PAIN, PLEASE: CONSENT TO SADOMASOCHISTIC CONDUCT

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There currently exists in the United States a subculture comprised of individuals who choose to engage in the alternative sex practice of sadomasochism. Sadomasochism and the people who engage in it are often misunderstood. As many of the sadomasochistic practices could be considered assault or battery, members of this subculture could be liable to criminal penalties. This Note identifies the problem of widespread criminalization of consensual sadomasochism. After explaining what sadomasochism is and providing historical and medical perspectives on it, this Note then analyzes the current legal characterization of sadomasochism as criminal conduct. It then proposes changing the fundamental structure of the Model Penal Code to make consent as a defense the default approach, leaving lawmakers with the responsibility to specifically name instances in which they intend to exclude consent as a defense.

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I. INTRODUCTION

In 1934, Norah Eileen Harrison voluntarily consented to being struck by a cane "in circumstances of indecency."[1] According to the opinion of the court, the man who struck her was "addicted to a form of sexual perversion," and, therefore, acting with the sole motive "to gratify his own perverted desires."[2] For that reason, a jury found him guilty of indecent and common assault, and he was sentenced to two years of imprisonment and hard labor.[3] Whether or not Ms. Harrison desired to be caned was "immaterial."[4] Although this case occurred over eight decades ago in Europe, laws that prohibit willing and interested individuals from consenting to sadomasochism remain largely unchanged in the United States today.

At its philosophical core, the criminal legal system acts as a powerful tool to codify generally accepted societal morals into rules designed to constrain illicit individual behavior.[5] Generally accepted standards of morality, however, are hotly contested and subject to continuous societal reevaluation.[6] Even if a uniform system of morality was generally accepted, a difficult, yet significant, problem would remain—identifying which of these forms of immoral conduct justifies criminal sanctions.[7] Injustice may occur if the legal principle of *stare decisis* prevents or delays laws from changing to reconcile with society's changed moral norms.[8] Can (and should) a standard as fundamental to criminal

1. Rex v. Donovan [1934] 2 K.B. 498 (Eng.) (holding that the woman could not consent to unlawful conduct and that the man's conduct was *malum in se*, and therefore unlawful, because he could have had no other intent but to inflict bodily harm).

2. *Id.*

3. *Id.*

4. *Id.*

5. ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 2–3 (1993) ("[I]t is an evident fact that laws regularly, and often profoundly, affect notions abroad in society about what is morally acceptable, forbidden, and required. People shape their own lives (and often treat others differently) in light of these notions.").

6. *See, e.g.*, *Moral Issues*, GALLUP, http://www.gallup.com/poll/1681/moral-issues.aspx (last visited Apr. 5, 2018).

7. *See, e.g.*, Vera Bergelson, *Vice Is Nice but Incest Is Best: The Problem of a Moral Taboo*, 7 CRIM. L. & PHIL. 43, 50 (2013).

> Enforcement of morals by means of criminal sanctions has long been viewed as a legitimate state function, even though it has also been criticized for going against the liberal tradition in both principle (infringing on citizens' liberty) and practical implementation (requiring significant encroachment on citizens' privacy). Prohibited conduct traditionally included, among other things, incest, sodomy, fornication, bigamy, adultery, and prostitution.

Id.

8. *See infra* Section III.D.

law as the concept of consent shift the conversation from lawmakers affirmatively setting permitted conduct to valuing individual autonomy with only explicit limitations? How could this shift benefit marginalized populations, specifically those who engage in sadomasochistic behavior? Is this sweeping categorization a socially and politically feasible approach?

This Note identifies a problem of widespread criminalization of consensual sadomasochism across the United States. Part II of this Note provides the necessary backdrop to understand what sadomasochism is, including describing the various reasons individuals may choose to engage in sadomasochistic conduct, the context and role of the broader community of sadomasochistic practitioners, recent developments in professional understanding of sadomasochism in a variety of fields, and the ongoing challenge of stigma facing those engaged in sadomasochism. Part III analyzes the reasons why the current legal characterization of sadomasochism as criminal conduct is problematic and therefore requires comprehensive reevaluation. Finally, Part IV proposes changing the fundamental structure of the Model Penal Code to make consent the default approach, leaving lawmakers with the responsibility to specifically name instances in which they intend to exclude consent as a defense. This section also recognizes practical challenges to this approach.

II. BACKGROUND

The umbrella term BDSM comprises a variety of alternative sexual practices including bondage, discipline, domination, submission, sadism, and masochism.[9] These dynamics, generally categorized as kink,[10] are incredibly varied[11] and include "a wide array of related practices which tend to deal with the administration of consensually experienced pain, humiliation, and uses of power, conducted for mutual pleasure."[12] Naturally, BDSM encompasses both physical and psychological components.[13] To achieve these ends, practitioners may use a wide variety of instruments to elicit sensations or responses, including whips, floggers, ropes, canes, gags, medical devices, fire, weapons, and other pervertables.[14] Activities are typically referred to within the community as "play,"

9. J. Tuomas Harviainen, *Information Literacies of Self-Identified Sadomasochists: An Ethnographic Case Study*, 71 J. DOCUMENTATION 423, 424 (2015).

10. *See* CATHERINE SCOTT, THINKING KINK: THE COLLISION OF BDSM, FEMINISM AND POPULAR CULTURE 48–50 (2015).

11. *See* Charles Moser & Peggy J. Kleinplatz, *Themes of SM Expression*, *in* SAFE, SANE AND CONSENSUAL: CONTEMPORARY PERSPECTIVES ON SADOMASOCHISM 41, 43 (Darren Langdridge & Meg Barker eds., 2013) ("Individuals who adopt a particular label do not necessarily participate in the same, associated activities, nor does use of the same label by two people imply that they assign identical meanings to their labels. SM practitioners often argue amongst themselves about what these labels actually mean . . . .").

12. Harviainen, *supra* note 9.

13. *See* Moser & Kleinplatz, *supra* note 11.

14. *BDSM and Kink Terminology: A to Z*, REKINK.COM, http://rekink.com/terminology/glossary-of-kink-terminology-a-to-i/ (last visited Apr. 5, 2018) (describing terminologies related to BDSM, including many of the types of gear used by sadomasochists).

with associated connotations of "romantic sense of innocence and freedom from encumbrances."[15]

This Note focuses on the legal implications of sadomasochism specifically. BDSM encompasses both sadism and masochism, and this Note conceptualizes the term as fundamentally rooted in giving and receiving pain.[16] While pain is generally a physical reaction, it is almost impossible to fully separate the infliction of pain from the psychological power exchange.[17] Nevertheless, from a legal perspective it is important to separate the physical from the psychological manifestations of pain because the reason many BDSM practices are criminal is due to a perceived direct analogy with physical violence.[18]

To fully understand the context of the recommendations presented at the end of this Note, it is important to have a detailed understanding of BDSM and the context in which it is practiced. This Part begins by describing the underlying motivation for BDSM along with the relevant historical, psychological, and medical perspectives. Next, it discusses the role of consent and negotiation. This Part then describes the impact of marginalization and stigma, and the important support role of the BDSM community. Finally, it concludes with a discussion of the prevalent misconception of BDSM as socially harmful violence and a brief history of consent laws.

A. Underlying Motivation, Historical, Psychological, and Medical Perspectives on BDSM

For many, sadomasochism is fundamentally a "sexual behavior."[19] All participants, however, do not always equate BDSM and sexuality, complicating mainstream and academic understanding of the practice.[20] Perhaps the tendency to merge BDSM and sexuality helps society make sense of "bizarre behavior" that may be difficult to understand and explain outside of the context of "alternative sex."[21]

Instead, the experience of sadomasochism, particularly from the perspective of a person receiving pain (commonly referred to as a "bottom"),[22] has the potential to elicit a nonsexual emotional and physiological response. One indi-

15. STACI NEWMAHR, PLAYING ON THE EDGE: SADOMASOCHISM, RISK, AND INTIMACY 8 (2011).

16. Darren Langdridge, *Speaking the Unspeakable: S/M and the Eroticisation of Pain*, *in* SAFE, SANE AND CONSENSUAL: CONTEMPORARY PERSPECTIVES ON SADOMASOCHISM 91, 91 (Darren Langdridge & Meg Barker eds., 2013) ("Pain is probably most often identified as *the* constructive component of S/M in lay representations of this particular sexual practice/identity.").

17. NEWMAHR, *supra* note 15, at 71.

18. *See, e.g.*, Regina v. Brown [1994] 1 AC 212 (Eng.); Rex v. Donovan, [1934] 2 K.B. 498 (Eng.).

19. Patricia A. Cross & Kim Matheson, *Understanding Sadomasochism: An Empirical Examination of Four Perspectives*, *in* SADOMASOCHISM: POWERFUL PLEASURES 133 (Peggy J. Kleinplatz & Charles Moser eds., 2006).

20. NEWMAHR, *supra* note 15, at 66.

21. *Id.*

22. In this context, a "bottom" refers to someone being acted upon. Moser & Kleinplatz, *supra* note 11.

vidual described their experience as being reduced to only "the sum of my five senses" while "relish[ing] being able to use my body to the utmost."[23]

> He hit me this way about once every couple of seconds.
>
> It was a powerful feeling. It felt like someone was beating me up . . . but "pain" doesn't describe it. And yet I felt a little bit afraid each time he was about to do it again. The act of absorbing the blows was all-encompassing. There was nothing else but the feeling of being hit . . . the weight and the warmth and the softness of the floggers . . . the movement of my body into the cross . . . my breath escaping me in whatever the hell sounds I was making, sounds that felt as if they started somewhere very deep.[24]

Those doling pain (commonly referred to as "tops")[25] may experience similar sensations through intense focus. For example, "the physical and auditory rhythm of flogging, juxtaposed with the concentration required to do so safely, can be meditative."[26] In her book *Playing on the Edge*, Staci Nevmahr described one BDSM participant's experience in doling out pain.

> A tall thin woman stood with her back to the audience, and Jonas began to hit her back lightly with the whip. As he whipped her, he began to move, increasingly, rhythmically. He was not quite dancing in the performative sense; it was as if he were unaware that he was even moving to the music. He circled the woman, repeatedly throwing the whip in such a way that it curled around the woman's body, appearing deeply engrossed.[27]

In practice, BDSM "play is not a simple pursuit" but "is a hobby and a lifestyle rife with political, social, and sexual implications."[28] It "encompasses a wide range of leisure activities and intimate interactions," "requires a significant amount of education, both formal and informal," and "is exhausting, often physically, emotionally, and psychologically."[29] Therefore, when immersed, particularly within an established community, BDSM may begin to resemble other forms of leisure.

While there is still significant need for additional research into the psychological, sociological, and anthropological underpinnings of BDSM, other conceptions of the complex motivations include: social deviance through empowerment to challenge "normative conceptions of sexual desire, practice, and relationships,"[30] spirituality, energy exchange, and transcendence,[31] and even

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23. NEWMAHR, *supra* note 15, at 97.
24. *Id.* at 83.
25. In this context, a "top" refers to someone acted upon another. Moser & Kleinplatz, *supra* note 11.
26. NEWMAHR, *supra* note 15, at 96.
27. *Id.* at 37.
28. *Id.* at 8; *see also* Harviainen, *supra* note 9.
29. NEWMAHR, *supra* note 15, at 8.
30. Brenna Harvey, *"Are You Comfortable with Blood Play" BDSM Mobilization and Social Movement Identity as Cultural Capital*, *in* CONFERENCE PAPERS—AMERICAN SOCIOLOGICAL ASSOCIATION 2 (2015).
31. Consider the similarities between religious practices like self-flagellation. *See* Benjamin C. Graham et al., *Member Perspectives on the Role of BDSM Communities*, 53 J. SEX RES. 895, 904–05 (2016).

appreciation of cultural tradition, art, and aesthetics.[32] Some individuals also identify BDSM as an indistinguishable component of their own fixed personal identities, in a similar way as those identify as lesbian, gay, bisexual, transgender, or queer ("LGBTQ").[33] Within the BDSM community, these types of dynamics and considerations are frequently discussed and debated,[34] but consensus is often lacking because each individual possesses their own unique set of driving motivations.

Sadomasochism has been practiced and studied by the medical community for centuries.[35] Initially, the terms "sadism" and "masochism" were coined by psychologist Richard von Krafft-Ebing, referencing the 1785 novel *Les 120 Journes de Sodome by Comte Donatien Alphonse Francois de Sade*.[36] Although there is early evidence of BDSM, the practice was not formally studied and written about until the late 1800s.[37] At that time, sadism and masochism began to be pathologized as sexual perversions.[38]

There has been a shift, however, in psychology research away from characterizing sadomasochism as a disorder and toward a view of the behavior as "pathologically neutral."[39] This trend has been recognized formally with a significant change in the latest version of the *Diagnostic and Statistical Manual of Mental Disorders* ("DSM") to recognize that "most people with atypical sexual interests do not have a mental disorder."[40] The BDSM community has worked

32. *See* John Walsh, *Shibari: A Couple Explain the Appeal of Japanese Rope Bondage*, INDEPENDENT (Feb. 11, 2015, 12:33 PM), http://www.independent.co.uk/life-style/health-and-families/features/fifty-shades-of-grey-bondage-and-sm-sex-in-relationships-10036644.html.

> Some people say it has a meditative effect. . . . It silences the chatter of the everyday. . . . I think about how my body looks, how the public sees it. I have a better awareness of myself, of my body, my brain, my psychology, and a better understanding of other people. The sexual part is only a small component for me, it's not what I'm doing bondage for. It's about personal growth.

Id.

33. NEWMAHR, *supra* note 15, at 48–49.

34. *See, e.g.*, *id.* at 10 (describing conversation among submissive women regarding reconciling feminism and submission).

35. Anne M. Lowrey, *From Freud to America: A Short History of Sadomasochism*, CRIMSON (Oct. 28, 2004), http://www.thecrimson.com/article/2004/10/28/from-freud-to-america-a-short/ (tracing the roots of sadomasochism from its origin with Marquis de Sade in 1785 through the 1990s and discussing the role Sigmund Freud played in describing masochism in the late 1800s).

36. *Id.*

37. *Id.*

38. *Id.*

39. Jonathan Powls & Jason Davies, *A Descriptive Review of Research Relating to Sadomasochism: Considerations for Clinical Practice*, 33 DEVIANT BEHAVIOR 223, 224 (2012) (quoting Margaret Nichols, *Psychotherapeutic Issues with 'Kinky' Clients: Clinical Problems, Yours and Theirs*, 50 J. HOMOSEXUALITY 281, 282 (2006)).

40. *Paraphilic Disorders*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Paraphilic-Disorders.pdf (last visited Apr. 15, 2018). By contrast, homosexuality was considered a mental illness in the DSM until 1973. Neel Burton, *When Homosexuality Stopped Being a Mental Disorder*, PSYCHOL. TODAY (Sept. 18, 2015), https://www.psychologytoday.com/blog/hide-and-seek/201509/when-homosexuality-stopped-being-mental-disorder.

hard to distinguish consensual conduct with truly harmful paraphilia disorders, like pedophilia and frotteurism.[41]

Although the medical community's perspective on BDSM has changed, courts have been reluctant to adopt these new perspectives. In 1967, one court summed up the historical understanding by stating, "[i]t is a matter of common knowledge that a normal person in full possession of his mental faculties does not freely consent to the use, upon himself, of force likely to produce great bodily injury."[42] This same rationale was cited again in 2015 by a California Court of Appeal, reasoning that this would make even apparent consent ineffective because "[i]t is also the rule that the apparent consent of a person without legal capacity to give consent, such as a child *or insane person*, is ineffective."[43] Thus, even though the medical, psychological, sociological, and anthropological professions are just beginning to understand why, in practice, people routinely seek out and consent to receiving pain, judges continue to rely on a conception of BDSM as a mental disorder. Depatholization of sadomasochism validates the community understanding of BDSM as a normal human characteristic, rather than an abnormality, with the negative connotation that implies. For that reason, organizations like the National Coalition for Sexual Freedom ("NCSF") have made depathologization a priority.[44] This trend in the professional and academic contexts may have the potential to influence widespread public opinion, and therefore the associated legal framework.

B. Role of Negotiation and Consent in BDSM

Although these practices may, at first glance, appear to exemplify violence, the BDSM community is careful to distinguish its practices from true violence on the basis of consent.[45] An individual engaging in any conduct without consent is not engaged in BDSM but rather sexual violence.[46] In fact, the

41. *Consent and BDSM: The State of the Law*, NAT'L COAL. SEXUAL FREEDOM, https://www.ncsfreedom.org/who-we-are/about-ncsf/item/580-consent-and-bdsm-the-state-of-the-law (last visited Apr. 5, 2018).

42. People v. Samuels, 58 Cal. Rptr. 439, 447 (Cal. Ct. App. 1967) (emphasis added) (explaining that if someone were to consent, they would be "suffer[ing] from some formal of mental aberration" and therefore in need of the legal system to protect them by "prohibit[ing] one human being from severely or mortally injuring" them).

43. People v. Davidson, No. D064880, 2015 WL 4751166, at *7, *24 (Cal. Ct. App. Aug. 12, 2015).

44. *DSM-V*, NAT'L COALITION SEXUAL FREEDOM, https://ncsfreedom.org/key-programs/dsm-v-revision-project/dsm-v-program-page.html (last visited Apr. 5, 2018).

45. Graham et al., *supra* note 31, at 895 (2016) ("[A]ny deviation from this central feature [consent] constitutes rape and/or sexual assault and is not considered BDSM."); Megan R. Yost, *Development and Validation of the Attitudes about Sadomasochism Scale*, 47 J. SEX RES. 79, 79 (2010).

46. Graham et al., *supra* note 31; *see also* Linda S. Anderson, *Marriage, Monogamy, and Affairs: Reassessing Intimate Relationships in Light of Growing Acceptance of Consensual Non-Monogamy*, 22 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 3, 23 (2016).

> Unlike many other erotic or sexual interactions where those involved simply fumble through the interactions without knowing exactly where the boundaries will appear, the practice of BDSM involves explicit consent to clearly negotiated parameters. "Consent" is considered the "first law" of S/M sex—the moral dividing line between S/M and brutality.

Anderson, *supra*, at 23.

BDSM community has developed widely accepted standards around informed consent and associated risk.[47]

The basis of consent in BDSM is negotiation with the goal of establishing a mutually agreed on set of parameters between participants who "regard their interactions within those constraints as spontaneous, pure, and authentic."[48] In some cases, this may necessitate detailed pre-planning in the form of either questionnaires or extensive conversation about "interests, fears, and limits." In other situations (particularly between well-acquainted partners) participants may utilize less formal methods of negotiation.[49] Negotiation checklists may be used to structure these conversations and ensure clear understanding between partners.[50] Further, participants may establish "safewords" that signal withdrawal of consent and are generally recognized as a safeguard both in private play as well as in public community spaces.[51]

Some commonly applied theories of consent include: "safe, sane, consensual" ("S.S.C."); "risk aware consensual kink" ("R.A.C.K."); and "personal responsibility, informed consensual kink" ("P.R.I.C.K.").[52] While nuances between these consent philosophies may be hotly debated among sadomasochism practitioners, fundamental to each of these approaches is that the participants not only give explicit consent but do so with a focus on, or at least an awareness of, safety and risk considerations.

47. *See* NEWMAHR, *supra* note 15, at 75.

48. *Id.* at 61.

49. *Id.* at 75.

50. *E.g., Negotiation Checklist*, KINK WEEKLY, http://www.kinkweekly.com/wp-content/uploads/2016/03/BDSM-negotiation-checklist.pdf (last visited Apr. 5, 2018).

51. Thomas M. Millar, *The Annotated Safeword*, YES MEANS YES BLOG (July 7, 2010), https://yesmeansyesblog.wordpress.com/2010/07/07/the-annotated-safeword/; *see also* NEWMAHR, *supra* note 15, at 64.

52. NEWMAHR, *supra* note 15, at 75; *Personal Responsibility, Informed Consensual Kink (PRICK)*, KINKLY, https://www.kinkly.com/definition/1176/personal-responsibility-informed-consensual-kink-prick (last visited Apr. 5, 2018).

C. Marginalization, Stigma, and the Role of Support Within the BDSM Community

There is a fundamental concern among many BDSM practitioners regarding maintaining privacy and avoiding being outed.[53] Alternative forms of sexuality have routinely resulted in discrimination.[54] This can have the effect of further unifying communities around a shared experience of marginalization.[55] Further, many BDSM participants come from otherwise independently marginalized backgrounds and are therefore potentially subjected to even greater degrees of discrimination.[56]

Similarly, BDSM practitioners are routinely subject to stigma in many important contexts.[57] There is significant variation in individual knowledge of BDSM, which can have significant negative implications in interactions with professionals like doctors, police, psychologists, and researchers.[58]

Mistrust of the professionals and the legal system can have serious consequences for those that experience consent violations. One extensive study conducted by the National Coalition for Sexual Freedom ("NCSF") found that of over 1,000 people who experienced a violation of their consent, only twenty-nine, or 2.7%, reported it to the police with 181 individuals reporting that doing so "could have caused too much trouble for me" and 123 individuals citing police mistrust.[59]

Risk of criminal prosecution and civil liability for engaging in sadomasochistic conduct may prevent people from seeking necessary health or legal services in the event of injury or consent violation. This is particularly true given the nature of many people "switching" by taking on both sadistic and masochistic roles at different times[60] as well as having a strong incentive to protect their own social network and broader community in which they may be an active participant.[61]

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53. *See* NEWMAHR, *supra* note 15, at 205 n.3 (describing changing all proper names within her book, including people, places, and organizations).

54. Yost, *supra* note 45. There is considerable debate, though, regarding whether engaging in sadomasochism is similar to labeling a sexual orientation as compared to specifying a preferred sexual activity. *Id.*

55. NEWMAHR, *supra* note 15, at 7.

56. *Id.* at 25.

57. Graham et al., *supra* note 31, at 896 (pointing to stigma in media, legal, occupational, and clinical contexts); *see also* NEWMAHR, *supra* note 15, at 7 ("SM participants continue to fear damage to their personal and professional reputations, and the loss of the custody of their children, should their activities become public knowledge.").

58. Graham et al., *supra* note 31, at 896.

59. Susan Wright et al., *Consent Violations Survey*, NAT'L COAL. SEXUAL FREEDOM (Aug. 2015), https://ncsfreedom.org/images/stories/2015_Survey_PDFs_ETC/Consent%20Violations%20Survey%20Analysis%20final.pdf.

60. Neel Burton, *The Psychology of Sadomasochism: An Attempt to Explain Sadism and Masochism*, PSYCHOL. TODAY (Aug. 17, 2014), https://www.psychologytoday.com/blog/hide-and-seek/201408/the-psychology-sadomasochism; *A Switch of the D/s Lifestyle*, SUBMISSIVE GUIDE, https://submissiveguide.com/fundamentals/articles/switch-ds-lifestyle (last visited Apr. 5, 2018).

61. *See infra* notes 70–75 and accompanying text.

The BDSM community, or scene, emerged in the United States in the early 1970s as a form of BDSM support and education.[62] It now exists at both the local and national levels[63] and has a more varied purpose, including discourse and play.[64] "[T]he community as a whole shares responsibility for recruitment, education, and supervision of [BDSM] play."[65] The BDSM community exists formally and informally as a nexus for supporting its members through networking, vetting, accountability, negotiation, resources, and skill sharing.[66] Each of these functions occurs in a variety of environments, including social gatherings (commonly referred to as "munches"),[67] educational events, conventions, and play parties. In one study, forty-eight self-identified members of a BDSM community shared their experience around a single question: "What role does the BDSM community play in your life?"[68] Answers reflected a variety of categories, including friendship, acceptance, sexual expression, personal growth, spiritual/philosophical dimensions, support, sharing educational knowledge, activism, and safety.[69]

The community has an important function towards facilitating conversation and demonstration around safety issues. Whether for the purpose of building community, identifying potential play partners, utilizing specialized facilities, or developing skills, many SM activities occur in quasi-public spaces.[70] Within these realms, safety is a common topic of conversation, where "to contribute to this discourse of safety is to make a statement that one belongs there."[71] Within these spaces, active negotiation on intentions, desires, and limits are often encouraged.[72]

Communities also frequently develop a system for informal policing. An individual's reputation often precedes him or her, and potential partners routinely vet one another through contact with other partners and trusted individuals.[73] Some play spaces may also utilize "dungeon monitors" who are tasked with interrupting play in the event of a participant using a safeword or otherwise revoking consent.[74] Members of the community may also take it upon

62. *See* NEWMAHR, *supra* note 15, at 4.

63. *Id.*

64. *Id.* at 42.

65. *Id.* at 84.

66. Thelemitian, *What to Expect at Kinky Happy-Hours?*, KINKYOTL http://www.kinkyotl.com/2014/03/what-to-expect-at-kinky-happy-hours.html?zx=3713decd792bd3d8 (last visited Apr. 5, 2018).

67. *Id.*

68. Graham et al., *supra* note 31, at 899.

69. *Id.* at 901–02.

70. *See, e.g.*, NEWMAHR, *supra* note 15, at 1–4.

71. *Id.* at 86.

72. Shadow-girl, *Thinking About Safety: SSC, RACK, Negotiations and Vetting*, ONTARIO KINK (Jan. 6, 2015 5:36 AM), http://ontariokink.com/thinking-safety-ssc-rack-negotiations-vetting/; *see also* NEWMAHR, *supra* note 15, at 6 ("Membership in [an] organization grants insider status to would-be visitors and thus, to an important extent, sets one apart from the unknown and potentially unsafe.").

73. *See also* NEWMAHR, *supra* note 15, at 6.

74. *Id.* at 86.

themselves to check in with each other in the event of a concern, particularly with respect to protecting those newer to the scene.[75]

Finally, the BDSM community has become an important source of support for members of the historically marginalized subculture. Participating in a BDSM community can have the effect of "recast[ing], blend[ing], and romanticiz[ing]" marginalized identities where "to be a 'pervert' is to be open-minded, geeky, and creative."[76]

D. Misconception of BDSM as Socially Harmful Violence

On its face, many BDSM activities seem to be acts of physical violence, indistinguishable from the type of conduct the law is designed to shield society from experiencing.[77] These activities may use many of the same instruments used by those perpetuating more traditional, socially harmful forms of violence.[78] Therefore, it is understandable why outsiders, looking in, might have trouble separating clearly justifiably illegal conduct from sadomasochistic activities with social utility.

Whether or not violence is considered an aspect of consensual sadomasochistic conduct is largely determined by the perspective of the person being consulted. For example, as one court stated, "[t]he violence of sadomasochistic encounters involves the indulgence of cruelty by sadists and the degradation of victims."[79] By contrast, torture and cruelty are fundamentally different because "consent is notably absent and the infliction of pain is a deliberate act of cruelty without regard for the agency of the victim and their wishes to be involved or not."[80]

Courts and the BDSM community have markedly different understandings of sadomasochistic activities. Participants in BDSM will generally not use the term "violence" and most would strongly object to this categorization.[81] The description of the above court assumes the existence of a fundamental power imbalance where bottoms are not equal participants with agency, actively seeking a particular experience, but rather powerless victims of cruelty.[82]

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75. *Id.* at 87.

76. *Id.* at 46.

77. *See, e.g.*, Yasmeen Hassan, *Laws and Legal Systems as an Essential Strategy to Prevent Violence Against Women and Girls*, UN WOMEN (Sep. 2012), http://www.soon-young.com/wp-content/uploads/2014/09/EGM-paper-Yasmeen-Hassan-pdf.pdf.

78. *See infra* Part II.

79. Regina v. Brown [1994] 1 AC 212 (Eng.).

80. Darren Langdridge, *Speaking the Unspeakable: S/M and the Eroticisation of Pain*, *in* SAFE, SANE AND CONSENSUAL: CONTEMPORARY PERSPECTIVES ON SADOMASOCHISM 91, 95 (Darren Langdridge & Meg Barker eds., 2013).

81. NEWMAHR, *supra* note 15, at 127.

82. *Brown*, 1 AC at 212.

E. History of Consent Laws

There is a long history in the common law that consent is not a defense to assault and battery.[83] Consider, for example, the case of two friends mutually choosing to engage in a fight.[84] Both can be guilty of crimes against each other, even if any resulting injury was not intentional and each freely consented to the encounter.[85] The rationale is generally justified as a matter of public policy disapproving of any individual causing another harm.[86] The result that both friends could be criminally responsible for the other's injuries, however, seems to defy logic and deny each person the opportunity to choose to engage in such conduct.

Of course, each state establishes their own criminal code, and specific statutory language on the issue varies.[87] State laws, however, generally follow a typical pattern of prohibiting consent as a defense rooted in historical decisions and supported by the Model Penal Code.[88] Most states, therefore, have an exception to permit consent in the event that the harm is not serious or in certain types of activities which society endorses as socially valuable.[89] Examples include participation in competitive sports and medical procedures.[90] This exemplifies the fact that the law is not categorically opposed to any instance of violence.

Courts and jurisdictions differ on what types of conduct is considered "serious" and which specific activities are worthy of an exception. Though there are clear distinctions, it is possible to draw logical comparisons between whether individuals should be able to consent to sadomasochism with other areas of controversial consent. This might include any activity which a person may choose to engage in, but that would simultaneously subject them to actual or risk of some degree of physical harm. Possible examples include tattoos,

83. *See, e.g.*, Commonwealth v. Collberg, 119 Mass. 350, 352 (1876).

84. *Id.*

85. *Id.*

86. *See* Bergelson, *supra* note 7, at 50.

87. *See e.g.*, N.H. REV. STAT. ANN. § 626:6 (2016) ("When conduct constitutes an offense because it causes or threatens bodily harm, consent to the conduct is a defense if the bodily harm is not serious; or the harm is a reasonably foreseeable hazard of lawful activity."); TENN. CODE ANN. § 39-13-104 (West 1992) (permitting consent as a defense if the "injury consented to or threatened" is not "serious" or if both conduct and harm are "reasonably foreseeable hazards" of "lawful athletic contest or competitive sport" or "concerted activity of a kind not forbidden by law"); TEX. PENAL CODE ANN. § 22.06 (West 2007) (permitting consent to assault, aggravated assault, or deadly conduct if the conduct did not "threaten or inflict serious bodily injury" or if "the victim knew the risk of the conduct" with respect to occupation, medical treatment, or scientific experiment).

88. MODEL PENAL CODE § 2.11 (AM. LAW INST. 2015).

89. *Id.*

90. *Id.*; *cf.* NEWMAHR, *supra* note 15, at 8 (indicating some SM community members equate participation in SM to extreme sports).

body modification, elective surgery, drug use, impact sports, and assisted suicide.[91]

The standard of consent to sexual conduct, however, is clearly distinct. Specifically, the presence of consent is the sole characteristic that distinguishes lawful (and socially valued) conduct between partners and criminal conduct like sexual assault and rape.[92] The common law definition of rape may include both elements of nonconsent and force.[93] There has even been a recent trend of reworking rape laws to focus even more on the importance of consent.[94] This is built directly into the definition used by the Federal Bureau of Investigation of rape as "penetration, no matter how slight . . . without the consent of the victim."[95] Although "most scholars today agree that the essential characteristic of rape is nonconsensual sex rather than an act of physical violence," the empirical practice may be significantly different, with a prosecutorial focus only on cases in which there is an element of force.[96] This is notable in the context of consent laws for sadomasochistic conduct (even under general assault statutes) because there is likely to be an appearance of force in factual instances of BDSM. This same mindset, therefore, may help explain the reason that BDSM conduct is almost always considered "serious" while other conduct that is objectively worse is not.[97]

The recommendation of this Note is to attempt to shift the fundamental structure of consent laws on assault from a general statement that consent is not a defense to criminal assault or battery, except in instances specifically outlined by statute, to a statement that consent will always operate as a defense to assault and battery unless legislatures specify instances in which public policy requires that should not be the case.

III. ANALYSIS

For many individuals, sadomasochism is a sophisticated and nuanced personal pursuit, intrinsically tied to the person's own marginalized individual identity.[98] Despite its possible appearance as a form of violence or abuse, sadomasochism demands a more nuanced understanding as a victimless activity

91. *See* Thomas Schramme, *Preventing Assistance to Die: Assessing Indirect Paternalism Regarding Voluntary Active Euthanasia and Assisted Suicide*, *in* NEW DIRECTIONS IN THE ETHICS OF ASSISTED SUICIDE AND EUTHANASIA 27, 30 (Michael Cholbi & Jukka Varelius eds., 2015).

92. Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER L. 147, 150 (2011) ("Under common law, rape was defined as intercourse accomplished through the use of force and against a woman's will. Today, American jurisdictions vary in their legislative schemes: some define the offense by focusing on the nonconsensual sex element, while others focus on the force element.").

93. *Id.*

94. Julie Morse, *Re-Writing Rape Laws to Better Focus on Consent*, PAC. STANDARD (June 28, 2016), https://psmag.com/re-writing-rape-laws-to-better-focus-on-consent-35156b240bdf#.2okk2ubae.

95. *Id.*

96. Buchhandler-Raphael, *supra* note 92.

97. *See Hot for Kink, Bothered by the Law: BDSM and the Right to Autonomy*, CAN. B. ASS'N (Aug. 8, 2016), https://www.cba-alberta.org/Publications-Resources/Resources/Law-Matters/Law-Matters-Summer-2016-Issue/Hot-for-Kink,-Bothered-by-the-Law-BDSM-and-the-Rig.

98. *See supra* Section II.A.

with some degree of social utility. Current laws do not recognize BDSM as a valid and legal expression of individual identity. Therefore, it is important to consider whether the law ought to change to protect, rather than criminalize, those that engage in sadomasochistic conduct with other consenting adults.

This Part will first discuss the pattern of incremental legalization of a variety of previously outlawed sexual practices, mirroring growing societal acceptance of these types of practices. Second, this Part weighs an individual's autonomy to make highly personal decisions surrounding their own risk acceptance profile with any potentially related public policy implications. Third, this Part analyzes the relevance of nonsexual components of BDSM to inform possible legal approaches that would categorize BDSM as a form of sex and risk incentivizing otherwise unwanted sexual contact. Fourth, this Part evaluates the challenges of legally protecting a marginalized minority in a society based on majoritarian lawmaking. Finally, this Part considers the risk of creating a law which may allow individuals to hide true assault through coercion, while falsely framing the encounter as consensual BDSM.

A. Incremental Acceptance and Legalization of Alternative Sexual Practices

Throughout recent years, there have been growing societal trends toward acceptance of alternative forms and expressions of sexuality across generations.[99] The legal system has generally mirrored this social acceptance through legalization of a variety of previously outlawed, illicit sexual practices.[100]

Interracial cohabitation and marriage is one example of a previously outlawed practice which was later accepted within society and by the courts. As late as 1967, sixteen states had antimiscegenation laws that prevented marriage between interracial couples.[101] These laws reflected the antiquated belief that, as one Virginia judge put it, "Almighty God created the races . . . and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."[102] It took until 1964 for the Supreme Court to hold that laws prohibiting interracial cohabitation were unconstitutional because they violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[103] It took another three years for the Supreme Court, in *Loving v. Virginia*, to reach the same conclusion with respect to antimiscegenation laws.[104]

Individual possession of obscene materials is another example of laws related to sexuality becoming more permissive over time. In 1969, the Supreme

99. Amy Craft, *Changing Attitudes About Premarital Sex, Homosexualty*, CBS NEWS (May 5, 2015, 4:10 PM), http://www.cbsnews.com/news/changing-attitudes-about-premarital-sex-homosexuality/.

100. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 559 (1969); Loving v. Virginia, 388 U.S. 1, 3 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

101. *Loving*, 388 U.S. at 3.

102. *Id.* (quoting the Circuit Court of Caroline County).

103. *See McLaughlin*, 379 U.S. at 184.

104. 388 U.S. at 2.

Court held, in *Stanley v. Georgia*, that "mere possession of obscene matter cannot constitutionally be made a crime" as it would violate the First Amendment.[105] In part, the Court relied on the principles that "fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[106] The Court also relied on the fact that the Founders "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations" and therefore "conferred, as against the government, the right to be let alone."[107] Similarly, the Court held in 1967 that states do not have "power to suppress the distribution of [obscene] books and magazines" when there was no specific concern for juveniles and where individuals could act in a way to avoid exposure.[108]

The theme of respecting individuals' private decisions again arose with regard to contraception and abortion in *Eisenstadt v. Baird*,[109] *Roe v. Wade*,[110] and *Carey v. Population Services*.[111] The Supreme Court categorized this realm of privacy as limiting "unjustified government interference [in] personal decisions 'relating to marriage, procreation, contraception, family relationships, child rearing, and education.'"[112]

Most recently, social and legal attention has shifted to solidifying protections for same-sex partnerships. Although the Supreme Court recently upheld same sex marriage in *Obergefell v. Hodges*,[113] the related line of cases stems from sodomy laws, as in *Lawrence v. Texas*.[114] The social process leading up to the ruling in *Obergefell* reflects widespread growing public acceptance of homosexuality. For example, public acceptance of adult same-sex relationships has grown from only 11% in 1973 to 44% (including 51% of women) in 2012.[115] The Court even acknowledged the role that shifting public perception had on its decision in *Obergefell*:

> The history of marriage is one of both continuity and change. Changes, such as the decline of arranged marriages and the abandonment of the law of coverture, have worked deep transformations in the structure of marriage, affecting aspects of marriage once viewed as essential. . . . Changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations.
>
> This dynamic can be seen in the Nation's experience with gay and lesbian rights. Well into the [twentieth] century, many [s]tates condemned

105. 394 U.S. at 559.

106. *Id.* at 564.

107. *Id.* (quoting Olmstead v. United States, 277 U.S. 438, 478 (Brandeis, J., dissenting)).

108. Redrup v. New York, 386 U.S. 767, 768–69 (1967).

109. 405 U.S. 438, 440 (1972).

110. 410 U.S. 113, 166 (1973).

111. 431 U.S. 678, 681–82 (1977).

112. *Id.* at 685 (quoting *Roe*, 410 U.S. at 152–53; citing *Eisenstadt*, 405 U.S. at 453–54; Loving v. Virginia, 388 U.S. 1, 12 (1967); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1942); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

113. 135 S. Ct. 2584, 2608 (2015).

114. 539 U.S. 558, 562 (2003).

115. Craft, *supra* note 99.

> same-sex intimacy as immoral, and homosexuality was treated as an illness. Later in the century, cultural and political developments allowed same-sex couples to lead more open and public lives. Extensive public and private dialogue followed, along with shifts in public attitudes. Questions about the legal treatment of gays and lesbians soon reached the courts, where they could be discussed in the formal discourse of the law.[116]

A society's moral compass is not stagnant but constantly fluctuates. Through reflecting on the social and legal progress that led to the legalization of interracial marriage, personal possession of obscenity, contraception, and same-sex partnerships, it is clear that the American Legal System is designed to respond to reflect shifts in public understanding, particularly with respect to highly personal, intimate choices. Courts have specifically distinguished consensual BDSM conduct, however, from protected sexual behavior as described in *Lawrence* because the former involves a "threat of bodily harm."[117]

Public acceptance of sadomasochism is not yet at the level of acceptance for many of the practices described above. BDSM practitioners are still largely at the stage of promoting public awareness and rebutting common misconceptions.[118] Public knowledge, however, is growing in part due to an influx of BDSM into popular culture through books, music videos, and other media.[119] For example, the *Fifty Shades of Grey* series has sold over 100 million copies.[120] BDSM was also featured in a T-Mobile commercial that aired during the 2017 Super Bowl.[121] Anthony Bourdain also featured BDSM and the related art of shibari, or Japanese-style rope bondage, on his television series, "Parts Unknown."[122]

The handful of references to BDSM in popular culture, however, are not yet sufficient to result in widespread public acceptance of the practice. Even where references serve to raise some degree of awareness, that is unlikely to go deeper than the surface level as long as the conversation remains firmly rooted in popular culture. Therefore, without quality points of reference, it can be otherwise difficult for those who have never desired to experience or inflict physical pain in a BDSM dynamic to understand and empathize with someone who

116. *Obergefell*, 135 S. Ct. at 2588.

117. Anderson, *supra* note 46, at 27 (citing *Lawrence*, 539 U.S. at 578; Commonwealth v. Carey, 974 N.E.2d 624, 631 (Mass. 2012)).

118. Cassie Fuller, *Dear BDSM Community: Your Fifty Shades of Complaining Isn't Productive*, HUFFINGTON POST (Feb. 20, 2015, 4:27 PM), http://www.huffingtonpost.com/cassie-fuller/dear-bdsm-community-your-_b_6721566.html.

119. *See, e.g.*, E. L. JAMES, FIFTY SHADES OF GREY (2011); FKA Twigs, *Pendulum*, YOUTUBE (Jan. 15, 2015), https://www.youtube.com/watch?v=O8yix8PZKlw.

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

121. *T-Mobile Super Bowl Commercial 2017 Kristen Schaal Punished*, YOUTUBE (Feb. 9, 2017), https://www.youtube.com/watch?v=VGlhlTGEmDg.

122. *Anthony Bourdain Parts Unknown: Tokyo* (CNN television broadcast Nov. 3, 2013), http://www.cnn.com/video/shows/anthony-bourdain-parts-unknown/season-2/tokyo/.

seeks out those experiences. Lack of understanding may contribute to the problem shared by other minority groups, in which the minority is significantly disadvantaged in the social and political process.[123]

Despite the progress that has been made toward more permissive laws surrounding sexuality, there remain frontiers where the law has not yet gone. For example, prostitution, "the world's oldest profession,"[124] remains illegal in every state except Nevada.[125] This is despite the fact that the United Nations declared that prostitution should not be a criminal offense in 1959 and that some other nations have gone to the extent of fully legalizing and regulating prostitution as a professional trade.[126] Further, despite its illegality, prostitution remains relatively common in the United States, with approximately 15% to 20% of men having paid for sex at least once, based on studies conducted worldwide between 1994 and 2010.[127] Therefore, BDSM is not the only frontier remaining in the direction of more permissive laws regarding private, sexual conduct.

B. Individual Autonomy and Risk Acceptance

As a philosophical concept, the ideal of personal autonomy is the constraint not by external forces but "to be directed by considerations, desires, conditions, and characteristics that are not simply imposed externally upon one, but are part of what can somehow be considered one's authentic self."[128] Of course, any legal system must constrain autonomy of individuals on the basis of public policy, at least to some degree, to respect others' fundamental rights. In systems that place a high degree of value on autonomy, if the resulting acts do not conflict with others' fundamental rights, criminal punishment may not be justified.[129] Setting the appropriate boundaries, therefore, between legal and criminal conduct requires an understanding on the part of the decision-maker regarding the decision and rationale individuals may use and the empirical potential for real harm as a result of those choices.[130]

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123. *See infra* Section III.D.

124. Forrest Wickman, *Is Prostitution Really the World's Oldest Profession?*, SLATE (Mar. 6, 2012, 5:57 PM), http://www.slate.com/articles/news_and_politics/explainer/2012/03/rush_limbaugh_calls_sandra_fluke_a_prostitute_is_prostitution_really_the_world_s_oldest_profession_.html.

125. *See generally* Daria Snadowsky, Note, *The Best Little Whorehouse Is Not in Texas: How Nevada's Prostitution Laws Serve Public Policy, and How Those Laws May Be Improved*, 6 NEV. L.J. 217 (2005).

126. *Id.* at 217.

127. *Percentage of Men (by Country) Who Paid for Sex at Least Once: The Johns Chart*, PROCON.ORG, http://prostitution.procon.org/view.resource.php?resourceID=004119 (last updated Jan. 6, 2011, 3:00 PM).

128. *Autonomy in Moral and Political Philosophy*, STAN. ENCYCLOPEDIA PHIL. (July 28, 2003), http://plato.stanford.edu/entries/autonomy-moral/#AutSocPol.

129. *Punishment*, STAN. ENCYCLOPEDIA PHIL. (June 13, 2003), http://plato.stanford.edu/entries/punishment/#ThePun.

130. *See, e.g.*, Barbara J. Cox, *"The Tyranny of the Majority Is No Myth": Its Dangers for Same-Sex Couples*, 34 HAMLINE J. PUB. L. & POL'Y 235, 242 (2012).

> It is hard to imagine how allowing the marriages of 10,207 same-sex couples or even 175,000 individuals in Minnesota could harm the 5.3 million people or the 1.066 million different-sex married couples in Minnesota. . . . Since no one proposes to remove the 5,500 children from their parents who are in same-sex relationships, it is again bad public policy to exclude their parents from the legal recognition and rights that come from marriage and thereby strengthen and protect those children's families.

The current system for determining consent as a defense to criminal assault uses a piecemeal approach that creates a system riddled with inconsistencies and lacking in a uniform rationale.[131] By attempting to specifically enumerate named contexts, rather than defaulting to generalized principles of auautonomy and risk acceptance, most states end up protecting only conduct viewed as socially useful by the majority, without respect to minority viewpoints.[132]

One example of this is sports. Up to 40% of former players in the National Football League have signs of traumatic brain injury which leads to chronic traumatic encephalopathy, a form of brain degeneration.[133] As serious as this is, football players that caused those injuries while choosing to participate in the sport will generally not be criminally liable under the Model Penal Code approach, which contains a specific exception that "consent to [conduct that causes or threatens bodily injury] is a defense if . . . the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law . . . ."[134] Because each player consented to assume the risk through participation in the sport, consent will operate as a defense.[135]

The risk-reward calculation may not be particularly different between BDSM practitioners and athletes. Each weighs the personal utility they receive from participating with the associated risk and possible severity of harm.[136] Nevertheless, although the mental calculation is similar, the two groups may not be granted the same respect for their choices under the law because one made a socially acceptable choice to play sports while the other made a decision which is not understood or accepted within the mainstream.[137]

At its core, an individual making a truly autonomous, rational choice will evaluate their options with respect solely to individual implications instead of in accordance with whatever choice is in the best interest of the community as a whole.[138] Therefore, it is appropriate in many instances for criminal laws to put constraints on individual autonomy to ensure that no single person uses their own autonomy to cause unjustifiable harm to another on the basis of public policy.[139]

Id.

131. *See supra* Section II.E. (on the history of consent laws).

132. *See supra* Section II.E.

133. Travis M. Andrews, *40 Percent of Former NFL Players Suffer from Brain Injuries, New Study Shows*, WASH. POST (Apr. 12, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/04/12/40-percent-of-former-nfl-players-suffer-from-brain-damage-new-study-shows/.

134. MODEL PENAL CODE § 2.11 (AM. LAW INST. 2015).

135. *Id.*

136. *Normative Theories of Rational Choice: Expected Utility*, STAN. ENCYCLOPEDIA PHIL. (Aug. 8, 2014), https://plato.stanford.edu/entries/rationality-normative-utility/.

137. MODEL PENAL CODE § 2.11 (AM. LAW INST. 2015).

138. Note, though, that individuals frequently do consider implications of choice on others— particularly those that they care about. This does not, however, take away from the fact that the inputs to the cost-benefit analysis are highly personal rather than made in the best interest of society as a collective.

139. *See* JOHN STUART MILL, ON LIBERTY 13 (Currin V. Shields ed., 1956) (discussing harm principal).

If the public policy justification for preventing individuals from consenting to their own assault or battery is, as one court suggested, a "breach of the peace,"[140] the judicial system then must identify exactly what conduct qualifies as breaching peace based on its understanding of acceptable norms. One could easily conceptualize forceful hits in football or fights in hockey as also breaching peace, but in practice these are seen as routine aspects of the sports.[141] Further, conduct that is or is not justifiable can shift depending on both the opinion of the judge as to the activity's utility and the prevailing social understanding at the time. For example, "manly sports calculated to give bodily strength, skill and activity"[142] (including wrestling) may be acceptable, while "prize-fighting, boxing matches, and encounters of that kind" could be considered illegal because, according to one judge, they "serve no useful purpose."[143]

Sports is certainly not the only example of conduct which justifies infliction of harm. Another example of conduct considered to have social utility, and therefore be permissible in the eyes of the law of many states, is "chastisement of a child."[144] On its face, this conduct actually seems objectively more troubling because it inflicts pain on children who likely lack the power to defend themselves. Further, children cannot consent to such treatment.[145] Yet, physically chastising a child remains permissible in many states,[146] almost certainly due to the historically widespread acceptance of the practice.

This naturally places the legal system in the precarious position of needing to determine what type of conduct is or is not socially valuable. This is an inappropriate inquiry because the purpose of criminal law is not typically to encourage socially optimal behavior, but rather to narrowly exclude conduct contrary to public policy.[147] Further, relying on judges to apply the standards in a way that shifts criminal fault to reflect changed social norms will result in either inevitable delays, while judges adhere to past precedent, or complete refusal to act, while waiting for democratically elected officials to make the first move to reconcile changing societal norms with related criminal sanctions.[148]

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140. *See e.g.,* Rex v. Donovan [1934] 2 K.B. 498 (Eng.). *But see* Commonwealth v. Collberg, 119 Mass. 350, 352 (1876) (finding support for assault and battery in instance of two acquaintances engaged in a mutually consensual physical fight despite "no evidence of any uproar or outcries when the contest took place, or that any one was disturbed").

141. *See e.g.*, Scott Burnside & Jim Kelley, *The Do's and Don'ts of Fighting*, ESPN (Jan. 19, 2004), http://
www.espn.com/nhl/columns/story?id=1711835.

142. *Donovan*, 2 K.B. at 498. This raises an issue of gender, worthy of further consideration.

143. *Colberg*, 119 Mass. at 353.

144. *Donovan*, 2 K.B. at 498.

145. MODEL PENAL CODE § 2.11(3)(b) (AM. LAW INST. 2015) ("[A]ssent does not constitute consent if . . . it is given by a person who by reason of youth . . . is manifestly unable . . . to make a reasonable judgment as to the nature or harmfulness of the conduct.").

146. Corey Adwar, *These Are the 19 States That Still Let Public Schools Hit Kids*, BUS. INSIDER (Mar. 28, 2014), http://www.businessinsider.com/19-states-still-allow-corporal-punishment-2014-3.

147. *See* People v. Nash, 52 Cal. 2d 36, 54 (1959).

148. *See infra* Section III.D.

C. Informing Solutions Sensitive to Nonsexual Components of BDSM

The most straightforward approach to decriminalizing BDSM would be to get states to add another exception into their consent statute that would encompass BDSM conduct. Politically, however, this could prove an almost insurmountable challenge as few lawmakers who value their careers would be willing to sign a piece of legislation designed to create protections for the BDSM community. A slightly more politically sensible approach would be to incorporate a more general category into the exceptions for sexual activities.[149] Unfortunately, this approach cannot account for the reality that although there is often significant overlap between sexual conduct and sadomasochism, that is not always the case.[150]

Therefore, creating a solution that addresses sadomasochism solely in the context of sexual assault, rather than assault generally, could be problematic. Specifically, it could result in paradoxical circumstances where some conduct that is not inherently sexual, like whipping or flogging, might be considered illegal if performed independently, but legal if paired with some form of more traditionally sexual conduct. This could result in an unintended consequence of incentivizing the otherwise-unwanted sexual contact for legal protection.

It is also worth considering the implications this might have on the broader organization and education of the community. Events held for the benefit of sharing information regarding safety and technique may frequently include BDSM conduct in the form of demonstrations, conventions, workshops, and showcases.[151] These would also be some of the most frequent instances where BDSM was not done for the purpose of sexual gratification but rather for some other end. Further, these are the most likely to occur in public, rather than the privacy of one's own home, and the most likely to be observed and potentially prosecuted. Instituting a solution that fails to protect practitioners when engaging in BDSM for nonsexual purposes in a public place fails to adequately meet the needs of the BDSM community and may result in additional risk through decreased BDSM education.

149. It is worth noting that this is distinct from the role that consent already plays with respect to sexual assault charges. The real risk for the BDSM community is that charges will be brought under the general assault/battery statutes rather than as an alleged sexual assault, where consent will already be available as a defense. Anderson, *supra* note 46, at 26.

> Whether based on a lack of understanding of the sexual nature of BDSM activities or from the similarity to nonconsensual assaults, criminal charges for these behaviors have typically been brought under traditional assault and battery prohibitions rather than sex assault statutes. . . . By choosing to proceed under traditional assault and battery statutes prosecutors remove any possibility of consent being introduced as a potential defense to the allegations underlying the charge.

Id.

150. *See supra* Section II.A.

151. *See supra* Section II.D. (describing the organization of the BDSM community for the purpose of support and education).

D. Implications of Majoritarian Lawmaking on Marginalized Minority

As described previously, any legislative solution requires securing political support from elected officials in a majoritarian system. This raises a risk of "tyranny of the majority."[152] This term, coined by Alexis de Tocqueville, reflects the understanding that democratic societies, by relying on systems of voting in which majorities are largely in charge of decision making, fundamentally rely on the majority of voters to make decisions with respect to the laws and rights applicable to minority groups.[153] In this way, "majority tyranny is a threat to minority communities and has long been recognized as a danger inherent in governments founded on democracy."[154] This is so engrained in the American political system that the Supreme Court described the role of the Constitution as offering a guarantee "not confined to the expression of ideas that are conventional or shared by a majority" but "protect[ing] advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax."[155]

Even in instances where there is increasing support for minorities, true protection for minorities through legislative means is unlikely until such time when more than half of the general population is actively willing to support reform. It is important to consider not only what legal solutions may be ideal, but also which have the potential to be either politically palatable to the majority or go into effect regardless of their consent. Nevertheless, although widespread cultural acceptance of a practice might make legislative decriminalization easier and more politically tolerable, it is not necessarily essential for protecting minority rights. The judiciary may be in a better position to protect these populations.[156]

In contrast to the legislative and executive branches, the judicial branch may operate as a check on this majority power. Courts, however, are frequently hesitant to extend new protections to minority groups outside of those specifically designed through the majority based legislative process.[157] Because of the principal of *stare decisis*, they also tend to avoid ruling in a way inconsistent

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152. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1835); *see also* Cox, *supra* note 130, at 238–39.

> [S]exual minorities, consisting of lesbian, gay, bisexual, transgendered, and queer people (LGBTQ), comprise a small number of people within the U.S. . . . Thus the LGBTQ community is dependent on the non-LGBTQ community to decide ifs rights when those rights are debated at the ballot box, a bad public policy in and of itself.

Id.

153. Cox, *supra* note 130, at 239.

154. *Id.*

155. Kingsley Int'l Pictures Corp. v. Regents of Univ. of State of N.Y., 360 U.S. 684, 689 (1959).

156. *See* Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1177 (1977).

157. Jack L. Landau, *The Myth of Judicial Activism*, 70 OR. ST. B. BULL. 26, 30–31 (2010).

> The fact is that recent judicial decisions do raise serious questions about the proper use of judicial power—questions, for example, . . . about when it is appropriate to defer to legislative policy choices (Always? In cases involving hotly debated issues of social policy? Only when individual liberties are involved? Only when economic regulation is involved?).

Id.

with previous, relevant decisions.[158] Therefore, attempting to circumvent the tyranny of the majority by relying on a court to step in may be a long, fruitless endeavor.

Even if judges did overcome these structural barriers, there is no guarantee they will elect to rule in a way that would be systematically beneficial to those engaged in BDSM. Judges, on the basis of their position alone, may not be ideally suited to identifying and weighing the social utility for an individual engaged in BDSM with the potential for actual social harm that must be mitigated through public policy. Further, this concern deepens when the action arises within the context of marginalized populations in which the judge may lack sufficient understanding. "[I]s it possible for a judge, tasked with the role of applying the law in a wide range of discretionary contexts, to act without regard to the perspectives and experiences informing that judge's background?"[159] For this reason, relying on judges to make these determinations on a case-by-case basis will likely result in inconsistent outcomes and uncertainty with the BDSM community with respect to the state of the applicable law.

Juries have the potential to be just as problematic as judges in analyzing the facts of a case and consent as a defense. Just like the judge, individual jury members bring with them their own personal understanding, or lack therefore, regarding what they may see as the social or moral harms of the conduct.[160]

On the other hand, prosecutors could serve as a control mechanism. The number of BDSM prosecutions is low.[161] It is, however, wrong to fail to take measures to correct a problematic legal issue, particularly with respect to criminal law where individual liberties of real people may be at stake, simply because actual prosecutions have not yet reached a high level. There is also at least some evidence that marginalized populations may specifically be targeted for prosecution.[162]

E. Considering Risk of Legal Misrepresentation

If consent is permitted to be used as a defense to assault charges, there runs the risk that truly guilty defendants will claim their victims' injuries arose out of consensual BDSM activities. It is possible to imagine a scenario where a

158. *Id.* at 28 ("It is an article of faith in the law that courts are bound by the rule of *stare decisis*, that is, by their prior decisions.").

159. The Honorable Arrie W. Davis, *The Richness of Experience, Empathy, and the Role of a Judge: The Senate Confirmation Hearings for Judge Sonia Sotomayor*, 40 U. BALT. L.F. 1, 8 (2009).

160. Anderson, *supra* note 46, at 22 ("Though millions of people engage in BDSM activities, those who do not often consider the practice perverted or deviant.").

161. *But see id.* ("Though the likelihood of being criminally prosecuted for cohabitating, fornicating, or engaging in adultery is remote, that is not the case for another alternate sexual behavior—BDSM.").

162. Sarah E. Malik & Jessica M. Salerno, *Moral Outrage Drives Biases Against Gay and Lesbian Individuals in Legal Judgments*, JURY EXPERT (Nov. 26, 2014), http://www.thejuryexpert.com/2014/11/moral-outrage-drives-biases-against-gay-and-lesbian-individuals-in-legal-judgments/ (describing a case study as "one of many that have resulted in concern that gay youth are being selectively prosecuted and punished for voluntary sexual activity among peers.").

perpetrator attempts to coerce a victim into lying about a nonconsensual assault to create the appearance that the interaction occurred with consent.

Simply allowing a defendant to raise consent as a defense, however, does not necessarily mean that the fact-finder in the case will view statements to that effect as credible. Problems of proof exist elsewhere within the law, and the recognition that some individuals may try to abuse a revised consent defense should not be a sufficient reason to reject modifying the rule.

At this point, it is also worth noting that the defendant may run into difficulty bringing forward evidence of consent while still affording protections to alleged victims in the form of rape shield laws currently in place in many states.[163]

IV. RECOMMENDATION

Courts have incrementally legalized a number of outlawed sexual practices previously seen as contrary to morality or public policy, including interracial cohabitation,[164] individual possession of obscene material,[165] contraception,[166] sodomy,[167] and same-sex marriage.[168] BDSM is a natural corollary to these practices in that it generally forms the basis of an alternative, deviant form of sexuality. Having gained significant traction in society broadly in recent years, and following this trend in the legal cases, the time has come for consensual sadomasochistic conduct to no longer be punishable as a criminal offense.[169]

The law, however, is frequently slow to change, as it is fundamentally created by people with their own deeply held sets of beliefs that do not always mesh with the prevailing scientific understanding of the time.[170] Historically, these deep-seated beliefs can take years or even decades to change.[171] For example, in 1952, one psychologist discussing homosexuality described it as a "matter of scientific and clinical knowledge for many years, but such knowledge has not affected the popular view which is guided more by unreasoning emotions than by rational thinking."[172] The result was many years of injustice while the legal system caught up to the degree of public opinion spread-

163. *See generally* State v. Van, 688 N.W.2d 600 (Neb. 2004).

164. McLaughlin v. Florida, 379 U.S. 184 (1864).

165. Stanley v. Georgia, 394 U.S. 557 (1969).

166. Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972).

167. Lawrence v. Texas, 539 U.S. 558 (2003). The issue of sodomy, however, came before the Supreme Court on two other occasions and state laws banning the act were upheld. *See* Bowers v. Hardwick, 478 U.S. 186 (1986); Doe v. Commonwealth's Att'y for Richmond, 425 U.S. 901 (1976). The process to decriminalize sodomy took decades after some academics expressed strong criticism to the practice. *E.g.*, Benjamin Karpman, *Considerations Bearing on the Problems of Sexual Offenses*, 43 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 13, 15–16 (1952) ("When we come to consider sodomy, the law is archaic and goes back almost to Deuteronomy. . . . The average psychiatrist can see no reason why any law should prohibit any two adult persons from engaging in any form of sexual activity in private and by mutual consent.").

168. Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

169. *See supra* Section III.A.

170. *See generally* Karpman, *supra* note 167.

171. *Id.* at 27.

172. *Id.* at 21.

ing widely.[173] Therefore, it is important for an approach toward decriminalizing BDSM conduct, at least using the political process, to be politically palatable.

A. Previously Proposed Recommendations

Because change frequently takes significant amounts of time, potential incremental solutions to the problem outlined in this Note will likely be insufficient.[174] For example, what would seem like the most straightforward solution, simply adding a BDSM exception to the Model Penal Code that would be extended to "sexual partners for injuries sustained as a result of sexual activities" would fail to account for the wide range of conduct contained within the BDSM umbrella, including nonsexual conduct.[175] Additionally, it would prove politically impossible to garner sufficient support in most states for this type of rule because it would require politicians to put their support behind a law designed very narrowly to provide protection to the minority of individuals who are engaged in BDSM conduct. This runs contrary to the general view that politicians must be upstanding citizens of sound morals and religion.[176] Therefore, these same politicians are not likely to get behind legislation with the purpose of benefitting people that many of the politicians' constituents believe are engaging in illicit conduct. On the contrary, politicians may be more willing to adopt a broader approach to consent requirements when phrased generically.

Another proposed recommendation, advanced by Vera Bergelson, is to establish a balancing test that would "offer an alternative rationale for the limitation on the power to consent and to try to draw the line between lawful and unlawful activities based on that rationale."[177] For consent to be a complete defense, however, Bergelson proposes that the court must identify a "good reason" for the harm, show that the actor "intended to achieve a better balance of harms/evils and benefits . . . and, in fact managed to achieve it."[178] This solution poses several challenges. First, judges would retain too much discretion to choose not to classify BDSM as a "good reason"[179] because it forces judges to use their own understanding of what makes an individual's reasoning good and, therefore, leaves too much room for discretion within the application of the test.[180] Second, in a BDSM context, it shifts all responsibility for risk onto the

173. *Id.* at 20.

174. Daniel Haley, *Bound by Law: A Roadmap for the Practical Legalization of BDSM*, 21 CARDOZO J.L. & GENDER 631, 652–53 (2015).

175. *See id.* at 653.

176. *See, e.g.*, David Masci, *Almost All U.S. Presidents, Including Trump, Have Been Christians*, PEW RES. CTR. (Jan. 20, 2017), http://www.pewresearch.org/fact-tank/2017/01/20/almost-all-presidents-have-been-christians/.

177. Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165, 202 (2007).

178. *Id.* at 235.

179. Consider the parallel to judges currently identifying almost any form of sadomasochistic conduct as "serious" in order to prevent consent as a defense in jurisdictions with laws based on the Model Penal Code. *See id.* at 174–79.

180. *See supra* Section III.D.

person inflicting the pain, and thereby strips the masochist of individual agency to consider and choose whether or not to accept the risk through a negotiation process. This runs contrary to personal acceptance of risk being a central principle to BDSM community conceptions of informed consent.[181]

B. Proposed Recommendation

This Note proposes completely restructuring the relevant Model Penal Code section to create an even more comprehensive solution of generally permitting consent as a defense to *any* form of criminal assault and battery, regardless of the specific factual circumstances.[182] As it currently reads, the Model Penal Code specifies in Section 2.11 the following:

> (1) In General. The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negates an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.
>
> (2) Consent to Bodily Injury. When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense if:
>
> (a) the bodily injury consented to or threatened by the conduct consented
>
> to is not serious; or
>
> (b) the conduct and the injury are reasonably foreseeable hazards of joint
>
> participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law; or
>
> (c) the consent establishes a justification for the conduct under Article 3
>
> of the Code.

An amended Model Penal Code would move away from a format that conditions consent as a defense on meeting one of a set of additional requirements when the consent is to "bodily injury" as opposed to "in general."[183] Instead, the wording of section (2) could be changed as follows:

> (2) Consent to Bodily Injury: When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of injury is a defense *unless*:

This is not to suggest that there should never be lines drawn that would make some consensual conduct illegal. Instead, the recommendation is rather that

181. *See supra* Part II.

182. *See* Haley, *supra* note 174.

183. MODEL PENAL CODE § 2.11 (AM. LAW INST. 2015) (treating consent of a victim differently for offensives in general versus those where there is actual or threatened bodily injury). In bodily injury cases consent will be ineffective unless it meets at least one of the specific categorizations—that "the bodily injury consented to or threatened by the conduct consented to is not serious," that "the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law," or that "the consent establishes a justification for the conduct under Article 3 of the code." *Id.*

consent be the norm, with the possibility for particular explicit exceptions being used to outline the instances in which consent would be unavailable as a defense. This changes the default calculation to permit consent as a defense but still provides adequate flexibility for states to identify the specific forms of conduct which they believe are so contrary to public policy that consent should not be available as a defense. An example of the type of circumstances which might be included in a list of specifically enumerated exceptions might be a prohibition of one consenting to be fatally injured by another.

In adopting this revision, the American Law Institute ("ALI") should carefully evaluate the types of activities which states may wish to specifically forbid, even in cases of consent. This should be done through communications with various stakeholders on those particular issues. Of course, it would be up to each individual state to determine which types of conduct the ALI identified would or would not be adopted, and the states may independently add to the list of exceptions.

It is imperative, however, that widely generalizable exceptions, which would operate like a catchall and have a higher likelihood of inconsistent application, be excluded. For example, it is easy to imagine an exception to the general rule that consent is a defense which mirrors the statement in Section 2.11(2)(a) by stating something along the lines of:

> (2) Consent to Bodily Injury: When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of injury is a defense *unless*:
>
> (a) the bodily injury consented to or threatened by the conduct is serious.

Phrasing like this would, in fact, effectively negate the benefit of this approach with respect to BDSM applications, where courts have consistently held that BDSM conduct is "serious" even when that notion is inconsistent with legitimate risks and accepted definitions of "serious bodily injury."[184] It would return the status of the law essentially back to where it is today.[185]

The term "serious bodily injury" is defined in the Model Penal Code as "injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss of impairment of the function of any bodily member or organ."[186] This definition is, unfortunately, not directly applicable to the section on consent above as it is not the exact language used in section 2.11(2)(a), which uses the language that the "bodily injury consented to

184. Anderson, *supra* note 46, at 27.

> [T]he fact that courts view temporary "injuries" such as pain caused by a clamp placed on the skin or by hot wax being dripped onto the skin, or the pain associated with being spanked by a wooden spoon, as serious bodily injury belies the fact that there is more at play than protecting the public interest and preventing citizens from serious harm. . . . Though there are certainly instances where BDSM transgressions can result in serious bodily injury, choosing to include all BDSM activities within this definition goes too far.

Id.

185. *See supra* Section II.E.

186. MODEL PENAL CODE § 210.0(3) (AM. LAW INST. 2015). This definition is applicable to Articles 210 through 213 of the Model Penal Code, but not specifically to § 2.11 on consent. *Id.*

or threatened by the conduct consented to is not serious."[187] Further, the "seriousness" of BDSM conduct is almost certainly overestimated by courts, even when things like "pain caused by a clamp placed on the skin or by hot wax being dripped onto the skin, or the pain associated with being spanked by a wooden spoon" clearly and directly fall outside of the scope of a definition referring to "permanent disfigurement" and "protracted loss . . . of function."[188] Therefore such generalized exceptions to a revised default rule would render the approach ineffective at solving the issue of consent to BDSM.

C. Disadvantages of a Broad Restructuring of Model Penal Code on Consent

There are three strong critiques to addressing the issue of consent to BDSM practices through a broad restructuring of the consent section of the Model Penal Code. One significant disadvantage is that it results in a sweeping reaction to a comparatively small issue. The actual number of prosecutions for BDSM conduct is, in fact, very small.[189] Restructuring the consent statute as described would have implications for the judicial system's treatment of other consent issues.[190] Therefore, in this way, the proposed recommendation does more than what is likely strictly necessary to decriminalize BDSM conduct. Yet, this approach may also have beneficial implications by refocusing an entire concept of consent in a variety of contexts in a way that is most likely to force legislatures to carefully consider the underlying public policy rationale for instances in which the state believes criminal sanctions are required, even when parties are acting in accordance with each other's desires. Therefore, on balance, the recommendation will likely have a positive result.

A second challenge to permitting consent to be a defense to bodily injury, actual or threats, arises with respect to the problem of proof.[191] The physical manifestations of BDSM conduct may be hard to distinguish from the physical evidence that may exist from circumstances of truly nonconsensual sexual, or nonsexual, violence.[192] This concern, however, would remain an issue regardless of the specific method used to permit a consent defense to BDSM conduct. The alternative is to suggest that the risk of abuse might be too high. Therefore, the logical conclusion requires leaving the status quo in place, even if it criminalizes someone for consensual BDSM conduct, to make enforcement of other assaults easier. This reflects a value judgment and reasonable minds may differ on what is appropriate. As one maxim states, "better that ten guilty persons escape, than that one innocent suffer," as reflecting the "Blackstone principle" that "in distributing criminal punishment, we must strongly err in favor of false negatives (failure to convict the guilty) in order to minimize false positives (convictions of the innocent), even if doing so significantly decreases overall

187. *Id.* at § 2.11.
188. Anderson, *supra* note 46, at 27; MODEL PENAL CODE § 210.0(3) (AM. LAW INST. 2015).
189. *See supra* Section II.D.
190. *E.g.,* assisted suicide, body modification, elective surgery, self-flagellation, etc.
191. *See supra* Section III.E.
192. *See supra* Section II.E. (regarding prosecution due to force in rape cases).

accuracy."[193] An alternative to the Blackstone principle would be to "[m]aximize the number of guilty punished proportionally with the seriousness of their offenses, while minimizing the number of innocents punished . . . . [I]f push comes to shove, set things up so that nonpunishment of the guilty is preferred to punishment of the innocent[, b]ut not too strongly."[194] Historically, though, adherence to the strong tradition of the United States legal system based on due process toward protecting the innocent from unfair conviction, even if it will result in the possible acquittal of a guilty party, is consistent with the proposed recommendation.

A separate, but related, issue to consider is to what extent, if at all, rape shield laws might be used to prevent introduction of evidence pointing to prior negotiation between partners in a BDSM scene and the impact those laws may have on a defendant looking to present a consent defense in an assault or battery case.[195] This is worthy of further evaluation, although it is outside of the scope of this Note.

V. CONCLUSION

Over the course of the last half-century, American laws have become significantly more permissive of previously forbidden alternative sexual practices.[196] Although that trend culminated in the Supreme Court recently holding that same-sex marriage is a constitutional right,[197] BDSM rights is a remaining frontier. Public knowledge and acceptance of sadomasochism is growing;[198] however, the legal framework is wrought with an antiquated understanding of sadomasochism as a pathology and has not yet been revisited.[199] Existing state laws largely give prosecutors discretion to charge those engaging in consensual BDSM conduct with assault and/or battery instead of sexual assault.[200] Presence, or absence, of consent, with generally narrow exceptions, is irrelevant to criminal culpability.[201]

193. *See* Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1067–68 (2015).

194. LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW 73–74 (2006); Richard L. Lippke, *Punishing the Guilty, Not Punishing the Innocent*, 7 J. MORAL PHIL. 462, 464 (2010). If evaluating the risk that protecting consent as a defense for BDSM practitioners, in the few cases that are actually brought, would be so harmful to the effective prosecution of true perpetrators committing and getting away with assault, sexual and otherwise, it would be worth analyzing under the type of test proposed by Richard Lippke and a reasonable person may likely reach the conclusion that although "punishment of the innocent, especially when the sanctions inflicted on them are severe, is . . . a very bad thing" it may be justified as opposed to the alternative—"non-punishment of the guilty, especially when their crimes are serious." *Id.* at 463–64.

195. Kevin Carlson, *New York v Jovanovic*, NAT'L COAL. SEXUAL FREEDOM (Feb. 20, 2012, 1:28 AM), https://ncsfreedom.org/please-login-to-kap/item/681-new-york-v-jovanovic.html.

196. *See supra* Section III.A.

197. *See supra* Section III.A.

198. *See supra* Section III.A.

199. *See supra* Section II.C.

200. Anderson, *supra* note 46, at 26 (describing the benefit to prosecutors of charging suspects with traditional assault or battery as a way to avoid possible consent defenses).

201. MODEL PENAL CODE § 2.11 (AM. LAW INST. 2015).

This Note proposes fundamentally altering the role of consent to allow it to always operate as a defense to criminal charges for assault and battery, unless specific exceptions to limit consent are incorporated explicitly into the enacted statute.[202] Recognizing the likely political hurdles that would prevent actual implementation of a narrower approach,[203] I propose a more holistic rec-recommendation that Model Penal Code § 2.11 be revised to automatically make existence of consent a defense to assault and battery.[204]

This Note also identified three potential issues with this approach to the issue. First, is that there are inherently significant implications outside of the application to BDSM.[205] Those are outside of the scope of this Note, but examples might include assisted suicide and body modification.[206] Research on the effect of this solution on additional crucial and controversial topics will be required going forward. Second, as proposed, states would retain the ability to specifically describe types of conduct which they deem contrary to public policy and explicitly exclude that behavior from the consent statute.[207] At this point, there is no reason why a state, if its leaders are fundamentally opposed to BDSM, could not simply add this to the list of specifically enumerated instances where consent is insufficient.[208] If a state does choose to do this, the current problems articulated in this Note will likely continue, at least with respect to that state.

Finally, I recognize a very real risk that permitting consent to operate as a defense to assault and battery may complicate prosecution of cases of true violence.[209] Perpetrators may attempt to coerce their victims into claiming physical injuries were consensual.[210] This is fundamentally a problem of proof, however, that can be addressed on a case-by-case basis in the normal life cycle of a criminal case.[211] Therefore, this rationale should not be used as a reason for rejecting legalization of consensual sadomasochism outright.[212]

202. *See supra* Part IV.
203. *See supra* Section III.D.
204. *See supra* Part IV.
205. *See supra* Part IV.
206. *See supra* Part IV.
207. *See supra* Part IV.
208. *See supra* Part IV.
209. *See supra* Part IV.
210. *See supra* Part IV.
211. *See supra* Part IV.
212. *See supra* Part IV.