A Fine Line Between Pleasure and Pain: Would Decriminalising BDSM Permit Nonconsensual Abuse?

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Abstract
The increasing social visibility of Bondage/Domination, Discipline/submission and Sadism/Masochism (BDSM) within Western society has placed pressure on the criminal law to account for why consensual BDSM activities continue to be criminalised where they involve the infliction of even minor injuries on participants. With moralistic and paternalistic justifications for criminalisation falling out of favour, one key justification that is gaining traction within international commentary on BDSM is the “bogus BDSM argument”. The bogus BDSM argument contends that BDSM activities should be criminalised because otherwise false claims of BDSM will be used by defendants to excuse or minimise their criminal liability for nonconsensual abuse. This article refutes this argument by showing how it relies on premises that are unjustifiable, illogical and irrelevant. This article concludes that the decriminalisation of BDSM would not permit nonconsensual abuse so long as legal officials were equipped with sufficient knowledge about the norms and conventions of BDSM culture.

Keywords Criminal law · Sexuality · Sadomasochism · BDSM

Introduction

BDSM themes and imagery have increasingly pervaded mainstream Western culture over the preceding decades, 1 peaking with the phenomenal commercial success of the 50 Shades of Grey book and film

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1 BDSM is an acronym that stands for Bondage/Discipline, Dominance/submission, and Sadism/Masochism. An explanation of BDSM will be given in Part 1 below, suffice to note that it is a term that widely denotes a particular set of activities, group of communities, sexual culture and, increasingly, identity claim. Other terms that are used by commentators, including sadomasochism (SM, S/M, S&M), kink, fetish, leather, etc., will be retained in direct quotes.

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trilogy.\textsuperscript{2} Weiss identifies that the ‘mainstream representation of sexual minorities’ is generally understood to be a ‘sign of progress’, that is this visibility is interpreted as the first stage of a liberalising process that will develop into tolerance, then understanding, and finally to rights and freedoms.\textsuperscript{3} However, commentators have warned that certain dangers accompany the mainstreaming of representations of BDSM, including the perils of stigmatising portrayals, commercial exploitation and homogenisation.\textsuperscript{4} The increasing visibility of representations of BDSM also draws attention to real-life BDSM communities and activities. It has ‘raised the critical profile of BDSM, bringing commentators to look more closely at the practice and [its] significance’.\textsuperscript{5} BDSM itself is thus arguably more exposed than ever before to the potentials and the dangers that accompany such visibility. What might this mean for the regulation of BDSM under criminal law?

The increased visibility of BDSM has the potential to boost the progressive prospects for BDSM ‘sexual citizenship’,\textsuperscript{6} that is the extension of legal rights and recognition to BDSM participants equivalent to those afforded to other legitimised sexual groups within society. Extending sexual citizenship to BDSM would involve a diverse array of reforms, including broadening the scope of discrimination law protections around sexuality to encompass BDSM,\textsuperscript{7} and facilitating commercial BDSM venues within zoning and planning schemes.\textsuperscript{8} The most crucial initial legal step towards sexual citizenship, however, would be the decriminalisation of BDSM activities, which are currently unlawful where they involve the consensual infliction of even minor injuries. But there is also a possible legal ‘cost to rendering SM visible’.\textsuperscript{9} The increased visibility of BDSM could alternatively instigate a backlash that affirms or even further entrenches law’s marginalisation of BDSM. This peril is apparent in the take-up of a line of argument that maintains that BDSM activities must remain criminalised because otherwise false claims of BDSM will be used by defendants to excuse or minimise their criminal liability for nonconsensual abuse. I will refer to this as the “bogus BDSM argument”.\textsuperscript{10} This argument has recently been

\begin{itemize}
\item The book trilogy sold 35 million copies across the period 2011–2019 and constituted the top three highest grossing books in the United States of America during this time: Aviles (2019). Soon after the release of the third film, the film trilogy ‘topped $1 billion at the global box’: Kratzer (2020: 10).
\item Weiss (2006: 112).
\item Barker et al. (2007); Beckmann (2001); Hoople (1996: 196–197); Weiss (2006); Wilkinson (2009).
\item Harvard Law Review (2014: 714).
\item Chatterjee (2012); Langdridge (2006); Langdridge and Parchev (2018).
\item Bennett (2016).
\item Herman (2007); Steinmetz and Maginn (2014).
\item Hoople (1996: 196).
\item This name is inspired by Gallant and Zanin’s description of “bogus BDSM defence” when dealing with two recent Canadian cases where ‘men were accused of severe, non-consensual harm and force and argued that they should be exonerated because the women had consented to BDSM’: Gallant and Zanin (2019: 33). The term ‘defence’ seems somewhat inapt here because consent does not currently prevent criminal liability from attaching to the infliction of even minor injuries caused during BDSM activities, either in Canada or in the other Western countries that will be discussed in this article. The bogus BDSM argument is concerned, however, that bogus claims of consent could operate like a “defence” if BDSM activities were to be legalised in the future.
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described by Jonathan Herring, Professor of Law at Oxford University, as ‘[p]erhaps the strongest argument against BDSM’, and can be found amongst a range of international commentary.

The purpose of this article is to dismantle the bogus BDSM argument by demonstrating why decriminalising BDSM would not permit nonconsensual abuse. Whilst commentators have previously critiqued parts of the bogus BDSM argument, this rebuttal has developed piecemeal as small fragments within work that more broadly addresses the regulation of BDSM. This article provides a sustained refutation of the bogus BDSM argument that unifies and also substantively builds on this previous work. In doing so, the scope of this article stretches across jurisdictional boundaries and draws in material from Western common law countries that share similar legal regulations around BDSM activities, including Australia, Canada, the United Kingdom and the United States of America. This article develops in three Parts. Part 1 briefly explains BDSM and sets out the criminal regulations on BDSM activities. Part 2 outlines the bogus BDSM argument. Part 3 refutes this argument by showing how it relies on premises that are unjustifiable, illogical and irrelevant. Ultimately, this article contends that the bogus BDSM argument does little more than highlight the need for the decriminalisation of BDSM activities to occur alongside remedial legal education about the norms and conventions of BDSM culture.

**BDSM and the Law**

BDSM ‘is a complex phenomenon’. At the individual level, it encompasses a wide variety of consensual interpersonal interactions that involve participants ‘playing’ with power differentials, physical restraint and/or pain within a context that is frequently (though not always) sexualised. Not all BDSM participants engage in the same activities nor do they necessarily all assign the same meanings to their activities. However, common examples of BDSM activities include flogging, tying up with rope, and adopting role-based power dynamics such as mistress/slave. Some BDSM participants exclusively take on “active” (Dominant, top, sadistic) roles or “passive” (submissive, bottom, masochistic) roles within their interactions, others are flexible and may switch roles between interactions or when playing with different partners. BDSM activities are thus heterogeneous: ‘encompass[ing] a wide range of activities that may, depending on the practitioner, vary in the nature, intensity, and content of the play as well as in the role from which the BDSM interaction is

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11 Herring (2017: 347).
12 Edwards (2016), Hanna (2001), Herring (2017), Kerr (2019), Pegg (2018).
13 Cowan (2011: 64–65), Green (2020: 291–294), Haley (2015: 653–654), Horn (2015: 30–31), Khan (2014: 249–250, 262–263), Pa (2001: 85–88), Schumann (2018: 1198–1199), Tanovich (2010: 92).
14 Doherty (2012: 131).
15 The term ‘playing’ is a longstanding term used within BDSM culture to describe participation in BDSM activities: Murray and Murrell (1989: 106–107). Contrary to popular misconceptions, academic research has found that BDSM should be understood as being centred around power dynamics rather than around pain, and that BDSM activities are not always regarded by participants to be sexual: Niewmahr (2011).
approached’. At the social level, BDSM participants have formed location-specific and online communities of practice that provide opportunities for socialising, meeting potential ‘play’ partners, trading equipment, and communicating knowledge and skills. At the public level, BDSM has developed a sexual culture formed by the growing points of connection between these various communities. BDSM culture emphasises the integral nature of consent and risk-management within BDSM, and has developed a clear set of norms and conventions for engaging in BDSM activities (these will be discussed further in Part 3 below).

BDSM has a troubled past and an uncertain present. In 1984 when Gayle Rubin outlined her foundational notion of the ‘hierarchical system of sexual value’ within Western society, she identified married, reproductive heterosexuals as being at the top of the socially-valued ‘erotic pyramid’ and BDSM participants as being one of the ‘most despised sexual castes’ that populated the bottom layer. Positioned alongside transvestites, sex workers and other ‘low status’ sexual groups, Rubin accurately described BDSM participants at the time of writing as being subject to a whole host of social ills, such as ‘[e]xtreme and punitive stigma’, criminal regulation and ‘presumption[s] of mental illness’. Some aspects of this have changed over the intervening years, for example representations of BDSM have become increasingly mainstreamed within popular culture (as discussed in the Introduction) and pathologising medical categories are in the process of being wound back. Nevertheless, BDSM ‘remains a frequently marginalized and misunderstood practice’ today, and is ‘besieged’ by ‘condemnation by various commentators from the moralist to the medic’. Criminal prohibitions on BDSM activities remain firmly in place.

Within Western legal systems BDSM is ‘entangled in the law in a number of areas, including obscenity, child access cases, and prostitution’, but the core concern for this article is the criminalisation of certain BDSM activities. Not all BDSM activities involve pain, but those that do may be criminalised where the infliction of pain is accompanied by the infliction of injury. Across common law Western jurisdictions a fairly standardised legal line criminalises BDSM activities where they involve the infliction of an injury that meets a threshold level of seriousness, despite these activities being consented to and the person receiving the injury wanting, desiring or even positively enjoying its infliction. In England and Wales,

16 Coppens, Brink, Huys, Fransen and Morrens (2019: 2).
17 For in-depth analyses of two particular local communities in the United States of America see Newmahr (2011), Weiss (2011).
18 Sisson (2007).
19 This is evident, for example, within the development and widespread circulation of the BDSM community credoes ‘SSC’ (Safe, Sane and Consensual) and ‘RACK’ (Risk Aware Consensual Kink).
20 Rubin (2007: 151).
21 Rubin (2007: 151).
22 Andrieu, Lahuerta and Luy (2019), Khan (2015), Lin (2017), Moser (2019).
23 Simula and Sumerau (2019: 454).
24 Richardson, Smith and Werndly (2013: 146).
25 Khan (2009: 102).
the threshold level of injury is ‘bodily harm’,26 in Australia it is ‘bodily harm’ (or ‘wounding’ in some jurisdictions),27 and in Canada it is ‘bodily harm’.28 These thresholds are low and can be crossed by minor injuries that do not require medical intervention and that do not result in permanent damage, such as bruising, cuts or abrasions.29 In the United States of America the threshold level is ‘serious bodily injury’, which theoretically seems to permit a higher level of injury but practically does not because ‘courts exaggerate or mischaracterize BDSM activities in order to force the resulting injuries into th[is] category’, even where the injuries constitute nothing more than ‘light grazing’.30 If the threshold of injury within a jurisdiction is crossed then BDSM participants will become criminally liable for the relevant offence, such as assault occasioning bodily harm, wounding or assault and battery.

In other contexts it is lawful to cause injury to another person as long as they consented to this. But whilst consent provides a shield from criminal liability in sport, surgery, tattooing and piercing, etc., it does not do so for BDSM. The rationale for this was most (in)famously articulated in the English case of R v Brown,31 which involved the prosecution of a group of homosexual men for engaging in BDSM activities. Here, the House of Lords held by a 3:2 majority that consensual BDSM activities were criminal if they involved the infliction of injuries amounting to at least bodily harm. The majority explained that the reason why consent was legally recognised in some contexts but not others was the public utility of the activities in question. Whilst sport, surgery, tattooing and piercing, etc., were all considered socially valuable, BDSM was considered by the majority to have no social benefit because it was immoral, depraved, risky and unpredictably dangerous. The decision of the House of Lords was upheld in a subsequent appeal to the European Court of Human Rights,32 and was recently reaffirmed by the Court of Appeal.33 R v Brown has been widely cited and debated internationally and its inclusion in a recent English collection of Landmark Cases in Criminal Law is certainly warranted.34

The criminalisation of BDSM activities has come under sustained criticism for a variety of reasons. For example, for being incompatible with core tenets of liberalism

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26 R v Brown [1994] 1 AC 212.
27 Bennett (2013).
28 Khan (2014), Tanovich (2010).
29 The longstanding definition of ‘bodily harm’ within English common law is that it ‘has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the [victim]. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling’: R v Donovan (1934) 2 KB 498, 509.
30 Kaplan (2014). See also Bergelson (2006–2007).
31 [1994] 1 AC 212.
32 Laskey, Jaggard and Brown v UK (1997) 24 EHRR 39.
33 R v M(B) [2018] EWCACrim 560.
34 Herring (2017).
such as autonomy and privacy,\textsuperscript{35} for inaccurately treating BDSM as violence rather than sex,\textsuperscript{36} for the arbitrary nature of the categories where consent is legally recognised and not recognised,\textsuperscript{37} and for failing to properly account for the social value of sexual pleasure.\textsuperscript{38} \textit{R v Brown} itself has been condemned for its unprincipled reasoning,\textsuperscript{39} judicial moralising and paternalism,\textsuperscript{40} and ignorance about BDSM.\textsuperscript{41} This case has been described as leaving the general area of the law in a state that is ‘ill-principled, inconsistent and illiberal’.\textsuperscript{42} Due to the perceived failings of this area of law, numerous commentators have put forward proposals for legal change that would treat the consensual infliction of injuries during BDSM activities in a manner equivalent to the legal treatment of injuries in sport, surgery, tattooing and piercing, and the like.\textsuperscript{43}

**The Bogus BDSM Argument**

Nevertheless, some commentators maintain that the criminalisation of BDSM is justified. Overtly moralistic and paternalistic rationales for criminalisation, such as those given in \textit{R v Brown},\textsuperscript{44} have been largely abandoned in favour of alternatives. For example, one emerging rationale is that BDSM activities purportedly contravene the ‘dignity’ of participants, that is that even though they are consensual they impermissibly denigrate the special, intrinsic value afforded to human beings by virtue of their humanity.\textsuperscript{45} Such dignity-based justifications for criminalising consensual sexual activities are familiar from debates around homosexuality and sex work. The focus of this article, however, is on the bogus BDSM argument, a rationale that is idiosyncratic to the issue of BDSM and that appears to be gaining momentum within the commentary. This argument is that BDSM activities should be criminalised because otherwise false claims of BDSM will be used by defendants to excuse or minimise their criminal liability for nonconsensual abuse. The most influential and widely-cited formulation of the bogus BDSM argument appears in a 2001 article by the late Professor Cheryl Hanna of Vermont Law School, entitled ‘Sex is not a

\textsuperscript{35} Athanassoulis (2002).

\textsuperscript{36} Bamforth (1994), Cowan (2014), Pa (2001).

\textsuperscript{37} Egan (2007).

\textsuperscript{38} Kaplan (2014).

\textsuperscript{39} Bix (1997–1998), Giles (1994), Tolmie (2012).

\textsuperscript{40} Bansal (2018).

\textsuperscript{41} Ashford (2010: 351), Doherty (2012: 119), Hoople (1996), Thomson (1994).

\textsuperscript{42} Clement (2018: 454).

\textsuperscript{43} Athanassoulis (2002), Bamforth (1994), Egan (2007), Kaplan (2014: 155–156), Onoma (2017).

\textsuperscript{44} [1994] 1 AC 212.

\textsuperscript{45} Baker (2008), Lim (2017). For rebuttals to this line of argument see Cowan (2011: 72–73), Kaplan (2014: 129–130).
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Sport: Consent and Violence in Criminal Law’. 46 This article’s formulation is worth setting out in detail, but this Part will also show how the tenets of the bogus BDSM argument have also appeared more broadly within international legal commentary in recent years.

As will become apparent as this Part progresses, the bogus BDSM argument is typically (but not exclusively) couched in gendered terms, that is its proponents often emphasise the particular concern that men will use bogus claims of BDSM to permit the nonconsensual abuse of women. Violence inflicted by men against women is a significant and serious social problem and legal responses to this have been manifestly inadequate in many ways. 47 This article affirms the importance of combatting gender violence but maintains that the continued criminalisation of BDSM activities is neither an effective nor a justifiable means of doing this. It should be noted here that there is a rich and highly diverse body of feminist scholarship on BDSM, one that ranges from the radical feminist claim that all forms of BDSM activity (including those between two women) are oppressive and abusive to women, through to the sex positive feminist claim that participation in BDSM activities can be empowering and have liberatory potential for women. 48 Different feminist accounts of BDSM thus provide theoretical support for very different criminal regulatory responses to BDSM activities. This article acknowledges these broader feminist disagreements but brackets them here so that it can focus its attention specifically on the merits of the bogus BDSM argument.

Cheryl Hanna’s ‘Sex is Not a Sport’

For Hanna, BDSM is an activity where ‘sex and violence intersect, becoming intertwined and indistinguishable’. 49 In a lengthy and wide-ranging analysis she argues that criminal law has historically developed as a means of controlling male violence by channelling it into regulated and socially beneficial pursuits and away from vulnerable potential victims, especially women. 50 This pattern of development explains why law allows violence on the sporting field and also explains why law should not allow the violence of BDSM. Whilst she recognises that when ‘practiced properly’ BDSM can be ‘safe and consensual’, 51 she nevertheless defends the criminalisation of BDSM activities as necessary to prevent violence from intruding into the sexual realm. She emphasises that this is not the result of any ‘moral judgement’ about BDSM but instead comes from weighing up the likely consequences of liberalising legal change. 52 Such change would enable widespread violence to occur within sex without legal recourse by giving ‘license to people—mostly men—to brutalize

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46 Hanna (2001).
47 Carline and Easteal (2014).
48 An extensive summary of feminist debates around BDSM can be found in Khan (2014: ch 2).
49 Hanna (2001: 239).
50 Hanna (2001: 245).
51 Hanna (2001: 247).
52 Hanna (2001: 287).
their sexual partners and then claim that she or he “asked for it.” Decriminalising BDSM would grant this license because defence lawyers in every sexual assault or domestic violence case could then claim that the accused and the victim were consensually engaging in BDSM activities, regardless of whether or not this was true. These bogus claims of BDSM would be extremely easy for defence lawyers to raise but very difficult for prosecutors to disprove. This is because BDSM is itself violent and ‘force and resistance is part and parcel of the encounter’, and thus a claim of BDSM explains away evidence of injuries as being desired and any struggles or cries of “no” as being merely role-playing. Such claims would transform key inculpatory evidence that prosecutors typically rely on into evidence that is exculpatory at worst or neutral at best.

Accordingly law, in Hanna’s telling, is faced with a choice between ‘two horns of a dilemma’: ‘in setting rules as to when one can consent to violence, the law will either be under-inclusive or over-inclusive’. If BDSM activities were to be decriminalised, BDSM participants would be able to enjoy their activities without fear of criminal repercussions but abusers would be able to indulge in sexual assault and domestic violence with greater impunity. If BDSM activities were to remain criminalised, BDSM participants would be put at risk of prosecution but vulnerable members of society would be better safeguarded from male violence. When weighing up ‘which horn of this dilemma is better (or less bad)’, Hanna prefers over-inclusivity. This is because she believes that it is unlikely that authentic BDSM activities would be brought to the attention of legal authorities or prosecuted, and also that ‘there are far more people who have been victimized by sexual violence than those who have been held criminally culpable for engaging in safe, consensual S/M’. More broadly, criminalisation aligns with society’s commitment to restricting male violence and reinscribes the ‘norms of civilized masculinity, and … civilized humanity’.

Take-Up in Commentary

The general contours of this bogus BDSM argument can be found internationally across recent commentary that touches on the legal status of BDSM activities. They are evident in claims that the criminal law ‘need[s] to make sure that domestic violence abusers cannot escape being held to account by claiming that their actions were consensual BDSM’, that ‘our greatest concern here should be that consent

53 Hanna (2001: 246).
54 Hanna (2001: 285).
55 Hanna (2001: 275).
56 Hanna (2001: 285).
57 Hanna (2001: 248).
58 Hanna (2001: 270).
59 Hanna (2001: 289).
60 Hanna (2001: 288–289).
61 Hanna (2001: 290).
62 Herring (2017: 351).
could be used to mask domestic violence and could provide an additional obstacle to claims of domestic abuse’, ⁶³ and that the ‘BDSM narrative is being appropriated by defendants to disguise what is essentially cruel and misogynist conduct as a strategy to manipulate trial and sentencing outcomes’. ⁶⁴ These arguments envisage the decriminalisation of BDSM activities as opening a floodgate of bogus exculpatory BDSM claims; ‘[i]t is certainly not difficult to imagine abusers arguing that the injuries they have inflicted upon their partner were part of a consensual S&M encounter’, ⁶⁵ indeed it is likely that men will ‘inevitably claim there was consent in circumstances in which even major injuries have been inflicted’. ⁶⁶ Such claims would pose a significant problem for law because they will be ‘easy’ for defendants to raise but very difficult for prosecutors to refute. ⁶⁷ It may even be the case that they ‘cannot be reliably tested by the courts’ at all. ⁶⁸ The concern here is that defendants will argue that ‘a “no” is really a “yes,” and [that] seemingly coercive conduct such as strangulation, slapping, bondage, threats, and name calling’ will be characterised as just ‘part of a [BDSM] game’. ⁶⁹ The fear of legal under-inclusivity justifies the legal status quo because it is argued to be better for the law to maintain the criminalisation of BDSM activities than to permit nonconsensual abuse. Because ‘permitting [BDSM] allows domestic abuse to take place without prosecution’, ⁷⁰ law should not permit BDSM at all. Accordingly, all ‘[m]en who wish to hurt women to satisfy their sexual proclivities must be willing to assume the risk of prosecution’, ⁷¹ even if certain specific women did indeed consent to this.

Some formulations of this argument have added an additional source of concern, namely that bogus claims of BDSM undercut prosecutions for fatal offences. Edwards, for example, has identified that ‘narratives of BDSM are entering the criminal law with greater frequency as part of defence submissions and considered [sic] by judges in trial and appellate courts’ within both non-fatal offence cases and fatal offence cases. ⁷² The particular concern for fatal offence cases revolves around what is known as the “rough sex” defence. The “rough sex” defence gained notoriety following the high-profile New York “Preppie Murder” case in the late 1980s. ⁷³ At its core, this defence is a claim by a defendant charged with a fatal offence that the victim died inadvertently during the course of a consensual sexual encounter. The defence claim here is not that the victim consented to being killed but that they consented to a certain level of “rough” sexual activity. Two exculpatory mechanisms explain why defendants make this kind of claim. First, it lessens the defendant’s

⁶³ Pegg (2018).
⁶⁴ Edwards (2016: 89).
⁶⁵ Pegg (2018).
⁶⁶ Kerr (2019: 58).
⁶⁷ Herring (2017: 348–349).
⁶⁸ Edwards (2016 88–89).
⁶⁹ Busby (2012: 349).
⁷⁰ Herring (2017: 347).
⁷¹ Kerr (2019: 59).
⁷² Edwards (2016: 89).
⁷³ Buzash (1989: 557).
culpability by raising the suggestion that the victim themselves ‘consented to the sexual activities that caused the resultant homicide’. 74 Second, it undermines the prosecution’s ability to establish that the defendant had an intention to kill the victim as it presents their death as inadvertent. 75 The potential benefits to the defendant of successfully raising a “rough sex” defence are that it increases the likelihood of being convicted of less serious fatal offence with a lower maximum penalty (such as manslaughter instead of murder), and it may also garner them additional leniency at the sentencing stage. In fatal offence cases, claims that the victim and defendant were engaged in BDSM activities are a kind a “rough sex” defence. 76 that is such claims suggest that the defendant unintentionally killed the victim during the course of BDSM activities that the victim themselves consented to. If a claim of BDSM is successfully raised in such cases it would accrue to the defendant all the potential benefits of a typical “rough sex” defence.

The Line Between BDSM and Nonconsensual Abuse

Across Parts 1 and 2 it has become apparent that despite widespread critiques of the law a resurgent bogus BDSM argument is being used by some commentators to defend and to shore up the criminalisation of BDSM. This argument is figured as posing a significant stumbling block to decriminalisation, with even a detractor acknowledging that it provides ‘[o]ne of the stronger arguments in favor of prohibiting consensual BDSM activity’. 77 This article contends that the bogus BDSM argument is not strong at all but rather is deeply flawed and does not justify the criminalisation of BDSM activities. This Part refutes the bogus BDSM argument by demonstrating the untenability of its assumption that law cannot distinguish between BDSM and nonconsensual abuse, the illogicality of its exceptionalisation of BDSM, and the legal irrelevance of its references to fatal offence cases. Ultimately, this Part shows that law can draw a sufficiently clear regulatory line between BDSM and nonconsensual abuse but that doing so will require educating legal officials about the norms and conventions of BDSM culture.

The Assumption of Indistinguishability

The first major flaw that unites the different formulations of the bogus BDSM argument is a fallacy that I will refer to as the “assumption of indistinguishability”. This assumption is that if BDSM activities were legalised then law would be unable to properly distinguish between cases involving authentic BDSM and those involving nonconsensual abuse masked by a bogus claim of BDSM. I refer to this as an “assumption” because proponents of the bogus BDSM argument typically assert that law would face difficulty making this distinction and gesture broadly to what

74 Buzash (1989: 560).
75 Buzash (1989: 560).
76 Christopholus (2020).
77 Kaplan (2014: 135).
they see as similarities between BDSM and nonconsensual abuse, but do not explain in detail why there would be such difficulty. Similarly, proponents of the bogus BDSM argument often do not make entirely clear what they believe the scope of the problem here to be. Is law imagined to be wholly incapable of distinguishing BDSM from a bogus claim? To have serious difficulty doing so? Or just to have some difficulty doing so? Is this problem imagined to arise in every case involving a claim of BDSM? Most cases? Many cases? Or just some cases? In order to provide a justifiable rationale for criminalising all injurious BDSM activities, the bogus BDSM argument presumably needs to at least claim that law would have substantial difficulty distinguishing BDSM from a bogus claim in a substantial proportion of cases. But regardless of its exact scope this assumption is crucial to the bogus BDSM argument. This is because this assumption sutures together the legal fates of BDSM and nonconsensual abuse; the bogus BDSM argument justifies its sweeping approach to criminalisation on the basis that legalising BDSM activities simultaneously and necessarily permits nonconsensual abuse as well. The assumption of indistinguishability thus provides the lynchpin that enables the bogus BDSM argument to leverage the threat of legal under-inclusivity. But is this assumption tenable? Why would law struggle to distinguish between BDSM and a bogus claim?

Legal discourse has historically characterised BDSM activities as wild and unconstrained. In *R v Brown*, the majority judgements constructed an image of BDSM as violence that was ‘unpredictably dangerous’, escalatory, reckless as to the safety of the passive participants, and marked by a ‘loss of control’. This characterisation of BDSM in terms of ‘unpredictability and dangerousness’ was ‘crucial’ to the majority’s reasoning, because it feeds into the notion that BDSM activities need to be criminalised because ‘sado-masochistic participants have no way of foretelling the degree of bodily harm which will result from their encounters’. The notion that BDSM activities constitute a kind of ‘sexual frenzy’ is drawn on and reinforced further by proponents of the bogus BDSM argument who frame claims of BDSM as a kind of “rough sex” defence, implying that BDSM itself is nothing more than an especially violent and physical form of sex.

If the characterisation of BDSM activities that emerges from this legal discourse was accurate—if BDSM was merely a type of wild, unpredictable and physical sex—then it might be tenable to claim that law would have trouble distinguishing between BDSM and nonconsensual abuse. Even then, however, the bogus BDSM argument could still be refuted on the basis that ‘[a]llowing consent to harm in principle and difficulties in ascertaining the genuineness of consent should be two distinct questions’. Whilst law may struggle and ‘find it difficult to decide on the boundaries between consensual sado-masochism and assault … such difficulties

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78 Moran (1995: 226).
79 Giles (1994: 106).
80 Edwards (1993: 407).
81 Syrota (1996: 189).
82 Bakolas (2019: 48–49).
are not in themselves an argument for making sado-masochism illegal’. Instead of criminalising BDSM activities these difficulties could instead be addressed by placing strict conditions on the legal recognition of consent to BDSM activities, such as requiring that the victim give oral evidence at trial that they consented, or imposing a ‘presumption of nonconsent combined with a high burden of proof’ on the defendant to establish the victim’s consent. However, such strict conditions are unnecessary because law’s characterisation of BDSM activities here is not accurate.

It is reductive to conceptualise BDSM activities as simply sex with some minor quantitative additions, that is more physicality, more danger and more unpredictability. To be properly understood, BDSM activities should be recognised as a complex array of differing personal interactions that are unified by the common norms and conventions of BDSM culture. These core features of BDSM culture make the assumption of indistinguishability untenable because they provide a set of distinctive evidentiary characteristics that can be used to distinguish BDSM from bogus claims of BDSM. First, BDSM has developed a strong consent culture built around formal mechanisms for ensuring that participants in BDSM activities give clear, affirmative and ongoing consent. ‘Negotiations’ are the process by which participants in potential future BDSM activities discuss the terms of their participation in advance, setting out the specific activities that they consent to and those they do not (their ‘limits’). Negotiations include setting a ‘safeword’, a designated signal which when given by any participant indicates the immediate retraction of their consent and brings the activities to an end. During the course of lengthy BDSM activities, it is also commonplace for “active” participants to periodically ‘check in’ with “passive” participants to reconfirm their enjoyment of the activities. Even after BDSM activities end there may still be ‘aftercare’, a process by which the immediate needs of the participants—such as hydration, sustenance, quiet, physical contact, etc.—are met. Second, BDSM culture values both ‘education’ and ‘knowledge-sharing’. Local BDSM communities typically hold workshops on issues like basic medical knowledge and proper techniques for activities, and experienced participants may mentor those with less experience. Such information is also available within BDSM publications, such as how-to books, and via internet-based resources, such as video tutorials. Third, BDSM cultural standards discourage engaging in BDSM activities whilst intoxicated by alcohol and/or drugs. Within the widespread community credo ‘Safe, Sane and Consensual’, the term ‘Sane’ refers in part to BDSM participants being ‘in full control of their faculties when making the decision’ to participate in BDSM activities and any risks that may involve. Fourth, local BDSM community events that involve ‘play’, such as those held at dedicated dungeon venues or private houses, are typically governed by event rules that may include house-imposed

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83 Athanassoulis (2002: 154). See also Bergelson (2006–2007: 188), Schumann (2018: 1199).
84 Pa (2001: 81).
85 Haley (2015: 654).
86 Bennett (2018).
87 Fanghanel (2019: 116).
88 Newmahr (2011: 146).
‘limits’ on the kinds of activities that are acceptable, house-defined ‘safewords’ and patrolling ‘Dungeon Monitors’ tasked with rule enforcement and ensuring general safety.\(^89\) Fifth, whilst ‘[w]hat is possible within kink is vast [it is] also composed … along striated lines of permissibility’.\(^90\) “Edgeplay” is the term given to activities that are regarded as ‘controversial’ within BDSM communities\(^91\) and which may be banned within local BDSM community spaces. Such activities exist at the border-line of what is acceptable within BDSM culture and of what ‘belong[s] in the community’\(^92\). Activities considered edgeplay are characterised by a higher level of risk and/or a higher level of necessary technical proficiency, or they are controversial for ethical or political reasons. This includes playing with blood, fire, asphyxiation, race-based power dynamics, etc.

Far from being wild and unpredictable, BDSM activities are thus actually a highly controlled set of practices governed by clear and identifiable cultural standards of behaviour. Indeed, ‘[c]ontrary to images of “rough sex”, a sense of genuine recklessness and chaos is normally undesirable in SM interactions’.\(^93\) Far from being easy to raise and difficult to disprove, claims of BDSM can be strongly tested in a variety of ways with reference to the core features of BDSM culture. This could include inquiries into and questions about:

- Whether negotiations took place and what they covered;
- What limits were set;
- What safeword was agreed on and whether it was used;
- Whether checking-in took place;
- Whether aftercare took place;
- The participants’ experience in relation to BDSM generally and the relevant activities specifically;
- The participants’ training or education in relation to BDSM generally and the relevant activities specifically;
- The steps the participants took to minimise any potential risks of the relevant activities;
- The participants’ knowledge of the norms and conventions of BDSM culture;
- The extent of the participants’ involvement in local or online BDSM communities;
- The extent to which the relevant activities are recognised by BDSM communities as constituting BDSM; and,
- The extent to which the relevant activities are accepted within BDSM communities.

These issues are all potentially useful indicators for determining whether a claim of BDSM is bogus.

\(^{89}\) Weiss (2011: ch 2).
\(^{90}\) Fanghanel (2019: 130).
\(^{91}\) Newmahr (2011: 147).
\(^{92}\) Newmahr (2011: 147).
\(^{93}\) Newmahr (2011: 86).
Due to a general social lack of understanding about BDSM, it may be the case that not all police officers, lawyers, judges and juries, possess the requisite knowledge needed to identify and utilise these distinctive evidentiary features when tasked with assessing a claim of BDSM. Accordingly, a number of commentators have identified that the provision of proper information and education about BDSM is the key means of ensuring the ability to distinguish between BDSM and nonconsensual abuse. If there is a knowledge-gap here then remedial efforts should be made to equip all legal officials with the cultural competence necessary to deal appropriately with claims of BDSM. In addition to training programs for lawyers, judges and police, it may also be necessary to call expert witnesses in order to explain BDSM for the benefit of juries, and to ‘testify that there are several features distinguishing a consensual S/M relationship from domestic violence’ and other nonconsensual abuse. (Expert witnesses have already been of assistance to Canadian judges in some BDSM cases.) Juries may also need to be provided with judicial instructions that explain BDSM.

Although BDSM has developed strong internal cultural norms around consent and safety, BDSM activities are not immune from the potential for abuse. BDSM culture is not some utopia free from the wrongdoing and predation that afflicts human society. Examples of abusive behaviour within BDSM activities include the continuation of play after a safeword has been used and the imposition of activities by the “active” participant that exceed the “passive” participant’s pre-agreed limits. These nonconsensual behaviours are rightly criminalised and would remain criminal after the decriminalisation of consensual BDSM activities. To the extent that enhanced legal education and decriminalisation would de-stigmatise BDSM and heighten community awareness of how it works, these steps could even ‘lead to greater protection of those who do not consent’. Pitagora has identified ‘a need to educate the general population’ about the difference between BDSM and abuse within BDSM relationships, as well as a need for law enforcement officials that are ‘more empathetic and culturally competent’ in this area. These changes could help to give a voice to those BDSM participants who are actually abused and are currently silenced by stigma and discrimination. There is an opportunity here for law to protect, rather than persecute, members of BDSM communities.

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94 Egan (2007: 1641), Gallant and Zanin (2019: 41), Horn (2015: 32–33), Pa (2001: 85–88).
95 Busby (2012: 358).
96 Pa (2001: 87).
97 See eg the obscenity and humanity rights cases described in Khan (2014: 217–222, 290–293). Expert witnesses do not yet appear to have been used in criminal cases involving violent or sexual offences: Busby (2012: 349).
98 Horn (2015: 32).
99 Tanovich (2010: 92).
100 Pitagora (2016: 105).
101 Pitagora (2016: 98).
The Exceptionalisation of BDSM

The second major flaw apparent across formulations of the bogus BDSM argument is the illogical exceptionalisation of BDSM that is necessary to reach the conclusion that BDSM activities should be criminalised. That is, this argument relies on arbitrarily singling BDSM activities out for special legal scrutiny and additional legal requirements. This exceptionalisation manifests in a number of ways, including following lines of reasoning that are not universalisable to other similar situations and treating defense claims of BDSM in manner that is inconsistent with the treatment of other defense claims.

Exceptionalisation is apparent in the way the bogus BDSM argument unproblematically concludes that over-inclusivity is preferable to under-inclusivity when it comes to regulating BDSM. Assuming arguendo that legalising BDSM activities would make law under-inclusive, why is over-inclusivity preferable here? Blackstone’s Ratio that “better that ten guilty persons escape, than that one innocent suffer” is inverted for BDSM,102 with the bogus BDSM argument concluding instead that it is better that some non-culpable BDSM participants suffer than more non-consensual abusers escape criminal liability. Problematically, this argument does not impose criminal liability on BDSM participants for the principled reason that participating in BDSM activities itself constitutes culpable wrongdoing,103 but instead does so for the instrumental reason that this will bolster the chances of convicting people who have not participated in BDSM activities. The exceptionalising nature of this approach to BDSM comes into focus if we consider a hypothetical proposal to criminalise sex that mirrors, mutatis mutandis, Hanna’s bogus BDSM argument for criminalising BDSM activities.104 Such a proposal would look something like this:

Criminalising all sex, regardless of consent, would resolve the serious difficulties that prosecutors have in trying rape cases where the defendant claims that the victim “asked for it”. Bogus claims of consent in rape cases are easy to raise and notoriously difficult to disprove, so preventing them from being raised at all would greatly enhance the prospects for conviction. Whilst criminalising all sex would make the law over-inclusive because it would criminalise both consensual sex as well as rape, this is preferable to the law being under-inclusive by permitting both consensual sex and rape where consent is falsely claimed. Over-inclusivity is preferable here because it is very unlikely that consensual sex would be brought to the attention of legal authorities or prosecuted, and there are far more people who have been victimised by rape than those held criminally liable for engaging in consensual sex.

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102 Schumann (2018: 1203).
103 As Ashworth identified in his influential article ‘a core element of criminal law, from a normative point of view, is that the criminal sanction should be reserved for substantial wrongdoing’, and that if the scale of wrongdoing can be measured by the ‘two main dimensions of harm and culpability’ then ‘[t]he centrality of the culpability requirement is surely part of the essence of the criminal law’: Ashworth (2000: 240).
104 This hypothetical builds on similar comments made by Cowan (2011: 65), Green (2020: 293).
These are risible reasons for criminalising sex. Whilst rape is a serious and pressing issue that law certainly needs to address in an effective manner, the reasons given here simply do not justify such gross state overreach and such deep intrusion into the core human rights of autonomy and privacy. If these reasons for criminalisation are rightly rejected when it comes to sex, they cannot logically be regarded as compelling reasons for criminalising BDSM activities. Indeed, the bogus BDSM argument fails on multiple fronts to treat the regulation of BDSM activities consistently with the regulation of other activities. Another example of this is identified by Kaplan, who notes that if concerns about proof of consent are really so ‘significant’ in determining whether consent should constitute a defence to activities involving injuries, ‘then we might expect to see courts and legislatures prohibiting the consent defense in the context of informal sports that lack oversight by referees or umpires’.105

Exceptionalisation also manifests in the way the bogus BDSM argument attempts to leverage the assumption of indistinguishability to justify criminalisation. Accepting arguendo that law would face some level of difficulty identifying bogus claims of BDSM, how is this different from the other difficult defense claims that law deals with already? One would think that the ‘most straightforward solution’ to sorting BDSM from bogus claims of BDSM would be to proceed ‘in the same way we handle rape and sexual assault—that is, on an ad hoc, case-by-case basis’.106 It is standard operating procedure for trials to test all sorts of complex claims and ‘courts routinely grapple with questions of consent in many criminal and civil cases’.107 In such ‘difficult cases’ we ‘trust the judicial adversarial fact-finding system’ and its evaluative procedures, such as ‘cross-examination, evidentiary rules, expert testimony, and thorough investigations’.108 It is arbitrary to contend that out of the panoply of difficult defense claims that can be raised, claims of consent to BDSM should not be allowed because they are somehow too hard for the law to deal with. Any ‘[p]ractical problems with policing sado-masochism are similar to those of policing other practices’ that involve consent,109 and any such problems should be resolved through the typical legal measures, such as ‘judicial instructions, the ethical obligations of defence counsel to not lead false or bad faith defences and expert evidence on the nature of S/M practices’.110

Indeed, it is unclear why the bogus BDSM argument seems to treat bogus claims of BDSM as if they are a particularly powerful means of excusing or minimising criminal liability. ‘Simply allowing a defendant to raise consent as a defense … does not necessarily mean that the fact-finder in the case will view statements to that effect as credible’,111 and there is no reason to think that bogus claims of BDSM are somehow more inherently credible than other defense claims. Law is not obliged to ‘take every claim of consent at face value’ and ‘[e]ven if SM were lawful … the jury

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105 Kaplan (2014: 135–136).
106 Green (2020: 293).
107 Haley (2015: 654). See also Cowan (2011: 67), Khan (2014: 249).
108 Pa (2001: 86).
109 Athanassoulis (2002: 154).
110 Tanovich (2010: 92).
111 Schumann (2018: 1199).
might still judge the encounter to be non-consensual and convict the accused’. Indeed, in an analysis of every Canadian criminal case between 2005 and 2011 where the defendant relied on a claim of consensual BDSM, Busby concluded that ‘[c]onvictions are likely where the evidence clearly supports a finding that an assertion of consensual BDSM is little more than a pretense to justify extreme violence’. In cases where the victim gives evidence that they did not consent, this can easily reveal the bogus nature of such a claim and lead to it being rejected by decision-makers. Where a victim does not give evidence there nevertheless remains, as discussed above, a number of distinctive evidentiary features of BDSM that can still be used to identify bogus BDSM claims. Concerns that victims of nonconsensual abuse may in some cases perjure themselves and give evidence in support of a defendant’s bogus claim of BDSM do not justify law’s blanket refusal to recognise the possibility of authentic consent to BDSM activities in all cases.

The Irrelevance of Fatal Offences

The third major flaw in the bogus BDSM argument is only apparent in those formulations that extend their scope of concern beyond cases involving non-fatal offences to also encompass fatal offences. Whilst the term ‘“rough sex” defense’ was originally used to describe a particular kind of defence in fatal offence cases, some commentators now use this term more broadly as a descriptor that also encompasses claims of consent in non-fatal offence cases involving injuries that occurred in a sexual context (including rape cases and violent offence cases). Hanna, for example, describes claims of consensual injurious sex as constituting a “rough sex” defence to assault and battery charges. This terminological expansion would seem to capture each and every claim of BDSM under the broadened rubric of the “rough sex” defence, regardless of whether the offence charged was assault occasioning bodily harm or murder. But when addressing the decriminalisation of BDSM activities it is misleading to use the single term ““rough sex” defence’ interchangeably across both categories of offences. It is also misleading for the discussion to freely traverse both fatal and non-fatal offence cases. These rhetorical moves are misleading because they conflate claims of BDSM in non-fatal offence cases with claims of BDSM in fatal offence cases. In actuality, these claims operate in different ways and have different effects across these two categories of offence, and they should be properly understood as constituting two distinct and separate legal issues.

Let us begin with claims of consent to BDSM activities in non-fatal offence cases. The current criminalisation of BDSM activities means that consent does not negate

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112 Cowan (2011: 64).
113 Busby (2012: 352).
114 See eg R v Latsamyvong (2017) (Queensland, Supreme Court, Court of Appeal).
115 Hanna (2001: 244).
116 MacKinnon would agree with this characterisation as she believes that every claim of “rough sex” is already ‘a sadomasochism defense’, because all such claims apparently rely on ‘the woman being stereotypically cast as a consensual sexual masochist who is lying in that she desired what she is now charging as an undesired attack’: MacKinnon (2016: 461).
117 See eg Kerr (2019).
criminal liability for non-fatal violent offences involving the causation of even minor injuries. The decriminalisation of BDSM activities would involve a change to the law that allowed, at minimum, a successful defense claim of consent to negate criminal liability for non-fatal violent offenses involving minor injuries. Whether or not decriminalisation should also extend to encompass major injuries, such as those that constitute grievous bodily harm, is a more vexed question. It should be noted here that the infliction of disabling or potentially life-threatening injuries is not a feature of BDSM culture, indeed this violates the “Safe” aspect of the “Safe, Sane and Consensual” credo. Whilst some BDSM participants do engage in activities that involve the infliction of permanent (or semi-permanent) decorative body markings, such as piercing, branding and cutting, this is regarded as “edgeplay” within BDSM culture. There are a variety of different proposals for the decriminalisation of BDSM activities. Some proposals contend that the exculpatory power of consent to injuries inflicted in the course of BDSM activities should be the same as it is for injuries inflicted in the course of similar activities such as sport, cosmetic surgery, tattooing and piercing,\(^\text{118}\) other proposals contend that such consent should only extend to minor injuries and not more serious injuries.\(^\text{119}\) Despite differences across these proposals in terms of what exact level of injury should be decriminalised within the course of BDSM activities, it has never been proposed that killing should be decriminalised. Needless to say, such a proposal would be outlandish. It would be wildly at odds with the practices of BDSM communities and the norms and conventions of BDSM culture, it is never been sought by BDSM advocates and it would give consent to BDSM activities an exculpatory legal power far beyond that given to consent to other injurious activities (whilst consent is recognised to injuries inflicted in sport, for example, this does not permit gladiatorial combat to the death).

Let us turn now to claims of BDSM in fatal offence cases. BDSM versions of the “rough sex” defence do not claim that the killing was legally authorised, excused or justified by the BDSM context. They do not claim that because it is lawful to consensually inflict injuries in the course of BDSM activities that it is thereby lawful to kill in the course of BDSM activities. All the “rough sex” defence does is invoke BDSM as an expository prop that attempts to recontextualise the killing in a manner more favourable to the accused. The claim of a BDSM context here is not so much a legal defence as it is a factual assertion with legal implications, as what it offers is a narrative that can be put before the decision-maker to explain why the defendant lacked the intent to kill the victim. Because the viability of the “rough sex” defence does not depend on whether the infliction of injuries in the course of BDSM activities is criminal or lawful, the continued criminalisation of BDSM activities is not somehow needed to prevent “rough sex” defences from being raised in fatal offences cases. This disconnection is evidenced by the fact that the “rough sex” defence has consistently been raised for decades within jurisdictions that already criminalise BDSM activities. Decriminalisation of BDSM activities would not enable or boost these defences—indeed it would have no legal effect on them. Whether or not

\(^{118}\) Egan (2007), Kaplan (2014: 155).

\(^{119}\) Athanassoulis (2002: 154), Law Reform Commission (1995: 198).
consent negates liability for the infliction of injuries in the course of BDSM activities is simply a different issue from whether consent protects against liability for the infliction of death in the course of BDSM activities.

Concerns about the operation of the “rough sex” defence in fatal offence cases are thus a red herring in discussions about the decriminalisation of BDSM activities in terms of non-fatal offences. The only marginal claim for relevance that could possibly be made here is that if the law were to explicitly and specifically criminalise BDSM activities within non-fatal offences then bogus claims of BDSM in fatal offence cases would be less believable. The argument would be that criminalisation places an additional burden on lying defendants because they would have to convince the decision-maker that the victim voluntarily participated in a criminal (and thereby presumably a condemned and socially marginal) activity. Conversely, if BDSM activities were to be decriminalised then the argument would be that lying defendants would be more believable because decision-makers would be more likely to believe that the victim participated in a lawful (and thereby presumably more socially acceptable) activity. This argument, if taken at face value, provides a very tenuous basis for the state to take the weighty step of attaching criminal liability to participants in all injurious BDSM activities. This argument also falls apart under scrutiny. If anything, it is the continued criminalisation of BDSM activities that makes bogus claims of BDSM more believable because it hinders the spread of accurate information about BDSM by marginalising BDSM participants, driving BDSM communities underground and allowing misrepresentations of BDSM to proliferate. As has been argued above in this Part, for legal officials to be able to properly test and evaluate bogus BDSM claims they need to understand the norms and conventions of BDSM culture. Only decriminalisation can facilitate proper access to this information.

There may very well be valid and serious concerns about the ability of defendants to raise “rough sex” defences by falsely claiming BDSM after they have killed someone. However, these concerns have no bearing on whether consent to injuries within BDSM activities should be legally recognised. To the extent that some proponents of the bogus BDSM argument conflate these two categories of offences, this is at best misguided and at worst deliberately misleading. Revealing the irrelevance of fatal offence cases not only directly rebuts account of the bogus BDSM argument that rely on such cases it also indirectly undermines the persuasive power of the bogus BDSM argument more generally. The fact that fatal offence cases are included within the scope of discussion about the criminal regulation of BDSM activities creates the false impression that decriminalisation is a matter of life-and-death. This false impression bolsters all versions of the bogus BDSM argument by inaccurately amplifying considerations of risk and danger. Dispelling this illusion reveals that the true stakes of the bogus BDSM argument are actually a matter of injury, and indeed many calls for decriminalisation extend only to minor injuries.

120 Christopholus (2020).
Conclusion

The bogus BDSM argument may not be a new argument but it has found a new lease on life in recent years. The recent up-take of this argument within legal commentary has likely been prompted by the increasing social visibility of BDSM and the attendant pressure this places on criminal law to account for why BDSM activities continue to be criminalised. As Chatterjee has observed, ‘[i]t can be no coincidence that at the very moment when the sexual narrative of consensual BDSM is entering into a new economy of representation, poised on the threshold of more fully entering into the public imaginary, we find its suppression’. But the bogus BDSM argument is deeply flawed and does not justify the continued criminalisation of BDSM activities. As this article has shown, this argument relies on premises that are untenable, illogical and irrelevant.

The ‘proper function’ of the criminal law in relation to BDSM activities is to ‘sort out those cases that are genuinely consensual from those that are not, not to prohibit them all categorically’. The bogus BDSM argument fails to establish that it is impossible for criminal law to effectively carry out this sorting function and thus categorical prohibition is not warranted. The bogus BDSM argument does, however, provide a salutary warning that efforts need to be made to redress the lack of legal knowledge about BDSM, as it is this knowledge that would make it possible for law to effectively sort cases involving claims of BDSM. Where there is ‘openness to BDSM’ but ‘ignorance about BDSM practices’, this creates a ‘vulnerable spot’ that is ‘ripe for exploitation by individuals wishing to defend non-consensual sexual behaviour by using the language of BDSM’. With the benefit of remedial education about the norms and conventions of BDSM culture, legal officials and processes are capable of sorting between cases involving BDSM and those involving bogus claims of BDSM. Such education would help ensure that legal officials ‘do not make wrong assumptions about BDSM practices and permit violence … to be dressed up as consensual pleasure’, and would also benefit BDSM communities in terms of de-stigmatisation and better legal protection.

The increasing visibility of BDSM within Western societies provides a valuable opportunity for the criminal law to better understand what it seeks to regulate. If law were equipped with sufficient knowledge about the norms and conventions of BDSM culture then the decriminalisation of BDSM activities would not permit non-consensual abuse. There may be a fine line between pleasure and pain but there is a thick line between BDSM and nonconsensual abuse—in order to find it, law simply needs to know where to look.

121 Chatterjee (2012: 747).
122 Green (2020: 350).
123 Busby (2012: 346).
124 Gallant and Zanin (2019: 37).
125 Busby (2012: 358).
Complaince with Ethical Standards

Conflict of interest On behalf of all authors, the corresponding author states that there is no conflict of interest.

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