

Decriminalizing Kink: A Proposal For Explicit Legalization Of Sexually Motivated Consensual Harm

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Sarah Stein

INTRODUCTION: THE GERMAN CANNIBALISM CASE

Bernd-Jurgen Brandes wanted to die. More specifically, Brandes wanted to be killed, cooked, and eaten by another person. Luckily (or unluckily) for him, he met his match in Armin Meiwes, a man with compatible interests who was searching for a willing and eager victim on the Internet. After slaughtering and eating Brandes in 2001, Meiwes was apprehended by German authorities and tried for murder. At Meiwes' trial, both the defense and the prosecution more or less agreed that Meiwes killed and ate Brandes, and that Brandes fully and enthusiastically consented to the killing and cannibalism. The only real dispute between the parties appeared to be the purpose of the killing: was Meiwes a sexually motivated predator, or, was he a reluctant but benevolent killer who helped Brandes achieve his ultimate wish?¹

Why did it matter to the German court whether or not Meiwes' cannibalism was sexually motivated? While the German Cannibalism Case is a disturbing and extreme example, and few would take issue with the criminalization of consensual cannibalism, it raises several questions about the circumstances under which the criminal law should intervene in consensual activities that cause or risk causing physical harm. This paper will explore courts' unwillingness to permit consent defenses for physical harm, where the infliction of such physical harm appears to be sexually motivated.

Part I will explore whether criminalizing sexually motivated consensual violence, such as sadomasochism or BDSM,² infringes on the constitutional right to individual autonomy under *Lawrence v. Texas*.³ Part II will assess possible reasons why courts do not recognize the right to consent to harm in the BDSM context. Part III will consider why certain types of non-sexual consensual activities that can, and do, cause serious physical injury, such as sports, are permitted under the law. It will argue that the law deems certain activities "good" for society, regardless of the risk of physical harm. Part IV will explain why the current state of the law on consensual BDSM is inconsistent and problematic. Part V will propose that lawmakers clarify the law on BDSM by explicitly permitting consent to physical harm in the BDSM

1. . See generally Charles J. Reid, Jr., *Eat What You Kill: Or, a Strange and Gothic Tale of Cannibalism by Consent*, 39 N.C. J. INT'L L. & COM. REG. 423 (2014).

2. For a more detailed explanation of BDSM, see *infra* Part I.A.

3. 539 U.S. 558 (2003).

context, just as athletes are statutorily permitted to consent to physical harm in the sports context.

I. BDSM AND THE RIGHT TO PERSONAL AUTONOMY

A. *BDSM Overview*

While cannibalism is an extreme and taboo sexual fantasy, there are other forms of consensual sexually motivated violence that have become increasingly common and mainstream in modern society. BDSM (Bondage, Discipline/Domination, Sadism/Submission, and Masochism) is a sexual fetish, or kink, that encompasses a range of sexual activities between consenting adults who enjoy psychological control, physical control, humiliation and/or pain.⁴ Such activities may include the infliction of physical pain through whipping or spanking, verbal stimulation through threats and insults, a dynamic where one person orders the other one to do his or her bidding, bondage involving restraints like ropes and chains, and punishment for “transgressions”.⁵ There are many forms and variations of BDSM, which makes it difficult to define with precision. However, BDSM encounters generally occur in a consensual sexual context, where participants assume either a dominant or submissive role, and have agreed ahead of time on specific parameters of the interaction.⁶

Evidence suggests that a significant percentage of Americans are interested in or fantasize about BDSM. References to BDSM have become more frequent in popular culture through music,⁷ film,⁸ advertising,⁹ and literature. *Fifty Shades of Grey*, an erotica book published in 2012 about a BDSM relationship, is one of the biggest-selling series in publishing history.¹⁰ Additionally, studies have revealed that many Americans incorporate BDSM activities into their

4. Elizabeth Mincer, Note, *Fifty Shades and Fifty States: Is BDSM a Fundamental Right?: A Test for Sexual Privacy*, 26 WM. & MARY BILL RTS. J. 865, 871 (2018).

5. See Monica Pa, Note, *Beyond the Pleasure Principle: The Criminalization of Consensual Sadoomasochistic Sex*, 11. TEX. J. WOMEN GENDER & L. 51, 58 (2001).

6. See *id.* at 59.

7. See, e.g., Rihanna, *Rihanna—S&M (Official Music Video)*, YOUTUBE (Jan. 21, 2011), https://www.youtube.com/watch?v=KdS6HFQ_LUc (“Sticks and stones may break my bones but chains and whips excite me”).

8. See, e.g., SECRETARY (Slough Pond 2002) (a film about BDSM starring Maggie Gyllenhaal and James Spader).

9. See, e.g., Kiss My Ads, *T-Mobile—#NSFWireless (Super Bowl 2017 Commercial)*, YOUTUBE (Feb. 6, 2017), <https://www.youtube.com/watch?v=BN2FN2XJaQY> (“Wireless pain is fine . . . if you’re into that sort of thing.”).

10. Julie Bosman, ‘*For Fifty Shades of Grey, More Than 100 Million Sold*, N.Y. TIMES (Feb. 26, 2014), <https://www.nytimes.com/2014/02/27/business/media/for-fifty-shades-of-grey-more-than-100-million-sold.html>.

sex lives. For example, a 2005 Durex survey found that 36% of American adults use masks, blindfolds, and bondage tools during sex.¹¹

BDSM has also received positive attention from the psychiatric community. In 2013, the American Psychiatric Association depathologized BDSM in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), by distinguishing paraphilias from paraphilic disorders. The DSM-5 defines a paraphilic disorder as paraphilia “that is currently causing distress or impairment to the individual or... has entailed personal harm, or risk of harm, to others.”¹² A paraphilia, which is an unusual sexual interest such as BDSM, “is a necessary but not sufficient condition for having a paraphilic disorder, and a paraphilia by itself does not necessarily justify or require clinical intervention.” The DSM-5 also acknowledges that a “majority of individuals who are active in community networks that practice sadistic and masochistic behaviors do not express any dissatisfaction with their sexual interests, and their behavior would not meet DSM-5 criteria for sexual sadism disorder.”¹³

B. *BDSM as a Constitutional Right?*

Despite the fact that BDSM has become more culturally mainstream in the United States, this has not translated into acknowledgment of BDSM practices under the law. BDSM advocates and practitioners argue that BDSM is a constitutional right under *Lawrence v. Texas*, but neither state nor federal courts have ever recognized BDSM as a legal right.¹⁴ In *Lawrence*, the Supreme Court invalidated a Texas statute that criminalized sexual relations between same-sex couples. The Court noted that prohibiting a particular sexual act has “far-reaching consequences, touching upon the most private human conduct, sexual behavior”.¹⁵ The Court held that the statute was unconstitutional, because morality was not a legitimate state interest that could justify intruding on the personal and private lives of individuals.¹⁶ The *Lawrence* holding recognized that engaging in private sexual conduct is a liberty right under the Due Process Clause of the Fourteenth Amendment.

11. Rose Eveleth, *Americans Are More into BDSM Than the Rest of the World*, SMITHSONIAN MAG. (Feb. 10, 2014), <https://www.smithsonianmag.com/smart-news/americans-are-more-bdsm-rest-world-180949703/>.

12. Nat’l Coalition for Sexual Freedom, *Kinky is Not a Diagnosis*, <https://secureservercdn.net/198.71.233.68/9xj.1d5.myftpupload.com/wp-content/uploads/2019/12/Kinky-is-Not-A-Diagnosis-brochure.pdf>.

13. Nat’l Coalition for Sexual Freedom, *DSM Revision Project Timeline*, <https://secureservercdn.net/198.71.233.68/9xj.1d5.myftpupload.com/wp-content/uploads/2019/12/DSM-Revision-Project-Timeline-1.pdf>.

14. See Mincer, *supra* note 4, at 874.

15. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

16. *Id.* at 578.

There are several ways in which the Supreme Court's reasoning as applied to homosexual sex in *Lawrence* may be equally applicable to consensual BDSM. Central to the *Lawrence* holding is the recognition that personal choices about sexual acts are directly tied to personal dignity and autonomy, and are "central to the liberty protected by the Fourteenth Amendment." The Court recognized that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life," and that prohibiting homosexual sex would deny people in same-sex relationships the right "to seek autonomy for these purposes."¹⁷

Just as criminalization of same-sex sexual relationships impedes the pursuit of personal dignity and autonomy for homosexuals, criminalization of BDSM may have similar effects on BDSM practitioners. For many BDSM practitioners, BDSM is a vital component of personal identity.¹⁸ Integrating BDSM into one's personal identity may feel similar to identifying as gay, lesbian, bisexual, transgender, or queer.¹⁹ BDSM practitioners often become members of formal or informal BDSM communities, which host social gatherings, educational events, conventions, and BDSM "play" parties.²⁰ In a study that asked BDSM community-members about the role of BDSM in their lives, answers included "friendship, acceptance, . . . [and] personal growth."²¹

The Court in *Lawrence* also emphasized the important role of sex and sexuality in building intimate relationships, noting that sexual conduct with another person is "one element in a personal bond that is more enduring."²² Because of the significance of sexual intimacy in the context of a romantic relationship, the Court acknowledged that statutes criminalizing homosexual sex would impermissibly inhibit personal relationships.²³ Similarly, in BDSM-oriented intimate partnerships, BDSM activities are crucial to forming deep romantic bonds.²⁴ Studies have shown that consensual BDSM may have a psychological effect of increasing intimacy between participants. People reported increases in relationship closeness following positive BDSM encounters, and demonstrated displays of caring and affection as a part of the BDSM

17. *Id.* at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

18. *See* Mincer, *supra* note 4, at 880.

19. *See* Morgan Schumann, Note, *Pain, Please: Consent to Sadoomasochistic Conduct*, 2018 U. ILL. L. REV. 1177, 1182.

20. *Id.* at 1186.

21. *Id.*

22. *Lawrence*, 539 U.S. at 567.

23. *Id.* at 580.

24. *See* Daniel Haley, *Bound by Law: A Roadmap for the Practical Legalization of BDSM*, 21 CARDOZO J.L. & GENDER 631, 641 (2015).

activities.²⁵ For some, BDSM may be the *only* way they feel comfortable with sexual intimacy.²⁶

C. Courts' Reluctance to Apply *Lawrence* to BDSM Contexts

Despite the similarities between the criminalization of homosexuality and the criminalization of BDSM, courts have refused to apply *Lawrence* to sexual encounters involving BDSM. In several post-*Lawrence* decisions, courts have held that consent defenses are not permissible in assault cases, even where such assault occurred in a BDSM context. In *State v. Van*,²⁷ the defendant was convicted of assault in the first and second degree, after kidnapping, torturing, and raping his submissive partner.²⁸ The victim and the defendant had previously exchanged hundreds of emails over the course of a few months, in which the victim informed the defendant that he wanted to be his “total slave.” In his 2004 appeal, the defendant argued that the Nebraska assault statutes as applied to his conduct were unconstitutional under *Lawrence*, because they violated his right to privacy guaranteed by the Due Process Clause.²⁹ The defendant contended that “the ‘Nebraska legislature did not intend these statutes to apply to conduct that occurs during a private, consensual relationship involving BDSM activities.’”³⁰ The Nebraska Supreme Court disagreed, concluding that because the Nebraska assault statutes included no reference to consent,³¹ a person could not legally consent to assault in the BDSM context.³² Noting that the *Lawrence* decision did not extend protection to *all* conduct within a sexual relationship, the court held that the assault statutes were not unconstitutional as applied to the defendant.³³

Eight years later in *Commonwealth v. Carey*,³⁴ the Supreme Judicial Court of Massachusetts held that consent was not a defense to assault, even in the context of a sexual encounter.³⁵ In *Carey*, the defendant had allegedly entered the victim’s home, and strangled her with a necktie until she “began to fade out”.³⁶ The defendant testified that the strangulation was a part of a consensual sexual encounter, and argued on appeal that the judge should have instructed the jury that consent was

25. See Brad J. Sagarin et al., *Hormonal Changes and Couple Bonding in Consensual Sadoomasochistic Activity*, ARCH SEX BEHAV, Apr. 2009, at 186.

26. See Haley, *supra* note 24, at 642.

27. 268 Neb. 814, 823 (2004).

28. *Id.* at 819–23.

29. *Id.* at 823.

30. *Id.* (quoting Brief for Appellant at 20).

31. *Id.* at 824.

32. *Id.* at 825.

33. *Id.*

34. 974 N.E.2d 624 (Mass. 2012).

35. *Id.* at 630 (citing *Commonwealth v. Appleby*, 402 N.E.2d 1051, 1061 (Mass. 1980)).

36. *Id.* at 628.

a defense to his conduct.³⁷ The court rejected this argument, claiming that the holding in *Lawrence* did not pertain to situations where someone might be “injured or [coerced].”³⁸ Therefore, the right to sexual privacy would be outweighed when balanced against the “State’s interest in preventing violence . . . upon its citizens under the claimed cloak of privacy in sexual relations.”³⁹

II. POSSIBLE EXPLANATIONS FOR WHY COURTS REJECT CONSENT DEFENSES IN BDSM CASES

The courts in *Van* and *Carey* explicitly denied that the *Lawrence* decision had any impact on the right to practice consensual BDSM. Their holdings, which have been cited in other jurisdictions dealing with similar issues,⁴⁰ represent courts’ reluctance to acknowledge consent in the BDSM context as an acceptable form of sexual expression. There are a few possible explanations for this reluctance. One possibility is that courts have addressed this issue in cases where the consent of the victim was either missing completely or invalid. Another possibility is that the handful of cases in which courts have addressed this issue involve serious physical harm to the victim. This section will examine both of these possible explanations, ultimately concluding that neither invalid consent nor serious physical harm can fully account for the way that courts treat bodily injury in the BDSM context.

A. Invalid Consent

Under Section 213 of the Model Penal Code, a part of the definition of consent is that it may be “revoked or withdrawn any time.”⁴¹ This idea that a person must be able to withdraw her consent at any time comports with the BDSM community’s emphasis on “voluntary, knowing, explicit,” and “ongoing” consent.⁴² In the context of a BDSM relationship or encounter that may involve power dynamics, bondage, and physical pain, clear communication on consent is vital to protecting the safety of the participants. For this reason, BDSM practitioners often use pre-determined safewords, which can be used at any time during the encounter to withdraw consent and stop the activity.⁴³ A person who attempts to practice BDSM without valid consent is “not engaged in

37. *Id.* at 629.

38. *Id.* at 631 (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

39. *Id.*

40. *See, e.g.*, *People v. Davidson*, No. D064880, 2015 WL 4751166, at *7 (Cal. Ct. App. Aug. 12, 2015) (citing *State v. Van*, 268 Neb. 814, 825 (2004)) (“[N]umerous courts have concluded that consent is generally *not* a defense to conduct involving serious bodily injury and terrorizing threats even when based on a claim of consensual sadomasochistic activity.”).

41. MODEL PENAL CODE app. B (AM. LAW INST. 2017) (Sexual Assault & Related Offenses).

42. *See Pa, supra* note 5, at 61.

43. *See Schumann, supra* note 19, at 1184.

BDSM but rather sexual violence.”⁴⁴ Therefore, even if courts had found that BDSM was protected under *Lawrence*, the underlying BDSM activities in cases like *Van* and *Carey* would not be constitutionally protected if they involved inadequate or invalid consent.

In *Van*, the consent was invalid because the defendant and the victim pre-arranged a BDSM dynamic in which consent could *never* be revoked.⁴⁵ Prior to the kidnapping, torture, and assault, the defendant and victim had mutually defined their relationship to be “without limits, to have no safe word, and to be permanent.”⁴⁶ During the course of the kidnapping, which the victim appeared to consent to at the outset, the victim realized that he did not want to continue the relationship. When the victim changed his mind and attempted to revoke his consent, the defendant, pointing out the prior email correspondence, nonetheless continued his brutal assault.⁴⁷ This would not be considered adequate consent, as consent must be voluntary and ongoing, which requires a mechanism for withdrawal.⁴⁸ Similarly, in *Carey*, the defendant testified that after the victim “acquiesced” to have sex with him, he strangled her with a tie. He admitted that he continued to strangle her even after she fell on the floor and warned him that her son was home.⁴⁹ This also would not constitute adequate consent, as it was not explicit, and provided no mechanism for withdrawal.⁵⁰

In the extreme example of the German Cannibalism Case, Brandes, the victim, was ultimately deprived of his ability to withdraw his consent. At the outset, consent appeared to be an integral component of Meiwes’ cannibalism fantasy. In fact, Meiwes turned down multiple potential victims before Brandes after they expressed reservations about going through with it. Brandes, on the other hand, expressed a deep desire to be “slaughtered and eaten,” and made it clear to Meiwes that he was serious about going through with it.⁵¹ They drafted a formal “contract of consumption,” and Brandes eventually boarded a train to go meet Meiwes. When they met at the train station, Brandes said, “I am your flesh . . . I hope you’ll find me tasty.”⁵²

Despite Brandes’ prior eagerness, the circumstances immediately leading up to his death suggest that his consent may not have been valid. On the day of the killing, the two men bought narcotic cough syrup and sleeping pills, which Brandes “rapidly consumed” until he was sleepy and numb.⁵³ Brandes may have drugged himself to the point

44. *Id.*

45. *State v. Van*, 268 Neb. 814, 818 (2004)).

46. *Id.*

47. *Id.* at 820–22.

48. *See Haley*, *supra* note 24, at 635.

49. *Commonwealth v. Carey*, 974 N.E.2d 624, 629 (Mass. 2012).

50. *See Pa*, *supra* note 5, at 61.

51. *Reid*, *supra* note 1, at 455–61.

52. *Id.* at 462–63.

53. *Id.* at 464.

that he was unable to withdraw consent, which would invalidate his initial consent. Moreover, Section 2.11 of the Model Penal Code explicitly invalidates consent where “it is given by a person who by reason of . . . intoxication is manifestly unable . . . to make a reasonable judgment as to the nature or harmfulness of the conduct.”⁵⁴ If Brandes prevented himself from the ability to withdraw consent by intoxicating himself with sleeping pills, this likely rendered his initial consent invalid under the Model Penal Code and under generally understood consent standards in kink and BDSM communities.

The conduct underlying *Van*, *Carey*, and the German Cannibalism Case exemplify clear cases of assault and brutal murder, rather than consensual BDSM. In fact, the court in *Van* explicitly acknowledged that this was not a typical arrangement for BDSM couples, even going as far as to lay out some BDSM community standards for consent.⁵⁵ The court noted that BDSM relationships usually involve negotiated limits and a safeword, and that people rarely enter a BDSM relationship without limits.⁵⁶ However, none of these three cases were decided on consent grounds. In the German Cannibalism Case, both the prosecution and defense agreed that the consent Brandes gave to Meiwes was explicit and valid throughout the encounter. In the underlying trials whose verdicts were upheld in *Van* and *Carey*, the juries were not permitted to even consider the validity of the consent, because consent was not a defense under the applicable assault statutes. Therefore, invalid consent cannot fully explain the failure to apply *Lawrence* to BDSM contexts in cases where courts take the seemingly unnecessary leap of categorically rejecting constitutional protection for BDSM, regardless of consent.

B. Serious Injury

If invalid consent cannot fully explain courts’ failure to entertain consent defenses in BDSM cases, a second explanation could have something to do with the seriousness of the harm involved. Under the Model Penal Code, consent to bodily injury may be a defense to charged conduct, if “the bodily injury consented to or threatened by the conduct consented to is not serious.”⁵⁷ The German cannibalism case exemplifies the importance of this limitation. Even if Brandes had, somehow, enthusiastically and validly consented to being cannibalized, he ultimately consented to his own brutal murder. Similarly, even assuming valid consent in *Van* and *Carey*, the victims consented to severe assaults that risked serious injury and death. The Model Penal Code defines serious injury as “bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or

54. MODEL PENAL CODE § 2.11(3)(b) (AM. LAW INST. 2017).

55. *State v. Van*, 268 Neb. 814, 817 (2004).

56. *Id.*

57. MODEL PENAL CODE § 2.11 (AM. LAW INST. 2017).

protracted loss or impairment of the function of any bodily member or organ.”⁵⁸ Perhaps consent simply becomes irrelevant once the harm, or risk of harm, reaches a certain threshold level of seriousness.

However, the seriousness of the risk or injury cannot tell the whole story, because courts have upheld assault convictions in BDSM contexts, even where the injuries are either minor or non-existent. In *State v. Guinn*,⁵⁹ the Washington Court of Appeals held that a rational juror could conclude that the defendant had caused serious physical injury because the candle wax that he dripped on the victim was “hot and it stung” and the nipple clamps were “tight and cutting.”⁶⁰ In *Commonwealth v. Applebee*,⁶¹ the Massachusetts Supreme Court upheld the defendant’s conviction for assault and battery based on the fact that the defendant lightly hit the victim with a riding crop. In describing the incident, the victim testified that the riding crop “just barely connected with [his] back” and that it was a “glancing blow.”⁶² Despite the fact that there was “no evidence of visible injury or after effects,”⁶³ the court rejected the notion that one could consent to this kind of activity.⁶⁴

While the activities underlying *Guinn* and *Applebee* may have caused the victims some pain, which falls under the Model Penal Code’s definition for “bodily injury,” they certainly would not rise to the level of “serious bodily injury,” which would require a substantial risk of death, permanent disfigurement, or impairment of an organ.⁶⁵ The holdings in *Guinn* and *Applebee* therefore demonstrate that the seriousness of the harm involved cannot fully account for courts’ rejection of consent defenses in BDSM cases.

III. “GOOD HARM” VERSUS “BAD HARM”

If neither invalid consent nor serious harm can explain why courts reject consent defenses in BDSM cases, what is actually driving the holdings in such cases? One possibility is that, even where the harm or risk of harm is not serious, courts are concerned that allowing even minor instances of consensual violence would create a slippery slope to serious harm. Perhaps the government wishes to preserve a total monopoly on violence, and allowing *any* kind of consensual violence would infringe on that. However, the slippery slope argument also cannot tell the whole story, because there is plenty of non-sexual consensual violence, both serious and otherwise, that is permitted under the law. Instead, the answer appears to lie in the nature of the underlying activity that gives rise to the injury.

58. *Id.* § 210.0.

59. 2001 Wash. App. LEXIS 502 (Mar. 30, 2001).

60. *Id.* at *33.

61. 380 Mass. 296 (Sup. Ct. 1980).

62. *Id.* at 299.

63. *Id.* at 313.

64. *Id.* at 311–12.

65. See MODEL PENAL CODE § 210.0 (AM. LAW INST. 2017).

A. “Good” Activities

Valid consent may turn a “bad” or criminal activity into something considered to be good or valuable for society. Consent “turns a rape into love-making, a kidnapping into a Sunday drive, a battery into a football tackle, a theft into a gift, and a trespass into a dinner party.”⁶⁶ For activities that do not involve bodily harm or risk of bodily harm, valid consent will typically defeat any attempt to criminalize that activity. For example, the act of walking into a neighbor’s home while the neighbor is not home is not, in and of itself, criminal. It only becomes criminal when the person does not have consent from the neighbor to do so. Therefore, if the person had valid consent from his neighbor to enter his neighbor’s home, he cannot be prosecuted for trespassing.⁶⁷

There are also many activities that *do* involve physical harm or risk of physical harm that are not criminal if consented to. For example, elective body modification such as tattoos, piercings, and plastic surgery would certainly qualify as causing “serious bodily injury” under the Model Penal Code, but are nonetheless permitted as long as there is valid consent.⁶⁸ This further demonstrates how the seriousness of the risk or injury of the activity simply cannot tell the whole story about what kinds of consensual harm can be criminalized. Getting a tattoo or a piercing is a typically painful process that involves penetration of the skin and permanent physical effects. The injuries most commonly associated with BDSM are much less serious, and usually would not qualify as “serious bodily injury” under the MPC. Despite this, courts have refused to allow consent defenses in BDSM cases, but would likely allow consent defenses in assault cases that arise in the body modification context.

Similarly, and significantly, most states explicitly allow for consent defenses in the context of bodily injury or risk of injury caused while playing sports. Under the MPC, and according to the law in most states, consent is a defense to charged conduct involving physical injury or risk of injury “where the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law.”⁶⁹ The sports exception to the typical rule that consent is not a defense to assault demonstrates an effort by lawmakers to “accommodate the assault law to reality,” and allow for people to participate in activities that “our society considers to be quite acceptable, and even desirable,” but would

66. See Vera Bergelson, *Consent to Harm*, 28 PACE L. REV. 683, 685 (2008).

67. See Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165, 170 (2007).

68. See Kelly Egan, *Morality-Based Legislation Is Alive and Well: Why the Law Permits Consent to Body Modification but Not Sodomasochistic Sex*, 70 ALB. L. REV. 1615, 1638 (2007).

69. See MODEL PENAL CODE § 211 (AM. LAW INST. 2017).

otherwise qualify as assaults under the statute.⁷⁰ In other words, because we have embraced sports competitions as a valuable and acceptable part of our society, the law must allow players to consent to the risk of bodily injury in the context of a sports competition.⁷¹

B. “Bad” Activities

In comparing the way that the law treats consensual BDSM with the way that the law treats consensual sports competitions, it becomes clear that courts and lawmakers are ultimately making moral judgments about whether the underlying activity being consented to is “good” or “bad” for society. The distinction appears to be between activities that judges and lawmakers consider to be inherently bad, regardless of consent, and activities that only become bad by absence of consent.

While courts will consider seriousness of harm or risk of harm when deciding whether to allow for a consent defense in a case of bodily injury, this does not end the inquiry. Courts are also concerned with the *kind* of harm that the participants wish to consent to, and whether people should be able to consent to that kind of activity in the first place. If the underlying activity that caused the harm is considered beneficial for society, courts and lawmakers are more likely to permit participants to consent to physical harm in the context of that activity. Courts and lawmakers acknowledge that sports and tattoos have important societal purposes like social bonds and self-expression, but treat BDSM as mere violence.⁷² Therefore, BDSM cannot be legally transformed by consent.

State v. Collier,⁷³ a 1985 Iowa Court of Appeals decision cited in several post-*Lawrence* opinions,⁷⁴ exemplifies courts’ willingness to insert their morality in order to criminalize BDSM activities.⁷⁵ In *Collier*, the defendant tied the victim to a bed, beat her with a belt, and performed sex acts on her. The defendant alleged that the victim had been reading books on sadomasochism, and had instructed him on how to beat her to fulfill one of her sexual fantasies. At trial, the court refused to instruct the jury that consent could be a defense to such conduct.⁷⁶ The Iowa Court of Appeals affirmed the defendant’s conviction, primarily on the basis of the “moral welfare” of citizens. The court held that a person could not consent to a wrong that would

70. *State v. Floyd*, 466 N.W.2d 919, 922 (Iowa 1990) (internal citations and quotation marks omitted).

71. *See State v. Shelley*, 85 Wash. App. 24, 30 (1997).

72. *See Pa, supra* note 5, at 65.

73. *State v. Collier*, 372 N.W.2d 303 (Iowa Ct. App. 1985).

74. *See, e.g., State v. Van*, 268 Neb. 814, 825 (2004); *People v. Davidson*, No. D064880, 2015 WL 4751166, at *7 (Cal. Ct. App. Aug. 12, 2015).

75. *See Anne Onoma, Legal Censure of Unconventional Expressions of Love and Sexuality; Finding a Place in the Law for BDSM*, 28 HASTINGS WOMEN’S L.J. 25 (2017).

76. *Collier*, 372 N.W.2d at 304–05.

“undermine the moral principles underlying the criminal law.”⁷⁷ In response to the defendant’s assertion that BDSM conduct should be exempted from prosecution as a social activity, the court found it “preposterous” that the legislature would intend “social activity” within the meaning of the applicable statute to include an activity that is “considered to be in conflict with the general moral principles of our society.”⁷⁸

Similarly, in *People v. Samuels*,⁷⁹ a 1967 case also cited to support post-*Lawrence* decisions criminalizing consensual BDSM,⁸⁰ the court asserted that a “normal person in full possession of his mental faculties” would not consent to an assault in the BDSM context.⁸¹ The court then went on to say that even if someone suffered from “some form of mental aberration which compelled him” to submit to a BDSM beating, consent would not be a defense.⁸² Evidently, the court found sadomasochistic tendencies so morally objectionable, that it concluded a person interested in such activities would have to suffer from a serious mental disorder. The fact that the *Collier* and *Samuels* holdings continue to be cited in support of criminalizing BDSM is evidence that their moralistic underpinnings remain in modern judicial consciousness.

IV. WHY THE CURRENT STATE OF THE LAW ON BDSM IS PROBLEMATIC

The limited case law addressing consensual BDSM is inconsistent and confusing, making it difficult for BDSM practitioners to understand what, if anything, they can legally consent to. Post-*Lawrence* courts faced with this question appear reluctant to consider BDSM as a liberty right, but also fail to provide a clear answer as to why *Lawrence* should not apply to consensual BDSM the way that it applies to private sexual encounters. Instead, many courts simply avoid directly addressing the issue by rejecting the consent defense on other grounds. For example, in *People v. Febrissy*,⁸³ the California Court of Appeals avoided answering the difficult question of whether *Lawrence* applies in the BDSM context, because the underlying jury verdict made clear that the victim had not fully consented to the BDSM activities.⁸⁴ Other courts have rejected *Lawrence*’s applicability on public safety grounds, noting that *Lawrence* protects consensual activities between adults “absent injury to a person,”⁸⁵ but not in situations where the activities cause, or

77. *Id.* at 307.

78. *Id.*

79. *People v. Samuels*, 250 Cal. App. 2d 501 (1967).

80. *See, e.g., State v. Van*, 268 Neb. 814, 826 (2004).

81. *Samuels*, 250 Cal. App. 2d at 513–14.

82. *Id.*

83. *People v. Febrissy*, No. C049033, 2006 WL 2006161 (Cal. Ct. App. July 19, 2006).

84. *Id.* at *5.

85. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

risk causing, serious bodily injury.⁸⁶ While these holdings may have been appropriate as to the specific facts at issue in each individual case, they do little to clarify the boundaries of what kinds of consensual BDSM may be protected under *Lawrence*, and what people actually have the right to consent to.

People v. Jovanovic,⁸⁷ a First Department case decided in 1999, exemplifies the judicial confusion surrounding consensual BDSM. In that case, the First Department held that the trial court had erroneously withheld from the jury evidence that tended to show that the victim consented to BDSM activities. However, the court also stated in a footnote that that consent was not a defense to assault charges in the BDSM context where the victim is physically injured, which directly contradicts its own holding. If consent was not a defense to the charges, why did the court overturn the verdict on the basis that the jury had to see evidence pertaining to consent? While the *Jovanovic* holding is logically unsound, it may reflect a shared societal intuition that individuals should be able to consent to physical harm in the BDSM context. The legal precedent on consensual BDSM is made even more confusing when viewed in conjunction with the way that BDSM has become so much more visible and accepted in society. Despite BDSM's prevalence and heightened visibility, it appears that there is little consensus on when consent matters, and when it does not.

The confusion surrounding the legality of consensual BDSM is problematic, because it makes it much more difficult for people to practice BDSM safely. As Justice Kennedy noted in *Lawrence*, even an unenforceable law can stigmatize those who it targets.⁸⁸ A mere handful of cases criminalizing BDSM can become an invitation for "discrimination in both the public and private spheres".⁸⁹ Due to the state of the law on BDSM, BDSM practitioners may be deterred from attending BDSM community meetings and workshops out of fear of social stigma or legal repercussions. These meetings are important in the BDSM community, as they teach people about how to practice BDSM safely and about unsafe practices to avoid.⁹⁰ Keeping consensual BDSM in a legal grey area will only drive the community underground, and most likely result in a less informed community of BDSM practitioners.⁹¹

Additionally, the confusing state of the law on consensual BDSM may discourage actual victims of assault from reporting to the police or seeking medical attention. They may fear that doing so could have legal

86. *See, e.g.*, *People v. Davidson*, No. D064880, 2015 WL 4751166, at *8 (Cal. Ct. App. Aug. 12, 2015).

87. *People v. Jovanovic*, 263 A.D.2d 182 (N.Y. App. Div. 1999).

88. *Lawrence*, 539 U.S. at 575.

89. *Id.*

90. Haley, *supra* note 24, at 648–49.

91. Pa, *supra* note 5, at 83.

implications, or that they might face blackmail or ridicule.⁹² For example, in the *Van* case, after the victim had been kidnapped and tortured for several days, he was reluctant to reveal the details of what happened to him out of “embarrassment.”⁹³ If the law were to explicitly acknowledge the right to practice BDSM, victims of assault in the BDSM context would likely feel more confident reporting to law enforcement without fear of being blamed or judged for practicing BDSM in the first place.

V. PROPOSAL: BDSM AS A SPORT

Several suggestions have been put forth for clarifying the law on consensual BDSM. The National Coalition for Sexual Freedom argues that, because BDSM “is intended to be a mutually pleasurable interaction between two people, in which any pain or stimulation that is consented to is welcomed by that person and is experienced as a form of pleasure,” BDSM should be classified as “sexual conduct,” and any nonconsensual BDSM should be prosecuted under sexual assault statutes as opposed to general assault statutes.⁹⁴ While logically sound, the problem with this proposal is that it would require prosecutors to make decisions about the nature of the crime at the charging stage, when they might not have enough information to know that a BDSM dynamic was at play in the first place. This is especially likely considering the stigma attached to BDSM, which makes victims of assault less likely to admit that BDSM dynamics were involved.⁹⁵ In practice, questions about consenting to physical harm in the BDSM context typically arise *after* the charging stage, when the defendant attempts to assert a consent defense at trial.

Vera Bergelson suggests that courts should employ a balancing test, where, “if the perpetrator’s actions do not violate rights and produce a positive balance of harms/evils and benefits, he is entitled to the defense of complete justification.”⁹⁶ In the BDSM context, the justification comes from the fact that “the participants desired it.”⁹⁷ The problem with Bergelson’s “balance of evils” approach is that it would force courts to further delve into issues that they are ill-equipped to handle. In the BDSM context, it would require courts to balance the victim’s desire to be physically harmed against the victim’s dignity and “long-term interests.”⁹⁸ These are vague and subjective concepts that would be very difficult for courts to implement with any consistency. The

92. *Id.* at 84.

93. *State v. Van*, 268 Neb. 814, 822 (2004).

94. *Consent Counts Project*, NAT’L COALITION FOR SEXUAL FREEDOM, <https://secureservercdn.net/198.71.233.68/9xj.1d5.myftpupload.com/wp-content/uploads/2019/12/ALI-Project-summary.pdf> (last visited Apr. 12, 2020).

95. *See Pa.*, *supra* note 5, at 84.

96. *See Bergelson*, *supra* note 65, at 226.

97. *Id.*

98. *Id.*

concept of dignity is particularly problematic in the context of BDSM activities, which are often used to cause feelings of humiliation and degradation for the purpose of sexual gratification. Moreover, Bergelson's approach goes beyond merely assessing the seriousness of the physical harm, but would ask judges to decide the way that adults are allowed to have sex in the privacy of their own homes.

Instead of a difficult balancing test, a stronger approach would be for lawmakers to clarify the issue for the courts as they have for consensual harm in the context of athletic competitions.⁹⁹ This could look very similar to the language used for the sports exception in Section 211 of the Model Penal Code, which states that consent is a defense to bodily injury "if the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law."¹⁰⁰ In adopting similar language for BDSM activities, lawmakers would signal to courts that BDSM, like a sport athletic, is an activity that is mainstream and has value in society. This approach would relieve courts from the difficult task of determining whether and under what circumstances *Lawrence* applies to BDSM activities, and would likely make judges more comfortable allowing defendants to assert consent defenses under such circumstances.

Clear statutory language on consensual BDSM would also make it easier for courts and juries to distinguish between consensual BDSM and criminal assault. In assessing physical harm that occurs in the context of an athletic event, courts are able to rely on evidence about established rules and norms of the game.¹⁰¹ For example, courts have held that punching another player in the middle of a sports game does not permit a consent defense, as "there is a limit to the magnitude and dangerousness of a blow to which another is deemed to consent."¹⁰² Similarly, in the BDSM context, experienced BDSM practitioners could be qualified as experts to testify about the rules and norms in BDSM activities, and courts could also rely on existing literature on the difference between BDSM and abuse.¹⁰³ Ideally, the BDSM statutory language would include specific limits on the extent of harm permitted, thereby explicitly criminalizing extremely dangerous or deadly BDSM

99. See Pa, *supra* note 5, at 81. ("[W]ithout clear statutes stating the legal status of [BDSM], the judiciary has had free reign to engage in covert policy assumptions and moral condemnation under the guise of statutory interpretation—interpreting assault statutes which have no mention of bondage sex in their legislative history.").

100. See MODEL PENAL CODE § 211 (AM. LAW INST. 2017).

101. See *State v. Shelley*, 85 Wash. App. 24, 33 (1997) ("[T]his limit, like the foreseeability of risks, is determined by presenting evidence to the jury about the nature of the game, the participants' expectations, the location where the game has been played, as well as the rules of the game.").

102. *Id.*

103. See, e.g., *BDSM vs. Abuse*, NAT'L COALITION FOR SEXUAL FREEDOM, <https://ncsfreedom.org/who-we-are/about-ncsf/current-ncsf-board-and-staff/item/467-sm-vs-abuse> (last visited Apr. 12, 2020).

activities like the murder in the German Cannibalism Case. This would make it easier for juries to determine when an abuser is attempting to use BDSM as a cloak for assault or murder.

Perhaps most importantly, treating BDSM similarly to the way that sports are treated under state assault statutes will help to de-stigmatize the activity, which will ultimately make BDSM practitioners safer. Explicit legalization of BDSM will likely strengthen community standards on how to practice BDSM consensually and safety, and push such standards further into mainstream consciousness. As the community becomes more informed on safety standards for BDSM, it will be easier for courts and juries to rely on such standards when evaluating consent defenses. This is similar to the way that athletes have community rules and standards, which courts may rely on in assessing whether an assault has occurred in the context of an athletic event. Moreover, explicit legalization will empower victims of assault to report to law enforcement without fear of being blamed or judged for the initial choice of engaging in consensual BDSM.

CONCLUSION

Thus far, courts have rejected consent as a defense in BDSM cases for a variety of unsatisfying and inconsistent reasons, suggesting that those decisions ultimately come down to judicial distaste and discomfort with BDSM. Evidence suggesting the ubiquity and social value of BDSM should prompt lawmakers to clarify the issue for courts through explicit legalization of consensual BDSM.