harmful activities is evident in interpreting unconscious consent laws.

It is important to remember that Feinberg's theory of legal paternalism reveals that there is a widespread range of restricting autonomy based on where the activity stands on a scale from soft to hard paternalism (1981). Soft paternalism prevents a person from self-harm because the conduct is non-voluntary, or when intervention is necessary to establish whether the conduct is voluntary, such as the government ensuring people know the risk of smoking cigarettes by putting pictures of cancerous lungs on the packages (1987). On the other end of the spectrum, hard paternalism contends that the state is justified in protecting a person against his will from the harmful consequences of their entirely voluntary choices, as seen in regulations prohibiting people under 18 from consuming cigarettes.

The problem with unconscious consent within the dataset was that there was no way to verify whether the conduct was voluntary. For example, the majority in *JA* (2011) stated that:

> The definition of consent for sexual assault requires the complainant to provide actual active consent throughout every phase of the sexual activity. It is not possible for an unconscious person to satisfy this requirement, even if she expresses her consent in advance. Any sexual activity with an individual who is incapable of consciously evaluating whether she is consenting is therefore not consensual within the meaning of the *Criminal Code.* (*JA*, 2011, para. 66).

Within this quote, McLachlin demonstrates that the majority did not reject the possibility of unconscious consent because it was harmful or immoral, but rather they found that unconscious consent was impossible to prove. Here, the question is not whether one can consent to the act, but the focus is on whether one can voluntarily consent to an act when they are unconscious. In finding that an unconscious person cannot consent, the prohibition of advanced consent to unconscious acts demonstrates soft legal paternalistic thinking rather than hard legal paternalism.

The importance of unconscious consent legislation being based on soft legal paternalist thinking becomes evident when explaining how this legislation may infringe autonomy. Because of the insurance that the person is making an informed decision to consent, Feinberg (1987) argued that soft paternalism does not restrict autonomy, but rather ensures it is present. This theorizing by Feinberg is evident when McLachlin in *JA* (2011) states: "only one person really knows what happened during the period of unconsciousness, leaving the unconscious party open for exploitation" (*JA*, 2011, para 61). The need to protect an individual who cannot voluntarily consent being used in this quote in reference to the risk of exploitation that this may cause connects soft paternalist thinking to the risk management aspect of neoliberalism. Altogether, this allows for soft legal paternalism to continue to be used to disallow unconscious consent to sexual acts.

6.5. The status of sexual autonomy within neoliberal judicial discourse

The case law analyzed in earlier chapters has revealed a shift away from restrictions on autonomy that reflected the sex-negative ideals in society, done so through the potential extinction of legal moralism. Additionally, this has been accompanied by a shift towards neoliberal governance, wherein there is a greater emphasis on privatization and liberty, reflected in other areas of law that has decriminalized acts which were previously considered immoral,

such as gay marriage. In particular, what was evident in this analysis was that a focus on a transactional sexual economy has allowed people to consent to bodily harm within the context of BDSM sexual activity, thus reflective of greater personal autonomy in sexual transactions.

Furthermore, the case law has demonstrated that identifying unconscious consent as a harmful act has resulted in consent becoming excluded as a part of a defence in criminal trials. While this does restrict the autonomy of those who may wish to continue to have sex after a partner has passed out from erotic asphyxiation, the restriction has also ensured that submissives have autonomy to consent to the free and ongoing consent standards ingrained through *Ewanchuk* and Section 273.1 of the *Criminal Code*. Protecting people from such harm while emphasizing autonomy can be best explained through Whitworth's notion of the "twin thrust" of neoliberal soft paternalism; the model of governance that is seen as an aid to improve self-selected outcomes of rational individuals rather than be coercive over liberty interests (2016). The "twin thrust" of neoliberalism soft paternalism sees that the risk that occurs when you allow someone free sexual access to your body when you are unconscious as too 'costly' to be permitted within the sexual transaction, thus requiring governmental intervention.

Altogether, these changes in the law through neoliberal privatization and individualization of responsibility have resulted in BDSM practitioners having greater sexual autonomy under criminal law. The best example of this change is exemplified *in R. v. Harnett* when the judge explains:

> "Giving full effect to sexual autonomy means that courts are not to decide whether sexual activity is "nice" or "normal," but strictly whether it was consensual. Where genuine, legally effective consent exists, unconventional sexual choices, even those that some might find offensive or questionable, should be protected" (*Harnett*, 2022, para 249).

This so-called “new” status of BDSM has resulted from sexual autonomy that has freedom from legal moralism under a neoliberal regime, whereby legal paternalism can still restrict sexual autonomy for certain acts. The status of sexual autonomy regarding BDSM-adjacent consent has several implications for those who practice the acts; two of these implications are explained next.

6.6 Implications of the status of sexual autonomy on BDSM complainants

While the emerging legal results are significant for those who research BDSM and the law, it also begs the question as to what it means for those who practice BDSM. My arguments to this question are two-fold. First, BDSM practitioners are seen as being responsible for their safety and decision-making. Second, the case law demonstrated that the well-established ideal victimization standards have changed to idolize consistent, rational, and risk-managed victims.

6.6.1. With freedom comes responsibility

The first implication that can be taken away from the results is that the neoliberal individualization of responsibility can place the onus on individuals to be responsible for risk-taking and self-discipline. While this increase in responsibility may seem daunting for practitioners of BDSM who already practice risky activities, at the same time, those practicing consensual standards of BDSM through established consent models may be already practicing cost-benefit analyses of sexual transactions. In particular, the levels of BDSM consent highlighted by Dunkley and Brotto (2020) can be seen as giving a self-disciplined actor information to make a well-informed cost-benefit analysis within Gotell's model of neoliberal responsibilization. In analyzing whether someone has received surface, scene, and deep consent, the Dominant sexual citizen can actively manage their risk of criminalization to self-discipline. With the results of this study, these three levels of consent, along with scene negotiation strategies highlighted by Pitagora (2013), can be best seen in the case of *Gubbels* (2022).

The case of *Gubbels* (2022) demonstrates proper BDSM consent standards and ideal sexual negotiations cost-benefit analyses under neoliberalism. It also demonstrates how risk management within those negotiations can result in both convictions and acquittals for an accused. In particular, the complainant, in this case, may have used proper BDSM scene consent when she negotiated her limits while in a non-sexual position:

> After a month or so of dating, the complainant provided to the defendant a BDSM 'checklist' comprised of a list of various acts and sexual activities. For each act or activity listed, the complainant indicated any prior experience and her preference for and willingness to engage in the activity on a scale of 1 to 5, with "0" being a "hard limit". The complainant described a "hard limit" as an activity that can never happen and that in which she would never engage. A "2-3" indicated a "soft limit" or an activity the complainant was prepared to try. (*Gubbels*, 2022, para 12)

From this pre-sexual negotiation, the judge was able to place the accused's actions within a risk management analysis to conclude that proper self-disciplining was done through the levels of consent: "I find that the defendant could have reasonably interpreted this abrasion and knife play as acceptable and within the complainant's soft limits if he had not been asked to stop and the complainant had not used the safe word 'red'"(*Gubbels,* 2022, para 75). This finding was supported by damming evidence from a police interview that demonstrated all levels of consent were present within the scene. "Q. I'm going to suggest that you never used the safe word at any point with John because everything that took place between the two of you was consensual? A. That is correct" (*Gubbels*, 2022, para 61). Ultimately, the accused was not convicted, in part because he met all three levels of BDSM consent: surface consent (described by a 'yes' or 'no');

scene consent (described by negotiated parameters); and deep consent (as the bottom could use a safe word and did not).

Within the same case, however, the accused was found guilty of striking the complainant with a hose (an assault) as the act was not within her pre-established negotiated parameters:

> "M.D. testified that she was not interested in pain for the sake of pain. She said that she enjoyed mild erotic pain in the context of BDSM play. She explained that if pain is inflicted in a setting that is not sexual, there is nothing about the pain she enjoyed." (*Gubbels*, 2022, para 79)

Because she had earlier negotiated that pain may only be inflicted consensually for pleasure, and "there is no evidence suggesting the complainant was struck with the hose during any of the three incidents in anticipation of or as part of any sexual activity" (*Gubbels*, 2022, para 77), the judge found that the accused had all the information he needed to manage his risk within a cost-benefit analysis and still acted aggressively, making him guilty of "the offence of assault with a weapon" (*Gubbels*, 2022, para 81).

While the example above in *Gubbels* demonstrates the possibility that proper BDSM scene negotiation and levels of consent can protect both the Dominant and submissive in neoliberal negotiations, meeting such standards of scene consent can be difficult without teachings by the BDSM community. While it is difficult to know statistics with any sense of certainty, one study indicated that the prevalence rates caution us that while 46% of people engage in some BDSM-related behaviour, only 7.6% are members of the BDSM community that emphasize specific consent and scene negotiation procedures (Holvoet et al., 2017). The same trend was seen within the case law. In fact, *Gubbels* (2022) was the only case where proper BDSM scene negotiation was present; this was also the only case wherein the actors specifically

stated that they were in a BDSM-governed "collaring" arrangement. In the case of *Hunter* (2019), the judge called out the complainant and accused them of not using proper boundaries in a BDSM-related threesome:

> All three of the participants were unwise to not set more specific boundaries of permissible conduct – had they done so, we might not be here. However, that mutual failure to do so did not leave the three of them, in these particular circumstances, without a governor on their conduct – that governor was to be a communicated withdrawal of consent by the submissive and the discontinuance of that activity by the Dominant. (*Hunter*, 2019, para 185)

The quote above demonstrates that the potential neoliberal transaction between sexual actors was not present, precluding proper risk management from the complainant regarding her risk of sexual assault and stopping the accused from using self-discipline to prevent criminalization—the culmination of these mistakes to negotiate ended in them both facing those consequences; the submissive was left feeling sexually violated and the Dominant was left being charged with sexual assault. The emphasis on women to self-managing risk, along with the onus being placed upon the submissive to communicate the withdrawal of consent in BDSM play, can further be placed within the context of neoliberalized ideal victimization standards.

6.6.2. Ideal victimization standards.

The current project demonstrates how "ideal victim" standards have changed to reflect neoliberal ideas within jurisprudence. An "ideal victim" standard reflects the tendency to assess the credibility of women based on societal notions of who is an authentic victim. In particular, Larcombe (2002) notes that a neoliberal "ideal victim" is consistent, rational and risk-managing; such a description was evident in *R. v. Preuschoff* (2011), wherein a sex worker was praised for her fit within ideal victimization standards. First, the complainant was consistent with her

testimony and behaviour: "I found the Complainant to be a truthful and reliable witness. There was no real change in her demeanor during cross examination and she answered every question put to her without being evasive." (para 32*).* Furthermore, she was seen as a rational actor who "was obviously street wise" (para 32) to recognize the "costs" associated with allowing a stranger to tie her up. Finally, she was seen as someone who makes conscious risk avoidance efforts in disallowing strangers to perform risky acts of bondage with her through her job:

> She was obviously street-wise at that time and she recognized how vulnerable she would be if she agreed to let someone she had only just met an hour or two earlier to tie her up to his bed, in his residence. That would put a sex trade worker in a dangerous and terribly compromising position with one of her customers." (*Preuschoff,* 2011, para 32).

In demonstrating these characteristics, the complainant reflected all three characteristics of a neoliberal ideal victim, allowing for a conviction: "[I can] say unequivocally that his evidence does not even raise a reasonable doubt. Accordingly, I find him guilty of both counts on the indictment" (*Preuschoff*, 2011, Para 31-32). The other cases in the dataset were not so prescribed.

First, good neoliberal victims are consistent in their stories and behaviours (Larcombe, 2002). However, the result of inconsistent behaviours can be seen in *Thompson*, whereby the complainant was ridiculed for her inconsistent testimony regarding her insistence on using condoms. In this case, evidence that the complainant allowed two men to have sex with her without a condom was used to infer that she likely allowed the accused to do so in the act at bar. In this case, the inconsistency in her behaviours was used to support a non-guilty finding, demonstrating the importance the criminal justice system has placed on women to properly self-manage their risk and give men the proper tools to complete a cost-benefit analysis when

entering a sexual transaction. The lack of responsibility in being consistent precluded the defendant in the case to manage his risk surrounding using condoms correctly, and thus, he successfully proved he had mistakenly believed the woman had consented. This case demonstrates the ongoing presence of the ideal victim as someone consistent in behaviour and testimony and that victim-blaming behaviour can arise when consistent behaviours are absent.

Furthermore, Larcombe describes the ideal victim within neoliberalism as making rational choices based on available rational calculations (a means to an end, cost-benefit analysis) to achieve desirable outcomes (2002). The pressure placed on women to be rational actors in sexual transactions demonstrates the increased responsibilities on the individual within neoliberalism, but fails to acknowledge the external factors that may influence someone in making an irrational decision, such as evidence of coercion or emotional bonds. By disregarding external factors, this ideal victimization standard can be seen as a result of decontextualization in neoliberal sexual assault rhetoric, as outlined by Gotell (2010). The caselaw demonstrated that when women did not demonstrate rational decision-making, they were often questioned about their role in causing their own victimization. This was evident in the case of *R. v. SRW* (2015) when the complainant was questioned regarding her responsibility to halt contact with the man who sexually assaulted her: "there were times when she invited him into the apartment for coffee, after he had sexually assaulted her. When asked why she would do that, she said: 'Because I was stupid'" (*SRW,* 2015, p. 5). Instead of focusing on the contextual information in the case that demonstrated financial and emotional manipulation on the part of the accused, the judge gave space in his decision to discuss the woman's role in her victimization because of her alleged irrational behaviour by inviting her abuser in for coffee. This victim-blaming behaviour

may result from the decontextualization of gendered violence and the emphasis on rational choices, demonstrating a connection between the two neoliberal concepts.

Finally, the ideal victim as a rational actor is inherently connected to the final characteristic Larcombe highlighted in risk avoidance: a rational actor would make decisions to manage her risk of being sexually assaulted, and those who do not adequately avoid risk are blamed for not doing so. The case of *Hunter* (2019) exemplifies an instance where the complainant did not engage in risk avoidance behaviour in establishing a safe word. The judge criticized the fact that "the participants were unwise to not set more specific boundaries of permissible conduct" (para. 185), hence blaming the victim for not correctly managing her own risk by establishing a safe word, which ended in the accused mistakenly believing she was consenting to the act in question. The lack of risk avoidance behaviour from the complainant may have led the judge to think that the accused did not have enough information to manage his own risk within the sexual transaction properly, thus making him not responsible for the eventual incident that took place.

The results have demonstrated that with the possibility of increased autonomy around consent issues, there is an increased responsibility on the part of the sexual actor to self-manage their risk within sexual negotiations. This increase in responsibilities has resulted in a shift in what is considered as an "ideal victim". Overall, ideal victimization standards and the increased responsibilities of individual risk management strategies demonstrate the costs associated with increased sexual autonomy and freedom.

6.7. Conclusion

This chapter has focused on what the data that emerged from the case analysis may mean for the liberation of sexual agency for BDSM practitioners. This greater agency has been paired via neoliberal ideals of increased individualized responsibility on the sexual actors within a

BDSM scene to manage their risk within a sexual economy. The implications of these results on those who practice BDSM include the need to properly negotiate scenes within the framework outlined by BDSM subcultures and take prudent steps to ensure all levels of consent are present. Navigating a risk-based practice such as BDSM in a neoliberal society that places great emphasis on risk management may result in increased victim blaming towards those who do not properly rationalize their conduct. Notwithstanding such a challenge, the neoliberal shift to risk management may have resulted in legal moralist arguments being excluded from law and for greater acceptance of BDSM as a socially accepted practice. The contributions these results may make, and the study's limitations will be highlighted in the concluding chapter.

Chapter 7: Conclusion

The past six chapters have argued that the evolving transition to a neoliberal criminal justice system has resulted in the exclusion of legal moralist pathologizing of BDSM play and practitioners, allowing people with such interests more sexual autonomy. First, the research topic and objectives were highlighted in the introduction. Next, the literature review demonstrated differing definitions of consent within sexual assault laws and BDSM standards. In chapter three, critical legal principles in the data were conceptualized and contextualized in the Canadian criminal justice system as neoliberal. Furthermore, the methodological chapter outlined the main steps of a thematic analysis research project and applied them to the current project. Next, the results chapter demonstrated the themes in interpreting legislation surrounding consent. Finally, the preceding chapter tied the results with the pre-existing literature on the subject. The current chapter will highlight the limitations of the current project, as well as the future research areas and the significance of the results.

7.1. Limitations

The limitations of this thesis surrounded two elements: the data collection method and the language around BDSM. First, the *Quicklaw* and *CanLii* databases used for data collection only contain cases reported and deemed relevant by the publisher. Using these databases, therefore, left the thesis with the possibility that cases were excluded that dealt with BDSM differently but were not deemed notable enough to be found on either of the platforms. In particular, appeal cases may have more significant legal outcomes and can be seen to have greater implications on future cases, which can skew both the *Quicklaw* and *CanLii* databases to have a more substantial number of such cases. Meanwhile, trial court cases may not have been as prevalent in such databases but not because they were less likely to mention BDSM, but because the decision in the case was not reported on or deemed important.

Second, using BDSM as an umbrella term for many different kinds of sexual activity also posed challenges in many facets. Through the data collection method, I used as many terms as possible to get all the available cases that covered BDSM activities. Still, because the acronym encompasses many acts, there is a possibility that other cases have referred to BDSM-adjacent acts as something else. Additionally, there is no set checklist of BDSM acts, which resulted in some acts within the case, namely anal sex, being identified as BDSM when that may not necessarily be considered within the parameters set out by the BDSM subculture. Additionally, because BDSM is a term that is used widely but also is used as a label for a specific subculture, accurate prevalence rates are virtually impossible to identify. Bauer (2014) highlighted this when saying there are no clear boundaries between BDSM practitioners and non-practitioners since the majority of the sexually active population use at least some aspect of BDSM play within their regular sexual practice. More research is needed to help identify at least an idea of a boundary from which BDSM play begins.

7.2. Future Research Areas

Along with the limitations above, the current project has identified several future areas for research. As alluded to above, the first area of future research would be sexuality studies focusing on the entry barriers for people identifying within the BDSM subculture. This study demonstrated the problems associated with practicing BSDM without proper exposure to negotiating and consent training given by the subculture, as well as highlighted a discrepancy between the number of people who practice BDSM and those who identify as a member of the community. Future research is needed to determine why those who practice BDSM in their sexual relationships do not identify within the subculture and what they identify as the barriers to doing so.

Additionally, the results of this thesis identified risk management as a critical concept within an evolving neoliberal criminal justice system and determined that some aspects of BDSM consent and negotiation have those characteristics of risk management embedded within them. Because of this, future research should examine the risk management techniques that BDSM practitioners use. Of particular interest would be to compare such methods between those who identify with the subculture and those who do not.

Finally, the results of this study reaffirmed Larcombe (2002) and Gotell's (2010) characteristics of ideal victimization standards in a neoliberal criminal justice system. In particular, inconsistent behaviours, irrational actions and poor risk management were used to blame women for their victimization. These characteristics of victim blaming continue to be excluded from rape myth acceptance studies that examine how myths are associated with rape victims and perpetrators. Future action is needed in this area to update RMA scales to fit within neoliberal ideal victim standards.

7.3. Significance and Recommendations

The results of this study have significance for both populations that practice BDSM and those who research legal jurisprudence. Firstly, this research is important for those who may practice BDSM or identify within the BDSM subculture. Even though the results of this study found that there is greater acceptance for BDSM practitioners within the justice system, it continues to be a marginalized practice, whereby individuals continue to face stigma and discrimination based on their private choices. Researching this population can help break down stigmatization by normalizing the discussion of such acts within mainstream spaces such as the academy.

Additionally, the current project has significance in the realm of legal studies and criminology. While legal scholars (Khan, 2016; Pa, 2001; Bennett, 2020) have examined the

topic of BDSM in law, there has been a lack of research that explicitly examines such a topic through the lens of neoliberalism. The current project demonstrated signs of neoliberalism, making it possible to explore the neoliberal aspect of risk-taking and sexual management within the legal jurisprudence of BDSM-related laws. Furthermore, the emergence of neoliberal ideals from the data allowed the study to contribute to Gotell and Larcombe's work that explored ideal victimization standards and victim-blaming within neoliberal society.

7.3.1. The need for better sex education

Overall, the main recommendation from my data is the need for better sexual education. To be exact, I advocate for a more widespread acceptance of BDSM subculture, consent standards and negotiation parameters within mainstream sexual education within the school system and the community. Bennett (2020) notes that the lack of understanding of BDSM activity may lead to police, lawyers and especially jury members not being able to identify evidentiary features of genuine BDSM compared to abusive BDSM. Additionally, a lack of education on the position that the submissive holds within the relationship to ultimately have complete control over the scene may lead to women being unable to distinguish whether they are in a healthy relationship or are a victim of non-consensual abuse. Better education on what constitutes a healthy relationship within BDSM can thus help everyday individuals navigate sexual relationships while diminishing prejudice in the many institutions outlined within the literature review. Furthermore, better education on BDSM consent and power relationships can help foster an environment to give a voice to BDSM participants who are abused and currently feel silenced by stigma and discrimination.

In addition, I would argue that the neoliberal context in which the criminal justice system is currently operating demonstrates the importance of BDSM consent strategies for those that do not practice BDSM. This is because neoliberal sexual assault laws and ideal victimization

standards are presently emphasizing the need for individual risk management, and we have seen that BDSM consent standards may be utilized as risk-management techniques. While abolition of victim blaming and ideal victimization standards are the ideal solution, risk-management education through BDSM consent education may be a start in helping to minimize victim blaming that occurs in neoliberal judicial discourses.

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R. v S.R.W. [2015] ONSC 8130

R. v. A.(J.), [2008] ONCJ 195

R. v. A.P., [2013] ONCA 344

R. v. AP, [2011] ONSC 2716

R. v. Ashlee, [2006] ABCA 244

R. v. BDN, [2015] ONSC 6613

R. v. Esau, [1997] 2 S.C.R. 777

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R. v. Welch., [1995] ONCA 200

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Appendix A: Unique cases found in each search

Table 1

Cases added to the dataset through Quicklaw search 'BDSM' 'Consent.'

Case citation	Court Level
R v A.L. 2020 ONSC 7334*	Ontario Superior Court of Justice
R v Boyle 2019 ONCJ 240*	Ontario Court of Justice
R v Gairdner 2017 BCCA 425	British Columbia Court of Appeal
R v Hueser 2018 SKQB 85*	Saskatchewan Court of Queen's Bench
R v KG 2018 ONCJ 537	Ontario Court of Justice
R v MacMillan 2019 ONSC 6018 *	Ontario Superior Court of Justice
R v Mardsen 2020 ONSC 3091*	Ontario Superior Court of Justice
R v PO 2021 ABQB 318	Alberta Court of Queen's Bench
R v S.M. 2021 ONCJ 4329*	Ontario Court of Justice
R v Sweet 2018 BCSC 1696	British Columbia Supreme Court

Table 2

Cases added to the dataset through CANLII search 'BDSM' 'Consent.'

Case Citation	Court Level
R. v. BTH 2018 SKQB 85*	Saskatchewan Court Of Queen's Bench
R. v. Gubbels 2022 ONSC 18	Ontario Superior Court Of Justice
R. v. Hunter, 2019 NSSC 369	Supreme Court Of Nova Scotia
R v KDH, 2012 ABQB 318	Court Of Queens Bench Alberta

R v KDH, 2012, ABQB 816	Court Of Queens Bench Alberta
R. v. X.X. 2018 BCPC 393*	Provincial Court Of British Columbia

Table 3

Cases added to the dataset through Canlii search 'kinky' 'consent.'

Case Citation	Court level
R. v. A.(J.), 2008 ONCJ 195	Ontario Court Of Justice
R. v. Gendreau, 2011 ABCA 256*	Court Of Appeal Alberta
R. v. Glassford, 1988 ONCA 7094*	Ontario Court Of Appeal
R v Harnett, 2022 ABQB 213	Court Of Queen's Bench Alberta
R. v. J.A., 2010 ONCA 226	Court Of Appeal Ontario
R. v. J.A., 2011 SCC 28	Supreme Court Of Canada
R. v. Preuschoff, 2011 BCPC 352	Provincial Court Of BC
R. v. R.W., 2020 ONCJ 148	Ontario Court Of Justice
R v SR, 2014 ONSC 1795*	Ontario Court Of Justice
R. v S.R.W., 2015 ONSC 8130	Ontario Superior Court Of Justice
R. v. Thompson, 2013 ONSC 6472	Ontario Superior Court Of Justice

Table 4

Cases added to the dataset through CANLII search 'Bondage' and 'Consent' Sexual Assault.'

Case Citation	Court Level
R. v. AP, 2011 ONSC 2716	Ontario Superior Court of Justice
R. v. A.P., 2013 ONCA 344	Ontario Court of Appeal

R. v. B.B., 2009 ONSC 9404*	Ontario Superior Court of Justice
R. v. BDN, 2015 ONSC 6613	Ontario Superior Court of Justice
R. v. D.A.B., 2021 MBQB 6*	Manitoba Court of Queen's Bench
R. v. E.M., 2021 PESC 30*	Prince Edward Island Superior Court
R. v. Ian, 2011 NUCJ 9*	Nunavut Court of Justice
R. v. J.F., 2019 ONSC 2680*	Ontario Superior Court
R. v. Mitchell, 2006 ONCA 29632*	Ontario Court of Appeal
Pappajohn v. The Queen, 1980 13 (SCC) *	Supreme Court of Canada
R. v. R.D.W., 2006 BCPC 300 *	British Columbia Provincial Court: Youth Court
R. v. Robinson, 2001 ONCA 24059	Ontario Court of Appeal
R. v. Scott, 1998 BCCA15002*	British Columbia Court of Appeal
R. v. T.J.N., 2018 ONSC 622*	Ontario Superior Court

Table 5

Cases added to the dataset through cross-referencing references in coding cycle

Case Citation	Court Level
R. v. Welch., 1995 ONCA 200	Ontario Court of Appeal
R. v. Ashlee., 2006 ABCA 244	Alberta Court of Appeal
R. v. Zhao., 2013 ONCA 293	Ontario Court of Appeal

***Signifies that the case met exclusion criteria:**

- **Solely Child pornography charges**
- **Offences only against a child**
- **Non-sex-related mention of Consent and BDSM-language**
- **BDSM is not mentioned within the case material**
- **Mentions BDSM less than three times**
- **Case is an application under Section 276 of the Criminal Code**
- **Case is a sentencing decision**

Appendix B: Details of included cases

AJ

Case citation: R v A. (J.), (2008) ONCJ 195

Year: 2008

Court: Ontario Court of Justice

Paragraph length: 45

Judge name: Nicholas

Type of Case: Judgement of guilt

Charges: (1) rendering her unconscious, or incapable of resisting with the intent of enabling him to commit the indictable offence of sexual assault contrary to s. 246 (a); (2) committing a sexual assault contrary to s. 271(1); (3) in committing an assault, wound, maim, disfigure or endanger her life per s.268.2; (4) breaching a probation order by failing to keep the peace.

Relationship between parties: Married

BDSM acts: Erotic Asphixiation

Finding: Guilty of sexual assault and breaching probation order; not guilty of rendering unconscious and assault

Note: this case becomes *JA* at higher court level

Brief Summary: One evening, in the course of sexual relations, J.A. placed his hands around the throat of his long-term partner K.D. and choked her until she was unconscious. At trial, K.D. estimated that she was unconscious for “less than three minutes”. She testified that she consented to J.A. choking her, and understood that she might lose consciousness. She stated that she and J.A. had experimented with erotic asphyxiation, and that she had lost consciousness before. When K.D. regained consciousness, her hands were tied behind her back, and J.A. was inserting a dildo into her anus. K.D. gave conflicting testimony about whether this was the first time J.A. had inserted a dildo into her anus. J.A. removed the dildo ten seconds after she regained consciousness. The two then had vaginal intercourse. When they finished, J.A. cut K.D.’s hands loose. K.D. made a complaint to the police two months later and stated that while she consented to the choking, she had not consented to the sexual activity that had occurred. She later recanted her allegation, claiming that she made the complaint because J.A. threatened to seek sole custody of their young son. The trial judge convicted J.A. of sexual assault.

AP

Case citation: R v AP (2011) ONSC 2716

Year: 2011

Court: Ontario Superior Court of Justice

Judge name: Quigley

Type of Case: Judgment of Guilt

Charges: Sexual Assault

Relationship between parties: Married at the time of offence

BDSM acts: Dominant/submissive role play

Finding: guilty of sexual assault

Brief Summary: The appellant was convicted of sexually assaulting his wife after a trial in the Superior Court of Justice. The appellant and the complainant agreed that they had engaged in Dominant/submissive sexual role-playing over the course of their relationship; the appellant candidly admitted that on the night in question, he and his wife had sex; and he also agreed that the complainant wife had said 'no' to the appellant's request for sexual intercourse that night. The appellant stated, however, that the complainant's verbal refusal to consent to sexual intercourse formed part and parcel of their standard sexual role-playing, and argued that either she actually consented to sex or that he had an honest but mistaken belief in her consent. In contrast, the complainant testified that her husband perpetrated a violent sexual assault upon her, in full knowledge of her unwillingness to participate (AP, 2011).

AP (appeal)

Case citation: R v AP. (2013) ONCA 344

Year: 2013

Court: Ontario Court of Appeal

Judge name: Rouleau

Type of Case: Decision on Appeal

Charges: Sexual assault

Relationship between parties: Married at the time of the offence

BDSM acts: Dominant/submissive role play

Finding: New trial ordered

Brief Summary: The appellant was convicted of sexually assaulting his wife after a trial in the Superior Court of Justice. The appellant and the complainant agreed that they had engaged in Dominant/submissive sexual role-playing over the course of their relationship; the appellant candidly admitted that on the night in question, he and his wife had sex; and he also agreed that the complainant wife had said 'no' to the appellant's request for sexual intercourse that night. The appellant stated, however, that the complainant's verbal refusal to consent to sexual intercourse formed part and parcel of their standard sexual role playing, and argued that either she actually consented to sex or that he had an honest but mistaken belief in her consent. In contrast, the complainant testified that her husband perpetrated a violent sexual assault upon her, in full knowledge of her unwillingness to participate. The appellant appeals his conviction on the basis that the trial judge misapplied the principles outlined by the Supreme Court of Canada in R. v. W.(D.), and erred by placing the burden of proof on the appellant and in his analysis of whether he was left with a reasonable doubt as to the appellant's guilt. The judge allowed the appeal and order a new trial. (R v AP,2013, para 1-2)

Ashlee

Case citation: R v Ashlee (2006) ABCA 244

Year: 2008

Court: Alberta Court of Appeal

Judge name: Paperny speaking for Conrad, Paperny JJ.A. and Lee J

Type of Case: Decision of appeal

Charges: Sexual Assault

Relationship between parties: Strangers

BDSM acts: Sex while unconscious

Finding: Appeal Dismissed

Brief Summary: Appeal by the Crown from Ashlee's successful appeal from conviction for sexual assault. A driver observed Ashlee and another man lying on a sidewalk with a woman between them. Both men appeared to be fondling the woman. The driver noted that the woman appeared to unconscious and the men were fondling the woman under her brassiere. The trial judge accepted the driver's and police officers' evidence that the woman was unconscious when

they observed Ashlee and the other man touching her breasts. Ashlee argued that the Crown failed to meet its burden because there was no evidence that the woman had not provided consent prior to her unconsciousness. The Crown argued that even if such consent had existed, such consent was vitiated by unconsciousness. The trial judge convicted Ashlee and his co-accused. The summary conviction appeal judge overturned the verdict on the ground that there was nothing to suggest that the woman did not consent to the activity when she was still conscious and capable of giving her consent (R v Ashlee, 2006, p. 1)

BDN

Case citation: R v BDN (2015) ONSC 6613

Year: 2015

Court: Ontario Superior Court of Justice

Judge name: Hockland

Type of Case: Decision of guilt

Charges: five count indictment with sexual assault, unlawful confinement, assault with several weapons (a belt, scissors, and an electric razor) and threatening bodily harm

Relationship between parties: Former Spouses

BDSM acts: Bondage (rope tying), Striking with several objects (belt, scissors, razor), Shaving public hair

Finding: Guilty

Brief Summary: The accused is charged on a five-count indictment with sexual assault, unlawful confinement, assault with several weapons (a belt, scissors, and an electric razor) and threatening bodily harm. These charges allege acts perpetrated against his former spouse, in their home, on the evening of December 26, 2013, during a marital fight. The threatening charge was dismissed for lack of evidence, with the concurrence of the Crown. (BDN, 2015, para 1)

Gairdner

Case citation: R v Gairdner [2017] B.C.J. No. 2499 | 2017 BCCA 425

Year: 2017

Court: British Columbia Court of Appeal

Judge name: Savage speaking for P.A. Kirkpatrick, J.E.D. Savage and G. Dickson JJ.A.

Type of Case: Appeal Decision

Charges: sexual assault causing bodily harm and choking to overcome resistance

Relationship between parties: Strangers

BDSM acts: Choking, role play

Finding: Appeal Dismissed

Brief Summary: Appeal by the accused from conviction for sexual assault causing bodily harm and choking to overcome resistance. The appellant argued the trial judge erred by withdrawing from the jury the defence of honest but mistaken belief in consent on the basis that there was no air of reality to the defence. The events, some of which were recorded on camera by the appellant, showed the complainant imploring the appellant to stop. He argued that this was all part of bondage, discipline, sado-masochism (BDSM) role-play, where everything was consensual, no matter what the other party said or did. The appellant and the complainant had engaged in two to three hours of consensual sexual activity prior to the incident recorded on video, which included kissing, oral sex, mild biting, and spanking. He did not have a specific discussion with the complainant about BDSM activity and there were no ground rules or safe words discussed. After viewing the video, the appellant agreed that the complainant was clearly not consenting. He argued, however, that evidence indicating he and the complainant engaged in what he understood was BDSM type role-play caused him to believe the complainant was consenting to sexual activity despite her objections. The trial judge found that once the complainant expressed an unwillingness to continue, the only available conclusion was that the appellant was either reckless, wilfully blind or failed to take reasonable steps to determine whether her earlier consent was continuing. (R v Gardiner, 2017 case summary)

Gubbels

Case citation: R v Gubbels (2022) ONSC 18

Year: 2022

Court: Ontario Superior Court of Justice

Judge name: Mitchell

Type of Case: Judgment of guilt

Charges: Sexual Assault with a weapon (knife), Assault with a weapon x 2 (knife), Assault with a weapon (hose)

Relationship between parties: Collared (BDSM equivalent to marriage)
BDSM acts: scarification, whipping
Finding: Not guilty of sexual assault and assault with knives, Guilty of assault with a hose.
Brief Summary: The Crown alleges that during the course of the complainant's and the defendant's relationship and without the complainant's consent:
(a) on Easter weekend in April 2014, the defendant used a knife to cut a criss-cross pattern on her back and to cut the words "John's slut" on the complainant's abdomen and the word "bitch" on her chest. Thereafter, he engaged in vaginal intercourse with the complainant and forced the complainant to perform oral sex on him until he ejaculated;
(b) furthermore, sometime after Easter 2014 in two separate incidents, using a knife, the defendant cut the complainant's thighs; and (c) last, in three separate incidents – two in 2013 and the third occurring sometime after the Easter incident - the defendant struck the complainant on her thighs with a piece of garden hose (Gubbels, 2022, para 7).

Harnett

Case citation: R v Harnett (2022) ABQB 213
Year: 2022
Court: Alberta Court of Queens Bench
Judge name: Renke
Type of Case: Judgement of Guilt
Charges: Sexual Assault
Relationship between parties: Strangers
BDSM acts: Blindfolding, anal sex, spitting
Finding: Not guilty
Brief Summary:
The parties encountered one another after last call at Blues on Whyte, a bar and music venue on Whyte Avenue in Edmonton. They talked over the course of about half an hour. The Complainant took a cab or uber with Mr. Harnett and Chris to Mr. Harnett's residence. At Mr. Harnett's residence, Mr. Harnett, Chris, and the Complainant had some drinks and each did a line of cocaine. After one of Mr. Harnett's housemates complained about noise, they went to the garage for a while. Mr. Harnett, Chris, and the Complainant then took a cab or uber to the

Complainant's residence. At the Complainant's residence, each did a line of cocaine. Mr. Harnett and Chris had some drinks. Chris left.

Mr. Harnett and the Complainant "hung out" for a while. The Complainant then went upstairs and had a shower. She told Mr. Harnett that he was not invited to join her. Mr. Harnett went to the main floor. The Complainant and Mr. Harnett went into her bedroom. They engaged in sexual activity. The sexual activity was initially consensual. Common to both accounts was that after some sexual interactions, they fell asleep. Upon awaking, further sexual contact occurred. The testimonies of the Complainant and Mr. Harnett differed on whether the sexual activity following the initial contact was consensual. The Complainant testified to conduct that would constitute sexual assault. Mr. Harnett testified that the contact was consensual or that he honestly believed the contact was consensual (Harnett, 2022, para 4-16).

Hunter

Case citation: R v Hunter (2019) NSSC 369

Year: 2019

Court: Supreme Court of Nova Scotia

Judge name: Duncan

Type of Case: Judgement of Guilt

Charges: Sexual Assault

Relationship between parties: Strangers

BDSM acts: Slapping breasts, deep throating

Finding: Not guilty

Brief Summary: A.G.'s complaint is that on the night of November 15, 2017, she engaged in certain consensual sexual activity with the accused and S.D., but that she did not consent to all of the acts of a sexual nature that Mr. Hunter engaged her in. In particular, A.G. states that she was forced to continue to have deep-throat oral sex and was slapped unconsensually (Hunter, 2019, para 2).

Note: There was a third party involved in this sexual incident, who testified at trial

JA

Case citation: R v JA (2010) ONCA 226

Year: 2010

Court: Ontario Court of Appeal

Judge name: Simmons speaking for Simmons, Juriansz

Laforme as dissenting

Type of Case: Appeal Decision

Charges: Sexual Assault

Relationship between parties: Married

BDSM acts: Erotic Asphyxiation

Finding: Appeal allowed

Brief Summary: The accused and the complainant were intimate partners. The complainant testified that she consented to the accused choking her into unconsciousness, tying her up and penetrating her anally with a dildo while she remained unconscious. She stated that she went to the police and complained about the incident about six weeks later, after a particularly heated argument with the accused. The accused was acquitted of aggravated assault and of attempting to render the complainant unconscious to enable him to sexually assault her, but convicted of sexual assault. In relation to the aggravated assault charge, the trial judge found that the complainant's unconsciousness was transient, and therefore rejected the Crown's submission that choking the complainant into unconsciousness constituted bodily harm. In convicting the accused of sexual assault, she found that the complainant did not consent to being penetrated anally with a dildo. In addition, she held that the complainant could not legally consent in advance to sexual activity while unconscious. The accused appealed (JA, 2010, p. 1).

JA (SCC)

Case citation: R v JA (2011) SCC 28

Year: 2011

Court: Supreme Court of Canada

Judge name: McLachlin speaking for McLachlin C.J. and Deschamps, Abella, Charron, Rothstein and Cromwell JJ. (Majority)

Fish speaking for Binnie, LeBel and Fish JJ (Dissent)

Type of Case: Appeal Decision

Charges: Sexual Assault

Relationship between parties: Married

BDSM acts: Erotic Asphyxiation

Finding: Conviction entered

Brief Summary: The accused and the complainant were intimate partners. The complainant testified that she consented to the accused choking her into unconsciousness, tying her up and penetrating her anally with a dildo while she remained unconscious. She stated that she went to the police and complained about the incident about six weeks later, after a particularly heated argument with the accused. The accused was acquitted of aggravated assault and of attempting to render the complainant unconscious to enable him to sexually assault her, but convicted of sexual assault. In relation to the aggravated assault charge, the trial judge found that the complainant's unconsciousness was transient, and therefore rejected the Crown's submission that choking the complainant into unconsciousness constituted bodily harm. In convicting the accused of sexual assault, she found that the complainant did not consent to being penetrated anally with a dildo. In addition, she held that the complainant could not legally consent in advance to sexual activity while unconscious. The accused appealed and the appeal was held (JA, 2011, p. 1).

KDH

Case citation: R v KDH (2012) ABQB 318

Year: 2012

Court: Alberta Court of Queens Bench

Judge name: Manderschield

Type of Case: Judgement of Guilt

Charges: Sexual Asssault

Relationship between parties: Step Father and Step Daughter (Mom was also charged with incest related sexual assaults)

BDSM acts: Fetish Costumes, Free use, demand of threesomes with brothers and mother.

Finding: Guilty

Brief Summary: TM, was 19 at the time of the alleged sexual assault and therefore was potentially a legal sexual partner. There is no question that KDH and TM engaged in sexual activities. TM, KDH, and RA (KDH's wife and TM's mother) testified that was the case. The Agreed Statement of Facts admits:

1. that KH, the Accused's biological son, observed KDH and TM engage in sex as directed by KDH, though KDH was unaware that those activities were observed, and
2. that MA heard KDH and TM engage in sex.

The chief question, therefore, is whether the sexual interactions between KDH and TM were or were not consensual. KDH says they were. TM and RA report at least one sexual assault (KDH, 2012, para 6-7).

Note: This case also included 39 other charges ranging from bestiality, incest and child pornography

KG

Case citation: R v KG (2018) OJ No. 4218 | ONCJ 537

Year: 2018

Court: Ontario Court of Justice

Judge name: Brown

Type of Case: Judgement of Guilt

Charges: Utter Threats x 4, Assault, Assault with a Weapon x 3, Assault Cause Bodily Harm, Forcible Confinement, Sexual Assault with a Weapon, Mischief, Possession of a Weapon for a Dangerous Purpose, Make Child Pornography and Voyeurism. He is also charged with Trafficking Cocaine, Production of Marihuana, Possession of Marihuana for the purpose of Trafficking and Possession of Cocaine

Relationship between parties: In a relationship

BDSM acts: Slashing, whipping, bondage (tied to table), canning (bamboo cane), punishment play

Finding: Not guilty on any of the sex crimes (guilty for possession of cocaine)

Brief Summary: S.G. provided police with three statements. In these statements, S.G. alleged domestic abuse by Mr. G.S.G., also alleged in her statements that Mr. G. took a video of herself and a third party engaged in sexual activity, without their consent (KG, 2018, para 6).

Mitchell

Case citation: R v Mitchell (2006) ONCA 29632

Year: 2006

Court: Ontario Court of Appeal

Judge name: Blair speaking for Gillese, Blair And Laforme

Type of Case: Decision of Appeal

Charges: Sexual assault with a weapon

Relationship between parties: Friendship

BDSM acts: Sex while sleeping

Finding: Appeal dismissed

Brief Summary: Mr. Mitchell appeals from his conviction, by a jury presided over by Justice Jennings, for sexual assault with a weapon. The conviction arose out of a series of events that took place in the appellant's apartment on the night of February 5-6, 2000, after he and the complainant had been drinking, and which involved what the appellant says was the consensual enactment of a bondage fantasy. The Crown says it was a non-consensual sexual assault (Mitchell, 2006, para 1).

PO

Case citation: R v PO (2021) ABQB 318

Year: 2021

Court: Alberta Court of Queen's Bench

Judge name: Mandzuik

Type of Case: Judgement of guilt

Charges: sex trade offences (human trafficking, obtaining material benefit, procuring and advertising sexual services); sexual assault and sexual assault with a weapon; other assaults including aggravated assault; threats with a firearm; breach of recognizance; breach of court orders; possession of a restricted firearm without a license; and obstruction of justice.

Relationship between parties: In a relationship (he was also her "pimp")

BDSM acts: Gun play

Finding: Guilty

Brief Summary: The case involved the Accused threatening and striking AB with a handgun, forcing her to perform fellatio and analingus on him. This incident is captured in videos seized from the Accused's cellphone. Another charged incident involves the Accused beating AB with a belt and then sexually assaulting her. There are also charges arising from the unlawful possession and use of a firearm (PO, 2021, para 6).

Preuschoff

Case citation: R v Preuschoff (2011) BCPC 352

Year: 2011

Court: Provincial Court of British Columba

Judge name: Gardner

Type of Case: Judgment of guilt

Charges: Sexual assault and unlawful confinement

Relationship between parties: Sex worker and buyer of sex work

BDSM acts: Bondage (tying up); unconscious sex

Finding: Guilty

Brief Summary: Just before 9 a.m. on February 10, the complainant was working on the streets of Whalley, when she was approached by the Accused. There was a conversation regarding money for sex. They agreed on $100 for oral sex and intercourse. She then accompanied him back to his nearby apartment. She then performed oral sex upon him in the living room and then went to the bedroom where they had consensual intercourse. She was adamant, however, that she never agreed to being tied up. After they finished, the Complainant felt extremely tired and he offered her a blanket.

When she awoke, some minutes later, the Accused was on top of her and "he was inside of me." Although no clarification was really required, she added that his penis was inside her vagina. She discovered that her hands had been tied to all four corner posts of the bed with yellow rope and black electrical tape. The Complainant told him to get off of her but he refused. She said she never consented to being tied up. She then started yelling "Fire" because she didn't think anyone would respond if she yelled rape. Unfortunately, there was no response; she added that her screaming seemed to excite him (Preuschoff, 2011, para 4-9).

Robinson

Case citation: R v Robinson (2001) 24059

Year: 2001

Court: Ontario Court of Appeal

Judge name: Rosenberg speaking for Rosenberg, Moldaver, Goudge

Type of Case: Decision of Appeal

Charges: assault, unlawful confinement, uttering death threats, sexual assault, sexual assault with a weapon and sexual assault causing bodily harm.

Relationship between parties: In a relationship

BDSM acts: Bondage (Tying to bed), anal sex, urination, defecation

Finding: Appeal allowed for unrelated jury issue

Brief Summary: The accused was charged with assault, unlawful confinement, uttering death threats, sexual assault, sexual assault with a weapon and sexual assault causing bodily harm. Although there were multiple counts of several of those offences, the indictment did not provide particulars of any of the counts. However, in his opening and closing addresses, Crown counsel linked each count in the indictment with a particular allegation by the complainant. The accused was convicted of two counts of assault, two counts of unlawful confinement, assault causing bodily harm and assault with a weapon. He was acquitted on all of the other counts. The accused appealed (Robinson, 2001, p. 2).

RW

Case citation: R. v. R.W. (2020) ONCJ 148

Year: 2020

Court: Ontario Court of Justice

Judge name: Silverstein

Type of Case: Decision of Guilt

Charges: sexual assault, assault causing bodily harm

Relationship between parties: Strangers

BDSM acts: Testicle torture, nipple play

Finding: Not Guilty

Brief Summary: The two men agreed to meet and have sex through a dating app. E.V. picked up R.W. near his home and they drove a short distance and parked. They put down the back seat of E.V.'s hatchback, climbed in the back and took their clothes off. According to E.V., their sexual encounter started smoothly with consensual kissing and touching, but then, without E.V.'s consent, R.W. took control of him and became aggressive and sexually violent, causing him injury to his face, neck, chest and genitals (RW, 2020, para 3-4).

Note: This case was between two homosexual men; the only case to display non-heterosexual relationships

SRW

Case citation: R v SRW (2015) ONSC 8130

Year: 2015

Court: Ontario Superior Court of Justice

Judge name: Abrams

Type of Case: Judgment of Guilt

Charges: Assault, Sexual Assault, Sexual Assault with a weapon, Assault with a weapon,

Relationship between parties: In a relationship

BDSM acts: Anal sex with toy, fisting, hitting with dowel, deep throat oral sex

Finding: Guilty

Brief Summary: In conjunction with escalating emotional and physical violence in the relationship, the accused became more sexually assertive over Ms. K.L.Q.. He wanted her to experiment with "different sexual things". He tied her up with the rope from a window blind and hit her with a wooden dowel that he also used to penetrate her vagina. As Ms. K.L.Q. testified: "The first time was fine [but] I didn't want it again". He did this to her maybe "four or five times" in the bedroom at 21 W[…] Street. Again, he would tie her up with a rope and use a wooden dowel, which she described as being as big around as "your baby finger", to "smack" her bum, chest, arms and the backs of her legs. He also penetrated her vagina with the wooden dowel on more than one occasion. When she protested by telling him that she "didn't want him to do it", any of it, he would laugh and say that she was fine, or he would tell her to "shut up". (SRW, 2015, para 12)

Sweet

Case citation: R v Sweet (2018) BCSC 1696

Year: 2018

Court: British Columbia Supreme Court

Judge name: Marchand

Type of Case: Judgement of Guilt

Charges: sexually assaulted the complainant causing her bodily harm contrary to s. 272(2)(b) of the Code; assaulted the complainant contrary to s. 266 of the Code; assaulted the complainant with a weapon contrary to s. 267(a) of the Code; and unlawfully confined the complainant contrary to s. 279(2) of the Code.

Relationship between parties: In a relationship

BDSM acts: fisting, biting, slapping.

Finding: Guilty

Brief Summary: At the end of August 2017, the complainant left British Columbia on a two-week holiday. Mr. Sweet picked the complainant up at the Kamloops Airport just prior to midnight on September 9, 2017 and took her back to his place in Logan Lake. Mr. Sweet saw a "gallery" of photos of an ex-boyfriend on the complainant's phone. A series of events then occurred which left the complainant battered, bitten, bruised and bewildered. Mr. Sweet says these events were a consensual part of the couple's intimate relationship, which involved "BDSM" activities and fantasy role-playing. Mr. Sweet says he often took on a Dominant role and the complainant a submissive one. Mr. Sweet says the couple had discussed ground rules and safe words and that there was at the very least an understanding that when the complainant said "no" she really meant "yes"(Sweet, 2018, Para 6-8).

Thompson

Case citation: R v Thompson (2013) ONSC 6472

Year: 2013

Court: Ontario Superior Court of Justice

Judge name: Campbell

Type of Case: Judgement of guilt

Charges: Sexual Assault

Relationship between parties: Strangers (met and were talking on dating app)

BDSM acts: Sex while unconscious (sleeping)

Finding: Not Guilty

Brief Summary: The Crown contends that, at one point during her overnight stay with the accused, the complainant woke up to find the accused behind her in bed having sexual intercourse with her. He was not wearing a condom. The complainant told him to "stop," but it was only after she repeated this demand twice more that the accused finally ceased. The accused admits that he had sexual intercourse with the complainant, but he contends that the complainant was awake and conscious at the time, and fully consented to the intercourse, just as she did to all of the sexual activity that took place between them that night (Thompson, 2013, para 2-3).

Welch

Case citation: R v Welch (1995) ONCA 282

Year: 1995

Court: Ontario Court of Appeal

Judge name: Griffiths speaking for Griffiths, Galligan and Labrosse

Type of Case: Decision of appeal

Charges: Sexual Assault causing bodily harm and forcible confinement

Relationship between parties: Strangers

BDSM acts: Bondage (tied her to his bed), whipping (with belt), anal sex

Finding: Appeal dismissed

Brief Summary: The accused was charged with sexual assault causing bodily harm and forcible confinement. The complainant testified that the accused tied her to his bed, beat her with a belt on her breasts and buttocks, penetrated her with his penis, inserted his finger into her vagina and inserted an object into her rectum. The complainant suffered bruising on one of her breasts, legs, arm, buttocks and abdomen. She bled from her rectum for three or four days. The accused admitted much of this conduct, but asserted that he and the complainant were engaged in consensual sado-masochistic sex (Welch, 1995, p.1).

Zhao

Case citation: R v Zhao (2013) ONCA 293

Year: 2013

Court: Ontario Court of Appeal

Judge name: Tulloch speaking for Laskin, Juriansz and Tulloch

Type of Case: Decision of Appeal

Charges: sexual assault causing bodily harm

Relationship between parties: Strangers

BDSM acts: Strangulation

Finding: Appeal allowed

Brief Summary: Appeal by the accused from conviction for sexual assault causing bodily harm. The complainant, while intoxicated, agreed to accompany the appellant, a stranger, to his apartment. The appellant left the room and returned naked and with a condom in his hand. The appellant then pinned her down and she told him to stop. When she started screaming, the appellant began to strangle her and tried to force his groin into hers. The complainant was then able to flee. As a result of the attack, the complainant suffered bruising on various parts of her body. The trial judge instructed the jury that to convict the appellant on the charge of sexual assault causing bodily harm, they must first find the appellant both intended to cause bodily harm to the complainant and that bodily harm resulted, thus vitiating the defence of consent to the bodily harm aspect of the charge. The appellant argued the trial judge improperly instructed the jury on the law with respect to the role of consent in sexual assault causing bodily harm (Zhao, 2013, p. 1).

Appendix C: Glossary

All Definitions below were found using the "Kinkly.com" BDSM dictionary. Available online through kinkly.com/dictionary

Aftercare	Aftercare is a broad term for how you and your partner support each other and check-in after you've had sex.
Anilingus	Anilingus (rimming) is the kissing, licking, and sucking of the anus by a sexual partner.
BDSM	B/D (Bondage and Discipline), D/s (Dominance and submission), and S/M (Sadism and Masochism
BDSM Scenes	A BSDM scene is a play session involving consensual power exchange.
Bottom	The term bottom is often used to describe an individual who plays a subservient or receiving role for kinky activities in BDSM
Caning	Caning is a form of BDSM impact play wherein one person strikes another's body with a cane to cause pleasurable sensations of pain.
Collared	Collaring represents the act of submitting oneself to the Dominant. Often regarded as a powerful symbol in the world of BDSM, a collared individual publicly represents the D/s relationship between the two parties. Some people choose to have a formal collaring ceremony that is not unlike a traditional marriage ceremony.
Cuckolding	a cuckold is a man who takes pleasure from his partner having sex with other people.
D/S	Accronym for Dominant/submissive that also reflects the power balance
Degradation	Degradation, or degradation kink, refers to the consensual sexual demeaning and humiliation of one partner by another.
Dissent	A dissent refers to at least one party's disagreement with the majority opinion
Dominant	A Dominant is a sexual participant who takes on a leadership role and consensually controls a submissive participant.
Dungeons	A BDSM dungeon, or sex dungeon, is a room or space designated specifically for BDSM play or BDSM scenes.
Edgeplay	Edgeplay, also spelled edge play, refers to BDSM activities that are considered risky and that are consensually undertaken for the purposes of arousal, stimulation and pleasure
Erotic Asphyxiation	This is the practice of intentionally restricting the flow of oxygen to the brain for sexual gratification. There are several ways to accomplish the oxygen restriction. They include hanging, using a plastic bag for suffocation, self-strangulation, chest compression, and specific gases or solvents.

Erotic Humiliation	Erotic humiliation refers to consensual activity often performed in a Dominant/submissive context where the Dominant physically or psychologically humiliates the submissive for the purposes of sexual pleasure and/or arousal.
Fetish	A fetish refers to an intense sexual fixation on a generally nonsensual object, body part, practice, or situation.
Fetlife	FetLife is a social networking website that serves people interested in BDSM, fetishism, and kink.
Fisting	Fisting is a sexual technique in which the penetrating partner inserts their whole hand, or fist, into their partner's vagina or anus
Flogging	This is the act of hitting a partner with a flog. Dominant players will often flog their submissive partners with toys like whips, cat o' nine tails, and floggers.
Gun Play	Gunplay is the act of using either a loaded, or unloaded firearm during BDSM and sexual play. It can be used as a penetrative object or a prop
Hard Limits	A hard limit is a limit that is set before BDSM play that cannot be changed. A hard limit is something that either partner cannot or will not participate in whether for physical, emotional, or other reasons.
Japanese Rope Bondage	Also known as shibari, japanese rope bondage that originated in Japan has been incorporated into BDSM culture. It is also considered by some as an art form
Kink-Friendly	Kink friendly simply means that the person, group, or entity is friendly to those who enjoy kink.
Knife Play	Knife play is a BDSM activity that involves blades (knives, swords, or daggers, for example) as a means of producing physical and mental stimulation.
Masochist	A masochist is an individual who takes pleasure in the experience of physical or emotional pain to themselves.
Paraphilias	Paraphilia is a sexual disorder where an individual's sexual arousal is dependent upon atypical and extreme sexual fantasies and behavior. Paraphilia differs from fetishism in that the object or source of sexual arousal hinges on something that is either dangerous to the paraphiliac's health or extremely socially unacceptable.
Religious Mortification	The original meaning of mortification was religious; in Christianity the meaning is "putting your sin to death". In Christian practice, this has varied from denying oneself pleasurable things, like certain foods, to inflicting physical pain on oneself.
Role Play	Role play is the act of changing one's behavior, and possible clothing, to assume the role of a different person. Role playing during sex is used to fulfill fantasies.

Sadist	Sadism describes the experience of taking pleasure in inflicting pain, humiliation, degradation, cruelty, or watching others inflict these behaviors on someone else. People who take pleasure from these acts are known as sadists. Often this pleasure is sexual in nature although this isn't always the case
Sado-Maschohism	Sadomasochism (SM) refers to the combination of sadism (inflicting pain) and masochism (receiving pain) to derive pleasure and sexual gratification. It can include the infliction of, or submitting to, physical or emotional pain.
Scarification	Scarification is a form of body modification in which individuals scar or brand themselves by scratching, etching, cutting, or burning designs into their skin.
Sexual Scripts	Sexual scripts are blueprints and guidelines for what we define as our role in sexual expression, sexual orientation, sexual behaviors, sexual desires, and the sexual component of our self-definition
Sleep Sex (Somnophilia)	People who engage in somnophillia like to have sex (or do sexual things) while their partner is asleep. Other enthusiasts of the kink like to be on the receiving end, and allow their partner to do things to them while they're unconscious, either with the aim of waking up to discover what's happening, or to simply be told about it later.
Soft Limits	A soft limit is a negotiable limit that is set before engaging in BDSM play. A soft limit is something that either the Dominant or submissive may not be comfortable with at the time of negotiation, but may participate in after regular play with the same person, only with a certain person, or only in a certain play situation. It differs from a hard limit because it's flexible.
Submissive	A submissive, frequently known as a sub, is a sexual participant who willingly gives up some or all of their control to a Dominant partner.
Switch/Switcher	A switch is a person involved in BDSM play who may play either a Dominant or submissive, rather than committing to a single role. A switch can lead a submissive partner through a BDSM scene or take a more submissive role and receive pleasure, pain or both from a Dominant partner
Testicle Torture (Ball Busting)	Ball busting can consist of actions such as squeezing, tight binding and striking of the testicles, using the hands, feet, or torture aids such as paddles, whips, floggers, humblers and other manmade devices.
Top	In the context of BDSM, a top is the term given to the individual who assumes the controlling or Dominant role over a submissive participant or bottom.
Whipping	A whip is a long, thin leather sex toy that is often used to inflict pain/pleasure upon a sex partner.