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Legal Censure of Unconventional Expressions of Love and Sexuality; Finding a Place in the Law for BDSM

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means of upholding legislation that criminalizes the private sexual conduct of consenting adults.

Below, I will explore multiple ways in which the law has been used to enforce conventional morality and discourage untraditional or 'taboo' expressions of love and sexuality. I will then explore how courts have recently been applying a stricter standard when it comes to laws affecting sexual privacy rights, and show that the same rationale should be used to extend legal recognition to BDSM practitioners.

In Part I, I will use California as an example to introduce current laws defining assault and battery, which do not allow for consent to be used as a defense to criminal charges. In that section, I will also explore how these laws technically make consensual BDSM practices illegal, even when those practices create no risk of permanent harm or serious injury. Part II will examine a history of case law in the area of sexual privacy rights, with a focus on the Supreme Court's decision in *Lawrence v. Texas*. Part III will show how some courts have used the *Lawrence* decision to strike down laws that prohibit sexual expression in the form of sex toys, recognizing that the same arguments can be made in support of BDSM decriminalization. Part IV will address how many courts have been unwilling to express moral judgments against polyamory, another unconventional expression of love and sexuality, recognizing again that the same arguments can be made in support of BDSM decriminalization. Finally, Part V will explore the various ways courts and legislators may officially recognize the difference between assault or battery and consensual BDSM.

I. THE PRACTICAL CRIMINALIZATION OF BDSM PRACTICES

A. AN INTRODUCTION TO BDSM

"BDSM" is an acronym that encompasses a number of sexual preferences and fetishes; bondage and discipline (BD), dominance and submission (DS), and sadism and masochism (SM).³ BDSM activities may involve a certain level of pain or physical force, such as slapping, scratching, or biting.⁴ Often times, practitioners use props, such as rope, whips, floggers, or paddles.⁵ These activities may result in minor injury,

3. MARGOT WEISS, TECHNIQUES OF PLEASURE; BDSM AND THE CIRCUITS OF SEXUALITY, at vii (2011).

4. Tess M. Gemberling et al., *Psychological Functioning and Violence Victimization and Perpetration in BDSM Practitioners*, NAT'L COAL. FOR SEXUAL PRIVACY 16 (2015), https://ncsfreedom.org/images/stories/2015_Survey_PDFs_ETC/NCSF%20Technical%20Report%20Mental%20Health%20Survey.pdf.

5. *Id.* at 15–16.

which could range from bruises and welts to scratches and scars, depending on the level of force agreed upon by the participants.⁶

At the heart of BDSM culture is the importance placed on honesty, negotiation, and consent; all parties involved must desire and agree to the performed activities, as well as the results thereof, including any marks, pain or minor injury.⁷ However, BDSM practitioners are in danger of criminal prosecution because the law does not recognize consent as a defense to assault or battery, and those BDSM activities that result in pain or minor injury tend to meet the legal definitions of assault and battery, as described below.⁸

Note that I will use the terms “performer” and “recipient” to refer, respectively, to the person performing an action that may cause pain or minor injury, and the person on the receiving end of that action.

B. CRIMINAL ASSAULT AND BATTERY

I will be using the California Penal Code to exemplify the way that criminal assault and battery are defined within the legal system. While many states may have different wording in their statutes, none recognize exceptions for BDSM practices, and none make a defense of consent available to a performer that is engaging in consensual activity with a recipient.

The California Penal Code defines assault as “an unlawful attempt . . . to commit a violent injury on the person of another”⁹ and battery as “any willful and unlawful use of force or violence upon the person of another.”¹⁰ An initial reading raises questions about the utilized terminology. In the case of assault, what is “a violent injury”? Does the inclusion of the phrase “unlawful” imply the existence of a “lawful attempt” to commit a violent injury? If so, what is the difference between a lawful attempt and an unlawful attempt? In the case of battery, what is a “use of force or violence” and, similar to assault, what makes it lawful or unlawful?

First, in addressing assault, courts have interpreted the phrase “commit a violent injury” to mean the commission of any act of physical force against the person of another, even if the act does not actually result in pain, marks, or any tangible form of bodily harm.¹¹ Likewise, in

6. Gemberling, *supra* note 4, at 26.

7. WEISS, *supra* note 3, at 80–81; *see also* Elisabeth Sheff & Corie Hammers, *The Privilege of Perversities: Race, Class and Education Among Polyamorists and Kinksters*, Vol. 2 No. 3 PSYCHOL. & SEXUALITY 198, 202 (2011), <https://elisabethsheff.files.wordpress.com/2013/11/the-privilege-of-perversities-20111.pdf>.

8. *See infra* Part I.B.

9. CAL. PENAL CODE § 240 (2016).

10. *Id.*

11. *See, e.g.*, *People v. James*, 9 Cal. App. 2d 162, 163 (1935) (explaining that the term “violence” in relation to assault “include[s] any application of force even though it entails

addressing what constitutes “force or violence” as an element of battery, courts have noted the following:

The word ‘violence’ has no real significance. It has long been established, both in tort and criminal law, that ‘the least touching’ may constitute battery. In other words, any minor force against the person is enough; it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave any mark.¹²

Under these legal definitions, a BDSM performer may easily be confused with a criminal perpetrator of assault and battery. If a performer were to strike a recipient with a paddle, even gently so as not to leave a mark, that action would meet the definition of “commit a violent injury” or “use of force or violence” under California law.

Secondly, there is certainly a legal difference between an “unlawful attempt” and a “lawful attempt.” For example, a “lawful attempt” to commit a violent injury would occur where someone is acting in self-defense.¹³ Accordingly, a use of force or violence in defense of another would likely be lawful as well. I argue that many actions made with the consent of the other party should also be considered lawful, however, the courts have not yet recognized such a distinction in relation to BDSM.¹⁴

The California Penal Code also defines a second type of assault: that committed “with a deadly weapon or by force likely to produce great bodily injury.”¹⁵ More questions arise, such as what is a “deadly weapon,” and what is “force likely to produce great bodily injury”?

Courts have been hesitant to create a concrete list of objects that may qualify as a “deadly weapon.” California courts recognize that “[a]n instrumentality is a deadly weapon if it is capable of being used to inflict death or great bodily injury, and if its possessor intends to use it as a weapon should the circumstances require it,” but whether a particular object is a deadly weapon remains a question of fact that must be decided by a jury on a case-by-case basis.¹⁶ The objects that juries have found to be

no pain or bodily harm and leaves no mark.”); *People v. Flummerfelt*, 153 Cal. App. 2d 104, 106 (1957) (same).

12. *People v. Mansfield*, 200 Cal. App. 3d 82, 87–88 (1988) (internal citations omitted).

13. *People v. Lynch*, 101 Cal. 229, 230–31 (1894) (“One person cannot assault another in self-defense. An assault in itself is unlawful, and any act done in self-defense cannot be an assault.”).

14. Such a distinction has been recognized in relation to contact sports, however. *See People v. Samuels*, 250 Cal. App. 2d 501, 513 (1967).

15. CAL. PENAL CODE § 245 (2016).

16. *People v. Curcio*, 255 Cal. App. 2d 183, 190 (1967); *see also People v. Fisher*, 234 Cal. App. 2d 189, 193 (1965); *but see People v. Aguilar*, 16 Cal. 4th 1023, 1029 (1997) (noting that a “few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such”).

a “deadly weapon” range from obvious items, such as a knife¹⁷ or a car,¹⁸ to less obvious items, such as a pencil,¹⁹ a fingernail file,²⁰ or even a pillow.²¹ With such interpretations, a performer’s paddle could conceivably be seen as a deadly weapon. In fact, juries have found that hands and whips may both be deadly weapons, and both are common tools that a performer may use on a recipient during a BDSM encounter.²²

Similarly, what constitutes “force likely to produce great bodily injury” is also a question left to a jury.²³ When proscribing jury instructions, a judge will describe “great bodily injury” as “significant or substantial bodily injury or damage,” which does nothing to clarify the term.²⁴ Like those tasked with defining a deadly weapon, juries asked to define “great bodily injury,” and determine what force is likely to cause it, have put forward a range of interpretations depending on the circumstances of each case.²⁵

With such obscure definitions, it is easy to see how consensual BDSM practices may be confused with criminal assault and battery. When a bruise is evidence of “force or violence,” and hands may be seen as deadly weapons, we see the deficiencies of the law in creating a space for consensual BDSM activity. It would be simple for a court to rule that consensual activity should be considered a “lawful attempt” or a “lawful use of force or violence,” or for the legislature to include a consent-defense within these statutes, and yet neither of those have occurred.²⁶ Until one or both does occur, BDSM performers remain in the shadows of the law, constantly at risk of needless criminal prosecution.

17. *Hockenberry v. United States*, 422 F.2d 171, 173 (9th Cir. 1970).

18. *People v. Claborn*, 224 Cal. App. 2d 38, 42 (1964).

19. *People v. Page*, 123 Cal. App. 4th 1466, 1473-74 (2004).

20. *People v. Russell*, 59 Cal. App. 2d 660, 665 (1943).

21. *People v. Helms*, 242 Cal. App. 2d 476, 486-87 (1966).

22. *See People v. Schmidt*, 66 Cal. App. 2d 253, 256 (1944) (“One may be guilty of this crime although the attack is made with the hands.”); *People v. Gray*, 224 Cal. App. 2d 76, 79 (1964) (same); *see also People v. Kimbrel*, 120 Cal. App. 3d 869 (1981) (Jury found the use of a whip chord to meet the requirements for an assault with a deadly weapon conviction under section 245 of the California Penal Code.).

23. *See People v. Zankich*, 189 Cal. App. 2d 54, 70 (1961); *People v. White*, 195 Cal. App. 2d 389, 392 (1961).

24. *People v. Duke*, 174 Cal. App. 3d 296, 277 (1985).

25. *Compare People v. Armstrong*, 8 Cal. App. 4th 1060 (1992) (grabbing both sides of victim’s mouth and putting hand in victim’s mouth constituted force likely to produce great bodily injury), *with People v. Horton*, 213 Cal. App. 2d 185 (1963) (kicking victim in the head is force likely to produce great bodily injury), *and People v. Russel*, 129 Cal. App. 4th 776 (2005) (pushing victim into the path of a motor vehicle is force likely to produce great bodily injury).

26. The National Coalition for Sexual Freedom, however, has been attempting to change the law’s treatment of BDSM activities through a nationwide activism program called Consent Counts. Details available at: <https://ncsfreedom.org/key-programs/consent-counts/consent-counts.html>.

C. BDSM CASES

In the 1886 case *People v. Gordon*, the California Supreme Court acknowledged a consent defense to criminal assault charges.²⁷ There, the court explained that an attempt to commit a violent injury on the person of another, per the California assault statute described above, “must be made without the consent of the person against whom it is made. If it be made with his consent, it will not constitute an assault. It is a maxim of the law that one who consents to an act is not wronged by it.”²⁸ While *Gordon* has never been overruled, California courts have since strayed from this reasoning. The alternative approach taken by subsequent courts begs the question: was it moral disapproval of BDSM practices that made them change their minds? Readers should keep this question in mind while reviewing the courts’ analyses in the following cases.

The earliest assault case referencing sadomasochism²⁹ is the 1967 case *People v. Samuels*, which remains good law today.³⁰ In that case, defendant Samuels was an ophthalmologist with sadomasochistic tendencies.³¹ He indulged these tendencies with consenting partners, whom he would bind and whip, filming and taking photographs along the way.³² Samuels sent one of the rolls of film to a company for processing, and the company’s employees, unaware of what they were seeing, showed the film to police.³³ The police then arrested Samuels and charged him with aggravated assault.³⁴

At trial, Samuels asserted that the recipient’s consent should act as a complete defense to the aggravated assault charges.³⁵ Rejecting this argument, the court reasoned that consent may not be a defense to battery or assault, except in the case of contact sports.³⁶ The court went on to explain that even if the recipient had consented to the whipping contained in the films, anyone who would consent to such things must be suffering from “some form of mental aberration.”³⁷ Reasoning that such a mental aberration is akin to insanity, the court concluded that the consent of an insane person is “ineffective” and, therefore, insufficient as a defense.³⁸ This line of reasoning is clear evidence of bias against a BDSM performer. The judge could not possibly accept a consent-defense because he had such

27. 70 Cal. 467 (1886).

28. *Id.* at 468.

29. At least the earliest case I was able to find on LexisNexis or Westlaw.

30. *See* *People v. Samuels*, 250 Cal. App. 2d 501, 513 (1967).

31. *Id.* at 504.

32. *Id.*

33. *Id.* at 505.

34. *Id.* at 505–06.

35. *Id.* at 513.

36. *Id.*

37. *Id.* at 514–515.

38. *Id.*

moral disapproval of BDSM. He believed all BDSM recipients must be insane.

While the judgment that people who participate in BDSM activities are insane has disappeared from more recent cases,³⁹ courts have been consistently unwilling to accept consent as a defense to assault or battery. Instead, the courts have placed public policy concerns above any possible sexual privacy rights of the participants. The two big public policy concerns asserted by states, and upheld by courts, in support of the criminalization of BDSM are public safety and morality.

For example, in *Commonwealth v. Appleby* the Supreme Court of Massachusetts refused to allow a consent defense to criminal charges of assault and battery even though the case involved alleged consensual BDSM activities.⁴⁰ The court reasoned:

The fact that violence may be related to sexual activity (or may even *be* sexual activity to the person inflicting pain on another, as [the defendant] testified) does not prevent the State from protecting its citizens against physical harm.⁴¹

Similarly, the Iowa Court of Appeals in *State v. Collier* explained:

Whatever rights the defendant may enjoy regarding private sexual activity, when such activity results in the whipping or beating of another resulting in bodily injury, such rights are outweighed by the State's interest in protecting its citizens' health, safety, and moral welfare A state unquestionably has the power to protect its vital interest in the preservation of public peace and tranquility, and may prohibit such conduct when it poses a threat thereto.⁴²

The pattern continued in *People v. Jovanovic*:

There is no available defense of consent on a charge of assault Indeed, while a meaningful distinction can be made between an ordinary violent beating and violence in which both parties voluntarily participate for their own sexual gratification,

39. In fact, recent studies show that BDSM practitioners may exhibit superior mental health. Compared with a control group, “BDSM practitioners were less neurotic, more extraverted, more open to new experiences, more conscientious, less rejection sensitive, had higher subjective well-being” and were generally more favorable. Andreas A.J. Wismeijer & Marcel A.L.M. van Assen, *Psychological Characteristics of BDSM Practitioners*, 10 J. OF SEXUAL MED., 1943, 1943-52 (2013), <http://onlinelibrary.wiley.com/doi/10.1111/jsm.12192/abstract>; see also Gemberling, *supra* note 4, at 25 (finding that BDSM participants exhibited “no overwhelming concerns within a range of mental and emotional factors,” and that “[c]ollectively, all results undermine the equation of BDSM to mental illness and/or violence.”).

40. 380 Mass. 296, 1060–61 (1980).

41. *Id.*

42. 372 N.W.2d 303, 305 (Iowa Ct. App. 1985).

nevertheless, just as a person cannot consent to his or her own murder as a matter of public policy, a person cannot avoid criminal responsibility for an assault that causes injury or carries a risk of serious harm, even if the victim asked for or consented to the act.⁴³

The above cases have led to a dangerous standard that courts in other jurisdictions have been unwilling to challenge. For example, in *State v. Van*, the Nebraska Supreme Court reviewed an assault case in which the defendant alleged that the conduct at issue was a consensual part of his BDSM relationship.⁴⁴ In responding to the defendant's request for a defense based on consent, the court noted that it had previously disallowed consent as a defense to violent assaults.⁴⁵ The court then distinguished this case, however, reasoning that it had "not previously had occasion to determine the applicability of this principle to a BDSM relationship."⁴⁶ It then declined to analyze the issue because "other courts have [already] done so."⁴⁷ Citing all of the above cases (*Samuels*, *Appleby*, *Javonovic* and *Collier*), the court did not allow the defendant to develop a defense based on consent.⁴⁸ Though not bound by any of those decisions, the Nebraska Supreme Court found a way to avoid any examination of the issue by adopting the reasoning of other jurisdictions.

This conservative approach has continued into cases as recent as 2015. The court in *People v. Davidson* held that consent is not a recognized defense to assault "even when based on a claim of consensual sadomasochistic activity."⁴⁹ As the *Davidson* court explained, lack of consent is not an element of the offense of assault, so the presence of consent does not eliminate the crime.⁵⁰

Despite repeated judicial recognition that many people actively engage in consensual BDSM practices, courts and legislators alike have yet to create a space in the law for legal BDSM. While BDSM participants are no longer viewed as "insane," there is still a stigma attached to this form of sexual expression. This stigma is exemplified by the above courts' unwillingness to even question the state interests offered in support of BDSM criminalization, despite their dubious nature.

One such state interest is public health and safety. The *Jovanovic* court, for example, likens a consent-defense to assault to a consent-defense to one's own murder, explaining that the same public policy concerns are at

43. 700 N.Y.S.2d 156, 168 n.5 (App. Div. 1999) (internal citations omitted).

44. 688 N.W.2d 600, 613 (Neb. 2004).

45. *Id.* at 614.

46. *Id.*

47. *Id.*

48. *Id.*

49. No. D064880, 2015 Cal. App. LEXIS 5720, at *23 (Ct. App. Aug. 12, 2015).

50. *Id.*

play in either scenario.⁵¹ However, the large majority of harm resulting from BDSM practices is less than that caused by a tattoo, a piercing, or participation in contact sports, all of which are legal activities. The fact that a consent-defense to murder is part of the same conversation is unwarranted, and shows that BDSM is either incredibly misunderstood, or that there is still a lot of prejudice against BDSM practitioners. While both may be true, the second asserted state interest indicates that the latter is more controlling.

In addition to public safety, the *Collier* court explained that states may criminalize consensual BDSM because they have a legitimate interest in protecting the moral welfare of their citizens.⁵² The unavoidable assumption at the heart of this reasoning is that BDSM is patently immoral, so legalizing it would threaten the morality of the populace. The following discussion will show that this same reasoning has been used to criminalize and condemn other unconventional expressions of love and sexuality, and that courts are starting to question the validity of such arguments.⁵³

II. A BRIEF HISTORY OF PRIVACY RIGHTS WITH RESPECT TO SEXUAL ACTIVITY

Until recently, sexual privacy rights have only been recognized within the reproductive sphere. In 1942, the Supreme Court struck down an Oklahoma law that authorized the sterilization of “habitual criminals” because, among other things, it infringed on “one of the basic civil rights of man”— procreation.⁵⁴ In 1965, the Court struck down a Connecticut law prohibiting the use of birth control, and in doing so recognized a right to marital privacy regarding the decision to have children.⁵⁵ Over the following eight years, the Court extended that same privacy right to single people,⁵⁶ and went on to expand that right to include the right to terminate a pregnancy.⁵⁷ All of these cases touch upon the right to be free from governmental interference with one’s intimate relationships, but all are restricted to reproductive rights.

More recently, we begin to see courts addressing sexual privacy rights in a broader context. *Lawrence v. Texas*, the landmark case in which the Supreme Court held that anti-sodomy laws targeting same-sex partners are unconstitutional, represents a paradigm shift in the way that the nation’s highest Court has been willing to apply the rationale behind privacy rights

51. Jovanovic, 700 N.Y.S.2d at 168.

52. Collier, 372 N.W.2d at 305.

53. See discussion of *Lawrence v. Texas* *infra* Part II.

54. Skinner v. State of Okl. ex rel. Williamson, 316 U.S. 535, 541 (1942).

55. Griswold v. Connecticut, 381 U.S. 479 (1965).

56. Eisenstadt v. Baird, 405 U.S. 438 (1972).

57. Roe v. Wade, 410 U.S. 113 (1973).

to laws that target sexual conduct.⁵⁸ The *Lawrence* holding contained three key points of analysis that are relevant when thinking about the law's treatment of BDSM.

One key point is that the Court used the Fourteenth Amendment's protection of Substantive Due Process, rather than Equal Protection, to strike down the Texas statute.⁵⁹ The Court explained that to invalidate the law under an Equal Protection framework would suggest that a similar statute that applies to both same-sex and opposite-sex couples, as opposed to only same-sex couples, would be constitutional.⁶⁰ The Court rejected this analysis because the fatal flaw of the statute was not *whom* it targeted, but the *conduct* that it targeted: intimate and personal conduct with which the State may not legally interfere.⁶¹ The Court reasoned that adults engaging in consensual sexual activity are entitled to "respect for their private lives," and further declared that "[t]he State cannot demean their existence or control their destiny by making their private sexual conduct a crime. The right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."⁶²

These same words can be applied to consensual BDSM. If adults engaging in consensual sexual activity are entitled to respect for their private lives, the government should not be allowed to criminalize BDSM. Under this analysis, the lack of a consent-defense looks like a violation of the Due Process rights guaranteed by the Constitution. While assault and battery statutes were not purposefully designed to target BDSM conduct, unlike the statutes in *Lawrence* (which purposefully targeted homosexual conduct), both have the effect of turning sexually active, consenting adults into criminals.

A second key point in *Lawrence* is the Court's rejection of the state's asserted interest in morality as a basis for upholding the law.⁶³ When framing the issue as "whether the majority may use the power of the State to enforce [its] views on the whole society through operation of the criminal law," the Court made clear that its "obligation is to define the liberty of all, not to mandate [its] own moral code."⁶⁴ With these words, the Supreme Court made it clear that moral disapproval of a certain practice is not sufficient reason by itself to prohibit that practice.⁶⁵ As a

58. 539 U.S. 558 (2003).

59. *Id.* at 575.

60. *Id.*

61. *Id.* at 574.

62. *Id.* at 578.

63. *Id.* at 571, 577–78.

64. *Id.* at 571 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

65. *Id.* at 577.

result, the Supreme Court invalidated part of the reasoning used by the court in *Collier*, which accepted the state's interest in protecting moral welfare as a reason to disallow a consent-defense for BDSM activities.⁶⁶

A third key point of analysis is the Court's recognition of the Model Penal Code's treatment of consensual private activity.⁶⁷ In 1955, when the American Law Institute released the Model Penal Code, it "made clear that it did not recommend or provide for 'criminal penalties for consensual sexual relations conducted in private.'"⁶⁸ These comments show a historical hesitance among legal scholars to criminalize private sexual activities between consenting adults, regardless of society's moral judgments about those activities. Additionally, the Model Penal Code recognizes a consent-defense to assault.⁶⁹

The *Lawrence* decision represents an evolution in the way the Supreme Court has approached sexual privacy rights. It sends a strong signal that courts should be more open to unconventional expressions of love and sexuality as a matter of constitutional law, and warns that the strength of morality as a legitimate governmental interest is waning. Lower courts' inconsistency in fully applying *Lawrence*, however, shows that jurisprudence in this area is still in need of development. This issue is explored further below.

III. CRIMINALIZATION OF THE SALE OF SEX TOYS

One area in which *Lawrence* has been applied inconsistently is legal challenges to criminal bans on sex toys and other sexual devices. Alabama is among a handful of states that make the distribution of sex toys illegal.⁷⁰ Under Alabama's anti-obscenity laws, the distribution of materials or devices "designed or marketed as useful primarily for the stimulation of human genital organs" is a misdemeanor punishable by a fine of up to \$10,000 and service of up to one year in jail.⁷¹

The Eleventh Circuit addressed the constitutionality of this statute in *Williams v. Morgan*,⁷² wherein the court highlighted that the Supreme Court in *Lawrence* had not expressly recognized a fundamental right to sexual privacy.⁷³ In the absence of a fundamental right, which would require heightened scrutiny, the Eleventh Circuit applied a rational basis test and held that the state's interest in morality was a sufficiently rational

66. *Collier*, 372 N.W.2d at 305.

67. *Id.* at 572.

68. *Id.* (quoting MODEL PENAL CODE § 213.2, cmt 2 at 372 (AM. LAW INST. 1980)).

69. *See infra* Part V.

70. *See* ALA. CODE § 13A-12-200.2 (2015); *see also* MISS. CODE ANN. § 97-29-105 (2013); GA. CODE ANN. § 16-12-80(c) (2010).

71. ALA. CODE § 13A-12-200.2(a)(1).

72. 478 F.3d 1316 (11th Cir. 2007).

73. *Id.* at 1320.

basis to maintain the prohibition of the sale of sex toys.⁷⁴ Petitioner argued that morality was no longer a rational basis under *Lawrence*, but the court rejected that argument, reasoning that *Lawrence* did not indicate disapproval of moral justifications in all cases, but only those cases that target private, noncommercial activity.⁷⁵ Explaining that the Alabama statute only regulated public, commercial activity, the court did not view *Lawrence* as barring a state interest based on moral concerns.⁷⁶ When the Alabama statute was challenged again, three years after *Williams*, the Alabama Supreme Court adopted the reasoning of the Eleventh Circuit and the statute survived once again.⁷⁷

Not all jurisdictions are in agreement about that application of the rational basis test post-*Lawrence*. Applying the same test, the Fifth Circuit struck down a similar statute that banned the sale of sex toys in Texas.⁷⁸ In *Reliable Consultants, Inc. v. Earle*, the Fifth Circuit held that, under *Lawrence*, public morality was no longer a sufficient rational basis to justify a law that interfered with the Substantive Due Process rights guaranteed by the Constitution.⁷⁹ When faced with the distinction between private, noncommercial activity and public, commercial activity, the Fifth Circuit, unlike the Eleventh Circuit, explained that Supreme Court precedent dictates that “bans on commercial transactions involving a product can unconstitutionally burden individual substantive due process rights.”⁸⁰ Therefore, when regulations on public, commercial activity substantially interfere with an individual’s right to conduct private, non-commercial activity, then the regulations are inherently unconstitutional.⁸¹ The Supreme Court of Louisiana expressed the same reasoning when it struck down Louisiana’s law banning the sale of sexual devices.⁸²

This inconsistency evidences that *Lawrence* has led to confusion among the lower courts as to when morality may or may not be used in a rational basis review. However, both approaches suggest that the criminalization of consensual BDSM activities is unconstitutional. Under the Fifth Circuit’s more liberal interpretation in *Reliable Consultants*, morality can never be used as a legitimate state interest when it burdens individual sexual privacy rights. Even under the Eleventh Circuit’s more conservative ruling, morality cannot be used as a legitimate state interest

74. Morgan, 478 F.3d at 1323.

75. *Id.* at 1321–22.

76. *Id.* at 1323.

77. *See* 1568 Montgomery Highway, Inc. v. City of Hoover, 45 So. 3d 319 (Ala. 2010).

78. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008).

79. *Id.* at 745.

80. *Id.* at 743.

81. *Id.*

82. *State v. Brenan*, 99-2291 (La. 5/16/00); 772 So. 2d 64.

when it burdens private, noncommercial activity, a category that easily encapsulates consensual BDSM activities.

IV. POLYAMORY

Commercial regulation of sex toys is not the only area in which courts are rejecting moral judgments of sexuality. This attitude may also be seen with courts that address polyamorous practices, which can be defined in terms that go beyond sexual conduct and into the realm of family and relationship structure.

Polyamory is not a recent phenomenon, but it is only recently that the polyamorous community has begun to openly demand respect and recognition from society as well as the judicial system.⁸³ Researchers estimate that there are anywhere between 1.2 million and 9.8 million Americans that identify as polyamorous, though it has been difficult to narrow down that range because of differing views about the definition of polyamory.⁸⁴ For the purposes of this article, the definition of polyamory is the practice of emotionally committing to multiple partners, as opposed to popular conceptions of couples that “swing” or have “open relationships,” where there is typically no emotional element.⁸⁵

With the increased publicity of polyamory, polyamorous parents are at particular risk of prejudice during custody proceedings, where misunderstandings about the preference for multiple partners could lead a judge to declare that polyamorous tendencies make a parent unfit. While some courts have adopted this attitude,⁸⁶ many courts have reasoned that this romantic and sexual lifestyle should not, by itself, have a negative effect on parental rights.

For example, in *In the Interest of R.E.*, a juvenile court terminated the parental rights of a mother because, among other things, she had “failed to complete counseling to address her poly-amorous lifestyle which has negatively affected the children.”⁸⁷ In reversing the juvenile court’s decision, the Georgia Court of Appeals held that there was no evidence to

83. Jessica Bennett, *Polyamory: The Next Sexual Revolution?*, NEWSWEEK (July 28, 2009), <http://www.newsweek.com/polyamory-next-sexual-revolution-82053>.

84. Elisabeth A. Sheff, *How Many Polyamorists Are There in the US?*, PSYCHOLOGY TODAY, May 9, 2014, <https://www.psychologytoday.com/blog/the-polyamorists-next-door/201405/how-many-polyamorists-are-there-in-the-us>.

85. Elaine Cook, *Commitment in Polyamorous Relationships*, THE KINSEY INSTITUTE 10 (2005), http://www.kinseyinstitute.org/library/e-text/Cook_Elaine.pdf (noting that “the difference between polyamory and swinging is that in polyamory there is a focus on love and the emotional relationship with other lovers, whereas swinging is often recreational sex, with an explicit intention to avoid an emotional connection”).

86. *See, e.g.*, *Cross v. Cross*, 5 Pa. D. & C.5th 12, 21 (Pa. Com. Pl. 2008) (explaining that polyamory is “grossly inappropriate conduct” and would be a source of embarrassment for the children).

87. 775 S.E.2d 542, 546 (Ga. Ct. App. 2015).

support that the children were harmed by the polyamorous lifestyle.⁸⁸ Evidence of harm to the children must meet the “clear and convincing” evidence standard to sever the parent-child relationship, and the court ruled that the standard had not been met by mere existence of a parent’s polyamory.⁸⁹

While the complete termination of parental rights requires a high standard of evidence, courts have been unwilling to use polyamory against parents even when the stakes are lower. In *Johnson v. Bower*, the Court of Appeals of Indiana refused to give weight to a father’s claim that the children were suffering after the mother moved them into the polyamorous household of their grandparents.⁹⁰ The court noted that there was no evidence to support the existence of any emotional or psychological harm caused by exposure to polyamory.⁹¹ Absent such evidence, the court explained, “this Court is not about to impose such a moral code where none exists in the Indiana statutes regarding custody.”⁹² While the court seems to leave a door open to the Indiana legislature to codify discrimination against polyamorous parents, the legislature has not acted on the comment.

Similarly, in *V.B. v. J.E.B.*, the Pennsylvania Superior Court was unwilling to take custody from a polyamorous father when there was no evidence that the polyamory was negatively affecting the children.⁹³ In fact, in reversing the decision of the trial court, the Superior Court noted that the lower court’s analysis was tainted by prejudice against a polyamorous lifestyle.⁹⁴ As noted, “the record reveals the trial court’s general disfavor of polyamory weighed in its custody determination . . . [and] it fails to support its concomitant conclusion that the unorthodox lifestyle was detrimental to the children in this case.”⁹⁵ The Superior Court was unwilling to affirm a decision that was clearly influenced by moral disapproval.

Underlying these opinions is the notion that moral disapproval of a given practice is not sufficient evidence that the practice actually causes harm. Even in the case of children, who are most vulnerable and impressionable, courts have been unwilling to use morality as justification to punish those that engage in untraditional, but consensual, expressions of love and sexuality.

88. *In re Interest of R.E.*, 775 S.E.2d at 57.

89. *Id.*

90. *Johnson v. Bower*, No. 54A04-1102-DR-108, 2011 Ind. App. LEXIS 1535, at *7 (Ind. Ct. App. 2011).

91. *Id.* at *8

92. *Id.*

93. 55 A.3d 1193, 1201 (P.A. Super. Ct. 2012).

94. *Id.*

95. *Id.*

This same reasoning can be applied to BDSM practices. As discussed above, the two reasons offered in support of the criminalization of BDSM are public safety and morality. Given that BDSM is unlikely to cause serious injury, and in fact did not cause serious injury in the cases discussed above,⁹⁶ the main concern in preventing a consent-defense to assault is morality. The concern about safety seems to be a byproduct of moral disapproval, which is causing misunderstandings about BDSM's relationship with public safety. However, these decisions addressing polyamory show that courts are becoming more willing to place sexual privacy rights over their own perceptions of morality. Likewise, the *Lawrence* decision makes moral justifications suspect. It is time to find a place in the law for consensual BDSM practices.

V. A DIFFERENT LEGAL APPROACH TO BDSM

With the growing recognition of sexual privacy rights after *Lawrence*, there is little question that consensual BDSM falls within the sphere of intimate activity that should be protected from governmental influence. In those cases where consent is not at issue, it is time for the law to recognize that it is an individual's constitutional right to express his or her sexuality in a way that is free from state interference. In those cases where consent *is* at issue, courts should approach the case like a rape case, instead of refusing to even consider a consent defense. A number of solutions have been offered in response to this problem.

One proposition is that states adopt Model Penal Code ("MPC") § 2.11(2)(a),⁹⁷ which allows defendants in assault cases to raise the defense of consent so long as the injury is "not serious."⁹⁸ The MPC goes on to define "serious" injury as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."⁹⁹ The large majority of injury caused by BDSM activities, such as bruises, scratches, or other marks, would be categorized as "not serious," therefor allowing the use of consent as a defense. Combined with the American Law Institute's recommendations that consensual sexual activity not be criminalized,¹⁰⁰ the MPC looks very friendly to BDSM practitioners.

96. *See supra* Part I.C.

97. MODEL PENAL CODE § 2.11(2)(a) (AM. LAW INST. 2013), which reads:

Consent to Bodily Harm. When conduct is charged to constitute an offense because it causes or threatens bodily harm, consent to such conduct or to the infliction of such harm is a defense if: (a) the bodily harm consented to or threatened by the conduct consented to is not serious

98. Daniel Haley, *Bound by Law: A Roadmap for the Practical Legalization of BDSM*, 21 CARDOZO J.L. & GENDER 631, 650–51 (2015).

99. MODEL PENAL CODE § 210.0(3) (AM. LAW INST. 2013).

100. *See supra* note 66.

Such a solution would have been more than sufficient to prevent the conviction in the *Samuels* case,¹⁰¹ and perhaps in other cases, as well. The MPC approach would give BDSM practitioners the freedom to engage each other without fear of criminal prosecution, which is a big change from the California laws that make any act of physical force, even if the act does not actually result in pain, marks, or bodily harm, a crime.¹⁰²

Additionally, the MPC approach addresses the asserted state interest in protecting public health and safety. When consent cannot be used as a defense to “serious” harm or bodily injury, then the public policy concerns regarding health and safety, like those raised by the *Javonavic* court, become even more unconvincing.¹⁰³ Again, I raise the comparison to a tattoo, a piercing, or contact sports. If minor injury is legally justifiable in those cases, it should be legally justifiable in the arena of sexual expression, even if that form of sexual expression is unconventional.

A more comprehensive approach to the legalization of BDSM may be found under a theory suggested by law professor Vera Bergelson. Bergelson proposes a reexamination of the legal concepts of “harm” and “consent.”¹⁰⁴ Her analysis of “harm” leads to two significant definitions of the word: 1) a wrongful violation of rights, and 2) a violation of one’s dignity.¹⁰⁵ Consent, acting as a voluntary waiver of one’s rights, eliminates any harm under the first definition. That elimination of harm eliminates any need for legal action, because without harm there is no crime.¹⁰⁶

To determine if harm has been committed under the second definition, the violation of one’s dignity, Bergelson recommends a balancing approach that considers both the intent of the performer and the desire of the recipient.¹⁰⁷ If, for example, the recipient desires the activity in question, and the performer performs the act with good faith attention to the recipient’s interests and dignity, then no harm has been committed.¹⁰⁸ Both performer and recipient are benefitting from the exchange, and neither suffers at the advantage of the other. The dignity of both participants is left intact.

Bergelson’s proposition also requires that the benefit of the activity outweigh the resulting consequence.¹⁰⁹ In balancing the benefit and the consequence, full consideration is given both to the emotional and physical cost to the recipient, as well as the theoretical cost to society. This

101. See *Samuels*, 250 Cal. App. 2d at 513.

102. See *supra* Part I.B.

103. See *Jovanovic*, 700 N.Y.S.2d at 168.

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

105. *Id.* at 170.

106. *Id.*

107. *Id.*

108. *Id.* at 171.

109. *Id.*

requirement would prevent any serious injury from escaping the two given definitions of harm.

In a BDSM context, Bergelson's approach, like the MPC approach, would prevent the use of consent as a defense to murder or severe physical impairment, thus eliminating those concerns regarding public health and safety. Likewise, Bergelson's approach would allow consent to be used as a defense for consensual BDSM activities that may result in minor injury, such as bruises, welts, or scratches.

A third option is to create a legal exception for consensual BDSM activities in the laws governing criminal assault and battery.¹¹⁰ Unlike the previously mentioned MPC approach, which allows for consent to be used as a defense to any form of assault, such as a fight between rivals, this approach would single out those activities that are specific to BDSM conduct, only allowing a consent defense in those cases. Such an exception could be codified within the statute by direct reference to consensual sexual activities that involve an element of pain or injury. The key here would be for the legislature to highlight that informed consent is required for use of the defense, and to specify that consent will only be a viable defense to actions that do not result in serious bodily harm or injury. To define "serious bodily harm or injury," I would recommend utilizing the definition outlined in the MPC.¹¹¹ Note that, under this approach, the defense is only unavailable when serious harm actually occurs, without reference to the potential risk involved in an activity.

A fourth option is to include consensual BDSM activity within the sphere of "lawful" uses or attempts to use force against another person. For those states that define assault as "an unlawful attempt to commit a violent injury on the person of another," and battery as "an unlawful use of force," like California, BDSM would no longer be categorized as "unlawful." The statutory definitions would remain the same, but they would no longer apply to consensual sexual activities, which would be lawful.

While the third option would require legislative action to change the penal codes, this fourth option can be accomplished through judicial action. It is the judiciary that recognized self-defense as a "lawful" use of force,¹¹² and so the judiciary could grant the same recognition to consensual BDSM activities. A court applying the reasoning of *Lawrence* would not have a difficult time recognizing that sexual privacy should now be a priority under the Due Process Clause. Just as *Lawrence* used Due Process to overrule a previous case that allowed the criminalization of sodomy, so could a court use Due Process to define BDSM as a "lawful" use of force.

110. Haley, *supra* note 98, at 652–53.

111. MODEL PENAL CODE § 210.0(3) (AM. LAW INST. 2013).

112. *See* Lynch, 101 Cal. at 230–31.

At the heart of all of these propositions is the ability of the accused to prove the consent of the other party. As many sexual assault cases show, however, consent is often difficult to prove. The lines between consensual BDSM activity and sexual assault become even blurrier in situations where consent is revoked mid-encounter, like through the use of a safeword.¹¹³ However, when consent can be proven, there is no legitimate value in prosecuting BDSM practitioners, as there is no real “victim.” Similarly, there is no reason to deny a performer the opportunity to prove the consent of a recipient if there is ample evidence to support that the activities were consensual.

VI. CONCLUSION

The law has been used many times in the past, either directly or indirectly, to criminalize activities based on the moral code of the majority. However, when those activities are consensual and do not result in serious injury, history has shown that personal liberty prevails over prejudice. When it comes to legal censure of unconventional expressions of love and sexuality, the protections guaranteed by the Constitution have been used to defeat the criminalization of numerous activities between consenting adults, including the use of birth control and the practice of sodomy, as discussed above,¹¹⁴ and even marriages that were, at one time or another, considered untraditional and immoral.¹¹⁵ It is time for courts to extend the same constitutional protections to BDSM practitioners.

One might argue that the rarity of modern BDSM cases implies that the need for legal recognition of consensual BDSM is minor. However, even one conviction resulting from the inability to raise a consent defense is one conviction too many. Additionally, the official legalization of BDSM will help reduce the stigma that is attached to these practices.

A recent study by the National Coalition for Sexual Freedom shows that BDSM practitioners are at risk of discrimination because of their sexual preferences.¹¹⁶ Out of 3,058 people surveyed, 1,175 (37.5%) reported some form of persecution based on their participation in BDSM activities.¹¹⁷ Considering that most people keep their involvement in BDSM private, that number is astonishingly large. Twenty percent reported the loss of a job or contract, while 12.2 percent reported losing a

113. Amanda O. Davis, *COMMENT: Clarifying the Issue of Consent: The Evolution of Post-Penetration Rape Law*, 34 STETSON L. REV. 729, 732-33 (2005).

114. *See supra* Part II.

115. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Loving v. Virginia*, 388 U.S. 1 (1967).

116. Susan Wright, *Second National Survey of Violence & Discrimination Against Sexual Minorities*, NAT'L COAL. FOR SEXUAL PRIVACY 1 (2008), https://ncsfreedom.org/images/stories/pdfs/BDSM_Survey/2008_bdsm_survey_analysis_final.pdf.

117. *Id.* at 7.

promotion or being demoted.¹¹⁸ Over 6% lost custody of a child because of their association with BDSM, and over 4% were refused housing.¹¹⁹ Additionally, 11.3% reported being discriminated against by professional service providers, including doctors, lawyers, police, and mental health providers.¹²⁰ The study also shows BDSM practitioners are at risk of harassment, violence, and blackmail.¹²¹ If courts were to begin legally acknowledging BDSM, the stigma that has led to such discrimination would begin to disappear. As public acceptance of an unconventional expression of love or sexuality increases, discrimination based on that expression is more likely to decrease.

While discrimination prevention is a noble reason to decriminalize BDSM, the best legal reason is that the Constitution demands it. Under the Supreme Court's recent decision in *Lawrence*, the Due Process Clause requires that states no longer use morality to justify laws that interfere with the private, sexual conduct of consenting adults. United States courts are already applying the *Lawrence* logic to strike down laws that ban the sale of sex toys, and it is time for courts to apply that same logic to BDSM. The state's interest in morality is no longer sufficient to prevent a consent-defense to assault or battery when consensual BDSM is alleged.

Similarly, the state's interest in public health and safety is suspect, as the risk of serious harm or injury is low in most BDSM contexts. Even if certain BDSM activities create a higher risk of serious harm or injury, alternative legal approaches can address the state's concern for public safety while at the same time creating a space in the law for BDSM.

118. Wright, NAT'L COAL. FOR SEXUAL PRIVACY 1 at 9.

119. *Id.*

120. *Id.* at 11.

121. *Id.* at 14.

While BDSM practitioners may not be the designated targets of assault and battery laws, they have become purposeful casualties because of courts' unwillingness to consider a consent-defense to a claim of consensual BDSM. This unwillingness, however, is no longer defensible. With growing exposure to untraditional expressions of love and sexuality, and decreasing deference to states' moral justifications, the time is right for courts to recognize that consensual BDSM practitioners are not criminals, and that criminalization of BDSM activities is unconstitutional.
