

# Vitiating Consent for Sexual Assault Causing Bodily Harm: Should *Jobidon* Apply to Sexual Activities?

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M O N A   A B D O L R A Z A G H I \*

## ABSTRACT

The Court in *R v Jobidon* held that consent to participate in a fist fight between adults is vitiated once bodily harm follows as a result of the fist fight. *Jobidon*'s ruling fundamentally altered the defence of consent to assault. This paper critiques the extension of *Jobidon* to sexual assault in the context of BDSM in *R v Welch* on multiple grounds. First, the paper shows that there are complexities in applying *Welch*'s ruling, which have led to confusions in jurisprudence surrounding: (a) the mental state of the assailant causing bodily harm; (b) the addition of psychological harm as a bodily harm to the scope of the ruling in question; and (c) the characterization of the sexual activity in question as degrading or dehumanizing. Second, the paper challenges the Court's reasoning in *Welch* on three grounds. First, characterizing a sexual activity as degrading to show that it is not worthy of protection by the law is subjective. Instead, the courts should assess the interests of sexual minorities. Second, the Court's comparison of sex with sport was inappropriate in finding the former containing insufficient social utility as opposed to the latter. Third, irrespective of political philosophy, the Court's ratio was contrary to the letter of law pursuant to section 9 of the *Criminal Code* by effectively creating a new law. This paper advocates for legal reform in *Jobidon* and applying it to sexual assault. The paper positions that Parliament has already taken steps to criminalize high-risk sexual activities such as asphyxiation under section 267(c) of the *Criminal Code*.

**Keywords:** Consent; sexual assault; *R v Jobidon*; *R v Welch*; BDSM.

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## I. INTRODUCTION

In *Jobidon*, two adults engaged in a consensual fist fight which resulted in one party getting critically injured and dying. The Supreme Court of Canada (“SCC”) held that the surviving party was guilty of manslaughter with the unlawful act of assault. The SCC further held that consent is vitiated whenever two parties engage in a fist fight with the intent to harm each other and bodily harm follows. The Court exempted applying this rule for certain activities deemed to have social utility such as sports or stunt work.<sup>1</sup> This ruling has impacted the defence of consent to an assault. As Justice Sopinka stated in the concurring opinion, instead of introducing a new ruling on the vitiation of consent, the Court could have arrived at the same disposition by holding that consent was vitiated once the deceased lost consciousness after the first punch and that assault occurred on the second punch.

In *R v Welch*,<sup>2</sup> the accused engaged in a sexual act with the complainant which caused her bodily injury. While the complainant denied consenting to the activity, the accused brought the defence of consent. Instead of evaluating the issue of existence of consent, the Ontario Court of Appeal applied *Jobidon*’s ruling and held that when bodily harm follows from consensual sexual acts, the consent is vitiated. In addition, the Court reasoned that this type of sexual conduct is dehumanizing, and thus not worth protection under criminal law. The majority in *Welch* recognized the defence of consent is valid in sports where physical contact is intended, and harm is inflicted.<sup>3</sup>

Pop culture<sup>4</sup> promotes the exploration of various sexual practices;<sup>5</sup> however, individuals engaging in consensual sexual activities such as BDSM,<sup>6</sup> which intend and inflict harm, may be criminally charged.<sup>7</sup> BDSM is defined as a sexual activity which involves using physical restraint, giving up control, and inflicting pain.<sup>8</sup> It is characterized as a

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<sup>1</sup> *R v Jobidon*, [1991] 2 SCR 714, 66 CCC (3d) 454 [*Jobidon*].

<sup>2</sup> *R v Welch*, 25 OR (3d) 665 [*Welch*].

<sup>3</sup> *Ibid.*

<sup>4</sup> Lyrics from the pop song “WAP” by Cardi B feat Megan Thee Stallion, online: *Musixmatch* <[www.musixmatch.com](http://www.musixmatch.com)> [perma.cc/9R6Y-QNMV] [WAP].

<sup>5</sup> “Hot for Kink, Bothered by the Law: BDSM and the Right to Autonomy” (08 August 2016), online: *The Canadian Bar Association* <[cba.org](http://cba.org)> [perma.cc/RQE8-6FH7].

<sup>6</sup> BDSM is a combination of the acronyms for Bondage/Discipline, Dominance/Submission and Sadism/Masochism

<sup>7</sup> *R v JA*, 2011 SCC 28 [JA].

<sup>8</sup> Merriam-Webster, Inc., *Meriam Webster dictionary* (Springfield, Mass: Merriam-Webster, 2011) sub verbo “BDSM”.

sexual sub-culture of erotic activities between adults that may involve bodily harm.<sup>9</sup> As illustrated by the popular movie series *Fifty Shades of Grey*<sup>10</sup> and other cultural products,<sup>11</sup> there appears to be a rift between the increasing mainstream acceptance of BDSM<sup>12</sup> and criminal law's treatment of it.<sup>13</sup>

BDSM practices lie in a moral gray area, exhibiting a clear tension between a libertarian view such as individual liberty,<sup>14</sup> and a utilitarian view such as Bentham's social utility.<sup>15</sup> One can argue that individuals' right to their body and their choice include the right to sexual exploration (i.e., sexual autonomy). An opposing view, similar to the Court's holding in *Welch*, differentiates BDSM from contact sports and criminalizes the former by deeming it outside of social norms and lacking utility.

This paper aims to show that the extension of *Jobidon*'s ruling<sup>16</sup> to sexual acts such as BDSM activities between consenting adults in *Welch* is not reasonable. The paper critiques *Welch*'s decision<sup>17</sup> based on the confusion in its application and the Court's flawed reasoning. The paper first argues that *Welch* has brought about confusion in the application of jurisprudence that may lead to inconsistent outcomes. Additionally, the paper puts forward three grounds for challenging the Court's reasoning in *Welch* in extending *Jobidon*'s ruling<sup>18</sup> to the law of sexual assault. First, comparing sex with sports in the context of social utility is flawed. Second, the Court's metric of social value in terms of social norms and utility is incomplete. The paper argues that the value of safeguarding sexual minorities must be considered in assessing the criminality of this act. Third, irrespective of supporting opinions based on individual liberty and social utility arguments, the holding in *Welch*<sup>19</sup> is an excessive encroachment into the

<sup>9</sup> David M Ortmann & Richard Sprott, *Sexual Outsiders: Understanding Sexualities and Communities*, (Plymouth: Rowman & Littlefield Publishers, 2012).

<sup>10</sup> E L James, *Fifty Shades of Grey*, (New York: Vintage Books, 2012).

<sup>11</sup> WAP, *supra* note 4.

<sup>12</sup> Theodore Bennett, "A fine Line Between Pleasure and Pain: Would Decriminalizing BDSM permit Non-consensual Abuse?" (2021) 42 *Liverp Law Rev* 161 [Bennett].

<sup>13</sup> "Tied Up in K/Notes: The Criminalization of BDSM in Canada" (08 August 2016), online: *The Canadian Bar Association* <cba.org> [perma.cc/FK4U-Z38G].

<sup>14</sup> Edward N Zalta, "Libertarianism" (28 January 2019), online: *Stanford Encyclopedia of Philosophy* <plato.stanford.edu/> [perma.cc/DTD9-GH83] [Libertarianism].

<sup>15</sup> Edward N Zalta, "The History of Utilitarianism" (22 September 2014), online: *Stanford Encyclopedia of Philosophy* <plato.stanford.edu/> [perma.cc/2JNX-Y3N8] [Utilitarianism].

<sup>16</sup> *Jobidon*, *supra* note 1.

<sup>17</sup> *Welch*, *supra* note 2.

<sup>18</sup> *Jobidon*, *supra* note 1.

<sup>19</sup> *Welch*, *supra* note 2.

private life of citizens. The criminalization of intended and inflicted harm in the context of BDSM may result in situations where parties attempt to hide their injuries to avoid criminal prosecution, leading to unsafe BDSM practices. This paper reasons that Parliament has already taken steps to criminalize sexual activities that are highly risky to individuals by holding that consent is vitiated whenever one partner is unconscious or being asphyxiated, the latter a BDSM sexual activity named breath play.

## II. THE LAW ON THE DEFENCE OF CONSENT IN SEXUAL ASSAULT

This section is divided into three parts. The first part explains the law of sexual assault, the availability of the defence of consent, and the situations in which consent is vitiated according to the *Criminal Code*. The second part discusses the reformation in the vitiation of consent following from the extension of *Jobidon*<sup>20</sup> to sexual assault in *Welch*.<sup>21</sup> The third part discusses post-*Welch*<sup>22</sup> jurisprudence resulting from this reformation. This section aims to show that *Welch* has brought about uncertainties in applying the law of vitiation of consent in sexual assault cases.

### A. Sexual assault and the defence of consent

Sexual assault consists of touching in a sexual nature conducted without the consent of the complainant.<sup>23</sup> Sexual assault is a violation of the sexual integrity of the victim.<sup>24</sup> The basis for the law on sexual assault is to protect individuals' bodily integrity, sexual autonomy, and human dignity.<sup>25</sup> The *actus reus* of the offence is unwanted sexual touching.<sup>26</sup> The *actus reus* of sexual assault consists of three main elements, which are voluntary touching, sexual nature of the touching, and lack of consent.<sup>27</sup>

The *mens rea* with respect to touching is the intention to touch.<sup>28</sup> There is no *mens rea* with respect to the nature of touching as it is determined from the perspective of a reasonable person. The sexual nature of the circumstances is not limited to bodily touch, but also includes any words,

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<sup>20</sup> *Jobidon*, *supra* note 1.

<sup>21</sup> *Welch*, *supra* note 2.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Criminal Code*, RSC 1985, c. C-46, s 271 [*Criminal Code*]; *R v Ewanchuk*, [1999] 1 SCR 330, 169 DLR (4th) 193. [*Ewanchuk*].

<sup>24</sup> *R v Osolin*, [1993] 4 SCR 595, 86 CCC (3d) 481 at 533-534.

<sup>25</sup> *R v Barton*, 2019 SCC 33 [*Barton*].

<sup>26</sup> *R v AlRawi*, 2018 NSCA 10. See also *Ewanchuk*, *supra* note 23 at para 23.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

gestures, or intentions and motives of the accused that, in the totality of circumstances, a reasonable person would find sexual in nature. For instance, in *R v V(KB)*, touching the victim's genitals as a form of punishment was considered a sexual assault, even though the accused did not have a clear sexual purpose.<sup>29</sup> Further, in *R v Mastronardi*, the Court held that a doctor performing a medical examination with the intention of sexual gratification was committing sexual assault.<sup>30</sup>

The *mens rea* of lack of consent is from the complainant's subjective belief in a lack of consent at the time of the activity.<sup>31</sup> The accused's subjective belief is either reckless,<sup>32</sup> wilfully blind,<sup>33</sup> or knowledgeable.<sup>34</sup> Section 273.1 of the *Criminal Code* defines consent as a voluntary agreement of the complainant to participate in a specific sexual activity.<sup>35</sup> The lack of consent is solely decided based on the state of mind of the complainant.<sup>36</sup> The court looks at the complainant's testimony and surrounding circumstances and decides on its credibility. For instance, the court examines whether there is contradiction or ambiguity in the evidence to assess the credibility of the complainant's statement. Even if it appears that consent existed, the court may proceed with further examination of the evidence to see whether fear,<sup>37</sup> fraud, or exercise of authority as enumerated in section 245(3) of the *Criminal Code*<sup>38</sup> vitiates this consent. Consent must be given freely by the complainant and not be tied to any physical or psychological coercion.

The accused's understanding of the complainant's mental state is only relevant when the accused raises the defence of honest but mistaken belief in the existence of consent to negate the *mens rea* of offence. This defence is successful subject to two conditions. First, the accused honestly believed consent existed from the complainant (i.e. was positively communicated),<sup>39</sup> and second, the accused took reasonable steps to make sure the complainant was consenting to the sexual act in question pursuant to section 273.2(b) of the *Criminal Code*.<sup>40</sup> For the first condition, the accused

<sup>29</sup> *R v V (KB)*, [1996] 2 SCR 857, 82 CCC (3d) 382.

<sup>30</sup> *R v Mastronardi*, 2014 BCCA 302.

<sup>31</sup> *Ewanchuk*, *supra* note 23 at para 23.

<sup>32</sup> *Pappajohn v The Queen*, [1980] 2 SCR 120, 111 DLR (3d) 1 481 at 493.

<sup>33</sup> *R v Sansregret*, [1985] 1 SCR 570, 17 DLR (4th) 577 223 at 234-238.

<sup>34</sup> *R v Park*, [1995] 2 SCR 836, 99 CCC (3d) 1.

<sup>35</sup> *Criminal Code*, *supra* note 23, s 273.1.

<sup>36</sup> *Ewanchuk*, *supra* note 23 at para 26.

<sup>37</sup> *R v Lacombe*, 2019 ONCA 938.

<sup>38</sup> *Criminal Code*, *supra* note 23, s 245(3).

<sup>39</sup> *R v Robertson*, [1987] 1 SCR 918, 33 CCC (3d) 481.

<sup>40</sup> *Criminal Code*, *supra* note 23, s 273.2(b). See also *Ewanchuk*, *supra* note 23 at para 98.

must demonstrate that there was an air of reality to raising a reasonable doubt that consent did not exist or was not communicated by pointing to some facts as evidence capable of supporting this belief.<sup>41</sup> In other words, the accused cannot raise mistaking the understanding of the law of consent in sexual assault. Pursuant to section 19 of the *Criminal Code*,<sup>42</sup> mistaking the law is not a valid legal defence. The courts have repeatedly rejected the defence of honest but mistaken belief in consent in the law of sexual assault.<sup>43</sup> Many of these mistaken beliefs originated from societal misassumptions and stereotyping,<sup>44</sup> such as a woman being silent or passive means that she is giving consent. According to the law, consent to sexual activity<sup>45</sup> cannot be implied, advanced, or broad with no defined scope.<sup>46</sup> In *Barton*, the Court rejected the accused's honest but mistaken belief defence that he assumed that there was an implied consent based on having engaged in a similar sexual activity with the sex worker the previous night.<sup>47</sup> Similarly, in *R v Seaboyer*,<sup>48</sup> the Court held that it was a mistake of law with no valid defence when the accused relied on the defence of existence of consent based on prior sexual activity.<sup>49</sup> The jurisprudence around the notion of consent states that consent must be given for the specific sexual activity in question.<sup>50</sup> The underlying reasoning in the legal definition of consent is to remove myths and incorrect assumptions regarding sexual assault and to protect the security of the person.<sup>51</sup>

For the second condition for the defence of consent, the Court in *Redcliffe* rejected the existence of a reverse burden of proof on the defendant to take reasonable steps to ascertain consent. Instead, there is an evidentiary burden on the defendant to show reasonable steps were taken to ascertain consent. Once the defendant points to evidence showing that he/she has taken reasonable steps known to him/her, then the onus is on the prosecution to prove beyond a reasonable doubt that these steps were not

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<sup>41</sup> *Barton*, *supra* note 25 at paras 100-108.

<sup>42</sup> *Criminal Code*, *supra* note 23, s 19.

<sup>43</sup> *Ewanchuk*, *supra* note 23 at paras 32-35; *R v Forster*, [1992] 1 SCR 339, 88 DLR (4th) 169; *R v MacDonald*, 2014 SCC 3.

<sup>44</sup> *Ewanchuk*, *supra* note 23 at para 82; *R v Cepic*, 2019 ONCA 541; *R v Mills*, [1999] 3 SCR 668, 180 DLR (4th) 1; *R v Seaboyer*; *R v Gayme*, [1991] 2 SCR 577, 83 DLR (4th) 193 [*Seaboyer*].

<sup>45</sup> *Ewanchuk*, *supra* note 23 at para 97; *R v Hutchinson*, 2014 SCC 19 [*Hutchinson*]; *Barton*, *supra* note 25.

<sup>46</sup> *JA*, *supra* note 8; *R v AE*, 2021 ABCA 172.

<sup>47</sup> *Barton*, *supra* note 25.

<sup>48</sup> *Seaboyer*, *supra* note 46.

<sup>49</sup> *Ibid* at 604.

<sup>50</sup> *JA*, *supra* note 8.

<sup>51</sup> Manning, Mewett & Sankoff, *Criminal Law*, 5th ed, (Lexis Nexis Canada, 2015).

taken.<sup>52</sup> The constitutional challenge of section 273.2(b) of the *Criminal Code*<sup>53</sup> in violating the presumption of innocence was rejected by the Court in *R v Darrach*.<sup>54</sup> In *R v G(R)* the Court explained that these reasonable steps may be more or less onerous depending on the circumstances.<sup>55</sup> However, the law does not require the accused to have taken all the reasonable steps. The Court explained in *R v Malcolm*<sup>56</sup> and *R v Despins*<sup>57</sup> that taking reasonable steps is a modified objective standard. Specifically, this refers to a reasonable person who is in the position of the accused and is equipped with the same knowledge as the accused at the time of the alleged sexual assault.<sup>58</sup>

Consent can be vitiated under circumstances where the accused knowingly, recklessly, or wilfully blindly fails to understand or take reasonable steps to ascertain the existence of consent from the complainant in the circumstances known to the accused. The *Criminal Code* under sections 265(3), 271, 272, and 273<sup>59</sup> is very clear about the circumstances under which vitiation or absence of consent occur. The next section of this paper discusses how the Court's decision in *Welch* following the holding in *R v Jobidon*<sup>60</sup> leads to a situation where consent is vitiated by the underlying policy.

## B. Reformation of the defence of consent in sexual assault

The defence of consent is raised in both physical assault and sexual assault cases. Section 265(1) of the *Criminal Code* defines assault as the intentional application of force directly or indirectly without the consent of another person.<sup>61</sup> In *R v Jobidon*,<sup>62</sup> the SCC explained that consent cannot be a defence to assault where bodily harm is intended and caused,<sup>63</sup> at least for activities lacking in social utility such as fistfights. The bodily harm is defined to be serious and non-trivial<sup>64</sup> or more than transient, although it

<sup>52</sup> *R v Redcliffe*, [1995] OJ No 942, 26 WCB (2d) 590.

<sup>53</sup> *Criminal Code*, *supra* note 23, s 273.2(b).

<sup>54</sup> *R v Darrach*, (1998), 122 CCC (3d) 225 (Ont. C.A.), *aff'd* (2000), 148 CCC (3d) 97 (SCC).

<sup>55</sup> *R v G(R)*, 38 CR (4th) 123, 26 WCB (2d) 23.

<sup>56</sup> *R v Malcolm*, 2000 MBCA 77 at 43-44.

<sup>57</sup> *R v Despins*, 2007 SKCA 119.

<sup>58</sup> *R v Comejo*, 181 CCC (3d) 206, 61 WCB (2d) 513.

<sup>59</sup> *Criminal Code*, *supra* note 23, s 265(3), 271, 272, 273.

<sup>60</sup> *Jobidon*, *supra* note 1.

<sup>61</sup> *Criminal Code*, *supra* note 23, s 265(1).

<sup>62</sup> *Jobidon*, *supra* note 1.

<sup>63</sup> *Criminal Code*, *supra* note 23, s 267(b).

<sup>64</sup> *Jobidon*, *supra* note 1.

does not have to be permanent.<sup>65</sup> The Court explained that activities with social utility where consent can be used as a defence include surgery, sports, or stunt acts.<sup>66</sup>

The Court's reasoning in *Jobidon*<sup>67</sup> centered around public utility and morality. From the public utility perspective, the Court reasoned that physical fights break social order and peace, and thus have no social utility. From the morality perspective, the Court reasoned that fist fights breach the sanctity of the human body.<sup>68</sup> The Court elaborated that consent is not vitiated in the context of "rough sporting activities," "medical or surgical treatments," and "dangerous exhibitions by qualified stuntmen" which have a "significant social value."<sup>69</sup> In later cases, courts elaborated that social customary norms permit physical contact in activities such as boxing, tattooing, ear piercing, and surgery.<sup>70</sup> In *Paice*,<sup>71</sup> a subsequent case involving a fist fight, the SCC reaffirmed *Jobidon*<sup>72</sup>'s holding with respect to vitiation of consent whenever there is an intentionally inflicted harm.<sup>73</sup>

The Court in *Jobidon*<sup>74</sup> did not address the issue of consent in sexual activities causing bodily harm. In the UK case of *R v Brown*,<sup>75</sup> the House of Lords refused to accept the defence of consent to sado-masochistic (S&M) activities. Sado-masochism is defined as "the derivation of sexual gratification from the infliction of physical pain or humiliation either on another person or on oneself."<sup>76</sup> Despite the absence of complaints from the participants, the police laid charges of assault causing bodily harm. The Court reasoned that consent is vitiated where the inflicted bodily harm is actual and non-incidental as a result of physical violence and cruelty. By relying on an earlier UK case of *Rex v Donovan*,<sup>77</sup> the Court in *Brown* held that the harm caused may not necessarily be permanent but cannot be merely transient and trifling.<sup>78</sup> In *Brown*,<sup>79</sup> the Court's 3-2 split illustrates its

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<sup>65</sup> *Welch*, *supra* note 2.

<sup>66</sup> *Jobidon*, *supra* note 1.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Welch*, *supra* note 2; *R v Brown*, 83 CCC (3d) 394, 20 WCB (2d) 266. [*Brown*].

<sup>71</sup> *R v Paice*, 2005 SCC 22 [*Paice*].

<sup>72</sup> *Jobidon*, *supra* note 1.

<sup>73</sup> *Paice*, *supra* note 73.

<sup>74</sup> *Jobidon*, *supra* note 1.

<sup>75</sup> *Brown*, *supra* note 73.

<sup>76</sup> Merriam-Webster, Inc, *Meriam Webster dictionary* (Springfield, Mass: Merriam-Webster, 2011) sub verbo "sado-masochism."

<sup>77</sup> *Rex v. Donovan* [1934] 2 K.B. 498.

<sup>78</sup> *Brown*, *supra* note 73.

<sup>79</sup> *Ibid.*



struggle in applying public policy arguments to determine the involvement of criminal law. On the one hand, the majority invoked public policy on the basis of immorality of the accused's conduct. For instance, Lord Templeman said:

Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised.<sup>80</sup>

On the other hand, the dissenting opinion by Lord Mustill criticized the involvement of criminal law in the matter of "private sexual relations"<sup>81</sup> irrespective of whether it is vitiated once bodily harm to the complainant follows as a result of the sexual activities. The Court explained further that S&M has no social utility by characterizing it as "inherently degrading and dehumanizing conduct."<sup>82</sup>

Both *Jobidon* and *Welch* decisions have been criticized numerous times.<sup>83</sup> This paper intends to show that the analysis of the Court in extending *Jobidon*'s ruling to the law of sexual assault was flawed. Section C aims to show the flaw in the Court's assessment and the complexities in applying *Welch*'s ruling to the subsequent jurisprudence.

### C. Practical complexities in applying Welch

*Jobidon*'s ruling followed by *Welch*'s holding may have brought some confusions in jurisprudence in at least three aspects. First, whether the *mens rea* of assault causing bodily harm is subjective or objective foresight. Second, whether psychological harm constitutes bodily harm. Third, whether the sexual activity in question can be characterized as dehumanizing or degrading.

With respect to confusion around the *mens rea* of assault causing bodily harm, while the ruling in *R v Paice*<sup>84</sup> concerning a consensual fist fight confirmed *Jobidon*'s holding,<sup>85</sup> it did not provide a clear answer for whether consent is vitiated on the basis of subjective or objective foresight to the caused harm.<sup>86</sup>

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<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> Yarmi Taddese, "Courts need to reconsider laws around kinky sex" (14 November 2014), online: *Canadian Lawyer* <[www.canadianlawyermag.com](http://www.canadianlawyermag.com)> [perma.cc/7LQY-S9V6].

<sup>84</sup> *Paice*, *supra* note 73.

<sup>85</sup> *Jobidon*, *supra* note 1.

<sup>86</sup> *Welch*, *supra* note 2 at para 90.

The Court in *Welch*<sup>87</sup> incorrectly relied on *R v DeSousa*<sup>88</sup> to hold that consent is vitiated in sexual assault causing bodily harm if the bodily harm was objectively foreseeable from the perspective of a reasonable person. Although *DeSousa*<sup>89</sup> correctly explains that the *mens rea* of the consequence element of an offence is objective foresight, *DeSousa*<sup>90</sup> does not apply to the question of consent.<sup>91</sup> In *DeSousa*,<sup>92</sup> the Court explained that the offence of manslaughter, which is an unlawful act causing bodily harm under section 269 of the *Criminal Code*,<sup>93</sup> requires the Crown to prove beyond reasonable doubt that the bodily harm caused by the accused's unlawful act was reasonably foreseeable. However, the Court's inquiry in *Welch*<sup>94</sup> was whether consent is a valid defence to sexual assault causing bodily harm. The Court in *Welch*<sup>95</sup> did not correctly apply *Jobidon*,<sup>96</sup> as it should have held that irrespective of whether or not the bodily harm was objectively foreseeable, the focus is around the vitiation of consent where bodily harm was intended (i.e., the accused's subjective knowledge).

In *R v Zhao*,<sup>97</sup> the accused caused harm to the complainant through anal intercourse. The Court reviewed earlier post-*Welch* jurisprudence<sup>98</sup> and noted the lack of precision in defining the required mental element to vitiate consent in sexual assault causing bodily harm (i.e., the intention to cause harm).<sup>99</sup> The Court also observed a shift from objective foresight to subjective foresight in determining whether consent is vitiated in sexual assault causing bodily harm.

In *R v Quashie*, the court held that intent to cause bodily harm must be subjective to vitiate the defence of consent to sexual assault causing bodily harm.<sup>100</sup> In *Quashie*, the accused was charged with one count of sexual assault and one count of sexual assault causing bodily harm for forcefully

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<sup>87</sup> *Welch*, *supra* note 2.

<sup>88</sup> *R v DeSousa*, [1992] 2 SCR 944, 95 DLR (4th) 595 at 961 [*DeSousa*].

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> *Criminal Code*, *supra* note 23, s 269.

<sup>94</sup> *Welch*, *supra* note 2.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Jobidon*, *supra* note 1.

<sup>97</sup> *R v Zhao*, 2013 ONCA 293 [*Zhao*].

<sup>98</sup> *R v Robinson*, 53 OR (3d) 448 [*Robinson*]; *R v Amos*, 39 WCB (2d) 285 [*Amos*]; *Paice*, *supra* note 73; *R v Quashie*, 200 OAC 65, 198 CCC (3D) 337 [*Quashie*].

<sup>99</sup> *Zhao*, *supra* note 106 at paras 85& 90.

<sup>100</sup> *Quashie*, *supra* note 107.

penetrating the complainant and causing her psychological trauma and physical injuries.<sup>101</sup>

The Court in *Zhao*<sup>102</sup> relied on the decision in *Quashie*.<sup>103</sup> The Court held that in order to convict for sexual assault causing bodily harm, the Crown needs to prove beyond a reasonable doubt the elements of sexual assault and consequence of bodily harm. The *mens rea* for the bodily harm is objective foreseeability of non-trivial bodily harm. If the trier of fact is satisfied beyond a reasonable doubt that the accused subjectively intended to harm the complainant, then the defence of consent does not apply. If the trier of fact is not satisfied beyond a reasonable doubt that the accused intended to harm the complainant, then the focus of inquiry shifts towards whether consent existed to the sexual act in question.<sup>104</sup>

With respect to the second confusion regarding psychological harm, when the Ontario Court of Appeal in *R v Nelson*<sup>105</sup> affirmed the framework in *Zhao*,<sup>106</sup> it raised an additional complexity of including psychological harm in place of bodily harm to negate consent when it is intended and inflicted in the sexual assault offence. While the Court explicitly avoid addressing this issue, the Court referred to the previous jurisprudence that psychological harm can be described as a non-trivial bodily harm.<sup>107</sup> In *R v McCraw*,<sup>108</sup> the SCC interpreted the bodily harm in section 264.1(1)<sup>109</sup> as broadly including psychological harm. The Court in *McCraw* further explained that the only types of psychological harm considered as bodily harm are those that permanently and substantially interfere with the health and well-being of the complainant.<sup>110</sup> In *R v McDonnell*,<sup>111</sup> the Court confirmed the extension of bodily harm to psychological harm in section 272(1) of the *Criminal Code*<sup>112</sup> by holding that psychological harm is presumed in sexual assault.

With respect to the third confusion regarding characterizing a sexual activity as dehumanizing or degrading, multiple post-*Jobidon* and *Welch*

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<sup>101</sup> *Ibid.*

<sup>102</sup> *Zhao*, *supra* note 106.

<sup>103</sup> *Quashie*, *supra* note 106.

<sup>104</sup> *Zhao*, *supra* note 106 at para 98.

<sup>105</sup> *Ibid.*, at paras 36-37.

<sup>106</sup> *R v Nelson*, 2014 ONCA 853 at para 25.

<sup>107</sup> *R v McDonnell*, [1997] 1 SCR 948 at para 34, 145 DLR (4th) 577 [*McDonnell*]; *R v McCraw*, [1991] 3 SCR 72, 66 CCC (3d) 517 [*McCraw*].

<sup>108</sup> *McCraw*, *supra* note 116.

<sup>109</sup> *Criminal Code*, *supra* note 23, s 264.1(1).

<sup>110</sup> *McCraw*, *supra* note 116.

<sup>111</sup> *McDonnell*, *supra* note 116 at para 35.

<sup>112</sup> *Criminal Code*, *supra* note 23, s 272(1).

cases made attempts to characterize the sexual activity in question to assess whether *Welch*'s holding applies.

While the Court in *R v Amos*<sup>113</sup> referred to the lack of evidence showing the intent to harm by the accused, the Court did not apply *Welch*'s holding.<sup>114</sup> The Court referred to section 159(2) of the *Criminal Code*<sup>115</sup> which exempted anal sex between two consenting adults from being a sexual offence and concluded that anal intercourse is not considered inherently degrading and dehumanizing or socially unacceptable.<sup>116</sup> The reasoning in *Amos* suggests that courts may apply *Welch*'s holding if they find the underlying sexual activity in the case to be inherently degrading and dehumanizing. While the Court in *Amos* referred to the *Criminal Code* as a guide for this determination, this sort of subjective assessment can lead to uncertainty.

In *R v Robinson*,<sup>117</sup> by relying on *Welch* the Court confirmed the trial judge's instruction to the jury as to whether a cucumber used by the accused to penetrate and injure the complainant was a weapon that was intended to harm or threaten the complainant.<sup>118</sup> The Court reasoned that consent could not be a defence to certain forms of bodily harm.<sup>119</sup>

While *R v Zhao*<sup>120</sup> was not directly concerned with vitiation of consent in the context of BDSM activities, the Court reviewed the past decisions in *Welch*<sup>121</sup> and *Jobidon*<sup>122</sup> and the extension of vitiation of consent to the context of sexual assault causing bodily harm. The issue in *Zhao*<sup>123</sup> was about assessing the credibility of a complainant's testimony regarding lack of consent to sexual assault causing bodily harm. The Court stated that the social utility of intimate sexual relationships differs greatly from consensual fights.<sup>124</sup> It rejected applying the extension of *Jobidon*<sup>125</sup> and *Welch*'s ruling<sup>126</sup> to sexual assault causing bodily harm in general.<sup>127</sup> The Court isolated

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<sup>113</sup> *Amos*, *supra* note 107.

<sup>114</sup> *Welch*, *supra* note 2.

<sup>115</sup> *Criminal Code*, *supra* note 23, s 159 [Repealed, 2019, c.25, s 54].

<sup>116</sup> *Amos*, *supra* note 107.

<sup>117</sup> *Robinson*, *supra* note 107; *Amos*, *supra* note 107.

<sup>118</sup> *Robinson*, *supra* note 107 at paras 62-65.

<sup>119</sup> *Robinson*, *supra* note 107 at para 62.

<sup>120</sup> *Zhao*, *supra* note 106.

<sup>121</sup> *Welch*, *supra* note 2.

<sup>122</sup> *Jobidon*, *supra* note 1.

<sup>123</sup> *Zhao*, *supra* note 106.

<sup>124</sup> *Zhao*, *supra* note 106 at para 79.

<sup>125</sup> *Zhao*, *supra* note 106 at para 75.

<sup>126</sup> *Welch*, *supra* note 2.

<sup>127</sup> *Welch*, *supra* note 2 at para 98.

Welch's ruling<sup>128</sup> to sexual assault in the context of BDSM acts but not to sexual assault in general.<sup>129</sup>

In *R v JA*, the complainant received injuries as a result of consensual BDSM activities involving asphyxiation.<sup>130</sup> The SCC expressly refused to address the issue of whether consent is vitiated when bodily harm is inflicted in the context of BDSM activities.<sup>131</sup> Instead the Court centered the issue on the existence of consent when the complainant was unconscious. The SCC assessed a lack of consent due to the absence of "capacity" and "operating mind" by the complainant. The Court rejected an advance consent to a sexual act where the complainant was unconscious by reasoning that an unconscious person cannot revoke their consent during sexual activity. The Court held that consent must be ongoing and actively given.

The post-Welch<sup>132</sup> jurisprudence has brought at least three complexities and confusions resulting in inconsistencies in the lower courts in determining the validity of the defence of consent. In *Zhao*,<sup>133</sup> the Court explained that in assessing the defence of consent where there is an inflicted bodily harm, there exists two paths to conviction. First, under the offence of sexual assault causing bodily harm, the inflicted bodily harm must be viewed from an objective standard. Second, when the accused raises the defence of consent, the inflicted bodily harm needs to be viewed from a subjective standard of intention of the accused. This view is consistent with the current laws regarding sexual assault. However, this shift in inquiry from the objective *mens rea* for consequences of caused bodily harm to a subjective intent to cause harm for the vitiation of a defence of consent can be confusing for the trier of fact. The trier of fact must be able to determine the mental state of the accused in isolation for each inquiry.

A second issue with applying Welch's ruling<sup>134</sup> regarding vitiation of consent occurs when only psychological harm, as opposed to physical harm, is intended and caused pursuant to the Court's reasoning in *Nelson*. It may not be a trivial task for the trier of fact to determine whether psychological harm was intended or caused owing to its intangible nature. While expert opinion may be brought in for these cases, care must be taken not to prejudice the trier of facts with it.

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<sup>128</sup> *Ibid.*

<sup>129</sup> *Zhao*, *supra* note 106 at para 79.

<sup>130</sup> *JA*, *supra* note 8.

<sup>131</sup> *JA*, *supra* note 8 at para 75.

<sup>132</sup> *Welch*, *supra* note 2.

<sup>133</sup> *Zhao*, *supra* note 106.

<sup>134</sup> *Welch*, *supra* note 2.

In addition, courts may have difficulty in determining whether the *Welch*<sup>135</sup> framework applies when assessing whether a sexual conduct in question is degrading to address the issue of vitiation of consent in sexual assault causing bodily harm. For instance, in *Amos*,<sup>136</sup> the court relied on section 159 of the *Criminal Code*<sup>137</sup> to hold that anal sex between two consenting adults is not degrading. However, this can be problematic in other cases, where the trier of law decides on this criterion based on either prevailing social norms or their own views.

The above-listed factors demonstrate the complexities in applying *Welch*'s ruling<sup>138</sup> which may result in inconsistencies in its application. Since the stakes in criminal cases are higher than in civil ones (e.g., the length of imprisonment), criminal law must have sufficient precision to minimize possible errors in its application.

### III. CONTESTED PREMISE IN THE UNDERLYING RULING

The Court's reasoning in *Welch* for extending *Jobidon* to sexual assault can be viewed as a tension between two main political philosophy theories: utilitarianism<sup>139</sup> and libertarianism.<sup>140</sup>

The majority in *Jobidon*<sup>141</sup> and *Welch*<sup>142</sup> reasoned using utility theory and appealing to public policy by considering an act desirable if it brings the greatest expected benefit to the largest number of people. The Court in *Jobidon* found no social utility in fist fighting by reasoning that fist fighting breaks social order through public policy considerations.<sup>143</sup> The Court in *Welch* found the sexual activity of BDSM to be "inherently degrading and dehumanizing"<sup>144</sup> and not carrying social utility. In arriving at this decision, the Court in *Welch* relied on a prior UK case, *Brown*,<sup>145</sup> where social utility of sport was compared with that of sex. The Court in *Brown* found a higher social utility in sport than in sex, and, as a result, the Court found the intended and inflicted harm in sport to be acceptable in contrast with sexual

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<sup>135</sup> *Ibid.*

<sup>136</sup> *Amos*, *supra* note 106.

<sup>137</sup> *Criminal Code*, *supra* note 23, s 159 [Repealed, 2019, c.25, s 54].

<sup>138</sup> *Ibid.*

<sup>139</sup> Utilitarianism, *supra* note 16.

<sup>140</sup> Libertarianism, *supra* note 15.

<sup>141</sup> *Jobidon*, *supra* note 1.

<sup>142</sup> *Welch*, *supra* note 2.

<sup>143</sup> *Jobidon*, *supra* note 1.

<sup>144</sup> *Welch*, *supra* note 2.

<sup>145</sup> *Brown*, *supra* note 73.

activities involving S&M. Thus, the Court concluded that S&M sexual activity does not carry the social utility to be worthy of protection by law.

A libertarian might criticize *Welch*'s decision<sup>146</sup> as an unjustified encroachment of the state on individual liberty and sexual autonomy.<sup>147</sup> The underlying principle behind this argument is the respect for one's self-ownership. In this view, sexual assault is wrong because it is against the will of the owner of the body that has been touched but not because the sexual activity is inherently wrong.<sup>148</sup> Thus, characterizing a sexual act such as BDSM as inherently degrading contradicts the libertarian view.

Irrespective of the choice of political philosophy, this paper proposes three arguments criticizing the approach of the court in *Welch* in extending *Jobidon* to the law of sexual assault. First, the Court's view of characterizing sexual conducts such as BDSM as dehumanizing and degrading and without social value appears to be subjective. As shown by jurisprudence, social value must be identified through the lens of fundamental values in Canadian society. In addition, the Court did not balance the competing values of protecting individuals from bodily harm against safeguarding the rights of sexual minorities. Second, the Court's reasoning in comparing sex with sport in terms of social utility was inappropriate. Third, the Court's ruling violated the principle of fairness within criminal law.

### A. Social value: social norms versus safeguarding the rights of sexual minorities

Social norms are expectations which mandate social interactions in a society.<sup>149</sup> Behaving outside of these social norms results in sanctions such as stigmatization. Legal norms are a type of social norms which regulate society through formal rules and rights. Legal norms typically arise from social values.<sup>150</sup> In moral theory, values can be defined as intrinsic or instrumental. Intrinsic values are those that are inherently good, while instrumental values are those that are good because they are connected to something good.

Under current laws, the sexual practice of BDSM is not a crime unless harm is intended and inflicted pursuant to *Welch*. The Court in *Welch*

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<sup>146</sup> *Welch*, *supra* note 2.

<sup>147</sup> Ben Ramanauskas, "BDSM, body modification, transhumanism, and the limits of liberalism" (2020) 40 *Econ Aff* at 85.

<sup>148</sup> Libertarianism, *supra* note 15.

<sup>149</sup> Edward N Zalta, "Social Norms", online: *Stanford Encyclopedia of Philosophy*, <plato.stanford.edu/> [perma.cc/77C3-LR2E].

<sup>150</sup> Yehezkel Dror, "Value and the Law" (1957) 17:4 *Antioch Review* Inc 440.

found BDSM to be obscene and degrading<sup>151</sup> and thus without social worth. The Court's reasoning relied on the belief that a conduct such as BDSM does not promote human dignity and self-worth and does not possess intrinsic value to merit protection by the law. Another value the Court may have intended to protect but did not mention is the right against physical violence. While protection of society members against violence is a valid societal value, another value involves protection of the rights of sexual minorities. People who engage in BDSM activities are a minority in society. Thus, the Court should have balanced these values when making the ruling.

The Court's attitude in *Welch*<sup>152</sup> towards this sexual minority has parallels with the criminalization<sup>153</sup> of homosexuality which was later decriminalized.<sup>154</sup> Homosexuality is also practiced by a minority of society and was originally a crime, a status which was gradually repealed and entirely removed from the *Criminal Code*.<sup>155</sup>

Social norms evolve as society and its cultural values change. For instance, legal rules criminalized dueling, formerly a social norm in England and the United States, because the activity involved injuring or maiming someone. The harm resulting from dueling outweighed the preservation of a tradition; society then grew to accept this over time.<sup>156</sup> Similarly, while homosexuality remains contrary to the personal beliefs of certain members of society, there is no specific harm attached to its practice.

There were two problems with the Court's perspective on social value in *Welch*: first, the Court's partial criminalization of BDSM as an indecent and dehumanizing act seems to have stemmed from the Court's subjective view. Second, the Court did not engage in any analysis with respect to balancing the right of protection from bodily harm against the protection of rights of sexual minorities.

Regarding the first problem, the Court stated that acts such as unsanctioned fist fighting (*Jobidon*)<sup>157</sup> or BDSM activities (*Welch*)<sup>158</sup> are not within the customary norms of civilized society, and thus consent is not a

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<sup>151</sup> *Brown*, *supra* note 73; *Welch*, *supra* note 2.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Criminal Code*, *supra* note 23, s 157.

<sup>154</sup> *Criminal Code*, *supra* note 23, ss 147 & 149. *Criminal Law Amendment Act*, SC 1968-69, c 38, s 7 (Bill C-150, 1st Sess, 28th Parl), added the exception as s 149A. See also Benette, *supra* note 13; Cheryl Hanna, "Sex is not sport: Consent and Violence in Criminal Law" (2001) 42:2 BCL Rev 249 [Hanna]; Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, cls 53-56.

<sup>155</sup> *Criminal Code*, RSC 1985, c C-46, s 159 as repealed, 2019, c 25, s 54.

<sup>156</sup> Hanna, *supra* note 163.

<sup>157</sup> *Jobidon*, *supra* note 1.

<sup>158</sup> *Welch*, *supra* note 2.



valid defence to causing bodily harm in them.<sup>159</sup> Meanwhile, violence in sport activities is widely accepted by societal norms. The libertarian view criticizing *Welch*'s decision is validated by John Stuart Mill's "harm principle."<sup>160</sup> This principle states that the only purpose which justifies applying a state's legal power to a member of society against their will is to prevent harm to another.<sup>161</sup> This principle has already been used and advocated by the SCC in *Labaye*.<sup>162</sup>

In *R v Labaye*<sup>163</sup> the Court rejected the interpretation of an indecent conduct as contrary to social norms on the basis of a community standards test. The reasoning of the Court was that community standards can vary between communities or evolve over time. The Court in *Labaye* reasoned that the community standard of tolerance is subjective and refused to apply it to determine whether an act was indecent.<sup>164</sup> In *Labaye*, the accused was charged with the offence of indecency under section 210 of the *Criminal Code*<sup>165</sup> for operation of a bawdy house and arranging private sexual acts between its members.<sup>166</sup> The Court held that social values must be related to "the fundamental values reflected in" the Canadian Constitution or fundamental laws such as the Bill of Rights.<sup>167</sup> To criminalize an activity, an objective test is required to evaluate whether harm to society or individual follows from the act.<sup>168</sup>

The Court in *Labaye*<sup>169</sup> proposed a two-step test based on the harm principle to determine whether an act is criminally indecent. The first step involves identifying whether the conduct causes harm, and the second step involves determining the degree to which the harm would impact the proper functioning of society.<sup>170</sup> The harm created by the conduct can be one of the following three types: "(1) harm to those whose autonomy and liberty may be restricted by being confronted with inappropriate conduct; (2) harm to society by predisposing others to anti-social conduct; and (3) harm to

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<sup>159</sup> *Jobidon*, *supra* note 1.

<sup>160</sup> John Stuart Mill, *On Liberty and Considerations on Representative Government* (New Jersey: Blackwell, 1946) at 8.

<sup>161</sup> *Ibid.*

<sup>162</sup> *R v Labaye*, 2005 SCC 80 [*Labaye*].

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> *Criminal Code*, *supra* note 23, s 210.

<sup>166</sup> *Labaye*, *supra* note 174.

<sup>167</sup> *Labaye*, *supra* note 174 at paras 32-33.

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> *Labaye*, *supra* note 174 at para 20.

individuals participating in the conduct.”<sup>171</sup> In this judgement, harm was broadly interpreted to include both physical and psychological harm.

Applying *Labaye*<sup>172</sup> to the issue of extending *Jobidon*<sup>173</sup> to sexual assault, it can be argued that the sexual activity of BDSM performed in private between two consenting adults do not lead to any social harms. There are no studies demonstrating that individuals engaging in BDSM acts are anti-social. The other risk is the possibility of individual harm to participants engaging in BDSM acts. BDSM activities have a broad spectrum. Some practices such as breath play (asphyxiation) can be life threatening if done incorrectly, while others such as playful teasing carry a miniscule possibility of harm. With the exception of dangerous BDSM acts such as breath play, most of its activities do not objectively carry the risk of harm.

The second problem with *Welch* is balancing the right to protection against bodily harm with protection of sexual minorities’ rights. If harm following from a BDSM act has a greater cost than the constitutionally protected right of freedom of expression of an individual, the criminalization of this act is reasonable. The sexual acts classified under BDSM vary in terms of likelihood of harm. Parliament has already criminalized sexual acts with life-threatening risks such as asphyxiation under section 267(c) of the *Criminal Code*.<sup>174</sup> Thus, it can be argued that exclusive of these dangerous acts, there is no objectively foreseeable harm which follows from safe, consensual BDSM sexual activities between adults behind closed doors.

## B. Sport vs BDSM

“Not all consent is created equal and not all consent is viewed as equal”<sup>175</sup>

Some consensual activities are accepted under public policy, while others result in sanctions. *Jobidon* specifically exempts certain activities such as surgery, medical treatment, stunts performed by qualified professionals, or rough sporting activities<sup>176</sup> in which consent to participate is given freely.<sup>177</sup> On the contrary, the Court in *Welch*<sup>178</sup> refused to extend the defence of consent to assault from contact sports to BDSM sexual activities by

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<sup>171</sup> *Labaye*, *supra* note 174 at para 36.

<sup>172</sup> *Ibid.*

<sup>173</sup> *Jobidon*, *supra* note 1.

<sup>174</sup> *Criminal Code*, *supra* note 23, s 267(c).

<sup>175</sup> Jill D Weinberg, “Consensual Violence: Sex, Sports, and the Politics of Injury” (2016) University of California [Weinberg].

<sup>176</sup> *Jobidon*, *supra* note 1.

<sup>177</sup> *Ibid.*

<sup>178</sup> *Welch*, *supra* note 2.

reasoning that there is no “creation of a socially liable cultural product” involved in BDSM activities.<sup>179</sup> The previous literature compares sport with sex from different angles such as rules of consent<sup>180</sup> or the riskiness of the activity in terms of likelihood and degree of harm due to the degree of force encountered.<sup>181</sup> It appears the Court in *Welch* followed the reasoning in *Jobidon* and implied that BDSM activities as compared to sports have insufficient social utility to justify the state from interfering with an individual’s consensual rights when injury follows.<sup>182</sup> This section discusses the intrinsic flaw in comparing sex with sport from a social utility perspective.

Under Bentham’s welfarism framework, utility is an ordinal metric that rates the success, satisfaction, or happiness of individual members of society by ranking one preference over another.<sup>183</sup> Social utility is described as the aggregation of the utilities for individual members of a society. Within this framework, an act with a higher social utility is the one which brings maximum utility for the greatest number of people in a society.<sup>184</sup> This paper argues that it is inappropriate to compare sex with sport in the social utility context on two grounds. First, not every activity that carries less social utility is subject to criminal sanction. Second, even if social utility is the measure of criminalization, its estimation contains a substantial amount of uncertainty, and this was highlighted by Sopinka and Stevenson in a concurring opinion in *Jobidon*.

With respect to the first issue, the assumption is that a conduct with social value is one which has social utility. However, this is not necessarily true in all cases. For instance, since childbearing is a social value, one could argue that because same-sex marriage is less likely to lead to the birth of children, this type of marriage has less social utility than a traditional heterosexual marriage; yet same-sex marriage is now legally recognized and accepted by the majority of societies across the world. It can be argued that homosexuality was criminalized based on societal beliefs rather than actual harm, and that it was partially decriminalized and then legalized as a response to society’s changing beliefs and increasing tolerance.

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<sup>179</sup> *Ibid.*

<sup>180</sup> Weinberg, *supra* note 187.

<sup>181</sup> Hanna, *supra* note 163.

<sup>182</sup> Paul J Farrugia, “The Consent Defence: Sports Violence, Sadomasochism, and the Criminal law” (1997) 8:2 Auckland U L Rev 472.

<sup>183</sup> Laurent Cambon, Aicha Djouari & Jean-Leon Beauvois, “Social Judgement Norms and Social Utility: When It is more valuable to be useful than desirable” (2006) 65:3 Swiss J Psychol 167.

<sup>184</sup> Utilitarianism, *supra* note 16.

Regarding the second issue, assuming that utility is the measure of social value, then there exist two main challenges in using it: (a) standards for measuring the individual utility and (b) aggregating the utility. In terms of the first challenge, the utility arising from sport is not comparable to sex. The social utility of sporting activities can be demonstrated by their benefits to society as a whole. Some of these benefits apply to the participant including the joy of competing, building athletic skills and obtaining a healthy body; others such as promoting teamwork, cooperation and leadership, and building wealth apply more broadly to society. By comparison, the social utility of BDSM activities derives from the sexual pleasure of the participants only. An exception is commercial BDSM, where the exchange of money benefits the sex workers. The difficulty is that there is no standardized unit of utility which can be assigned to these two different types of activities. Similarly for the second challenge, the aggregation of the units of utility for these two activities is not practically possible.

### C. Fairness

“The view we take is, there's no place for the state in the bedrooms of the nation. What's done in private between adults doesn't concern the Criminal Code.”<sup>185</sup>

The above famous quote from then-Justice Minister Pierre Trudeau in 1967 emphasizes the notion that criminal law should not interfere in the private lives of citizens any more than necessary. Although Welch<sup>186</sup> did not create a new offence in contravention of section 9 of the Criminal Code,<sup>187</sup> in practice a new criminal burden was created by extending the vitiation of consent to intended and inflicted harm in sexual acts, thus placing BDSM activities under the purview of criminal law. This implication interferes with the notion of fair notice to citizens within criminal law. On the one hand, popular media has popularized the practice of BDSM, including emphasizing consent and safety precautions such as establishing a “safe word.”<sup>188</sup> On the other hand, the Court’s ruling in Welch has stigmatized this practice.<sup>189</sup>

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<sup>185</sup> CBC Television News, “Trudeau: ‘There’s no place for the state in the bedrooms of the nation’” (21 December 1967) at 00h:00m:36s, online (video): CBC <cbc.ca> [perma.cc/5LGV-CSNU].

<sup>186</sup> Welch, *supra* note 2.

<sup>187</sup> Criminal Code, *supra* note 23, s 9.

<sup>188</sup> Morton Nielsen, “Safe, Sane, and Consensual – Consent and the Ethics of BDSM” (2010) 24:1 Int J Appl Philos.

<sup>189</sup> Colin Perkel, “CBC executive fired in wake of Ghomeshi scandal sues for ‘political’ firing” (31 May 2016), online: *The Global News* <globalnews.ca/news/2725883/cbc-executive-fired-in-wake-of-ghomeshi-scandal-sues-for-political-firing/> [perma.cc/Z8H4-

In addition, while the purpose of Welch<sup>190</sup> appears to be the protection of victims of violence through removal of the defence of consent, in practice the Welch decision<sup>191</sup> leads to a potential miscarriage of justice in both intimate relationships as well as commercial settings. The primary issue in these situations is reporting. In intimate relationships, to avoid stigmatization and criminal sanction of their partner, the injured party may choose not to seek medical attention. In a commercial setting, the buyer paying to act out a submissive role in a BDSM setting could sustain serious body injuries.<sup>192</sup> In this case the buyer may elect not to bring criminal charges against the seller who caused these injuries, even if these were caused by unsafe practices or negligence of the seller, since the buyer can potentially face prosecution as a result of purchasing sex in violation of Bill C-36.<sup>193</sup> Conversely if the seller is playing a submissive role in BDSM activities and sustains injury, they may also decide not to report. Because sex workers may be in a weak economic position or under control of another party (e.g., a criminal gang or a pimp), they may avoid reporting their injuries for fear of losing their income or due to being forbidden to do so by the parties controlling them. While in some cases sex workers do report injuries which occurred on their job,<sup>194</sup> it's possible that a significant portion of them go unreported.

In the context of contact sports, the legal system has taken steps towards regulating the level of violence in sports.<sup>195</sup> For instance, in *R v Bertuzzi*,<sup>196</sup> the Court attempted to place limits on violence in ice hockey through a criminal sanction and proposed the possibility of vitiating of consent whenever aggression is beyond reasonable limits for the game.

Similarly, Parliament has taken steps to protect the safety of participants in BDSM acts. BDSM practices form a wide spectrum, ranging from nearly zero risk activities such as hand spanking to potentially life-threatening ones such as asphyxiation. It appears that the government has taken steps towards

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5PJ2]; Christie Blatchford, "Christie Blatchford: Manitoba judge's career stalls while possibly biased inquiry into nudge photos grinds on" (21 June 2013), online: *National Post* <nationalpost.com> [perma.cc/LJY6-AKD9].

<sup>190</sup> Welch, *supra* note 2.

<sup>191</sup> *Ibid.*

<sup>192</sup> "Prostitute gets probation after client dies in BDSM mishap" (26 Sep2016), online: *Toronto Sun* <torontosun.com/>[perma.cc/QCF7-8VDA].

<sup>193</sup> Bill C-36, *Protection of Communities and Exploited Persons Act*, SC 2014, c25, 2<sup>nd</sup> Sess, 41<sup>st</sup> Leg.

<sup>194</sup> *R v Preuschoff*, 2011 BCPC 352.

<sup>195</sup> *R v Maki*, 14 DLR (3d) 164, 1 CCC (2d) 333; *R v Green*, [1970], 16 DLR (3d) 137, 2 CCC (2d) 442; *R v Bertuzzi*, 26 CR (6<sup>th</sup>) 71 [*Bertuzzi*]; *R v Ashton*, 2017 ONSC 585.

<sup>196</sup> *Bertuzzi*, *supra* note 206.

regulating some of these riskier acts by criminalizing choking, suffocation, and strangulation under section 267(c) of the Criminal Code.<sup>197</sup>

After the Supreme Court of Canada's decision in *J.A.*,<sup>198</sup> Parliament amended the Criminal Code to expressly state that consent does not exist whenever one party is unconscious.<sup>199</sup> Section 273.1(2) (a.1) of the Criminal Code<sup>200</sup> states there is no consent whenever one party is unconscious<sup>201</sup> or incapacitated.<sup>202</sup> Section 273.1(2) (b) states there is no consent whenever one party is incapable of consenting to the activity. This effectively criminalizes the unsafe BDSM practice of breath play, since the receiver of the act is incapable of consenting while the sexual activity is taking place.

#### IV. CONCLUSION

The extension of *Jobidon* to sexual assault causing bodily harm in the Court's decision in *Welch* is controversial. In *Jobidon*, the SCC held that consent is vitiated in the case of assault causing bodily harm where the bodily harm is intended and inflicted. The SCC's underlying reasoning in *Jobidon* was that certain activities such as fist fights do not carry social utility. As a result, any intended harm that follows from them does not justify protection from criminal law. The Court contrasted low social utility activities such as fist fights with high social utility activities such as sports to explain this decision. In *Welch*, the Ontario Court of Appeal extended *Jobidon*'s holding to sexual assault causing bodily harm. The Court held that certain sexual activities such as BDSM do not carry social utility. If harm is intended and caused in their performance, consent is automatically vitiated.

*Welch*'s framework can be criticized on two fronts: the uncertainties in its application and its underlying policy.

Regarding the former criticism, the *Welch* decision created ambiguity for courts, leading to inconsistencies in its application. The first ambiguity stems from the court being able to distinguish the mental element required for vitiation of consent (subjective intention) and the objective *mens rea* of the consequence part of the offence. The second ambiguity for courts is how to determine whether *Welch*'s framework applies by evaluating whether an activity is inherent degrading in order to follow the underlying reasoning in *Welch*. The third ambiguity is evaluating the open question of whether

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<sup>197</sup> Criminal Code, *supra* note 23, s 267(c).

<sup>198</sup> *JA*, *supra* note 8.

<sup>199</sup> Criminal Code, *supra* note 23, s 273.1(2) (a.1).

<sup>200</sup> *Ibid.*

<sup>201</sup> *R v Toonanachiak*, 2005 NUCA 4.

<sup>202</sup> *R v R(R)*, 2003 SCC 4.

intended and inflicted harm which is purely psychological vitiates consent within the framework of *Welch*.

For the latter criticism, there are multiple viewpoints for questioning the underlying policy in the *Welch* holding, including libertarian and utilitarian. The libertarian view criticizes the decision as an intrusion to individuals' sexual autonomy. The utilitarian view employed in *Welch* was based on maximizing social utility. This paper demonstrated that there is an inherent flaw in the utilitarian argument used in *Welch*. The comparison of BDSM with sport to determine social utility is inappropriate, since it relies on the flawed assumption that social utility of each is objectively quantifiable and can be aggregated. The proposition of social utility of the sexual act of BDSM being lower than acts such as contact sports is flawed, since utility cannot be accurately ranked between these two. Although a smaller number of individuals in society engage in BDSM activities than participate in contact sports, the frequency and seriousness of injuries in the latter seems to be higher.

This paper then argued that there is an inherent flaw in relying on social value in terms of social utility to justify criminal sanctions. The social value in terms of social utility argument centers around whether an act or a behaviour is widely acceptable among individuals in a society. In other words, the Court in *Welch*'s argument of BDSM activities being fundamentally degrading stems from the perspective of social norms. Formulating criminal law based on intrinsically subjective and continuously evolving social norms defeat the principle of fairness of the law.

This paper holds that the libertarian view proposed by John Stewart Mills is a valid approach to the analysis of this issue. The basis of Mills's theory is that the state should only be involved in regulating behaviour of individuals to the extent which keeps them from harm. This framework was employed by the SCC in *Labaye*. In *Labaye*, the Court refused to criminalize a behaviour on the basis of social norms, and it proposed a harm analysis approach instead. Applying the harm analysis approach given in *Labaye* to BDSM acts shows that there is no substantial harm which follows from them. The problem with relying on social norms for criminal sanctions is the norms' subjective nature and their lack of consideration for certain types of values, such as the protection of the rights of sexual minorities. The former criminal sanction of homosexuality is an example of how social norms were used to unfairly sanction a minority group within society.

This paper concluded that irrespective of the choice of libertarian or utilitarian view, the *Welch* ruling inappropriately encroaches into the private life of individuals. This paper also explained how criminalization must be the last resort after other methods such as regulations have been exhausted,

particularly for areas involving personal choices and preferences of society's members. Criminal law must not invade the private life of citizens any more than necessary. *Welch's* decision adds a new burden for citizens to regulate their behaviour. It can be argued that it violates section 9 of the *Criminal Code* by bringing this additional burden through criminalizing intended and inflicted harm as a result of consensual sexual activity. In addition, it can be argued that *Welch's* decision suffers from practical implementation problems regarding sexual BDSM acts in private relationships or commercial settings by making individuals hesitate to report injuries from these activities due to fear of prosecution of the other party.

This paper aimed to show that *Welch's* underlying reasoning to extend *Jobidon's* ruling to the law of sexual assault is flawed and incomplete. With the increasing recognition and tolerance for consensual BDSM in popular media and among the general public, an action to challenge the ruling in *Welch* may be gaining traction.