Consent and the Constitution

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ABSTRACT

The consent of a victim generally operates as a bar to criminal responsibility. In its early jurisprudence, the Supreme Court of Canada went so far as to imply that the consent principle might qualify as a principle of fundamental justice under section 7 of the *Charter*. Subsequent jurisprudence, however, has failed to provide any moral content to the consent principle. In this article, I maintain that any constitutional role for the consent principle must derive from its dual purpose: protecting accused who commit morally innocent and morally permissible acts from criminal conviction. Constitutionalizing consent in this manner serves two purposes. First, it provides a mechanism for distinguishing the consent principle's role as an element of an offence from that of a defence. Second, it illustrates the valuable role a constitutional framework for consent can play with respect to refining several of its most controversial applications—pre-consent to sex, sadomasochism, and incest.

Keywords: consent; *Charter*; fundamental justice; pre-consent to sexual touching; sadomasochism; incest

I. INTRODUCTION

In *R v Barton*,[1] the Supreme Court of Canada demurred when presented with the opportunity to adopt the reasoning in lower appellate courts to the effect that intentionally causing bodily harm during sexual intercourse would vitiate consent.[2] The Court's reluctance to consider the argument was defendable given that the Crown had not appealed on this

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1 *R v Barton*, 2019 SCC 33.

2 *Ibid* at para 180 citing *R v Zhao*, 2013 ONCA 283.

basis, nor was the issue strictly necessary to resolve the appeal.[3] The factual record also failed to highlight the various public policy concerns relevant to making such a determination.[4] In short, the lower court decisions in *Barton* and other appellate cases "were insufficient to give this important issue the full and comprehensive analysis that it deserves."[5]

The Court in *Barton* also was not presented with argument about the relationship between the role of consent in the criminal law and the *Canadian Charter of Rights and Freedoms*.[6] Building on the Court's seminal decision in *R v Jobidon*,[7] lower courts have on occasion considered whether the consent principle might qualify as a principle of fundamental justice under section 7 of the *Charter*.[8] Unfortunately, the jurisprudence has not addressed this question in significant detail.[9] Instead, constitutional challenges relating to the role of consent in the criminal law have dovetailed into arguments about instrumental rationality,[10] full answer and defence,[11] absolute liability,[12] and equality.[13]

The lack of engagement with the constitutional rationale underlying the consent principle likely arises from its underdevelopment in Canadian law. Although in some instances it is uncontestable that consent is an essential element of the offence, courts have not engaged with the literature debating whether consent is properly conceptualized as a justificatory defence in other contexts.[14] More importantly, although there is broad agreement that public policy places some limits on the scope of the consent principle, this

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3 *Ibid* at para 181.

4 *Ibid.*

5 *Ibid.*

6 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the Canada Act 1982 (UK), 1982, c 11.

7 *R v Jobidon*, [1991] 2 SCR 714, 66 CCC (3d) 454 (WL) [*Jobidon*].

8 See *R v CM* (1992), 75 CCC (3d) 556 at 562-567 (ONSC) (absence of consent must be part of the offence where consent makes the act morally innocent); *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 at paras 1166-1173, 1184 (court refused to decide whether consent was a principle of fundamental justice).

9 *Ibid.*

10 See *R v Hann* (1992), 75 CCC (3d) 355 at para 9, 15 CR (4th) 355 (NLCA).

11 See *R v Geisel*, 2000 CanLii 8446 (MBPC) at para 5.

12 See *R v Robinson* (1991), 14 WCB (2d) 624, 96 Sask R 220 (SKQB).

13 See *R v CM* (1995), 98 CCC (3d) 481, 82 OAC 68 (ONCA); *R v Roy* (1998), 161 DLR (4th) 148, 125 CCC (3d) 442 (QBCA).

14 The relevant literature will be discussed in detail below.

policy rationale has not been distilled into a basic guiding principle.[15] Only by uncovering the principles underlying consent will it be possible to test whether they qualify as principles of fundamental justice under section 7 of the *Charter*.

In this article, I contend that consent is encompassed by two distinct principles. When consent must exist as an element of an offence, I maintain that failure to incorporate consent into the offence violates the principle of fundamental justice that the morally innocent not be subject to criminal liability. In cases where an act constitutes a *prima facie* wrong, I contend that consent is best conceptualized as a justificatory defence. The principle underlying consent in this capacity is moral permissibility. This principle, which I have developed in detail elsewhere,[16] requires courts to investigate the reasons why prohibiting an accused's act is wrong. If the benefits of prohibiting the accused's act do not clearly outweigh any benefits derived from the activity, its criminal prohibition will fail to satisfy the principles of fundamental justice.

The article unfolds as follows. In Part II, I review the literature discussing the jurisprudential basis of the consent principle. In so doing, I contend that consent may be conceptualized as either part of an offence or as a defence, depending on the relationship between the consent and the act at issue. In Part III, I then outline the moral innocence and moral permissibility principles in greater detail. Although the former principle has already qualified as a principle of fundamental justice, it is necessary to further consider whether the moral permissibility principle may be elevated to the same status. After answering this question in the affirmative, I use the moral permissibility and moral innocence principles to test the constitutional boundaries of several controversial applications of the consent principle: pre-consent to sex, sadomasochism, and incest.

II. The Jurisprudential Basis Of Consent

The jurisprudential basis of the consent principle has been the subject of significant academic debate. There is broad agreement that consent must be an element of the offence where absence of consent is essential to the

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15 See *Jobidon*, *supra* note 7.

16 See Colton Fehr, "(Re-)Constitutionalizing Duress and Necessity" (2017) 42:2 Queen's LJ 99 [Fehr, "(Re-)Constitutionalizing"]; Colton Fehr, "Self-Defence and the Constitution" (2017) 43:1 Queen's LJ 85.

conduct being criminal. Whether in other instances consent may operate as a justification for committing a criminal offence raises questions not only relating to the relationship between offences and defences, but as to the structure of justificatory defences as well.

A. Consent as an Element of Offences and Defences

The role of the consent principle with respect to two charges—sexual assault and assault *simpliciter*—illustrates why consent serves a bifurcated role within Anglo-American criminal law. It is generally accepted that consent is not a "defence" to sexual assault in the traditional sense of the term.[17] The reason for this is because there is nothing wrong with having sex.[18] An understanding of sexual assault as a prohibition against sexual intercourse that allows consent to be asserted as a defence "would invite an almost comically inefficient, intrusive, and disorienting use of prosecutorial and judicial resources."[19] The underlying conduct being socially desirable therefore requires that consent operate as an element of the offence.

To the contrary, scholars maintain that there is a *prima facie* reason to prohibit generic assaults.[20] Regardless of whether one consents, the fact that the assault occurs will result in human suffering.[21] For this reason, the

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17 See John Gardner, *Offences and Defences* (Oxford: Oxford University Press, 2007) at 144-145 [Gardner, "Offences"] citing Kenneth Campbell, "Offence and Defence" in Ian Dennis, ed, *Criminal Law and Justice* (London: Sweet & Maxwell, 1987) at 73; John Gardner, "Justification Under Authority" (2010) 23 Can JL & Jur 71 at 75-76 [Gardner, "Justification"]; and George Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown & Company, 1978) at 566-568. Although this view is generally accepted, at least one competing view exists. See Michelle Dempsey & Jonathan Herring, "Why Sexual Penetration Requires Justification" (2007) 27:3 Oxford J Leg Stud 467 at 467.

18 *Ibid.*

19 See Stuart Green, "Consent and the Grammar of Theft Law" (2007) 28:6 Cardozo L Rev 2505 at 2520.

20 The term *prima facie* is not used in the sense that a reason against committing the act appears to be there but is revealed to be illusory. Instead, "the reason…is really there and continues to be there and to exert its force throughout, such that [committing the act] is regrettable—even though this is a case with a stronger conflicting reason such that [committing the act] is justified". See Gardner, "Offences", *supra* note 17 at 146. See also Vera Bergelson, "The Defense of Consent" in Markus Dubber & Tatjana Hörnle, eds, *The Oxford Handbook of Philosophy of Criminal Law* (Oxford: Oxford University Press, 2014) 629 at 650 [Bergelson, "Consent"].

21 Gardner, "Offences", *supra* note 17 at 144-145; Gardner, "Justification", *supra* note 17 at 75-76; Fletcher, *Rethinking*, *supra* note 17 at 568; George Fletcher, *Basic Concepts of Criminal Law* (Oxford: Oxford University Press, 1998) at 158; and Green, "Consent",

offence of assault is still committed. However, the victim's consent serves as an undefeated reason which justifies the violation of the prohibitory norm against assaulting others.[22] Allowing the victim's consent to operate in this manner upholds the importance of the victim's autonomy to choose what happens to her body. Importantly, however, the victim's consent does not alter the fact that the underlying harm sought to be avoided by prohibiting assault was caused. The harm is simply counterbalanced by the autonomy interests of the victim.[23]

B. Consent as an Element of Offences Only

More recent scholarship has challenged the rationale advanced above. It is arguably confusing to assert that the purpose of the assault prohibition is to protect individuals from harm, while simultaneously holding that such harm is justified by the consent of the victim.[24] If the law values the victim's autonomy more than protecting the victim from harm, it would be sensible to conclude that the purpose of assault is to protect personal autonomy. By so doing, however, it must be recognized that the consenting victim is merely exercising her right to individual autonomy.[25] If true, her consent eliminates the harm to which the assault provisions are directed as opposed to justifying its infliction.[26]

Yet, autonomy itself cannot explain the scope of the consent principle. This is evidenced by the fact that Anglo-American criminal law generally places limits on the types of assaults to which a victim may consent.[27] An

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supra note 19 at 2519-2520.

22 *Ibid.*

23 *Ibid.*

24 See Luis Chiesa, "Consent is not a Defense to Battery: A Reply to Professor Bergelson" (2011) 9 Ohio State J Crim L 195 at 198-200 [Chiesa, "Consent"]; Malcolm Thorburn, "Justifications, Powers, and Authority" (2008) 117 Yale LJ 1070 at 1113-1116; Malcolm Thorburn, "Two Conceptions of Equality before the (Criminal) Law" in Francois Tanguay-Renaud & James Stribopoulos, eds, "*Re-thinking Canadian Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law*, (Oxford: Hart Publishing, 2012) 3 at 18; and Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct*, (Burlington: Ashgate, 2004) at 111-112.

25 *Ibid.*

26 *Ibid.*

27 See for instance *Jobidon*, *supra* note 7 (fist-fights); *R v Brown*, [1994] 1 AC 212 (HL) [*Brown*] (sadomasochism); and *People v Jovanovic*, 263 AD 2d 182 (NY App Div 1999) (sadomasochism).

obvious example concerns cutting off a limb without medical necessity.[28] As a result of this public policy aspect to consent, Luis Chiesa recently suggested that consent is better understood as occupying an "offence-modification" role in criminal law theory.[29] Although the legislature *did* intend for consensual maiming to come within the ambit of the assault provisions, it *did not* intend acts such as contact sports, tattooing, and ear piercing to come within the scope of the criminal law.[30] The reason for the latter exemption is simple: these activities are permissible.[31]

Although I will defend the view that "permissibility" partially underlies the consent principle, I nevertheless disagree that consent cannot operate as a defence to assault. I take this position for three reasons. First, it is implicit in Chiesa's argument that the legislature's purpose will shift over time, as what is impermissible today might become permissible as society's values change. The fact that duelling and consensual fights which did not result in maiming have previously been viewed as permissible provides an example of how the law, despite legislative intent at the time it was enacted, changes with social opinion.[32] To impute such "intent" to the legislature is a legal fiction. It is unclear why allowing such a legal fiction is preferable to imputing to the legislature the intent to prohibit all forms of assault, no matter how socially desirable (contact sports, ear piercing, tattooing etc.) and then concluding that such harms are justifiable.

Second, it is not unreasonable to assume that a legislature would purposefully draft an assault offence in such a broad manner. Consider the following options. First, assaults are defined as non-consensual applications of force. The consent element is left to be defined by the common law, as creating an exhaustive list of acts that might be consented to is extremely difficult.[33] Alternatively, all assaults are prohibited, and the common law or

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28 The disease, known as "Bodily Integrity Identity Disorder," involves accused persons who feel a desire to dismember parts of their body. See Tim Bayne & Neil Levy, "Amputees by Choice: Body Integrity Identity Disorder and the Ethics of Amputation" (2005) 22 J Applied Philosophy 75.

29 Chiesa, "Consent", *supra* note 24 at 205.

30 *Ibid* at 205-206.

31 *Ibid* at 206.

32 See *Rex v Rice* (1803), 3 East 581 for the Court's change of view with respect to duelling. See also *Brown*, *supra* note 27 for the reasons of Lord Templeman. As he observes, "in the old days, fighting was lawful provided the protagonists consented because it was thought that fighting inculcated bravery and skill and physical fitness."

33 As Lord Mustill observed in *Brown*, *supra* note 27: "I doubt whether it is possible to give

a statute provides a "consent defence." Both options provide consent with a legal meaning, which the citizen requires a profound understanding of law to decipher. Option two, however, at least puts citizens on notice that they will be responsible for convincing the court that consent made the activity permissible.

Finally, defining the offence of assault in such a broad manner is within the scope of the criminal law. Prohibiting consensual assaults generally forwards the goals of protecting public health and safety, two of the primary goals of criminal law.[34] Whether the criminal law may extend its reach to convict people for acts such as contact sports, tattooing, and ear piercing is doubtful as a matter of constitutional law; as a matter of the conceptual reach of criminal offences, however, it is difficult to understand why it must be so limited.

To conclude otherwise would lead to some absurd results. Consider the following example. The same type of harm is committed by throwing an individual to the ground in self-defence as doing the same to gain leverage in a sporting contest. Both acts are obviously permissible. If anything, the accused acting in self-defence is seen to act rightfully,[35] while the sport participant can claim no higher moral ground. It is simply anomalous to conclude that the accused with the higher moral claim commits an assault but has a defence, while the sporting participant commits no assault.

It may be countered that relying on the *prima facie* wrong distinction will also lead to absurd results. Consider the law of sexual assault. On the one hand, consent, in its moral innocence form, must constitute part of the offence for typical sexual assaults. However, what of sexual encounters with a violent element, such as sadomasochistic sex? If violence constitutes a *prima facie* wrong regardless of consent, an accused charged with such a sexual assault would be required to plead consent as a defence, thus bifurcating the role of consent with respect to the crime of sexual assault. One might counter that there is no violent aspect to sadomasochistic sex, as "the presence of negotiation and consent… remove[s] core features of

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a complete list of the situations where it is conceivable that one person will consent to the infliction of physical hurt by another."

34 See *R v Malmo-Levine; R v Caine*, 2003 SCC 74 at para 74 [*Malmo-Levine*] aff'g *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] SCR 1 [*Margarine Reference*] at 49-50.

35 See most recently *R v Ryan*, 2013 SCC 3 at para 31 [*Ryan*].

violence."[36] However, as numerous scholars have retorted, the actual causing of pain, whether consensual or not, is difficult to paint as entirely non-violent, especially as that word is legally understood.[37]

It is also likely that consent as a defence to sexual assault involving sadomasochistic acts would have to be plead under a different principle, thus further complicating consent's role in the context of sexual assault cases. In essence, sadomasochistic sex involves a desire to see another individual endure pain for sexual gratification.[38] Whether consensual or not, it seems inherently difficult to conceptualize causing pain for sexual gratification as "rightful" or morally innocent. As I explain in more detail below, if aspects of consensual sadomasochistic sex are defendable, it is because they have come to be viewed as morally permissible, not that they constitute inherently innocent acts.

Which of these circumstances should be tolerated? In my view, the broader rationale of the Anglo-American structure of criminal law requires that those flowing from the *prima facie* wrong distinction be tolerated. As criminal offences must forward public policy aims such as "peace, order, security, health, [or] morality,"[39] the fact that criminal offences are drafted broadly enough to encompass "rightful" acts is contrary to the morality purpose. If there is anything criminal offences are *not* seeking to curtail, it is rightful actions. Similarly, it is difficult to imagine a circumstance where prohibiting a rightful act could forward any of the other valid purposes of the criminal law.

The distinction between purely innocent acts, which are not offences, and *prima facie* wrongs, which are offences but may be offset by the accused's reasons for committing the offence, is the only tenable explanation of which I am aware that makes the Anglo-American structure of criminal law coherent.[40] In other words, the inherent disconnect between the purposes of offences and the moral rationale for justificatory defences is only tolerable

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36 Monica Pa, "Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex" (2001) 11 Tex J Women & L 51 at 77.

37 For a review of the literature see Theodore Bennett, "Persecution or Play? Law and the Ethical Significance of Sadomasochism" (2015) 24:1 Soc & Leg Stud 89 [Bennet, "Persecution"]; See also Cheryl Hanna, "Sex is not a Sport: Consent and Violence in Criminal Law" (2001) 42 Boston College L Rev 239 at 240 nn 8 [Hanna, "Sex is not a Sport"].

38 *Ibid.*

39 *Malmo-Levine*, *supra* note 34 at para 74.

40 See Gardner, "Offences", *supra* note 17 at 145-146.

if we accept that *prima facie* wrongs are sufficient to constitute an offence. The admittedly strange result concerning the role of consent within the offence of sexual assault is therefore an inevitable consequence of the Anglo-American structure of criminal law.

C. Inconsistency with the Structure of Justifications

Recent scholarship has also questioned whether consent fits within the logic of justificatory defences. As Chiesa contends, consent cannot operate as a justification because justifications defeat liability as a result of the accused choosing the lesser evil.[41] According to this argument, it is difficult to conceptualize a consensual assault as a reason to be weighed against competing reasons. In the context of committing a generic assault,[42] consent is simply not a reason for anyone to do anything.[43] Put another way, "it is borderline incoherent to contend that the infliction of such an evil on the victim is justified because it averts the evil of not acquiescing to the victim's wishes."[44] It does not avert any evil. As such, Chiesa argues that consent does not fit within the logic of justification-based defences.

This criticism is not, however, dispositive of whether consent can act as a justification. The requirement that the accused choose the "lesser evil" gives short shrift to the potential breadth of justificatory defences. If the accused's crime constitutes the lesser evil, courts have generally concluded that the act was rightful based on utilitarian principles.[45] However, scholars have also insisted that justifications encompass permissible conduct.[46]

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41 Chiesa, "Consent", *supra* note 24 at 200. Bergelson, "Consent", *supra* note 20 at 651 is susceptible to this criticism as she relies on the argument that consent constitutes the "lesser evil."

42 I mean to exclude assaults such as surgeries which obviously do have a reason for their performance.

43 Gardner, "Justification", *supra* note 17 at 78. The author provides a succinct summary of this argument.

44 Chiesa, "Consent", *supra* note 24 at 201.

45 See for instance *Perka v The Queen*, [1984] 2 SCR 232 at 246, 13 DLR (4th) 1.

46 See Kimberly Kessler Ferzan, "Justification and Excuse" in John Deigh & David Delinko (eds) *Oxford Handbook of Philosophy of Criminal Law* (Oxford: Oxford University Press, 2011) 239 at 239-242 citing JL Austin, "A Plea for Excuses" in Alan White, ed, *The Philosophy of Right* (Oxford: Oxford University Press, 1968) 19 at 19-20. See also Joshua Dressler, "New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking" (1984) 32 University of California at Los Angeles L Rev 61. In Canada, my work has developed the idea of "moral permissibility" as one of three principles that form the moral basis for granting

Indeed, as criminal law is only meant to prohibit wrongful conduct, I and others maintain that there must be room for justifications to include permissible acts.[47]

As I explain elsewhere,[48] morally permissible conduct encompasses two circumstances. The first is where the competing interests of the accused and victim are identical.[49] In this scenario, a balancing of the relevant harms cannot lead to a conclusion that one person's interests ought to be placed above the others.[50] The second scenario, which is relevant to the consent principle, concerns circumstances where the moral foundation of an act is exceedingly difficult to categorize.[51] For instance, weighing the benefits of sporting activities against the likelihood that serious injuries may occur during a match involves weighing two difficult-to-quantify factors. In this scenario, it is better to rely upon a more general notion of permissibility as the basis for granting an accused a defence. Using force in sport would be justified, not because it is "rightful," but because the state cannot prove it is wrongful.

My description of permissible conduct finds further support in John Gardner's influential theory of the role of justifications in the criminal law. In his view, an act is justified if two criteria are met. First, the reasons in favour of an act are not outweighed or excluded by reasons against committing the act.[52] It is irrelevant whether the reason in support of doing an act also outweighs the competing reasons against doing that act.[53] Nor is it necessary that the reasons for committing the act be noble or admirable.[54] Second, the accused must have acted for the reasons supporting the justification. In other words, the accused must have committed the assault because of the consent, and not for some other motive.[55]

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criminal defences. See Fehr, "(Re-)Constitutionalizing", *supra* note 16; Fehr, "Self-Defence", *supra* note 16.

47 *Ibid.*

48 See Fehr, "(Re-)Constitutionalizing", *supra* note 16; Fehr, "Self-Defence", *supra* note 16.

49 *Ibid.* The "innocent attacker" scenario is illustrative. It is discussed at length in both of my articles, as well as by Hamish Stewart, "The Constitution and the Right to Self-Defence" (2011) 61 UTLJ 899 at 916-917.

50 *Ibid.*

51 *Ibid.*

52 Gardner, "Justification", *supra* note 17 at 79.

53 *Ibid.*

54 *Ibid* at 81.

55 *Ibid* at 80-81.

Although Gardner does not divide justifications into multiple categories, his baseline requirement for a justification aptly describes the idea of moral permissibility. A permissibility defence is not one that outweighs competing reasons but is rather one which is undefeated by competing reasons. This provides a principled approach to justificatory defences as it is sometimes difficult, if not impossible, to ascribe a label of right or wrong to an act. In these scenarios, it is better for the criminal law to demonstrate some epistemic modesty and admit that our understanding of morality may not always lead to satisfactory conclusions. If our conception of justification is expanded to include the idea of permissibility, I see no difficulties with bringing the defence of consent within the scope of justificatory defences.

III. Consent And The Principles Of Fundamental Justice

If the analysis in Part II is forceful, the consent principle occupies conceptual space on both sides of the offence/defence divide. This does not, however, fully account for the principles underlying consent. Nor does it answer the question of whether those principles qualify as principles of fundamental justice. To better understand the conceptual and constitutional bases of consent, it is necessary to develop a more robust understanding of the relationship between consent and two principles of fundamental justice: moral innocence and moral permissibility.

A. Moral Innocence

The principle that the morally innocent not be subject to criminal sanction is a well-recognized principle of fundamental justice.[56] Its relation to the consent principle is illustrated by considering the offences of sexual assault and theft. As outlined earlier, if the offence of sexual assault did not include an absence of consent, the offence would effectively be the act of having sex. Similarly, if the offence of theft did not have absence of consent as an element, possessing another's property would constitute an offence. As basic sexual acts[57] and borrowing other people's property are not at all morally blameworthy acts, to define an offence in such a manner threatens

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[56] See *R v Beatty*, 2008 SCC 5 at para 34.

[57] I will discuss more controversial questions, such as sadomasochism, in more detail below.

an innocent individual's liberty.[58] As such, where absence of consent must be an element of an offence, the constitutional reason is that to do otherwise would infringe the liberty interests of a morally innocent individual.

B. Moral Permissibility

The moral permissibility principle is of recent vintage, only being developed in a pair of articles two years ago.[59] Although the principle was originally developed to explain controversial aspects of the defences of duress, necessity, and self-defence, consent provides another illustration of the principle's broad applicability in the criminal law. To explain this point in more detail, it is necessary to first review the historical development of the consent principle. After so doing, it will be possible to test whether the moral permissibility principle aptly captures the consent defence and, if so, whether it qualifies as a principle of fundamental justice.

1. Historical Development of the Consent Defence

Volenti non fit injuria—no wrong is done to one who consents—is the Latin term that first formed the basis of the consent defence.[60] The *volenti* principle originally provided a defence to virtually any consensual conduct.[61] Over time, however, the common law developed limited exceptions. In *Wright's Case*,[62] one of the first English cases to assess the issue of consent to an assault, the victim consented to have his hand cut off as it gave him "more colour to beg."[63] The Court did not allow consent to serve as a defence. In the Court's view, by maiming what was a capable man, the King was deprived of the aid and service of one of his subjects.[64]

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58 See for instance John Kleinig, "The Nature of Consent" in Franklin Miller and Alan Wertheimer, eds, *The Ethics of Consent* (Oxford: Oxford University Press, 2010) 3 at 4.

59 See Fehr, "(Re-)Constitutionalizing", *supra* note 16; Fehr, "Self-Defence", *supra* note 16. As suggested above, however, it was inspired by the writings of several leading authors in criminal law theory.

60 Bergelson, "Consent", *supra* note 20 at 642.

61 Terence Ingman, "A History of the Defence of Volenti Non Fit Injuria" (1981) 26 Jurid Rev 1 at 3. See also *Jobidon*, *supra* note 7 at para 30 citing JW Cecil Turner, *Russell on Crime*, 12th ed (London: Stevens & Sons, 1964) at 678; Don Stuart, *Canadian Criminal Law: A Treatise*, 2nd ed (Toronto: Carswell, 1987) at 469-470.

62 *Wright's Case* (1603), Co Litt f 127 a-b.

63 *Ibid.*

64 *Ibid.*

The scope of the consent principle was further narrowed in the seventeenth century with the rise of the state and its monopolization of the criminal law.[65] The state's interest in stopping disturbances in society became central to the defence.[66] Beginning with *Matthew v Ollerton*,[67] an assault case decided in the late seventeenth century, the victim's consent to the assault was found not to be a defence "because 'tis against the peace."[68] This reasoning would be applied later in the eighteenth and nineteenth centuries to prevent consent from providing a defence to participating in prize fights, which tended to cause broader public disturbances.[69]

The Supreme Court of Canada added to the above rationales for barring consent as a defence in *Jobidon*. The case arose from a consensual fist-fight which resulted in the unintentional death of one of the participants. In the Court's view, allowing consent to operate as a defence to such serious violence risked encouraging disrespect for the law.[70] Relying on George Fletcher's foundational work in *Rethinking Criminal Law*,[71] the Court observed:

> [T]he self-destructive individual who induces another person to kill or to mutilate him implicates the latter in the violation of a significant social taboo. The person carrying out the killing or the mutilation crosses the threshold into a realm of conduct that, the second time, might be more easily carried out. And the second time, it might not be particularly significant whether the victim consents or not.[72]

In other words, if individuals could legally consent to have such violence committed against their person, the person who commits the violent act might be more inclined to commit similar acts in the future.[73] Such an attitude might also breed a broader contempt for the law that could result in more overall crime.

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65 See Vera Bergelson, "The Right to Be Hurt: Testing the Boundaries of Consent" (2007) 75 Geo Wash L Rev 165 at 172.

66 *Ibid* at 172-173.

67 *Matthew v Ollerton,* (1692) 90 Eng Rep 438 (KB).

68 *Ibid*.

69 See *Boulter v Clark*, (1747) Bull NP 16; *R v Lewis* (1844), 1 Car & K 419, 174 ER 874; and *R v Coney* (1882), 8 QBD 534. A prize fight is a non-official boxing match. See section 83 of the *Criminal Code*.

70 *Jobidon*, *supra* note 7 at para 116

71 *Supra* note 17.

72 *Jobidon*, *supra* note 7 at para 116 citing Fletcher, *supra* note 17 at 770-771.

73 *Jobidon*, *supra* note 7 at para 117.

Finally, the Court in *Jobidon* recognized the sanctity of the human body as a consideration in determining whether an individual may consent to harm.[74] This rationale militates against allowing consensual harms that violate the victim's dignity.[75] Although vague in nature, this rationale holds that dignity is so essential to people's humanity that at some point it must take precedence over the autonomy interests of victims.[76]

The Court's application of these principles in *Jobidon* is illustrative of the type of case-by-case balancing required for determining the appropriate application of the consent principle. In determining that the accused committed an "unlawful act" (being the assault) that resulted in death, the Court concluded that any force intended to cause and actually causing serious hurt or non-trivial bodily harm falls outside the boundaries of consent.[77] This decision turned on considerations of public policy. The social uselessness of fist-fights, their tendency to lead to larger breaches of the peace, the need to deter fights, and the desire to protect the sanctity of the human body, all contributed to the Court's ruling.[78] The conclusion that it is permissible to consent to fights that are not intended to cause non-trivial bodily harm derives, presumably, from the respect the law has for individual autonomy.

The Court was, however, quick to stress that the mere causing of bodily harm does not necessarily serve to vitiate consent in all contexts.[79] Consensual activities that cause high degrees of harm, such as boxing, were found to be permissible despite meeting the other elements of the offence of assault.[80] Whether a type of bodily harm can be consented to must be determined on a case-by-case basis with full understanding of the social

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74 *Ibid* at para 118.

75 The Court does not expand upon what it means by sanctity of the human body. Other commentators, however, link this concern to a broader desire to uphold human dignity. See Bergelson, "Consent", *supra* note 20 at 649.

76 Bergelson, "Consent", *supra* note 20 at 649 citing R George Wright, "Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively" (1995) 75 BUL Rev 1397 at 1399; Meir Dan-Cohen, "Basic Values and the Victim's State of Mind" (2000) 88 Cal L Rev 759 at 777-778; and Markus Dubber, "Toward a Constitutional Law of Crime and Punishment" (2004) 55 Hastings LJ 509 at 570.

77 See *R v Paice*, 2005 SCC 22 at paras 11-14. The "intended" requirement therefore permits consent to be a defence even where the harm actually caused (if not intentional) qualifies as serious bodily harm.

78 See *Jobidon*, *supra* note 7 at paras 111-124.

79 *Ibid* at para 124.

80 *Ibid* at para 130.

utility of the act in question. This conclusion, however, does nothing more than beg the question: what underlying principle determines when an act has sufficient utility?

2. Consent and Moral Permissibility as a Defence

In many assault cases, it is easy to identify the reasons why society allows consent to protect individuals from criminal liability. Contact sports serve obvious developmental functions,[81] and constitute a form of recreation. Allowing people to have piercings serves an adornment function. Yet, fitting these cases into the current framework for criminal defences is problematic. As outlined earlier, under current Canadian criminal law theory, justification-based defences connote "rightful" conduct, and excuse-based defences connote "wrongful" but "morally involuntary" conduct.[82] It is difficult to see why allowing athletes to pummel each other during a game, and in so doing risk serious injury to themselves and others, is "rightful" or "morally involuntary." Similarly, the assault inherent in puncturing a person's skin to attach a piece of jewelry does not easily fit into these categories.

As Chiesa observes, the reason these acts are not punishable is because they are viewed as permissible.[83] Applying the framework developed by the Court in *Jobidon* to the consensual violence that occurs in contact sports illuminates this point.[84] There is a slight, but difficult to quantify, risk that contact sports will make those involved public discharges, cause disturbances of the peace, or make people less likely to abhor violence outside of the arena. However, contact sports also allow for personal development, health, and happiness. All these considerations are important but inherently vague. Weighing them against one another does not, therefore, allow for any distinct moral conclusion about the activity of contact sports. As with Chiesa, then, I suggest that the only viable moral conclusion is that such acts are permissible.

It may be retorted that there are instances where the consent defence can be invoked without relying upon the moral permissibility principle.

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81 See Hanna, "Sex is not a Sport", *supra* note 37 at 255.

82 See most recently *Ryan*, *supra* note 35 at paras 23-24.

83 Chiesa, "Consent", *supra* note 24 at 206.

84 It is notable that some extreme acts of violence in the sporting context are deemed outside the realm of consensual conduct. See *R v Bertuzzi*, 2004 BCPC 472, 26 CR (6th) 71.

Instead, consent would make an act "rightful" or "morally innocent" under the lesser evils' conception of criminal defences. Performance of a consensual surgery is exemplary. Where a doctor is able to obtain consent before conducting surgery, it may be queried whether the doctor commits an assault at all and, if so, what principle might be invoked in the doctor's defence. Applying the *prima facie* wrong distinction, it is not possible to consider the doctor's reason(s) for committing the assault. However, when one weighs the competing considerations under the traditional lesser-evils conception of a justificatory defence, it is clear that the doctor is doing a good deed.

In my view, consent would not form the basis of the doctor's defence. The following examples illustrate this point. Imagine that a doctor conducts two identical surgeries—one with the patient's consent and the other when obtaining consent is impossible. The consent principle obviously has no role to play in the latter scenario. Yet, we would still conclude that the surgery is a good deed and thus justified based on the lesser evils rationale underpinning a traditional necessity defence.[85] In my view, it must follow from the identical nature of the surgeries that consent is only an *additional* factor weighing in favour of the doctor performing the surgery. The doctor's justification, I suggest, is only nominally implicated by the consent principle as the desire to preserve the well-being of the patient drives the moral reasoning.

3. Moral Permissibility as a Principle of Fundamental Justice

The predecessors to this article explained at length why the moral permissibility principle is not only an important principle underlying criminal defences, but also meets the requirements for qualifying as a principle of fundamental justice.[86] That analysis need not be repeated here. However, one potential criticism has yet to be addressed. This criticism asks whether the moral permissibility principle is distinguishable from the harm principle.[87] The latter principle, developed by John Stuart Mill,[88] purports that state use of the criminal law must be limited to acts that physically, not

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85 I would categorize the act as a necessity defence. See Fehr, "(Re-)Constitutionalizing", *supra* note 16 at 125-126.

86 See Fehr, "(Re-)Constitutionalizing", *supra* note 16; Fehr, "Self-Defence", *supra* note 16.

87 This criticism was raised when I presented this article at a faculty seminar at the University of Alberta, College of Law.

88 John Stuart Mill, *On Liberty and Considerations on Representative Government* (Oxford: Blackwell, 1946).

morally, harm others.[89] Despite its surface appeal, the Court found that Mill's harm principle failed to meet any of the requirements set out for qualifying as a principle of fundamental justice.[90]

Although the Court suggested that the harm principle did not qualify as a legal principle, the Court's main concerns were with the other requirements for qualifying as a principle of fundamental justice.[91] First, the Court found that there is no consensus that Mill's conception of "harm" was the sole justification for criminal prohibition.[92] The Court cites cannibalism, bestiality, and cruelty to animals as "crimes that rest on their offensiveness to deeply held social values rather than on Mill's 'harm principle.'"[93] The Court also found that there is no consensus that criminal conduct is limited to harm caused to others. Offences such as requiring citizens to wear seatbelts or helmets are clearly designed to "save people from themselves."[94]

Second, if the term "harm" were read broadly enough to bring the aforementioned acts within the principle's ambit, it would render the harm principle an unmanageable standard upon which to measure deprivations of life, liberty, and security of the person.[95] As Bernard Harcourt explains in an article which was cited approvingly by the Court in *Malmo-Levine*:

> The proliferation of harm arguments in the debate over the legal enforcement of morality has effectively collapsed the harm principle. Harm to others is no longer today a *limiting* principle. It no longer *excludes* categories of moral offenses from the scope of the law. It is no longer a *necessary (but not sufficient) condition*, because there are so many non-trivial harm arguments. Instead of focusing on whether certain conduct causes harm, today the debates center on the types of harm, the amounts of harm, and our willingness, as a society, to bear the harms. And the harm principle is silent on those questions.[96]

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89 *Ibid* at 8-9. See also *Malmo-Levine*, *supra* note 34 at para 121.

90 *Malmo-Levine, supra* note 34 at paras 102-129.

91 *Ibid* at para 114. The Court suggested that the harm principle was better categorized "as a description of an important state interest" than a legal principle.

92 *Ibid* at para 115.

93 *Ibid* at para 117.

94 *Ibid* at paras 123-126.

95 *Ibid* at paras 127-129 citing Bernard Harcourt, "The Collapse of the Harm Principle" (1999) 90 J Crim L & Criminology 109 at 113.

96 See Harcourt, "Collapse", *supra* note 95 at 182 [emphasis in original]; See also *Malmo-Levine*, *supra* note 34 at para 127.

Whereas the harm principle originally served as a means for determining what acts cause harm and are thus properly categorized as criminal acts, the debate now allows for most anything to constitute a "harm." Without a narrower definition of the term, the Court quite reasonably concluded that the harm principle provided an unworkable constitutional standard.[97]

The moral permissibility principle, however, does precisely what the harm principle was *not* designed to do. Whereas the harm principle sought to restrict what types of acts in the abstract might be made an offence, the moral permissibility principle requires courts to assess the merits of the reasons to convict an individual offender. This weighing function has not prevented other principles from receiving constitutional protection. Notably, balancing of harms is central to the Court's own conception of duress, necessity, and self-defence.[98] As the principles underlying these defences have or can be expected to receive constitutional protection,[99] it is reasonable to conclude that a similar weighing function could serve a constitutional role with respect to the consent defence.[100] As I illustrate below, when complimented by deep understandings of the various evaluative factors relevant to criminal defences,[101] the moral permissibility principle can help the law come to reasonable conclusions about which acts should be afforded a consent defence.[102]

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97 *Ibid* at 140-181 providing an extensive overview of how harm in relation to pornography, prostitution, disorderly conduct, homosexuality, and alcohol/drug consumption, among other crimes, took on significantly broader meaning over the last half-century.

98 See generally Fehr, "(Re-)Constitutionalizing", *supra* note 16; Fehr, "Self-Defence", *supra* note 16.

99 *Ibid*.

100 In *Malmo-Levine*, *supra* note 34 at para 101, the Court tersely suggests otherwise. However, in light of the various roles played by proportionality with respect to constitutionalized criminal defences, this statement is not defendable. Notably, other constitutional principles—such as the prohibition against cruel and unusual punishment found in section 12 of the *Charter* and the prohibition against gross disproportionality under section 7 of the *Charter*—utilize similar weighing functions at the rights stage of analysis.

101 As Harcourt observed, resolving these questions requires that we "access larger debates in ethics, law and politics—debates about power, autonomy, identity, human flourishing, equality, freedom and other interests and values *that give meaning to the claim that an identifiable harm matters*." See Harcourt, "Collapse", *supra* note 95 at 183 (emphasis in original).

102 See Fehr, "(Re-)Constitutionalizing", *supra* note 16; Fehr, "Self-Defence", *supra* note 16.

IV. Applying The Consent Principle

Application of the constitutional framework described in Part III provides a principled means for assessing the constitutionality of some of the most controversial applications of the consent principle. The role of consent in relation to three issues—pre-consent to sexual touching; sadomasochism; and incest—will illustrate this point. It should be emphasized, however, that my goal is not to provide a comprehensive constitutional answer to whether such conduct must be allowed. Each topic is complex and merits its own article. However, by identifying the sites of contestation, the constitutional framework offered above will help frame the relevant issues.

A. Pre-Consent to Sexual Touching

In *R v JA*,[103] the Court concluded that consenting to sexual activity in advance of becoming unconscious was prohibited.[104] As the Court made clear, the issue was not whether an exception that permits pre-consent to sexual activity while unconscious should be developed, but instead whether the statutory scheme permitted such an interpretation.[105] In the majority's view, the statutory language prohibited consenting to any sexual conduct while unconscious.[106] The merits of this conclusion are unimportant for present purposes.[107] What is important is the fact that the Court did not fully consider the reasons for permitting pre-consensual sex. As the Court made clear, such reasons would only be relevant in the context of a constitutional challenge to the scope of the consent provisions.[108]

The complexity of the issue is illustrated by the range of facts which could fall under the category of pre-consent to sexual touching. Consider the Court's struggle with how to acquit the husband who obtains pre-

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103 *R v JA*, 2011 SCC 28 [*JA*].

104 *Ibid*. Earlier cases also rejected this idea. See *R v Humphrey* (2001), 143 OAC 151, 49 WCB (2d) 420 (ONCA); *R v Ashlee*, 2006 ABCA 244, 61 Alta LR (4th) 226.

105 See *JA*, *supra* note 103 at para 33.

106 *Ibid* at para 34-43. For a competing interpretation of the relevant provisions see the reasons of Justices Fish, LeBel and Binnie, concurring, at paras 92-108.

107 For a critique of the majority's reasons, see Joshua Sealy-Harrington, "Tied Hands? A Doctrinal and Policy Argument for the Validity of Advance Consent" (2014) 18 Can Crim L Rev 119.

108 See *JA*, *supra* note 103 at para 65.

consent to kiss his spouse goodnight while sleeping.[109] The *de minimis non curat lex* defence is offered as a reason to acquit.[110] However, the *de minimis* doctrine is based on a determination that the act is not *wrongful enough* to attract criminal liability.[111] Yet, kissing a sleeping spouse who has pre-consented does not intuitively seem "wrongful." If anything, the accused's conduct is entirely innocent, as such affection is directed at fostering a loving and caring relationship.[112] As such, the *de minimis* defence provides an unsatisfactory basis to acquit.

A similar conclusion may be drawn with respect to those who participate, with full consent, to more explicit (though non-violent)[113] sexual acts while unconscious. If only the activity consented to is performed, it is again difficult to conclude that the act is not morally innocent.[114] To be sure, there is a risk that the boundaries of what is consented to will not be clearly delineated in advance, will deliberately not be followed, or that information that would otherwise be revealed during conscious activity would result in revocation of consent.[115] However, those risks do not alter the inherently innocent nature of those who stay strictly within the boundaries of fully informed and consensual sexual activity. As section 7 rights are individual rights, it is only necessary that a criminal law threaten the liberty interests of one person in violation of the principles of fundamental justice.[116] As those who respect the boundaries of consent are innocent actors, the burden must shift to the Crown to demonstrate that

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109 *Ibid* at para 58.

110 *Ibid* at paras 63 and 121.

111 See Colton Fehr, "Reconceptualizing *De Minimis Non Curat Lex*" (2017) 64 Crim LQ 200 for a review of the defence.

112 As Sealy-Harrington, "Tied Hands", *supra* note 107 at 140 observes, pre-consent to non-violent sex allows for a mutually beneficial intimate experience. Hamish Stewart further contends that "it would be a significant limit on the sexual autonomy of each individual to say that, as a matter of law, no-one can consent in advance to being sexually touched while asleep or unconscious." See Hamish Stewart, *Sexual Offences in Canadian Law*, loose-leaf (Aurora: Canada Law Book, 2004) at 25.

113 I will discuss sadomasochism and erotic asphyxiation below. Here I am referring to more traditional sexual acts.

114 See Sealy-Harrington, "Tied Hands", *supra* note 107 at 140, 149-151.

115 See generally Hilary Young, "R. v. A. (J.) and the Risks of Advance Consent to Unconscious Sex" (2010) 14 Can Crim L Rev 273. See also *JA*, *supra* note 103 at paras 60-61.

116 See *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 127.

the competing risks of harm are sufficiently pressing to override constitutional rights.[117]

Whether a law prohibiting all pre-consent to sex strikes the appropriate balance between individual autonomy and the need to protect vulnerable parties is an immensely complex issue for which there are competing views.[118] Presumably the sexual autonomy of many individuals would be implicated, and it may be difficult to determine just how grave a threat authorizing pre-consent to sex may pose to vulnerable parties.[119] A clear line may also be drawn between consent to sex while unconscious as a result of being asleep, as opposed to more controversial scenarios such as when a victim is intoxicated[120] or rendered unconscious with physical violence.[121] To justify its current prohibition on all pre-consensual sex, which was explicitly reaffirmed by recent amendments to the *Criminal Code*,[122] Parliament would have to show why a prohibition broad enough to result in convictions of the morally innocent is necessary to prevent the evil caused by those who ignore the boundaries of consent identified by an unconscious partner.

B. Sadomasochism

As described earlier, sadomasochism involves giving or receiving pleasure from the infliction of pain or humiliation. Causing consensual bodily harm during sexual intercourse is not expressly prohibited in the *Criminal Code*.[123] As such, it falls to the common law to determine the constitutionally appropriate scope of consent in relation to sadomasochistic

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117 *Ibid.*

118 Contrast Sealy-Harrington, "Tied Hands", *supra* note 107; Young, "Risks", *supra* note 115.

119 See Young, "Risks", *supra* note 115 at 304.

120 See *Ashlee*, *supra* note 104.

121 Erotic asphyxiation can sometimes result in one partner being rendered unconscious (often by choking) while the other continues sexual activity with the other's unconscious body. However, as Karen Busby observes in her article, "Every Breath You Take: Erotic Asphyxiation, Vengeful Wives, and Other Enduring Myths in Spousal Sexual Assault Prosecutions" (2012) 24 CJWL 328 at 339, usually the "desired result [of erotic asphyxiation] is the heightened sexual pleasure or a sense of euphoria or light-headedness that comes when one is taken just to the point of unconsciousness *but not past it*." As such, erotic asphyxiation cases ought not to be treated as an advanced consent issue, instead as a sadomasochistic issue.

122 See s 273.2(a.1) of the *Criminal Code* which came into force in 2018.

123 See s 273.1(1).

sex.[124] As in *Jobidon*, the Court's task is to balance the relevant harms, risks, and benefits inherent in the activity, and come to a principled conclusion as to what activities warrant criminal sanction.

Although the Court has explicitly declined to decide whether individuals may consent to sadomasochistic acts,[125] lower courts have concluded it should be prohibited for two main reasons. The first may be categorized as moral outrage.[126] It is arguably cruel and immoral to make another person (even if consensual) face "pain for pleasure,"[127] as such activities are arguably inhumane, degrading, and viewed as perpetuating negative power structures in society.[128] These criticisms derive from the fact that sadomasochistic activities generally use power imbalances—guard and prisoner, cop and suspect—as themes to make the activity seem realistic.[129] It is questionable whether borrowing from inequitable and abusive situations makes the conduct non-egalitarian or, worse, non-consensual.[130]

The second concern is that such activity will inevitably go too far and cause serious harm to a participant.[131] In *R v Emmett*,[132] for instance, the accused became so caught up in his own pleasure that he left a bag on the victim's head—a practice known as "erotic asphyxiation"—much longer than consented to, nearly resulting in the victim's death.[133] More disturbingly, in

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124 See *R v Welch* (1995), 101 CCC (3d) 216, 25 OR (3d) 665 (ONCA).

125 See *Barton*, *supra* note 1 at para 180; *JA*, *supra* note 103 at para 21.

126 See *Welch*, *supra* note 124 at para 88. In the United States see *Barnes v Glenn Theater*, 501 US 560 at 574-575 (1991) where the Court stated: "Our society prohibits...certain activities not because they harm others but because they are considered...immoral. In American society, such prohibitions have included, for example, sadomasochism."

127 See *Brown*, *supra* note 27 where Lord Templeton stated at 236-237: "[t]he violence of sadomasochistic encounters involves the indulgence of cruelty by sadists and the degradation of victims. Such violence is injurious to the participants and unpredictably dangerous...Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilized."

128 See generally Bennett, "Persecution", *supra* note 37.

129 *Ibid* at 95 citing Pat Califia, "Feminism and Sadomasochism" (1981) 12 Heresies 30 at 32.

130 *Ibid* citing Carl Stychin, *Law's Desire: Sexuality and the Limits of Justice* (New York: Routledge, 1995) at 85.

131 See for instance *R v Hancock*, 2000 BCSC 1581 at para 66. See also *Brown*, *supra* note 27 at 245-262 where Lord Jauncey made such an argument and Hanna, "Sex is not a Sport", *supra* note 37 at 275.

132 *R v Emmet*, [1999] EWCA 2651.

133 *Ibid* at para 29.

R v Hancock,[134] the sadist endured many third degree burns, lacerations, and fractured bones during an apparently consensual sadomasochistic encounter.[135] The victim eventually died as a result of internal bleeding and a collapsed lung.[136]

The debate within feminist and other academic literature as to the extent to which these concerns with sadomasochism are legitimate is deeply divided.[137] Some view sadomasochism as replication of power inequalities for the purpose of perpetuating those inequalities.[138] These predominantly feminist scholars view sadomasochism as "the basic sexual perversion of Patriarchy"[139] and the "eroticization of violence."[140] Later feminist scholars, however, contended that sadomasochism merely simulated power differentials so as to recontextualize or redeploy them.[141] Importantly, the presence of consent, precautions such as "safe words," and the mutual pleasure derived from the activity divorces the power differentials inherent in sadomasochism from the history of oppression it is thought to perpetuate.[142] To ignore these aspects of sadomasochism is to "read theatre for reality."[143]

Still other authors reject the theatre analogy, observing that the actual harm caused not only distinguishes sadomasochism from theatre,[144] but also glosses over the psychological aspect central to sadomasochism.[145] As such,

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134 *R v Hancock,* 2000 BCSC 1581.

135 *Ibid* at paras 3-8.

136 *Ibid.*

137 See Bennett, "Persecution", *supra* note 37 at 96.

138 *Ibid* citing Cheri Lesh, "Hunger and Thirst in the House of Distorted Mirrors" in Robin Linden et al., eds, *Against Sadomasochism: A Radical Feminist Analysis* (Palo Alto: Frog in the Well, 1982) 202 at 203.

139 See Bennett, "Persecution", *supra* note 37 at 96 citing John Stoltenberg, "Eroticized Violence, Eroticized Powerlessness" in Robin Linden et al., eds, *Against Sadomasochism: A Radical Feminist Analysis* (Palo Alto: Frog in the Well, 1982) 124 at 126.

140 *Ibid.*

141 See Bennett, "Persecution", *supra* note 37 at 98 citing Gayle Rubin, "The Leather Menace: Comments on Politis and S/M" in Samois, ed, 3rd ed, *Coming to Power: Writings and Graphics on Lesbian S/M* (Boston: Alyson Publications, 1981) 194 at 224.

142 *Ibid.*

143 See Bennett, "Persecution", *supra* note 37 at 99 citing Anne McClintock, "Maid to Order: Commercial S/M and Gender Power" (1993) 37 Social Text 87 at 87.

144 See Bennett, "Persecution", *supra* note 37 at 100 citing Terry Hoople, "Conflicting Visions: S/M, Feminism, and the Law. A Problem of Representation" (1996) 11:1 CJLS 177 at 206.

145 See Bennett, "Persecution", *supra* note 37 at 100 citing Nils-Hennes Stear,

these authors contend that sadomasochism is more akin to game playing, wherein the audience of a production "play along" with the fiction on the screen, actually feeling emotions and reacting physically to the story.[146] The ethical implications of this theory are similar to those who view sadomasochism as simulation:

> Under this model, enjoying a make-believe sadomasochistic game involving power differentials premised on sexual or racial inequalities is no different to (*sic*) enjoying a film or television show that touches on similar themes. Accordingly, sadomasochism's power inequalities are not inherently problematic simply because of the fact that they draw on historical narratives of oppression in the same way that art or movies that draw on such narratives are not inherently problematic.[147]

In other words, the mere fact that sadomasochists often use common power inequalities as props in their sexual activities does not inexorably lead to the conclusion that they support or validate those same inequalities.[148]

Finally, other scholars view the moral implications of sadomasochism as context dependent.[149] Relying less on ideology and more on empirical evidence, these authors note that "sadomasochistic activities 'have differential effects' that cannot be captured by 'a political reading of [sadomasochism] on a formal dichotomy between transgression and reification of social hierarchies.'"[150] As such, it is possible that sadomasochism is empowering for all parties in some circumstances, while in other circumstances is meant to (and actually does) perpetuate negative stereotypes about groups of people.[151] It follows that "sadomasochism can 'reproduce material relations of inequality through mimesis or repetition' but 'can also produce new racial, gendered, and sexual knowledges, positionalities, and possibilities through resignification.'"[152] If true, it is necessary to assess each act on a case-by-case basis.[153]

The limited appellate jurisprudence in Canada has failed to consider the potential justifications for sadomasochistic sex in any detail. Without

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"Sadomasochism as *Make Believe*" (2009) 24:1 Hypatia 1 at 29.

146 See Bennett, "Persecution", *supra* note 37 at 101 citing Stear, *supra* note 145 at 23-32.

147 See Bennett, "Persecution", *supra* note 37 at 101 citing Stear, *supra* note 145 at 30.

148 *Ibid.*

149 See Bennett, "Persecution", *supra* note 37 at 102-103.

150 *Ibid* at 102, citing M Weiss, *Techniques of Pleasure: BDSM and the Circuits of Sexuality* (Durham: Duke University Press, 2011) at 24.

151 *Ibid* at 103.

152 *Ibid.*

153 *Ibid.*

considering the possible benefits accrued to practitioners of sadomasochistic sex or any of the competing theories underlying its practice, the Ontario Court of Appeal in *R v Welch*[154] held that the appropriate balance between individual autonomy and societal interests in protecting vulnerable persons was the same degree of harm that vitiates consent in the context of a fist-fight: non-trivial bodily harm.[155] The Nunavut Court of Appeal has since adopted this approach.[156] As sadomasochistic acts often cross the non-trivial bodily harm threshold, these courts concluded that consent will generally not provide a valid defence.

In *R v Zhao*,[157] however, the Ontario Court of Appeal recently expressed reservations about its earlier opinion. In so doing, it concluded that "the social utility of intimate sexual relationships is significantly different from that of consensual fights."[158] Although the Court did not explain what those differences were, it asserted that "the underlying policy reasons for the ruling in *Jobidon* cannot be generally applicable in a sexual context as suggested by the ruling in *Welch*."[159] This is a defendable conclusion, as the sexual autonomy interests of individuals are more important than the "socially useless" fist-fights at issue in *Jobidon*.

Discussion of the purpose of sadomasochism was again, however, absent from the Court's reasoning. This is unfortunate, as adoption of any one of the theoretical understandings of sadomasochism would inform the appropriate threshold of harm permissible during sadomasochistic sex. If sadomasochism is meant to perpetuate inequality, then it serves a negative social function, and a degree of permissible harm similar to that advocated for in *Welch* seems reasonable. On the other hand, if sadomasochism only serves sexual gratification purposes, then the sexual autonomy of the individual should justify a higher threshold of harm as suggested in *Zhao*. Finally, if sadomasochism is utilized to perpetuate inequities in some instances, but only serves sexual gratification in others, the question for the

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154 *R v Welch*, (1995), 101 CCC (3d) 216, 25 OR (3d) 665 (ONCA). The Court relied heavily on the House of Lord's decision one year earlier in *Brown*, *supra* note 27.

155 *Welch*, *supra* note 124 at para 88.

156 See *R v Atagootak*, 2003 NUCA 3. The decision was six paragraphs and did not consider any counter arguments.

157 *R v Zhao*, 2013 ONCA 293.

158 *Ibid* at paras 79, 98.

159 *Ibid*.

law would be whether it can distinguish between the two scenarios without jeopardizing the well-being of potentially vulnerable victims.[160]

With respect to the latter concern, courts must consider the fact that sadomasochists generally have built-in safety functions, such as the use of "safe words,"[161] and can be confined to a regulatory context.[162] Moreover, the ever-growing empirical evidence shows that sadomasochists are no more psychologically damaged or dangerous than the rest of the population.[163] As a result, the *Diagnostic and Statistical Manual of Mental Disorders* no longer lists sadomasochism as a pathology, instead as a paraphilia.[164] This modern understanding of sadomasochism is likely responsible for a changing societal attitude towards the practice. As recent studies have shown, as many as one in ten people experiment with sadomasochism.[165] And as the *Fifty Shades of Grey*[166] phenomenon illustrates, its popularity is showing no signs of fading.[167]

As stated at the outset, my goal is not to resolve the constitutionality of the prohibition against sadomasochism. My more modest aim is to show how focusing on the relevant issue—whether society views an act that constitutes a *prima facie* wrong as morally permissible—can help focus attention on the relevant theories and arguments with respect to whether activities such as sadomasochism should be tolerated and, if so, to what extent. If the physical and social dangers identified above are not present in

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160 In *R v Barton*, 2017 ABCA 216 at para 307, for instance, the Alberta Court of Appeal contemplated, without deciding, whether the equality interests of sex workers might affect whether any consensual violence should be permitted. The Supreme Court did not entertain such an analysis.

161 Bennett, "Persecution", *supra* note 37 at 98-99.

162 Hanna, "Sex is not a Sport", *supra* note 37 at 267-268 citing William Eskridge, *Gaylaw: Challenging the Apartheid of the Closet* (Harvard: Harvard University Press, 1999) at 262.

163 See Juliet Richters et al., "Demographic and Psychological Features of Participants in Bondage and Discipline, 'Sadomasochism' or Dominance and Submission (BDSM): Data from a National Survey" (2008) 5 Journal of Sexual Medicine 1660 at 1660-1661 citing numerous studies in support thereof.

164 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed (Arlington: American Psychiatric Publishing, 2013).

165 Hanna, "Sex is not a Sport", *supra* note 37 at 243-244. See also Lodro Rinzler, "How Many People are Actually Doing S & M? We Decided to Find out" *Marie Claire* (21 February 2015), online: <www.marieclaire.com/sex-love/news/a13435/who-is-doing-bdsm/> [perma.cc/4TG4-DZU4] [Rinzler, "How Many People"].

166 EL James, *Fifty Shades of Grey* (2011). See also the remaining books in the trilogy. The novels were adapted into major Hollywood movies.

167 Rinzler, "How Many People", *supra* note 165.

a given case, the sexual autonomy interests of those who wish to practice sadomasochism should weigh heavily in favour of allowing non-life-threatening conduct under the moral permissibility analysis.

C. Incest

Absence of consent is not included as an element of the incest offence in section 155 of the *Criminal Code*. If incest is an inherently "innocent" act, then omitting absence of consent as an element of the offence would violate the moral innocence principle. If incest constitutes a *prima facie* wrong, however, then it would fall to the common law to define the scope of any consent defence. This follows as consent is neither included in the offence or, as in the case of pre-consent to sexual touching, excluded by a specific provision of the *Criminal Code*.[168]

Although the Court has not heard a constitutional challenge to the incest provision, it has expressed general agreement with Parliament's rationale for prohibiting incest. In *R v GR*,[169] citing the reasons of Justice Roscoe in *R v FRP*,[170] the Court provided four main reasons for criminalizing incest. The first is that it is immoral. As incest has traditionally been viewed as "unacceptable, incomprehensible and repugnant to the vast majority of people," the criminal law has a vested interest in its prohibition.[171] Second, the prohibition against incest is integral to preserving the integrity of the family as it avoids any confusion in roles that result from incestuous sexual relationships.[172] Third, there is a significantly increased risk of genetic defects to any children who arise from incestuous relationships.[173] Finally, prohibiting incest serves to protect younger and potentially vulnerable parties from exploitation.[174]

Although incest evokes feelings of moral condemnation, the ability of the law to criminally punish citizens strictly on moral grounds is famously

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168 Section 150.1(1), which broadly defines the offences to which consent provides no defence, does not list section 155.

169 *R v GR,* 2005 SCC 45 [*GR*].

170 *R v FRP,* 1996 NSCA 72 [*FRP*].

171 *GR*, *supra* note 169 at para 18 citing *FRP*, *supra* note 170 at 445.

172 *GR*, *supra* note 169 at para 17 citing *FRP*, *supra* note 170 at 443-444.

173 *GR*, *supra* note 169 at para 19 citing a 1984 report of the Criminal Law Revision Committee in England on Sexual Offences. Others question whether the empirical evidence is sound. See Markus Dubber, "Policing Morality: Constitutional Law and the Criminalization of Incest" (2011) 61 UTLJ 737 at 755 [Dubber, "Policing Morality"].

174 See *FRP*, *supra* note 170 at para 23.

controversial.[175] Morality is nevertheless a stand-alone ground for criminal prohibition under section 91(27) of the *Constitution Act, 1867*.[176] From a doctrinal perspective, it is therefore reasonable to conclude that genuine moral condemnation is sufficient to engage the criminal law power. Importantly, however, this cannot also be used to dispose of the question of whether a consent defence ought to be constitutionally preserved in response to a criminal prohibition grounded in moral outrage. That determination, as seen above, turns on whether the reasons underlying the conclusion that an act is a *prima facie* wrong can withstand scrutiny. As such, it is necessary to assess the merits of the other reasons offered for criminalizing incest.

The notion that incest corrupts the institution of the family is frequently invoked as the main justification for prohibiting incest.[177] Two reasons are generally offered in support of this argument. First, incest causes "sex rivalries" and "jealousies" among family members.[178] If incest is allowed, the family unit will presumably be ridden with strife, making it highly unlikely that the family will serve its broader purpose of raising good citizens. Second, the prohibition assures that children have suitable role models to prepare them for assuming parental roles in the future.[179] Presumably, those engaged in incest are incapable of raising children in a way that would satisfy societal expectations.

As Vera Bergelson observes, the institution of the family has survived a variety of different types of rivalries, such as sibling rivalries. As such, it is not clear that incest will have the effect feared.[180] Further, rivalries and jealousies may be less apparent if the incestual relationship is between adults

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175 This was the central issue in the Hart/Devlin debate.

176 *Constitution Act, 1867*, (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5. See *Malmo-Levine*, *supra* note 34 at para 74 for the conclusion that "morality" constitutes a sufficient reason to define conduct as an offence pursuant to the federal criminal law power. At para 118, the Court further cites *FRP*, *supra* note 170 for the conclusion that incest comes within the scope of the criminal law power.

177 Several countries, for instance, do not categorize incest as a sexual offence, instead as an offence against the institution of marriage and family. As sexual autonomy is already protected by the offences of sexual assault and statutory rape, it seems that the incest offence is more directed at protecting marriage and the family. See Dubber, "Policing Morality", *supra* note 173 at 742-743.

178 See Vera Bergelson, "Vice is Nice but Incest is Best: The Problem of a Moral Taboo" (2013) 7 Crim L & Philosophy 43 at 48 [Bergelson, "Incest"].

179 *Ibid.*

180 *Ibid.*

no longer living within the main family unit. If the incestual couple lives alone, or start their own family, it is unclear how the institution of the family suffers.[181]

The desire to ensure children have suitable role models is further inapplicable in scenarios where incestuous couples do not have children. This rationale is also suspect in light of the variety of accepted types of family units that currently exist. As Bergelson observes in her comprehensive discussion of the incest offence:

> Only recently all the arguments that we hear today with respect to incestuous marriages (confusing social roles; embarrassing children; going against the traditional notion of a family) were used against homosexual marriages too (and before that against interracial marriages). And yet, decriminalization of homosexual sex and lifting the ban on homosexual marriages did not defeat the traditional family.[182]

The rationale that those in incestual relationships are inherently less capable of raising good citizens is not intuitive. Without an evidentiary basis for this assumption, it is difficult to use the inability of incestual couples to raise children as a reason to prohibit incest.

The argument that incest creates a significant risk of birth deformities is the next most common reason for prohibiting incest. In Bergelson's view, this consideration is arbitrary, as numerous other people with defective genes do not face criminal sanction for having sex.[183] Nor do parents who choose to bring a child to term knowing that there are genetic abnormalities face criminal sanction.[184] Those who have contracted HIV are also not prohibited from having sex if they take necessary precautions.[185] In these situations, complete prohibition of sexual intercourse would cause moral outrage in society.[186] If the state chooses not to criminalize in these circumstances, then it is arguably unfair to use the risk of birth deformities as a reason to criminalize incest.

This argument presumes, however, that the state must treat similar harms the same way. At least as a matter of constitutional law, this is not the case. As the Court observed in *R v Malmo-Levine*; *R v Caine*:[187]

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181 *Ibid.*

182 *Ibid* at 49.

183 *Ibid* at 47-48.

184 *Ibid.*

185 See *R v Mabior*, 2012 SCC 47.

186 See Bergelson, "Incest", *supra* note 178 at 48.

187 *Malmo-Levine, supra* note 34.

> [I]f Parliament is otherwise acting within its jurisdiction by enacting a prohibition on the use of marihuana, it does not lose that jurisdiction just because there are other substances [such as alcohol and tobacco] whose health and safety effects could arguably justify similar legislative treatment. To hold otherwise would involve the courts in not only defining the outer limits of the legislative action allowed by the Constitution but also in ordering Parliament's priorities within those limits. That is not the role of the courts under our constitutional arrangements.[188]

Prohibiting incest and not those with defective genes from reproducing may make the former prohibition less logical as a matter of policy. In the constitutional context, however, it is inappropriate for courts to use this rationale to justify changing a democratically enacted law.

For other more obvious reasons, the complete prohibition on incest nevertheless fails to further the purpose of preventing genetic abnormalities in children. First, contraceptive drugs have significantly lessened the link between sex and reproduction.[189] Second, the risk of birth deformity becomes moot when the incestual sex occurs with members of the same sex, post-menopausal females, castrated males, adopted siblings, or includes acts other than penile penetration of a vagina.[190] As such, the incest provision catches a considerable amount of conduct which does not involve the possibility of defective child birth.

With respect to the exploitation of parties involved in incestual relationships, it is frequently argued that prohibiting incest is necessary to ensure young or dependent members of a family are not sexually abused. However, such a prohibition is both overbroad and redundant.[191] Adult members who live outside of the family unit may well choose to enter into an incestual relationship for reasons that do not involve any exploitation.[192] Although protecting those that are vulnerable is a pressing policy goal, it is unclear how prohibiting incest furthers this goal, as modern criminal codes

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188 *Ibid* at para 139.

189 Bergelson, "Incest", *supra* note 178 at 46-47.

190 *Ibid.* For the reasoning behind interpreting the Canadian incest provision as barring incestual anal sex, see *R v KH*, 2015 ONSC 7760, 126 WCB (2d) 599.

191 See Bergelson, "Incest", *supra* note 178 at 49. Contra see *FRP*, *supra* note 170 at para 23 citing the Law Reform of Canada's 1980 Report of the Canadian Committee on Sexual Offences and Children and Youth. It is notable, however, that two years earlier the Commission had advocated to abolish the incest offence. See Law Reform Commission of Canada, *Sexual Offences* (Working Paper 22) (Ottawa: Law Reform Commission of Canada, 1978) at 30.

192 See Bergelson, "Incest", *supra* note 178 at 49.

typically prohibit statutory rape (thus protecting minors) and exploitive sexual relations (the strict rules around the law of consent).[193]

Whether a moral permissibility defence should be developed for the incest offence can only be resolved by scrutinizing the above arguments in much more detail than is possible here. Weighing the relevant considerations, it is possible that the dangers posed to the institution of the family and to vulnerable persons more generally outweigh any limitations on the sexual autonomy interests of those who desire to have incestual relations. However, the underlying reasons for prohibiting incest are highly contentious. It is therefore likely that the incest provision catches some conduct which fails to further any of its purposes, aside from expressing moral condemnation towards incest.

If incest only serves the purpose of moral condemnation in readily definable circumstances, this squarely raises the question of whether the constitution should allow strictly morality-based criminal convictions. Although the Court in *Malmo-Levine* concluded that morality is a sufficient basis to make an act an offence, it correctly left open the question of whether defences may counter any morally-based offence.[194] To do otherwise would be to subscribe to the legal moralism thesis, a reading of the Court's jurisprudence which does not seem sustainable. Society's general view that incest is immoral, however, must still count for something. After all, the criminal law is in part a vehicle for expressing society's moral opinions. Weighing the autonomy interests of those who wish to practice incest against society's moral judgment, in my view, bars those who practice incest from claiming that their conduct is morally innocent. With time, it is possible that this attitude will change, making the conduct morally innocent, and thus requiring consent as an element of the incest offence. Until that time, however, the notion of permissibility more appropriately captures the criminal law's moral judgment.

V. CONCLUSION

In this article, I have contended that the moral innocence and moral permissibility principles track the distinct role of consent in criminal law. Where consent must be an element of the offence, this is because to do otherwise risks convicting the morally innocent. However, if a consensual

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193 *Ibid.*

194 See generally *Malmo-Levine*, *supra* note 34.

act qualifies as a *prima facie* wrong, then the accused must provide a defence to the conduct by showing that her conduct is morally permissible. As the Court has constitutionalized the right to be acquitted for wrongful but morally involuntary conduct, it would be unprincipled if accused did not also have a constitutional right to be acquitted for morally innocent and morally permissible conduct. Adopting this framework for criminal defences can, alongside with adopting the *prima facie* wrong rationale underlying criminal offences, better explain the relationship between consent, criminal law, and the constitution. In turn, this framework can help resolve the role of consent within controversial offences such as those involving pre-consent to sex, sadomasochism, and incest.