RESURRECTING "SHE ASKED FOR IT": THE ROUGH SEX DEFENCE IN CANADA

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Internationally, the "rough sex defence" appears to be on the rise. Used to suggest that women enjoy violence as part of "sex play," it invites judges and jurors to find either consent to acts causing bodily harm or an honest but mistaken belief in consent. Our review of the Canadian case law from 1988–2021 examines how courts approach this defence. We found that the defence is gendered, with only men as perpetrators and overwhelmingly women on the receiving end. We explore themes from the cases including the role of pornography, the trivialization of bodily harm, the mischaracterization of strangulation, and how consent to some sexual activity undermines women's credibility. We conclude that consent should be barred as a defence to causing bodily harm unless that harm was unforeseeable when inflicted.

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I. INTRODUCTION

According to rape crisis centres and women's shelters in Canada, the United States, and the United Kingdom, women are reporting extreme levels of violence by men who rape them, including strangulation — a particularly dangerous form of violence that is highly predictive of femicide.[1] At the same time, accused men are deploying the "rough sex" defence when

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1 Jason Viau, "'I Was Scared': Strangulation a Factor in Roughly Half of Domestic Violence Cases in Windsor, Experts Say," *CBC News* (31 January 2020), online: <cbc.ca/news/canada/windsor/strangulation-windsor-1.5443699> (reporting that "[s]trangulation is something experienced by about half of all people who come through Windsor Regional Hospital's sexual assault and domestic violence centre"); Anna Moore & Coco Khan, "The Fatal, Hateful Rise of Choking During Sex," *The Guardian*

the victim — nearly always a woman — has suffered bodily harm or even death. This defence is used to suggest that the woman enjoyed strangulation, hitting, or other violence as part of "sex play," inviting judges and jurors to find that she either consented to the acts causing bodily harm or that the man honestly believed she consented.

The rough sex defence, if successful, can result in acquittal or the downgrading of charges. For example, the UK organization *We Can't Consent to This* tracked 60 homicides in the UK, in which 57 men killed women, nearly half of them by strangulation,[2] claiming that the deceased consented to "a sex game gone wrong,"[3] and arguing that they lacked the intent to kill or cause grievous bodily harm.[4] This defence resulted in manslaughter verdicts, dropped charges, or acquittals in almost half (26) of the cases.[5]

In Canada, there have also been several highly publicized cases where men have asserted that women who reported assault or sexual assault, or who succumbed to their injuries, consented to rough sex. Joshua Boyle,[6] Jian Ghomeshi,[7] and Bradley Barton[8] each claimed "consent to rough sex" when charged with assault, sexual assault, and in the case of Barton, initially murder. Ghomeshi and Boyle were both alleged to have engaged in strangulation, whereas Barton caused an 11-centimeter wound to the vaginal wall of a Cree and Métis woman, Cindy Gladue, resulting in her death through blood loss. Ghomeshi's consent to rough sex claim was made through his social media account; Boyle and Barton both argued "rough sex gone wrong" in their respective trials. These three men were all acquitted, either on the basis of consent or the complainants' eroded credibility,[9] although Barton was ultimately convicted of manslaughter at a second trial.[10]

Empirical studies demonstrate both the growing prevalence and the deeply gendered nature of rough sex practices. In a national probability survey of Americans aged 18 to 60

(25 July 2019), online: <theguardian.com/society/2019/jul/25/fatal-hateful-rise-of-choking-during-sex>; Olga Khazan, "The Startling Rise of Choking During Sex," *The Atlantic* (24 June 2019), online: <theatlantic.com/health/archive/2019/06/how-porn-affecting-choking-during-sex/592375/>.

2 Elizabeth Yardley, "The Killing of Women in 'Sex Games Gone Wrong': An Analysis of Femicides in Great Britain 2000–2018" (2021) 27:11 Violence Against Women 1840 at 1853.

3 *Ibid* at 1840–41. For example, John Broadhurst left his partner to bleed to death at the bottom of the stairs in their home. His guilty plea to negligent manslaughter was not based on the 40 horrific injuries that he inflicted on Natalie Connelly during sex that caused her death, but rather on his failure to seek medical treatment as she lay dying.

4 For a discussion of the *mens rea* required for murder in the UK, see Hannah Bows & Jonathan Herring, "Getting Away With Murder? A Review of the 'Rough Sex Defence'" (2020) 84:6 J Crim L 525 at 529. See also *Homicide Act 1957* (UK), 5 & 6 Eliz II, c 11, s 1.

5 Yardley, *supra* note 2 at 1854.

6 Andrew Duffy, "Joshua Boyle Defence Allowed to Question Caitlan Coleman About Her Sexual History, Judge Rules," *The Ottawa Citizen* (12 June 2019), online: <ottawacitizen.com/news/local-news/joshua-boyle-defence-allowed-to-question-caitlan-coleman-about-her-sexual-history-judge-rules>.

7 Alyshah Hasham & Kevin Donovan, "Jian Ghomeshi Acquitted on the Basis of 'Inconsistencies' and 'Deception,'" *The Toronto Star* (24 March 2016), online: <www.thestar.com/news/jian-ghomeshi/2016/03/24/jian-ghomeshi-verdict.html>.

8 Jess Martin, "Across Canada, Protestors Demand Justice for Cindy Gladue," *Feminist Current* (3 April 2015), online: <www.feministcurrent.com/2015/04/03/across-canada-protesters-demand-justice-for-cindy-gladue/>.

9 See e.g. Molly Redden, "Jian Ghomeshi Trial: Why the Prosecution's Case Fell Apart," *The Guardian* (24 March 2016), online: <www.theguardian.com/world/2016/mar/24/jian-ghomeshi-trial-why-prosecution-fell-apart>; Kathleen Harris, "Judge Dismisses All 19 Charges Against Ex-Afghanistan Hostage Joshua Boyle in Sexual Assault Case," *CBC News* (18 December 2019), online: <cbc.ca/news/politics/joshua-boyle-caitlan-coleman-verdict-1.5400633>; *R v Boyle*, Ottawa 18-RD19579 (Ont Ct J) [*Boyle*].

10 *R v Barton*, 2021 ABQB 603. The verdict has been appealed, in part on the basis that the trial judge erred in rejecting a purely subjective test for intent to inflict bodily harm in a sexual context.

years old, 21.4 percent of women reported choking/strangulation, 32.3 percent having their face ejaculated on, and 34 percent experiencing aggressive fellatio at some point during their lifetimes.[11] The BBC found even more alarming rates in a 2019 survey: among UK women aged 18 to 39, 59 percent had experienced slapping, 38 percent choking, 34 percent gagging, 20 percent spitting, and 59 percent biting.[12] More than half reported that these acts were "unwanted."[13] A parallel 2020 survey of UK men showed even higher rates of sexual violence: 62 percent had slapped, 40 percent had choked, 36 percent had gagged, 25 percent had spit on a partner, 53 percent had hair-pulled, and 44 percent had bitten.[14]

In this article, we explore cases in Canada where the rough sex defence has been raised in sexual assault, homicide, and assault prosecutions. We interrogate how these claims are made, how judges respond, and the themes that appear in these cases.

First, we summarize the literature on consent to bodily harm emanating from the UK, the US, and Canada. We review the arguments for and against criminalization of allegedly consensual infliction of bodily harm, often framed as the practices of "bondage, domination and sadomasochism" (BDSM) or "erotic asphyxiation," as a result of a Supreme Court of Canada decision bringing this issue to the fore.[15] Along with other scholars expressing concern about the apparent rise of this defence, we suggest that increasing normalization of rough sex practices can provide a ready-made template for those accused of violence against women, and that the "sex games gone wrong" defence functions as a new version of the much older "she asked for it" defence. As some critics have demonstrated, and as our analysis shows, far from agentic sexual exploration, these are cases where women have either died or reported violent rapes to the police.

Second, we turn to the case law to explore how the courts have approached defences by men who assert that the complainant consented to the sexual activities that caused them bodily harm. We trace the development of this defence and show that courts have legitimized it by holding, at least in Ontario and Alberta, that the complainant's consent can only be vitiated where the accused intentionally caused that harm, effectively creating a new, higher standard of *mens rea* for proving sexual assault causing bodily harm.

Third, we lay out what we found in our review of the reported cases in the period from 1988 to 2021 where any level of assault, sexual assault, or homicide was charged and the accused (or more rarely, a recanting complainant) either explicitly raised a rough sex defence or argued consent where additional violence had been inflicted on the complainant. Here, we describe our research methods and provide an overview of the nature of the cases in which

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11 Debby Herbenick et al, "Diverse Sexual Behaviors and Pornography Use: Findings From a Nationally Representative Probability Survey of Americans Aged 18 to 60 Years" (2020) 17:4 J Sexual Medicine 623 at 627. This study tracked the prevalence of sexual behaviours and whether the respondent was "dominant" or "target" in the behaviours. As the researchers note, future studies need to investigate whether the behaviours were consensual (*ibid* at 630).

12 Savanta ComRes, "BBC 5 Live, Women's Poll – 21st November 2019" (2019) at 7, online: <comresglobal.com/wp-content/uploads/2020/03/Final-5Live-Mens-Poll-Tables-140220-2c0d4h9.pdf>.

13 *Ibid* at 14.

14 Savanta ComRes, "BBC Scotland/Radio 5 Live, Rough Sex Survey with Men – 14th February 2020" (2020) at 9–10, 12, 14, 16, 18, online: <comresglobal.com/wp-content/uploads/2020/03/Final-5Live-Mens-Poll-Tables-140220-2c0d4h9.pdf>; Myles Bonnar, "'I Thought He Was Going to Tear Chunks Out of My Skin," *BBC News* (23 March 2020), online: <www.bbc.com/news/uk-scotland-51967295>.

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

this defence was argued — what charges were laid, the relationship between the parties, and the defence's success.

Fourth, we elaborate on the themes that emerge from our case law review. Specifically, we look at the role of pornography in these cases, the trivialization of the harm to the complainant and, particularly, of psychological harm, the mischaracterization of strangulation, and how a complainant's consent to any sexual activity undermines her credibility and perpetuates victim-blaming.

Finally, focusing on the sexual assault cases, we conclude that consent should never be a defence to bodily harm resulting from sexual activity unless that bodily harm was unforeseeable at the time it was inflicted. We underscore the importance of paying attention to what is going on in these cases. Too often, scholars have relied on hypothetical arguments about sexual liberty that are abstracted from the grim realities of violence against women that pervade the case law. We raise serious concerns about how the rough sex defence reinforces misogynist stereotypes about women "asking for it." We argue that those who assert the right to engage in violent sex should be responsible for bearing the foreseeable risk of causing serious injury or death to their sexual partners.[16]

II. LITERATURE REVIEW

Concerns about the emergence of the rough sex defence began to surface three decades ago. As George E. Buzash argued presciently, this defence "display[s] the potential to become both the updated 1990s' version of the 'she asked for it' defense and a formidable obstacle to prosecutors trying to secure a murder conviction in a homicide involving a male offender and a female victim."[17] Even though the literature on the rough sex defence is often framed as a debate over the criminalization of consensual sexual practices, it is critical to focus on how women's safety is put at risk by a narrative that they enjoy being hurt. While we acknowledge that there are legitimate concerns about the use of criminalization strategies to combat violence against women, especially given the racist thrust of carceral punishment,[18] much of the so-called "pro-sex" critique mischaracterizes the cases where the rough sex defence is argued, ignoring how the assertion of a "sex game gone wrong" defence can trivialize and distort severe forms of violence against women.

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16 This approach is being taken in the UK. See "'Rough Sex' Defence Will Be Banned, Says Justice Minister," *BBC News* (17 June 2020), online: <bbc.com/news/uk-politics-53064086>.

17 George E Buzash, "The 'Rough Sex' Defense" (1989) 80:2 J Crim L & Criminology 557 at 557.

18 We advocate for a more nuanced approach to engaging in criminal law than has characterized the critique of so-called carceral feminism. See the argument in Clare McGlynn, "Challenging Anti-Carceral Feminism: Criminalisation, Justice and Continuum Thinking" (2022) 93 Women's Studies International Forum 1 at 7 [emphasis omitted]:

> My aim is to encourage a complicated and nuanced approach to criminalisation which recognises both a role for criminal justice and alternatives; which listens to the voices of all survivors, including those whose understanding of justice includes criminal justice; and which is fully alive to the risks and challenges that all justice approaches entail, whether state or community based. It is an approach that would benefit from embracing 'continuum thinking', embedding ambiguity, nuance and complexity in all debates and strategies. This is a call to imagine a future where criminal law might be one part of a more holistic approach to violence against women; a criminal justice system that is not predicated on punitivism and punishment, but rehabilitation and accountability, and where incarceration is not synonymous with criminalisation.

In the US and UK, analysis of whether the criminal law should accept a consent defence when bodily harm is caused has focused almost exclusively on practices of so-called BDSM.[19] In Canada, the emphasis has been on how the law should treat strangulation (euphemized as "erotic asphyxiation") and sexual contact with an unconscious complainant.[20] The Canadian focus can be attributed to the Supreme Court of Canada's decision in *JA* in 2011,[21] which ruled that the criminal law does not recognize "advance consent." It held that a man who strangles a woman into unconsciousness cannot claim that his sexual use of her inert body was consensual. *JA* has been represented as a case involving a complainant who "consented" to what was done to her — a "kinky sex" case rather than one of domestic violence, which the facts supported.[22]

Some commentators argue that "privacy" should shield BDSM that results in bodily harm from state interference.[23] Others suggest that the long history of discriminatory law enforcement against lesbians and gay men should caution against criminal law intervention.[24] For example, critics of the House of Lords' decision in *R. v. Brown*[25] and the European Court of Human Rights' decision in *Laskey v. UK*[26] — which denied the consent defence to gay men who inflicted bodily harm upon each other as part of an allegedly consensual BDSM

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19 For the debate in the UK, see e.g. Marianne Giles, "*R v Brown*: Consensual Harm and the Public Interest" (1994) 57:1 Mod L Rev 101; Sharon Cowan, "Criminalizing SM: Disavowing the Erotic, Instantiating Violence" in RA Duff et al, eds, *The Structures of the Criminal Law* (Oxford: Oxford University Press, 2011) 59; Susan Edwards, "No Defence for a Sado-Masochistic Libido" (1993) 143 New LJ 406; Susan Edwards, "The Strangulation of Female Partners" (2015) 12 Crim L Rev 949 [Edwards, "Strangulation"]; Susan Edwards, "Assault, Strangulation and Murder – Challenging the Sexual Libido Consent Defence Narrative" in Alan Reed et al, eds, *Consent: Domestic and Comparative Perspectives* (London, UK: Routledge, 2017) 88; Susan SM Edwards, "Consent and the 'Rough Sex' Defence in Rape, Murder, Manslaughter and Gross Negligence" (2020) 84:4 J Crim L 293 [Edwards, "Consent and the Rough Sex Defence"]; William Wilson, "Consenting to Personal Injury" in Alan Reed et al, eds, *Consent: Domestic and Comparative Perspectives* (London, UK: Routledge, 2017) 68; Annette Houlihan, "When 'No' Means 'Yes' and 'Yes' Means Harm: HIV Risk, Consent and Sadomasochism Case Law" (2011) 20 Law & Sexuality 31; Bows & Herring, *supra* note 4; Yardley, *supra* note 2. For the debate in the US, see e.g. Cheryl Hanna, "Sex Is Not a Sport: Consent and Violence in Criminal Law" (2001) 42:2 Boston College L Rev 239; Monica Pa, "Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex" (2001) 11:1 Tex J Women & L 51; Lynn S Chancer, "From Pornography to Sadomasochism: Reconciling Feminist Differences" (2000) 571:1 Annals American Academy Political & Soc Science 77; Robin Ruth Linden et al, eds, *Against Sadomasochism: A Radical Feminist Analysis* (East Paolo Alto: Frog in the Well, 1982).

20 See e.g. Karen Busby, "*Every Breath You Take*: Erotic Asphyxiation, Vengeful Wives, and Other Enduring Myths in Spousal Sexual Assault Prosecutions" (2012) 24:2 CJWL 328; Elaine Craig, "Capacity to Consent to Sexual Risk" (2014) 17:1 New Crim L Rev 103 [Craig, "Capacity to Consent"]; Ingrid Olson, "Asking for It: Erotic Asphyxiation and the Limitations of Sexual Consent" (2012) 4:1 Jindal Global L Rev 171; Lise Gotell, "Governing Heterosexuality through Specific Consent: Interrogating the Governmental Effects of *R. v. J.A.*" (2012) 24:2 CJWL 359. On consent to sadomasochistic practices, see David M Tanovich, "Criminalizing Sex at the Margins" (2010) 74 CR (6th) 86; Maneesha Deckha, "Pain, Pleasure, and Consenting Women: Exploring Feminist Responses to S/M and Its Legal Regulation in Canada Through Jelinek's *The Piano Teacher*" (2007) 30:2 Harv JL & Gender 425; Ummni Khan, *Vicarious Kinks: S/M in the Socio-Legal Imaginary* (Toronto: University of Toronto Press, 2014) at 225–303; Ummni Khan, "Take My Breath Away: Competing Contexts Between Domestic Violence, Kink and the Criminal Justice System in *R. v. J.A.*" (2016) 6:6 Oñati Socio-Leg Series 1405 [Khan, "Take My Breath"].

21 *Supra* note 15.

22 See generally *R v A(J)*, 2008 ONCJ 624 (where the sentencing judge discussed the accused's long history of domestic violence against the complainant). See e.g. "Top Court Peeks Into Bedrooms of the Nation with Sexual-Consent Case," *iPolitics* (6 November 2010), online: <ipolitics.ca/2010/11/06/top-court-peeks-into-bedrooms-of-the-nation-with-sexual-consent-case/> (for an example of the Canadian media's depiction of the case).

23 Matthew Weait, "Harm, Consent and the Limits of Privacy" (2005) 13 Fem Leg Stud 97 at 117–18.

24 See generally Tanovich, *supra* note 20.

25 [1993] UKHL 19 [*Brown*].

26 [1997] 24 EHRR 39 (E Ct HR).

practice — note that these cases have not been applied where men have inflicted bodily harm on women in the context of marriage, thus protecting "traditional gender relations."[27]

For some critics, the criminalization of rough sex undermines sexual exploration as a form of empowerment for women and sexual minorities,[28] and thus denies women's autonomy and agency. Brenda Cossman criticizes the *JA* decision because it restricts "consensual choices of sexual minorities" and thwarts the development of "sexual democracy."[29] Ummni Khan emphasizes the allegedly transgressive nature of BDSM, positioning it as a form of resistance to dominant institutions governing sexual norms.[30] Khan characterizes the risky practice of strangulation during sexual activity as "[w]anting something dangerous despite or because of the lack of a guaranteed safety clause."[31] These authors call it paternalistic to interfere with individual women's freely expressed consent to violent sexual practices as they investigate their own sexuality.

Maneesha Deckha has also written critically about the *JA* decision but warns that the risk to women's autonomy must be weighed against the danger of failing to protect women from sexual violence.[32] Deckha's caution is a corrective to many of the critiques of *JA* that rest upon a "myth of autonomy" that ignores "the material and discursive conditions that frame, constrain, and construct women's sexual choices."[33]

In contrast to the often decontextualized emphasis on sexual agency, there are authors who, in our view, appropriately attend to the conditions of women's inequality as implicated in rough sex defence cases. Cheryl Hanna argues that decriminalizing the infliction of bodily harm because it occurs in a sexual context creates the potential for mistakes about the scope of consent and for deliberate abuse.[34] As others have stressed, the rough sex defence appears more available where the victim is a current or former intimate or dating partner because the accused is able to draw upon his knowledge to construct a plausible "sex game gone wrong" narrative.[35] When set against the backdrop of an intimate relationship, a "sex game gone wrong" defence becomes infused with notions of mutuality and consent,[36] reinforcing the myth of women's autonomy, obscuring abuse and coercive control within intimate relationships, and undermining prosecutions for sexual and domestic violence.[37]

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27 Weait, *supra* note 23 at 117. The cases that failed to apply *Brown*, *supra* note 25, are *R v Wilson*, [1996] 2 Cr App R 241 (CA); *R v Donovan*, [1934] 2 KB 498; *R v Slingsby*, [1995] Crim LR 570. See also Busby, *supra* note 20 at 347; Bows & Herring, *supra* note 4 at 535. See generally Houlihan, *supra* note 19; Leslie J Moran, "Violence and the Law: The Case of Sado-Masochism" in Leslie J Moran, ed, *Sexuality and Identity* (Aldershot: Ashgate, 2006) 225; Giles, *supra* note 19.

28 See e.g. Deckha, *supra* note 20 at 434; Khan, "Take My Breath," *supra* note 20 at 1420.

29 Brenda Cossman, "Sex and the Unconscious (No, We Aren't Speaking of Freud)," as cited in Gotell, *supra* note 20 at 370.

30 Khan, "Take My Breath," *supra* note 20 at 1414.

31 *Ibid* at 1413, citing Lisa Downing, "Beyond Safety: Erotic Asphyxiation and the Limits of SM Discourse" in Darren Langdridge & Meg Barker, eds, *Safe, Sane and Consensual: Contemporary Perspectives on Sadomasochism* (London, UK: Palgrave Macmillan, 2007) 119 at 123.

32 Deckha, *supra* note 20 at 457, 459.

33 Gotell, *supra* note 20 at 370.

34 Hanna, *supra* note 19 at 277–79.

35 Yardley, *supra* note 2 at 1845, 1857–58; Busby, *supra* note 20 at 355.

36 Yardley, *ibid* at 1857–58.

37 Edwards, "Consent and the Rough Sex Defence," *supra* note 19 at 296.

Elaine Craig also emphasizes how systemic sexual violence is a central mechanism of women's subordination and that criminal laws must be applied in ways "that recognize the impact of systemic inequities on individual sexual actors."[38] Hanna contends that the rough sex defence leads directly to the "glorification of sexual violence, rather than the sexual liberation of consenting adults."[39] Both scholars argue that if we must choose between the law being overinclusive and risking the autonomy of sexual minorities, or underinclusive and failing to protect women from bodily harm or death, the latter is the greater danger.[40]

We argue that it is critically important to analyze the empirical realities of the rough sex defence. Based upon her analysis of the reported Canadian cases where a consent to rough sex defence was advanced between 2005 and 2011, Karen Busby demonstrates that in most of the reported cases where a consent to rough sex defence was advanced, the complainant either asserted that she did not consent to anything or that the boundaries of her consent were exceeded.[41] Busby identifies a pervasive judicial ignorance around the "safe, sane, and consensual" credo used by BDSM practitioners, which places "erotic asphyxiation" outside the range of accepted practices because of the risk of accidental death. Combined with a reluctance to call evidence from experts, judicial ignorance often results in a heavy emphasis on perpetrators' versions of events and in reduced culpability for injuries caused.[42]

While evidence of violence and bodily harm were previously viewed as corroborative of rape accusations, increasing numbers of accused in the UK are reconstructing harm as the outcome of rough sex.[43] The courtroom has thereby been transformed into a "theatre of pornography," where women's pain is reconstructed as pleasure.[44] Susan Edwards writes, "'[r]ough sex' excuses, once consigned to the annals of sexual psychopathy, are now becoming the defence norm in trials for murder and non-fatal assault in this context."[45]

Scholars analyzing these developments in the UK emphasize the victim-blaming implications of this defence. Linked with the reconstruction of serious injury as "play" is the manner in which defence counsel depict victims as responsible for the harm they have suffered. Hannah Bows and Jonathan Herring contend that acts of violence during sex are thereby given a "veneer of complicity": she asked for it, she wanted it, or she should have done more to avoid it.[46] As Elizabeth Yardley has argued, "[t]his victim blaming draws upon neoliberal tropes of the sovereign individual, responsibilized to protect themselves from harm."[47] Many perpetrators have a history of violent sexual activity, but the links between

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38 Craig, "Capacity to Consent," *supra* note 20 at 128.

39 Hanna, *supra* note 19 at 239.

40 *Ibid* at 248; Craig, "Capacity to Consent," *supra* note 20 at 127.

41 Busby, *supra* note 20 (noting that "the issue in all of the Canadian sexual assault cases is not the legal question: *can* they consent to BDSM? It is the factual question: *did* they consent to BDSM?" at 347 [emphasis in original]).

42 *Ibid* at 352.

43 Edwards, "Consent and the Rough Sex Defence," *supra* note 19 at 296–97; Yardley, *supra* note 2 at 1840, 1844.

44 Edwards, "Consent and the Rough Sex Defence," *ibid* at 296, relying on Carol Smart, *Feminism and the Power of Law* (London, UK: Routledge, 1989) at 38–39.

45 *Ibid* at 297 [footnotes omitted].

46 Bows & Herring, *supra* note 4 at 531, 534, citing comments by Laura Farris MP, House of Commons, "Notice of Amendments Given up to and Including Wednesday 29th April 2020" (session 2019–21), online: <publications.parliament.uk/pa/bills/cbill/58-01/0096/amend/domestic_rm_pbc_0429.1-7.html>.

47 Yardley, *supra* note 2 at 1843.

patterns of entrenched misogyny and coercive control and the acts in question are concealed when injuries are represented as the accidental outcomes of consensual practices.[48]

III. DEFENCES TO SEXUAL ASSAULT

It is important to understand the doctrinal vehicles through which discriminatory reasoning and victim blaming are manifested in rough sex cases and how the case law has evolved to create an additional hurdle for the Crown when dealing with this defence. There are two main mechanisms for raising a rough sex defence for an accused charged with assault or sexual assault: the *actus reus* defence of consent and the *mens rea* defence of honest but mistaken belief in consent, the former employed more often than the latter. Both defences often rely improperly on the woman's prior sexual history to lay the groundwork for "consent" or the accused's "mistake."[49]

A. CONSENT DEFENCE

The general principle in Canadian criminal law that people cannot consent to their own deaths or to non-trivial injuries that are reasonably foreseeable ought to bar a rough sex defence when a woman suffers bodily harm, maiming or death.[50] In 1991 in *R. v. Jobidon*,[51] the Supreme Court set out public policy reasons for limiting consent as a defence when fist fights cause non-trivial bodily harm or death, focusing on the social uselessness of fist fights and their potential to lead to serious breaches of the peace. The Supreme Court acknowledged that other limits on consent might be necessary in future cases to be developed on a case-by-case basis.[52]

Four years later, the Court of Appeal for Ontario applied *Jobidon* in *R. v. Welch*,[53] an appeal from a sexual assault causing bodily harm conviction where the accused claimed consensual sadomasochism. The complainant testified that she did not consent to any sexual contact and described a violent rape where the accused beat her with a belt and inserted an object into her rectum, causing prolonged bleeding. The appeal turned not on whether the complainant had consented, but rather on whether the complainant *could* consent to such activity for her own (alleged) sexual pleasure. The Court held that consent could not be given to dehumanizing and degrading activity when the resulting bodily harm was reasonably foreseeable:

> Although the law must recognize individual freedom and autonomy, when the activity in question involves pursuing sexual gratification by deliberately inflicting pain upon another that gives rise to bodily harm, then

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48 *Ibid* at 1857.

49 Suzanne Zaccour, "'I'm Telling You, She Likes It Rough': Sexual History Evidence, Consent and the BDSM Defence in Canadian Sexual Assault Trials" (2021) 33:4 Child & Family LQ 347 at 348. See generally Busby, *supra* note 20.

50 *Criminal Code*, RSC 1985, c C-46, s 14.

51 [1991] 2 SCR 714 [*Jobidon*]. See also *R v Bruce* (1995), 55 BCAC 62 at para 16 (where the Court of Appeal for British Columbia expressed the view that the public policy concerns in *Jobidon* justifying the vitiation of consent should be given a stricter interpretation in the context of domestic violence).

52 *Jobidon*, *ibid* at para 125.

53 (1995), 25 OR (3d) 665 (CA) [*Welch*].

> the personal interest of the individuals involved must yield to the more compelling societal interests which are challenged by such behaviour.[54]

> Specifically, the majority in *Jobidon* recognized that consent may be a defence to certain activities such as rough sporting activities, medical treatment, social interventions, and "daredevil activities" performed by stuntmen, "in the creation of a socially liable cultural product". Acts of sexual violence, however, were conspicuously not included among these exceptions.[55]

As Janine Benedet has noted, the ruling in *Welch* spares complainants from being cross-examined on whether they enjoyed themselves in circumstances resulting in serious injuries.[56]

However, in a series of decisions in Ontario, starting with *R. v. Amos*[57] and ending with *R. v. D.K.*,[58] the Court of Appeal for Ontario has rendered these clear principles fraught and fragile, thus opening the door to men's claims that women consented to rough sex where they have experienced bodily harm. The Court of Appeal has twisted the statement from *Welch*, "deliberately inflicting pain upon another that gives rise to bodily harm,"[59] into a requirement that not only must the infliction of pain be intentional, but so too must the bodily harm. This interpretation flies in the face of the fact that assault and sexual assault causing bodily harm have no such *mens rea* requirement, as long as the underlying touching was intentional and bodily harm was reasonably foreseeable.[60]

The Court explicitly overruled *Welch* in *Zhao*,[61] a case in which the complainant agreed to participate in some consensual petting, but when the accused came toward her holding a condom, she immediately withdrew that consent. She described herself as crouching in a corner with her hands in front of her face. She tried to escape and the accused grabbed her by her underwear. She testified that she was afraid for her life and that she was screaming for help when he began to strangle her.[62]

The trial judge charged the jury on sexual assault causing bodily harm but did not instruct the jury that it must find the accused intentionally inflicted the bodily harm. The appeal court overturned *Welch*, holding that consent is only vitiated by bodily harm where that bodily harm was intentionally caused.[63] The Court set out a confusing instruction for the jury, stating that first it should determine whether the accused intended to inflict bodily harm beyond a reasonable doubt. If proven, consent is irrelevant. If unproven, the jury should go

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54 *Ibid* at para 88.

55 *Ibid* at para 87. The Court added at para 89 that "[q]uite simply it is suggested that hurting people is wrong and this is so whether the victim consents or not, or whether the purpose is to fulfil a sexual need or to satisfy some other desire."

56 *R v Zhao*, 2013 CarswellOnt 5207 (note by Janine Benedet) [Benedet, "*R v Zhao*"]; *R v Zhao*, 2013 ONCA 293 [*Zhao*].

57 1998 CarswellOnt 3117 (CA) [*Amos*]. *Amos* was followed by *R v Robinson* (2001), 153 CCC (3d) 398 (Ont CA) [*Robinson*]; *R v Quashie* (2005), 198 CCC (3d) 337 (Ont CA) [*Quashie*]; *Zhao*, *ibid*.

58 2020 ONCA 79 [*DK*].

59 *Welch*, *supra* note 53 at para 88.

60 *R v DeSousa*, [1992] 2 SCR 944 at 966; *R v Godin*, [1994] 2 SCR 484 at 485; *R v Williams*, 2003 SCC 41 at para 22.

61 *Zhao*, *supra* note 56.

62 *Ibid* at para 17.

63 *Ibid* at para 108.

on to consider whether the complainant did not consent to the sexual activity beyond a reasonable doubt.

It is deeply problematic to consider whether the accused intended bodily harm before making the consent determination.[64] How can vitiation of consent be determined before an assessment of whether there was any consent to begin with? This approach distorts the non-consent inquiry by asking whether we should nullify the complainant's consent before her consent has been established, which risks tilting the inquiry toward a conclusion that she consented.

In another Ontario case, *DK*,[65] the complainant described a violent rape by her intimate partner causing her to lose 40 percent of her blood volume; she testified that she acquiesced because she was afraid. The accused informed paramedics that her injuries were from rough sex and the complainant testified that the accused had told her to tell the paramedics the same story. The trial judge convicted the accused of sexual assault, yet acquitted him of the more serious charge involving bodily harm because he had a reasonable doubt about whether the accused intended to cause bodily harm.[66]

The appellate Court quashed the conviction on other grounds but made clear the trial judge's mistake:

> The trial judge blurred the distinction between (1) cases where bodily harm is caused during non-consensual sexual activity, and (2) cases where consent is vitiated through the intentional infliction of bodily harm. In the first category of cases, all the Crown is required to prove is objective foreseeability of bodily harm; in the second category, in order to vitiate consent, the Crown must prove the bodily harm was both caused and intentional.[67]

The Court did not comment on the order of analysis from *Zhao*, where vitiation is apparently determined before non-consent has been determined.[68] Both *Zhao* and *DK* indicate that where the Crown fails to prove non-consent to sexual contact, it must prove that the accused intended bodily harm in order for consent to be vitiated. What this means is that those who consent to some form of sexual contact — often intimate partners or women in the sex trade — run a particular risk that the violence against them will not be recognized.[69]

The Court of Appeal of Alberta explicitly declined to follow the Ontario approach and the requirement for the intentional infliction of bodily harm in the homicide context in *Barton*,[70] the facts of which are described above.[71] This issue arose because one path to establishing culpable homicide was to argue that any consent to sex was vitiated because of the fatal bodily harm caused to the victim. Both the Court of Appeal and the Supreme Court of

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64 See also Benedet, "*R v Zhao*," *supra* note 56.
65 *Supra* note 58.
66 *Ibid* at para 20.
67 *Ibid* at para 23.
68 In fact, *Zhao*, *supra* note 56 is not cited once in the decision.
69 For cases involving complainants in the sex trade, see e.g. *R v Barton*, 2017 ABCA 216 [*Barton* ABCA]; *R v Strong*, 2021 ONSC 1906 [*Strong*]; *R v MS*, 2010 ONCJ 600 [*Stratton*] (judgment on dangerous offender application); *R v Davidson*, 2010 BCPC 228 [*Davidson*].
70 *Barton* ABCA, *ibid*.
71 See Part I. Introduction, above, for the details of the case.

Canada[72] declined to decide the issue. The Court of Appeal acknowledged that *Jobidon* left open the possibility of looking at the policy issues in a particular context and noted that in the context of homicide, the policy scale may point toward vitiation of consent because where the victim is not alive to testify to what happened to her, the ease of raising the defence must be mitigated.[73]

Barton was found guilty of manslaughter at his second trial,[74] where the judge instructed the jury that in the context of "a commercial sexual transaction, in which the sexual service provider died as a result of the sexual activity," any consent the deceased may have given was vitiated if the accused intended, was reckless, or wilfully blind to causing bodily harm.[75] However, the same Court of Appeal has recently followed the Ontario approach in *Zhao* in a sexual assault case, *R. v. A.E.*,[76] discussed in detail below, in finding that any purported consent was vitiated because the accused intended to cause bodily harm.

As Suzanne Zaccour has demonstrated, the rough sex defence facilitates admission of the woman's alleged prior rough sex history.[77] This evidence should be regarded as prima facie inadmissible on consent because it relies on the prohibited "twin myths" reasoning that because a woman has allegedly previously consented to rough sex, it makes it more likely that she did so on this occasion. Some judges nevertheless see prior rough sex evidence as highly relevant and admissible. For example, the judge in *R. v. B.(B.)* admitted the evidence:

> I am concerned that the jury could not properly understand the defence of consent to aspects of the sexual activity involving bondage, as testified to by Mr. B., without knowing if the complainant previously consented to this type of sexual activity in the context of their relationship in the months leading up to the alleged assault.
>
> …
>
> There is no issue of discriminatory belief or bias.[78]

B. MISTAKEN BELIEF IN CONSENT

The accused can also make a mistaken belief in consent claim — that even if the complainant did not consent, he mistakenly believed that she did.[79] Here, as is also true for a consent defence, sexual history evidence is offered to support prohibited inferences that are

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72 *R v Barton*, 2019 SCC 33.

73 *Barton* ABCA, *supra* note 69 at para 306.

74 *R v Barton*, 2021 ABQB 603 [*Barton* ABQB] (sentencing decision for manslaughter conviction).

75 *R v Barton*, 2020 ABQB 774 at para 107. See the defence's appeal notice, reported in "Ontario Trucker in Prison for Killing Cindy Gladue in Edmonton Hotel Appeals Conviction, Sentence," *Global News* (25 August 2021), online: <globalnews.ca/news/8140798/barton-cindy-gladue-yellowhead-inn-edmonton-manslaughterappeal/?fbclid=IwAR1lDl1TSlvtJ8ENCteKUEVlD6b1qP_F2ncSSIM5tI>.

76 2021 ABCA 172 [*AE*].

77 Zaccour, *supra* note 49 at 348. See also Busby, *supra* note 20.

78 *R v B(B)* (2009), 64 CR (6th) 58 (Ont Sup Ct) at paras 21, 24.

79 See e.g. *R v Gairdner*, 2017 BCCA 425 at para 2 [*Gairdner*] (where the accused raised a mistaken belief in consent defence on the basis that he was engaged in a BDSM role-play with the complainant where "no" meant "yes"); *R c SB*, 2013 QCCQ 6676 at para 12 [*SB*] (where the accused argued that he had an honest but mistaken belief in the complainant's consent because they had previously engaged in consensual sadomasochistic role-playing during sex without advance agreement).

simply re-wrapped as the accused's belief that, because the complainant consented before, the accused mistakenly believed she consented on the occasion in question.[80] Similar arguments were accepted in cases involving anal intercourse; dominant/submissive scenarios, including rape fantasies; striking and strangulation; and sadomasochism. For example, in *R. v. Ross*, the judge admitted evidence that the couple engaged in dominant/submissive sexual activity even though on the occasion at issue the accused acknowledged that he did not seek consent. The judge said that "the overall sexual activity of this couple" was relevant to the accused's alleged mistaken belief.[81] We note that the Supreme Court's decision in *R. v. Goldfinch* should preclude such generic uses of sexual history evidence to provide "context" for alleged rough sex defences in the future.[82]

Once this kind of evidence is admitted, the complainant may face an even more pitched credibility battle on the issues of consent and mistaken belief. Even in cases where the woman has died from her injuries and cannot contest the claim, judges have permitted men accused of homicide to introduce evidence alleging that the deceased had consented to rough sex with other men.[83]

IV. OUR CASE SAMPLE

We searched for reported Canadian cases in English and French dealing with some version of the rough sex defence. Our case sample covers the period of 1988 to 2021, inclusive.[84] We relied exclusively on the databases of Westlaw, Lexis Advance, and CanLII.[85] We searched for cases where the Crown case alleged that injuries were suffered by the complainant (whether or not the accused was charged with causing bodily harm) and where the complainant asserted either that she did not consent, that she consented to some sexual activity but the accused exceeded the scope of her consent, or where the complainant initially indicated that she did not consent and later recanted her evidence. We also looked for cases where the accused argued consent to rough sex, consent to the infliction of bodily harm, or consent to sexual contact that in some way caused bodily harm, including death.

We recognize that our findings from these searches may paint an incomplete picture of what is happening in Canadian courts because many trial level decisions remain unreported. We suspect that only a small percentage of the total cases charged make it to a final verdict, let alone to written reasons. Jury verdicts and guilty pleas will have been missed unless there are published reasons for sentence or an appeal. Our searches may have identified the more serious cases since those are more likely to go to trial and probably more likely to result in convictions. While our findings may not provide a precise picture of how the rough sex

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80 See e.g. *R v B*, 2014 ONSC 6709 at para 14; *R v ENG*, 2015 MBQB 95 at paras 22–24.

81 *R v Ross*, 2014 SKQB 50 at para 39. See also *R v Sweet*, 2018 BCSC 1696 at paras 4, 167 [*Sweet*].

82 2019 SCC 38 at para 72 [*Goldfinch*].

83 See e.g. *R v Garnier*, 2017 NSSC 341.

84 The earliest case we found was from 1988.

85 We found cases citing ss 271 (sexual assault), 272 (sexual assault causing bodily harm or with a weapon), 273 (aggravated sexual assault), and 222 (homicide) of the *Criminal Code*, *supra* note 50 and searched within those results using: "rough sex" OR "BDSM" OR "sadomasochism" OR "erotic asphyxiation" OR "bondage" OR "kinky" OR "sex game." We also ran broader searches of all cases in those three databases using: "rough sex" OR "sex game"; "consent" /s "rough sex"; and ("sexual assault" or "sexual offence") AND (consent /s "bodily harm" OR "rough sex"). We narrowed all the results by our time period of 1 January 1988 to 31 December 2021.

defence is being used in Canada, they do give us a powerful indication of how judges are approaching this issue.

We found a total of 93 completed cases.[86] Within these cases, there were 97 complainants[87] and 98 accused.[88] Of the 93 cases, 75 cases involved sexual assault charges, broken down as follows:

TABLE 1:
SEXUAL ASSAULT CHARGE LAID

Highest Sexual Assault Charge Laid	**N (%)**
Level 2 or 3 sexual assault causing bodily harm, aggravated sexual assault, sexual assault with a weapon, or sexual assault with another person[89]	42[90] (56%)
Level 1 sexual assault[91]	33[92] (44%)
Total	75 (100%)

86 We considered a matter to be "complete" if it resulted in a reported appeal, conviction (via trial or guilty plea), acquittal, sentencing, or combination of these results. We also found a number of rough sex cases that had reported judgments involving section 276 applications, which we excluded.

87 All of the completed cases involved one complainant, except for *Davidson*, *supra* note 69 (three complainants); *R v Sanmugarajah*, 2018 ONCJ 661 [*Sanmugarajah*] (two complainants); *Strong*, *supra* note 69 (two homicide victims).

88 All of the completed cases involved one accused, except for *AE*, *supra* note 76 (3 accused); *R v Bohorquez*, 2019 ONSC 1643 [*Bohorquez*] (2 accused); *R v Hancock*, 2000 BCSC 1581 [*Hancock*] (2 accused); *R v MacMillan*, 2020 ONSC 3299 [*MacMillan*] (2 accused). We only counted adult accused in our case sample, although one of the accused in *AE* was a minor who was sentenced separately as a youth.

89 Sexual assault charges under sections 272–73 of the *Criminal Code*, *supra* note 50.

90 The cases are: *R v CA*, 2011 ONSC 291 [*A(C)*]; *AE*, *supra* note 76; *R c Afriat*, [1988] RJQ 2906 (CQ crim & pén) [*Afriat*]; *Amos*, *supra* note 57; *R v Atagootak*, 2003 NUCA 3 [*Atagootak*]; *R v Barker*, 1997 NSCA 90 [*Barker*]; *R v Beaudry*, 2016 CM 4010 [*Beaudry*]; *Bohorquez*, *supra* note 88; *Boyle*, *supra* note 9; *DK*, *supra* note 58; *Gairdner*, *supra* note 79; *R v Glassford* (1988), 42 CCC (3d) 259 (Ont CA) [*Glassford*]; *R v Gonzalez-Hernandez*, 2011 BCSC 392 [*Gonzalez-Hernandez*]; *R v Graham*, 2019 ONCA 347 [*Graham*]; *R v Headley*, 2014 ONCJ 501 [*Headley*]; *R v KG*, 2018 ONCJ 537 [*KG*]; *R v Kilbourne*, 2013 MBPC 21 [*Kilbourne*]; *R v Laporte*, 2012 MBQB 230 [*Laporte*]; *R v Lavergne-Bowkett*, 2013 BCSC 1737 [*Lavergne-Bowkett*]; *R v Lozano Lopez*, 2015 BCCA 311 [*Lozano Lopez*]; *MacMillan*, *supra* note 88; *R v Nelson*, 2014 ONCA 853 [*Nelson*]; *R c Oakes*, [2003] JQ No 9538 (QC CA) [*Oakes*]; *R v Olotu*, 2016 SKCA 84 [*Olotu*]; *R v P(JA)*, 1998 CarswellOnt 5292 (Ct J (Gen Div)) [*P(JA)*]; *R v Percy*, 2020 NSSC 138 [*Percy*]; *R v PO*, 2021 ABQB 318 [*PO*]; *Quashie*, *supra* note 57; *R v RDW*, 2006 BCPC 300 [*RDW*]; *Robinson*, *supra* note 57; *R c Roy*, 2010 QCCQ 7927 [*Roy*]; *R v JRS*, 2013 BCSC 1363 [*S(JR)*]; *Sanmugarajah*, *supra* note 87; *R v Spencer* (1991), 10 CR (4th) 26 (Man Prov Ct (Crim Div)) [*Spencer*]; *Sweet*, *supra* note 81; *R v Tedjuk*, 2004 SKQB 418 [*Tedjuk*]; *R v Threefingers*, 2016 ABCA 225 [*Threefingers*]; *R c Touchette*, 2016 QCCA 460 [*Touchette*]; *R v Vandermeulen*, 2013 MBQB 118 [*Vandermeulen*]; *Welch*, *supra* note 53; *R v White-Halliwell*, 2019 ONSC 597 [*White-Halliwell*]; *Zhao*, *supra* note 56.

91 Sexual assault charges under section 271 of the *Criminal Code*, *supra* note 50.

92 The cases are: *R v B(AJ)*, 2006 CarswellMan 498 (Prov Ct) [*B(AJ)*]; *R v Bear-Knight*, 2021 SKQB 308 [*Bear-Knight*]; *R v ERC*, 2016 MBCA 74 [*Catellier*]; *R v CC*, 2018 ONSC 1262 [*CC*]; *R v CI*, 2021 ONCJ 43 [*CI*]; *R v Cross*, 2015 ONSC 4251 [*Cross*]; *Davidson*, *supra* note 69; *R v DC*, 2017 ONSC 5775 [*DC*]; *R v E(JA)*, 2006 CarswellOnt 5577 (Ct J) [*E(JA)*]; *R v Gendreau*, 2011 ABCA 256 [*Gendreau*]; *R v GOG*, 2000 BCPC 10 [*GOG*]; *R v Gulliver*, 2017 ABCA 223 [*Gulliver*]; *R v Hillier*, 2021 NLSC 108 [*Hillier*]; *R v Hoskins*, 2021 SKCA 23 [*Hoskins*]; *R v Hunter*, 2019 NSSC 369 [*Hunter*]; *JA*, *supra* note 15; *R v JP*, 2020 ONCA 162 [*JP*]; *R v JWS*, 2012 NSPC 102 [*JWS*]; *R v Kotio*, 2021 NSCA 76 [*Kotio*]; *R v Lawrence*, 2015 BCCA 358 [*Lawrence*]; *R v Meyers*, 2016 SKQB 413 [*Meyers*]; *R v AP*, 2013 ONCA 344 [*P(A)*]; *R v RW*, 2020 ONCJ 148 [*RW*]; *R v S(M)*, 1999 CarswellOnt 2881 (Ct J) [*S(M)*]; *R v SAM*, [1993] OJ No 4240 (Ct J (Gen Div)) [*SAM*]; *SB*, *supra* note 79; *R v TS*, 2012 ONSC 6070 [*Seaton*]; *R v Shepperd*, 2018 ONCJ 692 [*Shepperd*]; *R v Skoyen*, 2020 BCSC 362 [*Skoyen*]; *R v Stewart*, 2001 YKCA 10 [*Stewart*]; *Stratton*, *supra* note 69; *R v Ussa*, 2014 MBCA 71 [*Ussa*]; *R v Went*, 2004 BCSC 1205 [*Went*].

As we will discuss in more detail below, this case sample included very serious sexual assaults with a much higher number of level 2 and level 3 charges than is generally the case.[93]

In addition to the 75 sexual assault cases, we found ten cases involving the culpable homicides of 11 victims by 11 accused.[94] There were six cases involving first degree murder charges,[95] one involving second degree,[96] and three manslaughter charges.[97] Among these ten homicide cases, all the men claimed that the victim died as a result of "a sex game gone wrong," with the exception of one man who denied he killed his wife.[98] Three of the 11 homicide victims were women in the sex trade, who are particularly vulnerable to being on the wrong end of a rough sex defence because of stereotypes about their perpetual state of consent to sexual activity, however violent.[99] Three of the 11 victims were current or former intimate partners of the accused.[100]

Finally, we also found eight assault offences involving the rough sex defence.[101] These cases took three different forms. In four cases, the complainant alleged a violent non-sexual assault, but the accused maintained that the injuries were caused during consensual rough sex.[102] In two cases, the complainant testified that her injuries were sustained during violent sex but only assault charges were laid.[103] Finally, in two cases, the complainant alleged a violent assault but then recanted and testified that the injuries resulted from consensual rough sex.[104]

Many of the accused charged with either sexual assault or assault faced other charges, most commonly overcoming resistance by choking, suffocation or strangulation,[105] unlawful confinement,[106] and uttering threats.[107]

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93 See Part V.B, The Minimization of "Bodily Harm," below, for further discussion on this point.

94 The cases are: *R c Baril*, 2012 ABQB 428 [*Baril*]; *R c Deschatelets*, 2013 QCCQ 1948 [*Deschatelets*]; *Barton* ABCA, *supra* note 69; *R v Garnier*, 2018 NSSC 196 [*Garnier*]; *R v Guenther*, 2017 ABCA 205 [*Guenther*]; *Hancock*, *supra* note 88; *R v Liu*, [2004] OJ No 4221 (Ont CA) [*Liu*]; *R v Mcilwaine*, [1996] RJQ 2529 (QC CA) [*Mcilwaine*]; *Toupin-Houle c R*, 2017 QCCS 2280 [*Toupin-Houle*]; *Strong*, *supra* note 69. All the cases involved one victim, except for *Strong*, *ibid*, and all the cases involved one accused, except for *Hancock*, *ibid*.

95 *Barton* ABCA, *ibid*; *Guenther*, *ibid*; *Liu*, *ibid*; *Mcilwaine*, *ibid*; *Toupin-Houle*, *ibid*; *Strong*, *ibid*.

96 *Garnier*, *supra* note 94.

97 *Baril*, *supra* note 94; *Deschatelets*, *supra* note 94; *Hancock*, *supra* note 88.

98 *Liu*, *supra* note 94.

99 *Barton* ABCA, *supra* note 69 (one victim); *Strong*, *supra* note 69 (two victims).

100 *Deschatelets*, *supra* note 94 (current intimate partners); *Guenther*, *supra* note 94 (ex-intimate partners); *Liu*, *supra* note 94 (married).

101 The cases are: *R v Bolger*, 2019 CarswellNfld 365 (Prov Ct) [*Bolger*]; *R v Ceelen*, 2011 ONSC 4764 [*Ceelen*]; *R v Finnister*, 2010 ONCJ 14 [*Finnister*]; *R v Giroux*, 2015 ABPC 208 [*Giroux*]; *R v Gosse*, 2015 ONCJ 177 [*Gosse*]; *R v Pacheco*, 2015 ONCJ 485 [*Pacheco*]; *R v Reid*, 2019 ONSC 2165 [*Reid*]; *R v Tompkins*, 2017 ONSC 5524 [*Tompkins*].

102 *Finnister*, *ibid*; *Pacheco*, *ibid*; *Reid*, *ibid*; *Tompkins*, *ibid*.

103 *Bolger*, *supra* note 101 (complainant and accused had consensual sex; issue was whether complainant consented to striking and hitting during sex); *Ceelen*, *supra* note 101 (complainant consented to rough sex, but the accused caused bodily harm that was neither trivial nor transitory; therefore, consent was vitiated).

104 *Giroux*, *supra* note 101; *Gosse*, *supra* note 101.

105 See e.g. *Beaudry*, *supra* note 90; *Gairdner, supra* note 79; *Gosse*, *ibid*; *Lawrence*, *supra* note 92; *Vandermeulen*, *supra* note 90.

106 See e.g. *SB*, *supra* note 79; *Barker*, *supra* note 90; *Boyle*, *supra* note 9; *Finnister*, *supra* note 101; *Gendreau*, *supra* note 92.

107 See e.g. *B(AJ)*, *supra* note 92; *Gulliver*, *supra* note 92; *JP*, *supra* note 92; *Kilbourne*, *supra* note 90; *Meyers*, *supra* note 92.

A. THE GENDERED NATURE OF ROUGH SEX

The most striking finding from our case sample was the degree to which consent as a defence to violent sex in these cases is deeply gendered. Every one of the 98 accused in these cases was male. The victims were overwhelmingly female. Of the 97 complainants, there were only three male victims, two in homicide cases and one in a sexual assault.[108] In the ten homicide cases, all the perpetrators were male and nine of the 11 victims were female.[109] In the eight assault cases, all the perpetrators were male and all the complainants were female. Thus, the reported cases suggest that it is *only* men committing these crimes and overwhelmingly women who are on the losing end of rough sex. Our case sample would thus suggest that the rough sex defence is a problem of male violence against women.

These cases obscure the racialized nature of sexual and other violence against women. As an outcome of colonization, cultural dislocation, and poverty, Indigenous women and girls continue to face extreme forms of marginalization, including being targeted for violence at rates that are many times those of other women. For example, "more than six in ten (63%) Indigenous women have experienced physical or sexual assault in their lifetime."[110] Yet with the exception of sentencing decisions where section 718.2(e) requires that options other than imprisonment be considered for Indigenous offenders,[111] reported cases usually erase "race" from the narrative such that the racial identity of a complainant is unavailable. Compared to the rest of the cases in our sample, cases such as *Barton* or *Laporte* stand out because they clearly identified the victim as an Indigenous woman.[112]

B. ROUGH SEX AND INTIMATE RELATIONSHIPS

A majority of the perpetrators were known to their victim.

TABLE 2:
VICTIM -ACCUSED RELATIONSHIP IN ALL CASES

Relationship	**N (%)**
Current intimate partners[113] (legally married, common-law, dating, or other intimate relationship)	41 (44.1%)
Former intimate partners	5 (5.4%)

108 The complainant was male in *Hancock*, *supra* note 88 (homicide); *Mcilwaine*, *supra* note 94 (homicide); *RW*, *supra* note 92 (sexual assault).

109 The complainants were women in all but *Hancock*, *ibid* and *Mcilwaine*, *ibid*.

110 Statistics Canada, *Violent Victimization and Perceptions of Safety: Experiences of First Nations, Métis and Inuit Women in Canada*, by Loanna Heidinger, Catalogue No 85-002-X (Ottawa: Statistics Canada, 26 April 2022) at 3, online: <www150.statcan.gc.ca/n1/en/pub/85-002-x/2022001/article/00004-eng.pdf?st=Ya7D8wj5>.

111 Appellate courts have started to consider whether this section also applies to sentencing Black offenders. See e.g. *R v Morris*, 2021 ONCA 680; *R v Anderson*, 2021 NSCA 62.

112 *Barton* ABCA, *supra* note 69; *Laporte*, *supra* note 90.

113 We defined "intimate partner" as "current and former legally married spouses, common-law partners, dating partners, and other intimate partner relationships": Statistics Canada, *Intimate Partner Violence in Canada, 2018: An Overview*, by Adam Cotter, Catalogue No 85-002-X (Ottawa: Statistics Canada, 26 April 2021) at 3, online: <www150.statcan.gc.ca/n1/en/pub/85-002-x/2021001/article/00003-eng.pdf?st=CHWkavEC>. We interpreted "other intimate partner relationships" to mean pre-existing relationships of a sexual nature with no other elements of dating, such as a so-called "friends-with-benefits" relationship.

Relationship	**N (%)**
Exchanging sex for money	7 (7.5%)
Friends or casual acquaintances[114]	20 (21.5%)
Strangers[115]	16 (17.2%)
Unknown relationship	4 (4.3%)
Total	93 (100%)

Approximately half of the cases in our database (49.5 percent) involved allegations against men who were current or former intimate partners of the complainant. Overall, women were much more likely to be harmed by men with some degree of access to them than by strangers.[116] There was a documented history of domestic violence in 20 of the cases.[117] It is also important to recognize that coercively controlling relationships often involve men making violent sexual demands to further their use of humiliation, pain, and fear to control and isolate their female partners.[118]

C. THE DISTORTION OF WOMEN'S ALLEGATIONS

Our case law sample suggests that it is wrong to construct the rough sex issue as being primarily about women's sexual agency to engage in BDSM. Where women survived, they claimed that they did not consent to rough sex[119] or, more often, to any sexual contact at all.[120] Instead, the argument that the complainant consented to rough sex was used to distort what would otherwise be seen as a violent rape[121] and, often, domestic violence.[122]

There were 83 cases where the complainant survived the sexual or other violence. In only two cases did the complainant say that she agreed to the violence, including one case where the complainant was a 16-year-old girl who allegedly agreed to serious and disfiguring

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114 We defined "casual acquaintance" as "a social relationship which is neither long-term nor close": Statistics Canada, *Measuring Violence Against Women: Statistical Trends*, by Maire Sinha, ed, Catalogue No 85-002-X (Ottawa: Statistics Canada, 25 February 2013) at 36, online: <www150.statcan.gc.ca/n1/en/pub/85-002-x/2013001/article/11766-eng.pdf?st=VMF-oo5h>.

115 While there is no standard definition of "stranger" accepted by Statistics Canada, we defined this relationship as one where the parties only met in person for the first time on the night of the incident.

116 See further Sofia Persson & Katie Dhingra, "Attributions of Blame in Stranger and Acquaintance Rape: A Multilevel Meta-Analysis and Systematic Review" (2020) 23:3 Trauma, Violence, & Abuse 795 at 795; Yardley, *supra* note 2 at 1842–43.

117 *SB*, *supra* note 79; *B(AJ)*, *supra* note 92; *Bolger*, *supra* note 101; *Boyle*, *supra* note 9; *Catellier*, *supra* note 92; *CC*, *supra* note 92; *CI*, *supra* note 92; *DK*, *supra* note 58; *E(JA)*, *supra* note 92; *Giroux*, *supra* note 101; *JA*, *supra* note 15; *KG*, *supra* note 90; *Liu*, *supra* note 94; *Pacheco*, *supra* note 101; *S(JR)*, *supra* note 90; *SAM*, *supra* note 92; *Stewart*, *supra* note 92; *Stratton*, *supra* note 69; *Tompkins*, *supra* note 101; *P(A)*, *supra* note 92.

118 Yardley, *supra* note 2 at 1843; Evan Stark, "Foreword" in Louise McOrmond-Plummer, Jennifer Y Levy-Peck & Patricia Easteal, eds, *Perpetrators of Intimate Partner Sexual Violence: A Multidisciplinary Approach to Prevention, Recognition, and Intervention* (Abingdon: Routledge, 2017) xx.

119 In 19 percent of the cases in our sample where the complainant survived, the complainants testified that they only consented to sex without violence.

120 In 64 percent of the cases in our sample where the complainant survived, the complainants did not have capacity to consent or testified that they did not consent to any sex at all.

121 See e.g. *DC*, *supra* note 92; *Hillier*, *supra* note 92; *Robinson*, *supra* note 57.

122 See e.g. *SB*, *supra* note 79; *Boyle*, *supra* note 9; *CI*, *supra* note 92.

cuts on her body with a razor blade.[123] It was somewhat more likely (16 cases) for a complainant to testify that she agreed to sexual activity, sometimes involving some violence, but that the accused exceeded the scope of that agreement despite attempts by the complainant to communicate her objection.[124] In 53 of the 83 cases — 64 percent — the complainant testified or otherwise reported that she did not consent to any sex or lacked the capacity to consent.[125]

Looking specifically at the 42 cases involving charges of level 2 or 3 sexual assault, all accused — with the exception of one who pleaded guilty — argued either that the complainant consented or that he mistakenly believed she consented to the sexual activity involving some form of rough sex, with the injuries occurring accidentally.[126] In 27 cases (64 percent), the complainant reported that she did not consent to *any* sexual activity,[127] and in another four cases, that she lacked capacity to consent.[128] In five cases, complainants said they consented to sexual activity but not to violence.[129] In three cases, they consented to some form of rough sex, but the accused either acted beyond the complainant's consent or refused to stop when asked.[130] In only one sexual assault case involving more serious charges did the complainant allegedly agree to the full degree of bodily harm caused by the accused.[131]

These cases have all the indicia of very serious male violence against women, with the rough sex defence being used to effectively suggest that "she asked for it." As one trial judge

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123 The accused "cut the word 'Rothe,' meaning slave in a fictional language … in [to the complainant's] back. He also cut a star like an inverted pentagram on the back part of her shoulder": *RDW*, *supra* note 90 at para 8. These acts caused serious and permanent scarring requiring surgery. The second case was *Ceelen*, *supra* note 101 (complainant consented to rough anal sex, which was vitiated by an anal tear).

124 *Afriat*, *supra* note 90; *A(C)*, *supra* note 90; *AE*, *supra* note 76; *Amos*, *supra* note 57; *Catellier*, *supra* note 92; *Cross*, *supra* note 92; *Davidson*, *supra* note 69; *Gairdner*, *supra* note 79; *Hunter*, *supra* note 92; *Kotio*, *supra* note 92; *Lozano Lopez*, *supra* note 90; *RW*, *supra* note 92; *Sanmugarajah*, *supra* note 87; *Skoyen*, *supra* note 92; *Stratton*, *supra* note 69; *White-Halliwell*, *supra* note 90.

125 *Oakes*, *supra* note 90; *Roy*, *supra* note 90; *SB*, *supra* note 79; *Touchette*, *supra* note 90; *B(AJ)*, *supra* note 92; *Barker*, *supra* note 90; *Bear-Knight*, *supra* note 92; *Beaudry*, *supra* note 90; *Bohorquez*, *supra* note 88; *Boyle*, *supra* note 9; *CC*, *supra* note 92; *CI*, *supra* note 92; *DC*, *supra* note 92; *DK*, *supra* note 58; *E(JA)*, *supra* note 92; *Gendreau*, *supra* note 92; *Glassford*, *supra* note 90; *GOG*, *supra* note 92; *Gonzalez-Hernandez*, *supra* note 90; *Graham*, *supra* note 90; *Gulliver*, *supra* note 92; *Headley*, *supra* note 90; *Hillier*, *supra* note 92; *Hoskins*, *supra* note 92; *JP*, *supra* note 92; *KG*, *supra* note 90; *Kilbourne*, *supra* note 90; *Laporte*, *supra* note 90; *Lavergne-Bowkett*, *supra* note 90; *Lawrence*, *supra* note 92; *MacMillan*, *supra* note 88; *Nelson*, *supra* note 90; *Olotu*, *supra* note 90; *P(JA)*, *supra* note 90; *Percy*, *supra* note 90; *Quashie*, *supra* note 57; *Robinson*, *supra* note 57; *S(JR)*, *supra* note 90; *S(M)*, *supra* note 92; *SAM*, *supra* note 92; *Seaton*, *supra* note 92; *Shepperd*, *supra* note 92; *Spencer*, *supra* note 90; *Stewart*, *supra* note 92; *Sweet*, *supra* note 81; *Tedjuk*, *supra* note 90; *Threefingers*, *supra* note 90; *Ussa*, *supra* note 92; *Vandermeulen*, *supra* note 90; *Welch*, *supra* note 53; *Went*, *supra* note 92; *Zhao*, *supra* note 56; *P(A)*, *supra* note 92.

126 The accused pleaded guilty in *RDW*, *supra* note 90.

127 *Barker*, *supra* note 90; *Beaudry*, *supra* note 90; *Bohorquez*, *supra* note 88; *Boyle*, *supra* note 9; *DK*, *supra* note 58; *Glassford*, *supra* note 90; *Gonzalez-Hernandez*, *supra* note 90; *Graham*, *supra* note 90; *Headley*, *supra* note 90; *KG*, *supra* note 90; *Kilbourne*, *supra* note 90; *Laporte*, *supra* note 90; *Lavergne-Bowkett*, *supra* note 90; *MacMillan*, *supra* note 88; *Nelson*, *supra* note 90; *Olotu*, *supra* note 90; *Percy*, *supra* note 90; *Quashie*, *supra* note 57; *Robinson*, *supra* note 57; *S(JR)*, *supra* note 90; *Spencer*, *supra* note 90; *Sweet*, *supra* note 81; *Tedjuk*, *supra* note 90; *Threefingers*, *supra* note 90; *Vandermeulen*, *supra* note 90; *Welch*, *supra* note 53; *Zhao*, *supra* note 56.

128 *Oakes*, *supra* note 90; *Roy*, *supra* note 90; *Touchette*, *supra* note 90; *P(JA)*, *supra* note 90.

129 *A(C)*, *supra* note 90; *AE*, *supra* note 76; *Amos*, *supra* note 57; *Sanmugarajah*, *supra* note 87; *White-Halliwell*, *supra* note 90.

130 *Afriat*, *supra* note 90; *Gairdner*, *supra* note 79; *Lozano Lopez*, *supra* note 90.

131 *RDW*, *supra* note 90 (although the complainant did not testify). In another case, *Atagootak*, *supra* note 90, it could not be discerned what the complainant's position on consent was. And in the remaining level 2 or 3 sexual assault case, *PO*, *supra* note 90, the complainant initially said she did not consent to any sex but later recanted. The trial judge in this case found that the video evidence of the sexual assault disclosed a total absence of consent.

commented after admitting sexual history evidence where an accused alleged consent to rough sex:

> When I allowed Mr. Sweet's s. 276 application, I thought this might be a case about possible grey areas in the law concerning the autonomy of adults to set ground rules for themselves to engage in consensual and pleasurable sexual activities, albeit with some level of pain.
>
> After hearing all of the evidence, however, it simply turns out to be a case involving a controlling, possessive, jealous man who perpetrated sexual violence on an intimate partner he professed to love. Sadly, this type of sexual violence against women continues to be far too common.[132]

D. CONVICTION RATE

The conviction rate in these cases was relatively high, which we suspect is a reflection of the devastating injuries many of these victims faced. We break down conviction rate by offence charged below.

TABLE 3:
CONVICTION AND ACQUITTAL RATES OF SEXUAL ASSAULT CASES

Outcome of Case	**N (%)**
Accused ultimately convicted of at least one sexual assault charge	50 (66.7%) • Level 1 cases: 22[133] • Level 2 or 3 cases: 28[134]
Accused ultimately acquitted of all sexual assault charges	13 (17.3%) • Level 1 cases: 7[135] • Level 2 or 3 cases: 6[136]
Accused pleaded guilty to simple assault	1[137] (1.3%)

132 *Sweet*, *supra* note 81 at paras 157–58. It bears noting that this case was decided a year before *Goldfinch*, *supra* note 82, and the trial judge's logic for permitting the sexual history evidence is precisely what the majority of the Supreme Court of Canada ruled out. See *Goldfinch*, *ibid* at para 62. Evidence that a complainant consented to sexual activity "with some level of pain" at "some point" in the past is now inadmissible to support an accused's claim of honest but mistaken belief in communicated consent.

133 *SB*, *supra* note 79; *B(AJ)*, *supra* note 92; *Catellier*, *supra* note 92; *CC*, *supra* note 92; *CI*, *supra* note 92; *Cross*, *supra* note 92; *Davidson*, *supra* note 69; *E(JA)*, *supra* note 92; *Gendreau*, *supra* note 92; *GOG*, *supra* note 92; *Gulliver*, *supra* note 92; *Hoskins*, *supra* note 92; *JA*, *supra* note 15; *JP*, *supra* note 92; *JWS*, *supra* note 92; *Lawrence*, *supra* note 92; *Meyers*, *supra* note 92; *S(M)*, *supra* note 92; *SAM*, *supra* note 92; *Skoyen*, *supra* note 92; *Stewart*, *supra* note 92; *Stratton*, *supra* note 69.

134 *AE*, *supra* note 76; *Roy*, *supra* note 90; *Touchette*, *supra* note 90; *Barker*, *supra* note 90; *Beaudry*, *supra* note 90; *Bohorquez*, *supra* note 88; *Gairdner*, *supra* note 79; *Glassford*, *supra* note 90; *Gonzalez-Hernandez*, *supra* note 90; *Graham*, *supra* note 90; *Kilbourne*, *supra* note 90; *Laporte*, *supra* note 90; *Lavergne-Bowkett*, *supra* note 90; *Lozano Lopez*, *supra* note 90; *MacMillan*, *supra* note 88; *Nelson*, *supra* note 90; *Olotu*, *supra* note 90; *P(JA)*, *supra* note 90; *Percy*, *supra* note 90; *PO*, *supra* note 90; *Quashie*, *supra* note 57; *S(JR)*, *supra* note 90; *Sanmugarajah*, *supra* note 87; *Spencer*, *supra* note 90; *Sweet*, *supra* note 81; *Tedjuk*, *supra* note 90; *Vandermeulen*, *supra* note 90; *Welch*, *supra* note 53.

135 *Bear-Knight*, *supra* note 92; *Hillier*, *supra* note 92; *Hunter*, *supra* note 92; *RW*, *supra* note 92; *Seaton*, *supra* note 92; *Shepperd*, *supra* note 92; *Went*, *supra* note 92.

136 *Afriat*, *supra* note 90; *A(C)*, *supra* note 90; *Amos*, *supra* note 57; *Boyle*, *supra* note 9; *KG*, *supra* note 90; *White-Halliwell*, *supra* note 90.

137 *RDW*, *supra* note 90.

Outcome of Case	**N (%)**
New trial ordered on appeal (and outcome of new trial unknown)	9[138] (12%)
Unknown or unclear	2[139] (2.7%)
Total	75 (100%)

As shown above, the accused were ultimately convicted in 51 cases. Only one of those cases involved a guilty plea. Of the remaining cases that were resolved through the trial process, 44 convictions were based on the trier of fact accepting that the complainant did not consent,[140] and two convictions were based on the complainant's consent being vitiated on public policy grounds.[141]

Eight of the 11 men charged with homicide were ultimately convicted after appeals and retrials,[142] and another two ultimately pleaded guilty: one to second degree murder[143] and one to manslaughter.[144] Finally, one man was convicted of first degree murder but granted a new trial on appeal.[145] While in several homicide cases arguments were made that the victim

138 *Oakes*, *supra* note 90; *Atagootak*, *supra* note 90; *DC*, *supra* note 92; *DK*, *supra* note 58; *Kotio*, *supra* note 92; *Robinson*, *supra* note 57; *Threefingers*, *supra* note 90; *Zhao*, *supra* note 56; *P(A)*, *supra* note 92.

139 *Headley*, *supra* note 90; *Ussa*, *supra* note 92.

140 *AE*, *supra* note 76 (but it was noted that if consent were proven, it would have been vitiated because of the surreptitious recording of the encounter); *Roy*, *supra* note 90 (but it was noted that if consent were proven, it would have been vitiated); *SB*, *supra* note 79; *Touchette*, *supra* note 90 (but it was noted that if consent were proven, it would have been vitiated); *B(AJ)*, *supra* note 92; *Barker*, *supra* note 90; *Beaudry*, *supra* note 90; *Bohorquez*, *supra* note 88; *Catellier*, *supra* note 92; *CC*, *supra* note 92; *CI*, *supra* note 92; *Cross*, *supra* note 92; *Davidson*, *supra* note 69; *E(JA)*, *supra* note 92; *Gairdner*, *supra* note 79; *Glassford*, *supra* note 90; *GOG*, *supra* note 92; *Gonzalez-Hernandez*, *supra* note 90 (but noted that if consent were proven, it would have been vitiated); *Gulliver*, *supra* note 92; *Hoskins*, *supra* note 92; *JA*, *supra* note 15; *JP*, *supra* note 92; *JWS*, *supra* note 92; *Kilbourne*, *supra* note 90; *Laporte*, *supra* note 90; *Lavergne-Bowkett*, *supra* note 90; *Lawrence*, *supra* note 92; *MacMillan*, *supra* note 88; *Meyer*s, *supra* note 92; *Nelson*, *supra* note 90; *Olotu*, *supra* note 90; *P(JA)*, *supra* note 90; *Percy*, *supra* note 90; *PO*, *supra* note 90; *S(JR)*, *supra* note 90; *S(M)*, *supra* note 92; *SAM*, *supra* note 92; *Sanmugarajah*, *supra* note 87; *Skoyen*, *supra* note 92; *Spencer*, *supra* note 90; *Stewart*, *supra* note 92; *Sweet*, *supra* note 81; *Tedjuk*, *supra* note 90; *Vandermeulen*, *supra* note 90.

141 *Lozano Lopez*, *supra* note 90; *Welch*, *supra* note 53. In the remaining three cases — *Graham*, *supra* note 90, *Quashie*, *supra* note 57, and *Gendreau*, *supra* note 92 — it was impossible to determine whether the jury convicted on the basis of non-consent or vitiation. There were 50 total cases where the complainant disputed consent to any sexual activity, and 34 of those cases (68 percent) resulted in convictions after all appeals. See *Barker*, *ibid*; *Beaudry*, *ibid*; *Bohorquez*, *ibid*; *Glassford*, *ibid*; *Gonzalez-Hernandez*, *ibid*; *Graham*, *ibid*; *Kilbourne*, *ibid*; *Laporte*, *ibid*; *Lavergne-Bowkett*, *ibid*; *Nelson*, *ibid*; *Olotu*, *ibid*; *Percy*, *ibid*; *Quashie*, *ibid*; *S(JR)*, *ibid*; *Spencer*, *ibid*; *Sweet*, *ibid*; *Tedjuk*, *ibid*; *Vandermeulen*, *ibid*; *Welch*, *ibid*; *SB*, *ibid*; *B(AJ)*, *ibid*; *CC*, *ibid*; *CI*, *ibid*; *E(JA)*, *ibid*; *Gendreau*, *ibid*; *GOG*, *ibid*; *Gulliver*, *ibid*; *Hoskins*, *ibid*; *JP*, *ibid*; *JWS*, *ibid*; *Lawrence*, *ibid*; *S(M)*, *ibid*; *SAM*, *ibid*; *Stewart*, *ibid*. By contrast, only eight out of 16 cases (50 percent) resulted in convictions where the complainant testified to consenting to sex without violence or with a limited degree of violence. See *Gairdner*, *ibid*; *Lozano Lopez*, *ibid*; *Catellier*, *ibid*; *Cross*, *ibid*; *Davidson*, *ibid*; *Skoyen*, *ibid*; *Stratton*, *supra* note 69; *Sanmugarajah*, *ibid*.

142 *Barton* ABCA, *supra* note 69; *Deschatelets*, *supra* note 94; *Guenther*, *supra* note 94; *Hancock*, *supra* note 88 (two accused); *Liu*, *supra* note 94; *Strong*, *supra* note 69; *Garnier*, *supra* note 94.

143 *Toupin-Houle*, *supra* note 94.

144 *Baril*, *supra* note 94.

145 *Mcilwaine*, *supra* note 94.

agreed to all of the violence,[146] by the very nature of the crime, victims cannot dispute the accused's story in these cases.

Among the eight cases where only assault charges were laid, two cases involved complainants who recanted allegations of sexual assault. In both cases the women later claimed that they consented to rough sex.[147] Both men were found guilty at trial of assault, although one was granted a new trial on appeal.[148] Of the remaining six accused: two were acquitted,[149] three were convicted,[150] and one was convicted but granted a new trial on appeal.[151]

This brief summary of our findings is suggestive of the deeply gendered nature of rough sex claims and the role of intimacy in facilitating access to the claim. These cases overwhelmingly involve women who describe saying no, often repeatedly, even where initial consent may have been given to some sexual activity. Rather than upholding a woman's sexual autonomy to engage in BDSM, the rough sex defence in these cases shifts the focus away from whether a complainant actually consented toward the abstract question of whether law should allow consent to such violence.

V. THEMES EMERGING FROM THE CASE LAW

There are many potential themes emerging from these cases, but we focus on four: the prevalence of pornography, the minimization of bodily harm, the mischaracterization of strangulation, and the impact on complainant credibility of agreeing to some sex with the accused. We focus primarily on the sexual assault rather than the homicide cases because women's stories are heard only in the former context.

A. THE PREVALENCE OF PORNOGRAPHY

The forms of objectifying and violent sexual activities at issue in these cases often read like the scenes typically depicted in mainstream pornography. Indeed, the facts in these cases correspond with what researchers have labelled the "pornographic sexual scripts" prevalent in pornography, including hair pulling, slapping, spanking, facial ejaculation, aggressive penetration, gang rape, double penetration, penile gagging, and various forms of strangulation.[152] Pornography's influence on sexually aggressive and violent behaviours[153]

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146 See e.g. *ibid*; *Hancock*, *supra* note 88; *Barton* ABCA, *supra* note 69. For example, in *Hancock*, the multiple accused argued that the victim had agreed to all of the injuries inflicted. The victim was found with third-degree burns over his head and torso, deep and extended tears to his rectum, fractured ribs indicative of stomping, and serious head injuries which left a boot imprint. He died from respiratory distress and shock.

147 *Giroux*, *supra* note 101; *Gosse*, *supra* note 101.

148 *Giroux*, *ibid*.

149 *Bolger*, *supra* note 101; *Pacheco*, *supra* note 101.

150 *Ceelen*, *supra* note 101 (pleaded guilty); *Finnister*, *supra* note 101 (found guilty at trial); *Tompkins*, *supra* note 101 (found guilty at trial).

151 *Reid*, *supra* note 101.

152 Fiona Vera-Gray et al, "Sexual Violence as a Sexual Script in Mainstream Online Pornography" (2021) 61:5 Brit J Crim 1243 at 1245. See also Gail Dines, *Pornland: How Porn Has Hijacked Our Sexuality* (Boston: Beacon Press, 2010) at 9.

153 While pornography's influence has been a matter of controversy, recent empirical studies demonstrate how sexually explicit material plays a role in scripting sexual behaviours and in normalizing rough sex. See Vera-Gray et al, *ibid* at 1244–46; Herbenick et al, *supra* note 11 at 628–29 (after adjusting for age, age at first porn exposure, and current relationship status, the authors found statistically significant associations between men's pornography use and aggressive behaviours).

is most often discussed where it explicitly forms part of the facts of the case or where it is noted in sentencing decisions as a factor in psychiatric or psychological assessments of perpetrators. Nevertheless, we found several decisions in which pornography is implicated or in which the accused engaged in image-based sexual abuse by recording the sexual violence, sometimes without the knowledge or consent of the complainant.

The clearest connection between pornography and acts of extreme sexual brutality is found in *Barton*. The week before Cindy Gladue's death, Barton had engaged in numerous visits to pornography websites, searching for images of vaginas being ripped or torn by large objects.[154] Gladue died from a catastrophic injury to her vaginal wall.[155] As Sherene Razack argues, such acts of extreme sexual violence inflicted on the bodies of Indigenous women function as a visual symbol of systemic gendered colonial violence.[156]

Indeed, pornography and rough sex were deeply intertwined in this trial. At the initial trial, Gladue's severed vagina was brought into the courtroom in an effort by the Crown to show the jury that her injuries confirmed the prosecution theory that she had been wounded by a knife. This display of her flesh was a profound act of dehumanization that mimics the objectifying gaze of pornography.[157]

A forensic analysis of Barton's laptop was excluded at the initial trial.[158] The jury found Barton not guilty, accepting his defence that Gladue's death had occurred "accidentally" during consensual rough sex. On a retrial for manslaughter only, the trial judge allowed the computer evidence of violent pornography and Barton was convicted of manslaughter. In sentencing, Justice Hillier emphasized the significance of this pornography as a factor accentuating Barton's moral blameworthiness.[159] A handful of other decisions make similar connections between pornography use and rough sex.

In *Bohorquez*,[160] two men were convicted in the brutal gang rape of a young university student. As the judge noted in the sentencing decision, one of the co-accused "enjoys engaging in rough sex and dominating his partner" and "[a]t the time of the offence … was interested in pornography depicting rough sex," "watch[ing] it daily."[161] The perpetrator's obsession with rough sex pornography was also referenced in the sentencing decision *Skoyen*.[162] The accused was convicted of sexual assault after roughly forcing the complainant to perform fellatio and intercourse, and slapping and strangling her, over a period of several hours.[163] The accused described himself to a psychologist as a "sex addict" who found it

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154 *Barton* ABQB, *supra* note 74 at para 17.
155 *Ibid* at para 18.
156 See generally Sherene H Razack, "Gendering Disposability" (2016) 28:2 CJWL 285.
157 *Ibid* at 287. According to Barbara L Fredrickson & Tomi-Ann Roberts, "Objectification Theory: Toward Understanding Women's Lived Experiences and Mental Health Risks" (1997) 21:2 Psychology Women Q 173 at 175, sexual objectification occurs when "a woman's body, body parts, or sexual functions are separated out from her person, reduced to the status of mere instruments, or regarded as if they were capable of representing her."
158 Ryan Cormier, ''Jury Not Told of 'Disturbing Pornography' Evidence in Edmonton Hotel Room Murder Trial," *The National Post* (26 March 2015), online: <nationalpost.com/news/canada/jury-not-told-of-disturbing-pornography-evidence-in-edmonton-hotel-room-murder-trial>.
159 *Barton* ABQB, *supra* note 74 at para 81.
160 *Supra* note 88.
161 *Ibid* at para 61.
162 *Supra* note 92.
163 *Ibid* at para 21.

difficult to reach orgasm without rough sex and admitted to "watching an excessive amount of 'rough sex pornography.'"[164] In *Stratton*,[165] the accused pleaded guilty to numerous sexual offences against young women and children and to the possession and production of child pornography. The psychiatric assessment noted that the offender engaged in "significant viewing of pornography over the Internet," though the accused "denie[d] [viewing] any pornography that was directed towards violence or sexual sadism."[166]

Our cases also revealed coerced pornography viewing. In *Cross*, the accused — who was convicted of sexual assault and choking to assist — viewed rough-sex pornography with the complainant during the course of an evening during which he "became heavily intoxicated and then much more aggressive in playing out his rough sex fantasies."[167] The accused engaged in what the judge euphemistically described as "throat grabbing," as well as slapping, non-consensual digital penetration and aggressive intercourse.[168] The complainant testified that she had been afraid that if she did not submit there could be a "bad situation" that might have involved her young daughter sleeping in another room.[169]

Perhaps most disturbing are cases in which the links between rough sex and pornography take the form of pornography-creation, memorializing the sexual violence suffered by the survivor. These cases have contradictory implications. On the one hand, making pornography in which women are subjected to sexual violence constitutes image-based sexual abuse, a form of involuntary pornography.[170] Some survivors were unaware that the sexual activity was being filmed and most will never know how widely the images have been circulated.

On the other hand, these videos and images are frequently relied upon by the prosecution as a record of the sexual violence. In *Gairdner*, for example, the videos created by the appellant showed the complainant, who was exchanging sex for money, "imploring [him] to stop," though he claimed at trial that this was "all part of BDSM … role-play, where 'no means yes, yes means no.'"[171] In *PO*, the video evidence of the accused forcing the complainant to perform fellatio and analingus on him while he hit her with a gun, and verbally abused her, provided clear evidence that the accused was both terrifying and humiliating the complainant, even though she had recanted her evidence.[172]

In *R. v. Stratton*,[173] the accused pleaded guilty to sexually assaulting nine separate victims but disputed the extent of the sexual assaults against one victim, a vulnerable young woman involved in the sex trade who had apparently "agreed" to be videoed in exchange for money for drugs.[174] The videos show the complainant's consent being exceeded on several

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164 *Ibid*.
165 *Supra* note 69.
166 *Ibid* at 20.
167 *Cross*, *supra* note 92 at paras 27, 13.
168 *Ibid* at paras 13–19.
169 *Ibid* at paras 13–14, 27.
170 See generally Clare McGlynn & Erika Rackley, "Image-Based Sexual Abuse" (2017) 37:3 Oxford J Leg Stud 534.
171 *Gairdner*, *supra* note 79 at para 2.
172 *PO*, *supra* note 90 at para 319.
173 2009 ONCJ 459 (trial of an issue to determine extent of sexual assaults).
174 *Ibid* at 14.

occasions when Stratton had intercourse with her when she was "cracked out" and lifeless, as well as over her clear objections, particularly when he penetrated her with a beer bottle.[175] On another occasion, he threatened her with a knife, while repeatedly slapping her face with his penis.[176]

All too frequently, the videos created by the accused and entered into evidence depict scenes that characterize so-called gonzo pornography — a genre of pornography that puts the camera into the action, often with one or more of the participants filming and performing sexual acts, and which is most often marked by "hard core, body-punishing sex in which women are demeaned and debased."[177] This genre appears in the cases where the accused created videos that film rough sex, often in the context of gang rape. In these cases, rough sex becomes a spectacle of misogyny, with women being violated and sexually humiliated.[178] In *Bohorquez*, for example, the two young men were "trolling" for women to have sex[179] and invited the young complainant, a university student, to the basement of one of the co-accused.[180] She submitted out of fear and because she was trapped.[181] The two men videoed the hours-long violent assault of the complainant without her knowledge,[182] subjecting her to violent acts that mimic gonzo porn, including double penetration, penile gagging, and slapping.[183]

In *AE*,[184] cellphone videos taken without the complainant's consent were central to a successful Crown appeal of the acquittal of two participants in a brutal gang rape. The videos showed the three young men punching and slapping the complainant, laughing and directing each other in making gonzo pornography, yelling "[p]unch that pussy" and "[f*]cking fist that bitch bro."[185] The complainant can be heard crying out in pain and shouting at them to stop. The videos culminate with one of the accused penetrating her with an electric toothbrush and yelling "I'm gonna wreck her, bro" while AE was penetrating her orally.[186] The youth court judge who presided over the trial of the young offender who pleaded guilty to sexual assault described this video evidence as depicting "the most appalling acts of human depravity I have had the displeasure to witness."[187] But, despite this evidence, the two adult defendants were acquitted at trial, though AE was found guilty of sexual assault with a weapon for penetrating the complainant with an electric toothbrush.

On appeal by the Crown, a majority of the Court of Appeal of Alberta found that the trial judge had wrongly relied on a concept of broad advance consent in acquitting the accused of sexual assault.[188] Justice O'Ferrall, concurring, found that the "subjective intent of the

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175 *Ibid* at 27.
176 *Ibid* at 32.
177 Dines, *supra* note 152 at xi.
178 Nicola Gavey, *Just Sex?: The Cultural Scaffolding of Rape*, 2nd ed (London, UK: Routledge, 2019) at 234.
179 *Bohorquez*, *supra* note 88 at para 4.
180 *Ibid* at para 8.
181 *Ibid* at para 38.
182 *Ibid* at para 29.
183 *Ibid* at para 37.
184 *Supra* note 76.
185 *Ibid* at para 6.
186 *Ibid* at para 37.
187 *Ibid* at para 111.
188 *Ibid* at para 34. The SCC subsequently agreed with this conclusion. See *R v AE*, 2022 SCC 4 at para 1.

respondents to cause bodily harm to the complainant was clear from the video," and therefore consent was vitiated.[189]

As these cases show, violent pornography is deeply embedded in rough sex trials, scripting the violence enacted by perpetrators, who also frequently film their assaults in a manner that mimics gonzo pornography.

B. THE MINIMIZATION OF "BODILY HARM"

Our search terms produced a majority of cases involving very serious sexual assaults charged as aggravated sexual assault producing maiming, disfigurement, endangerment of life, or sexual assault causing bodily harm. Yet, nearly every sexual assault case in our study could have been charged at a higher level because it involved either injury to the complainant or a form of strangulation.

The level of charge has several implications. First, the accused's violence and the degree of harm inflicted on the complainant may not be fairly reflected by the seriousness of the charge. Second, level 2 and 3 charges offer higher sentencing ceilings. Third, if the attack left the victim with injuries amounting to bodily harm or maiming, then charging at the more serious level of sexual assault causing bodily harm or aggravated sexual assault may allow the Crown to prove that the injuries were intentionally inflicted, thus relieving the Crown of the obligation to prove non-consent. Fourth, charges that accurately reflect the harm suffered may encourage plea bargaining for lesser, included offences, relieving the complainant of the ordeal of testifying.[190]

While 98 percent of police-reported sexual assault cases are proceeded with as level 1 sexual assaults[191] (compared with 44 percent of the sexual assault cases in our study), our data does mirror a wider pattern of under-classifying sexual assault in Canada. Janice DuMont's research shows that only 40 percent of charges for sexual assault accurately reflected the degree of seriousness of the accused's acts and the injury he inflicted.[192] Even though our search terms produced a greater proportion of cases charged at the higher levels, in approximately one-third of our cases the charge did not reflect the more serious nature of the harm.

"Bodily harm," "maiming," and "endangerment of life" are legal terms. If the Crown can prove that the accused caused any of these beyond a reasonable doubt, then the sexual assault is not a level 1 sexual assault. "Bodily harm" is defined as "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature."[193] "Bodily harm" need not have necessitated medical treatment, and

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189 *Bohorquez*, *ibid* at paras 115–16, 129.

190 See e.g. *RDW*, *supra* note 90 (where the accused was charged with sexual assault causing bodily harm and sexual assault with a weapon but ultimately pleaded guilty to a single count of assault).

191 Statistics Canada, *Police-Reported Crime Statistics in Canada, 2021*, by Greg Moreau, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2 August 2022) at 46, online: <www150.statcan.gc.ca/n1/en/pub/85-002-x/2022001/article/00013-eng.pdf?st=-fEck-83>.

192 Janice Du Mont, "Charging and Sentencing in Sexual Assault Cases: An Exploratory Examination" (2003) 15:2 CJWL 305 at 306.

193 *Criminal Code*, *supra* note 50, s 2.

bruising, scraping, and discomfort that lasts more than a few days can amount to "bodily harm," as can psychological harm.[194]

Cases in our study revealed some very serious injuries where level 1 sexual assault was charged, including anal and vaginal tearing, bite marks, extensive and deep bruising, burst blood vessels in women's eyes, burns, and scarring from wounding. Yet if the Crown failed to charge the accused with bodily harm or endangering life, the degree of the accused's violence is not "seen" by the criminal law. For example, in one case where only level 1 assault was charged, the accused was witnessed strangling the complainant during sexual activity and a police officer stated that the complainant was covered "head to toe" in bruising.[195] In another, the complainant suffered bruising to her shoulders, neck, and thighs as well as cuts to her vaginal wall and urethra, yet the accused was charged with level 1 sexual assault.[196] Similarly, an accused was charged with level 1 assault despite photos of the complainant's injuries showing bruising to her neck and chunks of her hair torn out.[197]

Only a handful of cases in our study[198] specifically acknowledged psychological injury, even though the cases we examined involved violence that would be extremely traumatizing. In 1991, the Supreme Court in *R. v. McCraw*[199] ruled that a man's threat to rape a woman amounted to a threat to cause "serious" bodily harm, that psychological harm is bodily harm, and that "[t]here can be no doubt that psychological harm may often be more pervasive and permanent in its effect than any physical harm."[200] In *AE*, discussed earlier, Justice Martin held in *obiter* that the multiple accused's non-consensual videoing of the sexual violence vitiated any consent that the complainant may have given early on in the assault because of the serious psychological harm it caused, producing "paralyzing fears" of its dissemination and leading the complainant to consider suicide.[201]

Given the extreme violence that women in our study endured, it is surprising that psychological injury to the complainants was so rarely mentioned. In some cases, judges stated that a complainant did not experience psychological harm because the Crown had not introduced such evidence. In *Glassford*, the complaint was followed out of a bar by a man whose advances she refused. He attacked her outdoors, punching her repeatedly in the face until she lost consciousness, attempted to rape her, then left her on the street. Although he was convicted of sexual assault causing bodily harm due to her physical injuries, the judge at sentencing described the attack as "very traumatic but of short duration," stating "[t]here is no evidence before me that she has suffered any lasting emotional or psychological injury."[202]

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194 *Percy*, *supra* note 90 at paras 158–60. But see *Sanmugarajah*, *supra* note 87 at para 171, where the trial judge found no bodily harm regarding one complainant whose pain was treatable with Tylenol and whose bruising on her breast was "trifling."

195 *Bolger*, *supra* note 101 at para 2.

196 *S(M)*, *supra* note 92 at para 35.

197 *Tompkins*, *supra* note 101 at para 152.

198 *AE*, *supra* note 76; *Bohorquez*, *supra* note 88; *Ceelen*, *supra* note 101; *MacMillan*, *supra* note 88; *Meyers*, *supra* note 92; *Nelson*, *supra* note 90; *Quashie*, *supra* note 57; *Sweet*, *supra* note 81; *Zhao*, *supra* note 56.

199 [1991] 3 SCR 72.

200 *Ibid* at 81.

201 *AE*, *supra* note 76 at paras 74–75.

202 *Glassford*, *supra* note 90 at 263.

In other cases, the trial judge alluded to the complainant's psychological harm. For example, in *B(AJ)*, the complainant, who was 7.5 months pregnant, was strangled, threatened with death and raped while her children were in the next room. The accused was not charged with an offence involving "bodily harm," although the judge did describe her evident traumatic responses while testifying.[203] Sometimes the psychological harm was mentioned as part of sentencing although it did not ground the bodily harm component of the charge.[204]

There were only a few cases in which psychological harm *may* have been one of the bases for the bodily harm charge. For example, in *Sweet*, among the complainant's many injuries were "[p]sychological effects such as flashbacks, fear of being in public, fear of being hurt, isolating herself and anxiety attacks."[205] In none of the cases was psychological harm the sole "bodily harm" alleged by the Crown for the offence of sexual assault causing bodily harm.

The courts have never pronounced whether psychological harm itself can amount to "bodily harm" to which a complainant cannot consent. The issue was raised on appeal in *Nelson*.[206] At sentencing, the trial judge described the impact of the accused's attack on the complainant:

> She has been traumatized, cannot sleep, cannot trust anyone, especially men. She has moved home, and is afraid to be alone. She has dropped out of school, and appears to be immobilized as a result of the traumatic events. She filed a victim impact statement at the sentencing hearing confirming and elaborating upon her evidence at trial. I conclude that the psychological effect of these events upon Ms. S. has been profound.[207]

The accused appealed his jury conviction for sexual assault causing bodily harm, which included physical and psychological injury to the complainant, arguing that psychological harm can never vitiate consent, or alternatively that it can only vitiate consent if the accused specifically intended that psychological harm.[208] The appeal court did not respond to the argument and decided the appeal on other grounds.

In sum, our case review suggests that Crown charging patterns in the reported cases where a rough sex defence is launched understate both the physical and psychological injury that these women have experienced, failing to hold accused men accountable for the harms they have inflicted. We found a similar pattern in the cases involving strangulation, as will be discussed below.

C. MISCHARACTERIZING STRANGULATION

Strangulation emerged as a theme in our case law review because the accused allegedly strangled, suffocated, or gagged the complainant in approximately half of our sexual assault

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203 *B(AJ)*, *supra* note 92 at para 25.
204 See e.g. *Ceelen*, *supra* note 101 at para 7; *MacMillan*, *supra* note 88 at para 39; *Bohorquez*, *supra* note 88 at para 52.
205 *Sweet*, *supra* note 81 at para 59.
206 *Supra* note 90.
207 *R v Nelson*, 2012 ONSC 4248 at para 12.
208 *Nelson*, *supra* note 90 at paras 35–36.

cases. This finding is consistent with official statistics and social science evidence showing that men use strangulation to perpetrate domestic and sexual assault.[209]

Although practices like "erotic asphyxiation" are framed as gender neutral, "sex positive" activities, and "choking" as something either partner in a domestic fight might engage in,[210] women are overwhelmingly on the losing side of strangulation, more than 13 times more likely than men to be strangled during their lifespans.[211] None of our cases involved women strangling men, and the available evidence supports the observation that strangulation is "very clearly a male act."[212]

Despite what we know about strangulation, it is represented in legal decisions as an equal opportunity activity. Consider *Gardiner*, where the trial judge convicted the accused after having found the complainant did not want to be "choked" and had not agreed to it.[213] The Court of Appeal of Alberta normalized men "choking" women in the context of domestic violence by comparing a domestic fight to a sporting match where the doctrine of "implied consent" applies. It acquitted the accused, ruling that "choking was something that both parties accepted might reasonably occur during the fight…. If choking was a reasonable part of the risk that was consented to, it would be immaterial which party choked which."[214] Only the dissenting judge pointed out that it is wrong to equate equally matched sporting opponents with domestic partners.[215]

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209 See e.g. Colleen Mcquown et al, "Prevalence of Strangulation in Survivors of Sexual Assault and Domestic Violence" (2016) 34:7 American J Emergency Medicine 1281 at 1281; Statistics Canada, *Family Violence in Canada: A Statistical Profile, 2005*, Kathy AuCoin, ed, Catalogue No 85-224-XIE (Ottawa: Statistics Canada, July 2005) at 28, online: <www150.statcan.gc.ca/n1/en/pub/85-224-x/85-224-x2005000-eng.pdf?st=tYF0ltEq>; Statistics Canada, *Family Violence in Canada: A Statistical Profile, 2000*, Valerie Pottie Bunge & Daisy Locke, eds, Catalogue No 85-224-XIE (Ottawa: Statistics Canada, July 2000) at 12, online: <www150.statcan.gc.ca/n1/en/pub/85-224-x/85-224-x2000000-eng.pdf?st=hycj8Kw->. Some studies have found that Indigenous women and women with disabilities are much more likely to experience strangulation in the context of intimate partner violence. See Douglas A Brownridge, "Understanding the Elevated Risk of Partner Violence Against Aboriginal Women: A Comparison of Two Nationally Representative Surveys of Canada" (2008) 23:5 J Family Violence 353 at 359; Douglas A Brownridge, "Partner Violence Against Women with Disabilities: Prevalence, Risk, and Explanations" (2006) 12:9 Violence Against Women 805 at 810 (this study relied on the 1999 General Social Survey, which used the WHO/UN definition of disability: "[A] long-term physical or mental condition or health problem [that] reduce[s] the amount or the kind of activities [one] [can] do at home, school, work, or in other activities" *ibid*). Pregnancy also heightens the risk that men will strangle their female partners. See Douglas A Brownridge et al, "Pregnancy and Intimate Partner Violence: Risk Factors, Severity, and Health Effects" (2011) 17:7 Violence Against Women 858 at 869.

210 See e.g. *R v Gardiner*, 2018 ABCA 298 at para 5 [*Gardiner*].

211 See Matthew J Breiding et al, "Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization — National Intimate Partner and Sexual Violence Survey, United States, 2011" (2014) 63:8 Morbidity & Morality Weekly Report at Table 6, online: *Centers for Disease Control and Prevention* <cdc.gov/mmwr/preview/mmwrhtml/ss6308a1.htm>; Helen Bichard et al, "The Neuropsychological Outcomes of Non-Fatal Strangulation in Domestic and Sexual Violence: A Systematic Review" (2022) 32:6 Neuropsychological Rehabilitation 1164 at 1165.

212 John Archer, "Sex Differences in Physically Aggressive Acts Between Heterosexual Partners: A Meta-Analytic Review" (2002) 7:4 Aggression & Violent Behavior 313 at 327. See also Gael B Strack, George E McClane & Dean Hawley, "A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues" (2001) 21:3 J Emergency Medicine 303 at 307 (99 percent of the perpetrators in this case sample were men).

213 *Gardiner*, *supra* note 210 at para 4.

214 *Ibid* at para 5.

215 *Ibid* at para 29.

Strangulation must also be seen as a coercive strategy — a "reliable means of achieving … control"[216] — and as "setting the stage"[217] for femicide by communicating the capacity to kill. If a woman has been strangled by her partner, the risk of attempted murder increases sixfold, and the risk of femicide sevenfold.[218]

Even when strangulation is not immediately lethal, victims may die weeks later because of irreversible damage to their brains.[219] Further, if a victim experiences any loss of consciousness, the accused has inflicted at least mild traumatic brain injury upon her.[220] It only takes seconds of pressure on the neck to cause a lasting, serious injury.[221] Strangulation may result in no external evidence of injury, and is thus minimized or missed by victims, medical professionals, and police.[222] Strangulation is also known to cause other long-term health problems like paralysis,[223] psychological impacts such as acute and chronic fear, post-traumatic stress disorder, suicidality, and cognitive deficits like memory loss.[224]

Despite the wealth of evidence demonstrating the potential for profound injury and lethality, the vast majority of Crown attorneys failed to lay charges at the more serious levels. Only two of the many cases where men strangled women involved a charge of level 3,[225] aggravated sexual assault (endangering life),[226] despite the fact that strangulation clearly endangers life.[227] Although there were charges of level 2, sexual assault causing bodily harm, where the accused deployed strangulation and the woman's injuries included bruising and

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216 Yardley, *supra* note 2 at 1846.

217 Kristie A Thomas, Manisha Joshi & Susan B Sorenson, "'Do You Know What It Feels Like to Drown?': Strangulation as Coercive Control in Intimate Relationships" (2014) 38:1 Psychology Women Q 124 at 133; Gael B Strack & Casey Gwinn, "On the Edge of Homicide: Strangulation as a Prelude" (2011) 26:3 ABA Criminal Justice 32.

218 Nancy Glass et al, "Non-Fatal Strangulation is an Important Risk Factor for Homicide of Women" (2008) 35:3 J Emergency Medicine 329 at 329, 332 (the risk of attempted murder increased sevenfold if demographic predictors in the study were controlled). See also Ontario, Ministry of the Solicitor General, *2013–14 Annual Report* (Domestic Violence Death Review Committee, October 2015) at 19, 31, online: <cdhpi.ca/sites/cdhpi.ca/files/2013-2014_DVDRC_Annual_Report_Final-English_2.pdf>; Anne Kingston, "We Are the Dead," *Maclean's* (17 September 2019), online: <macleans.ca/news/Canada/we-are-the-dead/>.

219 George E McClane, Gael B Strack & Dean Hawley, "A Review of 300 Attempted Strangulation Cases Part II: Clinical Evaluation of the Surviving Victim" (2001) 21:3 J Emergency Medicine 311 at 313 [McClane, Strack & Hawley, "Clinical Evaluation"].

220 Bichard et al, *supra* note 211 at 2.

221 McClane, Strack & Hawley, "Clinical Evaluation," *supra* note 219 at 313.

222 Strack & Gwinn, *supra* note 217 at 32.

223 Heather Douglas & Robin Fitzgerald, "Strangulation, Domestic Violence and the Legal Response" (2014) 36:2 Sydney L Rev 231 at 232–33.

224 *Ibid*; Bichard et al, *supra* note 211 at 19. See generally Eve M Valera et al, "Strangulation as an Acquired Brain Injury in Intimate–Partner Violence and Its Relationship to Cognitive and Psychological Functioning: A Preliminary Study" (2022) 37:1 J Head Trauma Rehabilitation 15.

225 The following cases involved strangulation: *Baril*, *supra* note 94; *Deschatelets*, *supra* note 94; *SB*, *supra* note 79; *B(AJ)*, *supra* note 92; *Bear-Knight*, *supra* note 92; *Beaudry*, *supra* note 90; *Bohorquez*, *supra* note 88; *Bolger*, *supra* note 101; *Boyle*, *supra* note 9; *CC*, *supra* note 92; *Cross*, *supra* note 92; *Davidson*, *supra* note 69; *DC*, *supra* note 92; *Gairdner*, *supra* note 79; *Giroux*, *supra* note 101; *Gosse*, *supra* note 101; *Guenther*, *supra* note 94; *Gulliver*, *supra* note 92; *Hoskins*, *supra* note 92; *Hunter*, *supra* note 92; *JA*, *supra* note 15; *JP*, *supra* note 92; *KG*, *supra* note 90; *Kilbourne*, *supra* note 90; *Lavergne-Bowkett*, *supra* note 90; *Lawrence*, *supra* note 92; *Liu*, *supra* note 94; *Mcilwaine*, *supra* note 94; *Meyers*, *supra* note 92; *Nelson*, *supra* note 90; *Pacheco*, *supra* note 101; *PO*, *supra* note 90; *Reid*, *supra* note 101; *SAM*, *supra* note 92; *Seaton*, *supra* note 92; *Shepperd*, *supra* note 92; *Skoyen*, *supra* note 92; *Spencer*, *supra* note 90; *Tedjuk*, *supra* note 90; *Threefingers*, *supra* note 90; *Tompkins*, *supra* note 101; *Vandermeulen*, *supra* note 90; *White-Halliwell*, *supra* note 90; *Zhao*, *supra* note 56; *Garnier*, *supra* note 94; *P(A)*, *supra* note 92.

226 *Giroux*, *ibid*; *JA*, *ibid*.

227 Uniform Law Conference of Canada, *Report of the Criminal Section Working Group on Strangulation* (May 2006) at 2, online : <ulcc-chlc.ca/ULCC/media/EN-Annual-Meeting-2006/Working-Group-on-Strangulation.pdf>.

swelling of the neck or burst blood vessels in the eyes, in none was proof of bodily harm dependent on strangulation injuries.[228] We did find one charge of the new level 2 offence, sexual assault involving strangulation (section 272(1)(c.1)).[229] This new offence, introduced into the *Code* in 2019 among reforms aimed at domestic violence, obviates the need for the Crown to prove bodily harm in order to elevate assault or sexual assault involving strangulation to a level 2 offence by equating strangulation with bodily harm with no need for proof of the connection between the two.[230]

Part of the difficulty may be that, especially prior to this legislative change in 2019, Crowns do/did not have the resources to acquire expert evidence about the hidden injuries of strangulation to prove bodily harm or endangerment of life. For example, the Crown in *JA* attempted this argument without expert evidence. Although the trial judge found that strangulation to the point of unconsciousness amounts to "bodily harm," she accepted the complainant's claim that she consented. The judge found that the complainant's consent could not be vitiated because her loss of consciousness was "transitory," and, without expert evidence, the judge could not find that the harms were so serious as to vitiate consent.[231] The Court of Appeal for Ontario stated that the judge erred in not also considering whether the accused caused "bodily harm" because unconsciousness is more than a "trifling" interference with a complainant's health[232] but indicated that it would be "preferable" if the Crown introduced expert evidence.[233]

Some Crowns captured the strangulation dimension by adding charges under section 246(a) — choking or strangulation with the intent to overcome resistance to the commission of an indictable offence — as they did in one-third of our strangulation cases. Although half of these charges resulted in convictions,[234] the other half failed, most based on Crown inability to prove the particular intent required.[235] In one case, the judge acquitted the accused, refusing to equate the accused's intent to dominate the victim with an intent to overcome her resistance, saying:

> I accept that the accused attempted to choke K.Q. However, he appeared to do so because he was angry, and to demonstrate his physical dominance over K.Q. I have a reasonable doubt that he was trying to overcome her resistance to facilitate the sexual assault, which may not have been in his mind at the time.[236]

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228 See e.g. *Beaudry*, *supra* note 90; *Lavergne-Bowkett*, *supra* note 90; *Gairdner*, *supra* note 79; *Vandermeulen*, *supra* note 90.

229 *Bear-Knight*, *supra* note 92; *Criminal Code*, *supra* note 50, s 272(1)(c.1).

230 Consent remains a defence. See generally Department of Justice Canada, "Legislative Background: *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, as enacted (Bill C-75 in the 42nd Parliament)," online: <justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/c75/p3.html>.

231 *R v A(J)*, 2010 ONCA 226 at para 44 [*JA* ONCA].

232 *Ibid* at para 95.

233 *Ibid* at para 108.

234 *B(AJ)*, *supra* note 92; *CC*, *supra* note 92; *Cross*, *supra* note 92; *Gairdner*, *supra* note 79; *Gosse*, *supra* note 101; *Gulliver*, *supra* note 92; *JP*, *supra* note 92; *Lawrence*, *supra* note 92.

235 *JA*, *supra* note 15; *Lavergne-Bowkett*, *supra* note 90; *Meyers*, *supra* note 92; *Nelson*, *supra* note 90; *Vandermeulen*, *supra* note 90.

236 *Meyers*, *ibid* at para 69.

In another case, the judge acquitted on the basis that the strangulation was part of the sexual assault,[237] which reinforces the need for prosecutors to incorporate strangulation by charging under the new section 272(1)(c.1).

Not only is strangulation overlooked in charging, but it is mischaracterized in the case law. First, terms like *strangulation*, *choking* and *suffocation* are used in *Criminal Code* section 246(a) — choking or strangulation to overcome resistance — and even in the new offence of section 272(1)(c.1) — sexual assault involving strangulation or choking — although these terms mean different things.[238] Choking describes a blockage in the throat — often food — that usually involves no other human agent[239] and can result in deprivation of oxygen to the brain. Asphyxiation and suffocation, through covering the mouth and nose, also impede oxygen to the brain.[240] But strangulation involves an external force — usually human — that impedes not only the flow of oxygen but also of blood to the brain, which always risks permanent injury or even death.[241]

These misdescriptions matter in practical terms, as illustrated by one of the cases where the accused was charged with choking or strangulation to overcome resistance and the judge appeared oblivious to the difference between "choking" and "strangulation" and the more serious risk strangulation poses of cutting off blood flow to the brain. Despite the serious bruising caused by the accused seizing the complainant by her throat, the judge acquitted based on the dictionary definition of "choking" because no evidence was introduced to show that she was deprived of oxygen.[242]

Second, inaccurate descriptors of strangulation mask both the agency and the force the accused has deployed. Edwards' analysis reveals defence counsel reframing this dangerous act as "erotic asphyxiation," "squeezing," applying "pressure," or "pushing down," concealing its strong association with intimate partner violence.[243] Accused men and defence lawyers in our study routinely re-characterized strangulation in euphemisms, and judges often followed suit. For example, in *JA*, the Supreme Court decision was premised on framing the accused's act as "erotic asphyxiation,"[244] with the minority casting the issue as women's freedom to pursue "sexual adventures."[245]

We also found cases where complainants were cross-examined about whether, "from time to time, out of playfulness … you sometimes have him put his hands around your neck,"[246] and whether the accused "had in the past 'playfully' choked her during sex with her consent."[247] The suggestion that strangulation is playful occurred in cases where complainants suffered subconjunctival hemorrhaging and bruising. Other euphemisms, many

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237 *SAM*, *supra* note 92 at para 67.
238 *Criminal Code*, *supra* note 50, ss 246(1), 272(1)(c.1); Busby, *supra* note 20 at 338.
239 But see also penile gagging in *Percy*, *supra* note 90 at para 140.
240 Busby, *supra* note 20 at 338.
241 *Ibid* at 338–39.
242 *Beaudry*, *supra* note 90 at para 42.
243 Edwards, "Strangulation," *supra* note 19 at 954.
244 *JA*, *supra* note 15 at para 5.
245 *Ibid* at para 73, Fish J.
246 *R v AJB*, 2007 MBCA 95 at para 18 (appeal of *B(AJ)*, *supra* note 92).
247 *CC*, *supra* note 92 at para 16.

adopted by judges, included "pressing on her throat,"[248] "grabb[ing] her by the throat,"[249] "plac[ing] his hand around her throat,"[250] or engaging in "breath play," in a case where the accused allegedly strangled his domestic partner into unconsciousness and left her on the ground.[251]

In some cases, judges held a reasonable doubt based on the lack of bruising or marks on the complainant's neck,[252] despite the fact that strangulation injuries are frequently internal. In *Hunter*, the trial judge acquitted the accused and minimized the strangulation, despite the complainant's testimony that it rendered her unable to speak or to resist. The trial judge found: "I am satisfied that the placement of the hand did cause some discomfort to the complainant, but not sufficiently to leave a mark or to cut off her ability to breathe or talk."[253]

Overall, our cases show that strangulation is dramatically under-charged and the serious risk to women's lives and health is doubted and minimized in the context of rough sex. Judges seem to accept that consent to strangulation is legitimate and that, if couples agree on a "safe word," men can strangle women safely, in spite of the fact that a woman cannot use a safe word when she is being strangled.[254] Not only do such claims blame women for failing to set and police the ground rules for rough sex, but they mask the reality that strangulation cannot possibly be made "safe" as a form of alleged rough sex.[255]

D. CREDIBILITY ASSESSMENTS

As noted above, in a relatively small number of cases women consented to some sex with the accused, even to some rough sex, but clearly indicated that they did not consent to what was ultimately done to them. However, doctrinally, if a complainant agrees to some form of sexual contact in Ontario and Alberta, the Crown then bears the burden to prove that the accused intended to cause her bodily harm in order to secure a conviction for sexual assault causing bodily harm or aggravated sexual assault.[256] Beyond this increased burden of proof for the Crown, if the complainant consented to or participated in some form of sex, judges seemed more skeptical of her assertion that she did not consent to the harm inflicted. This skepticism was manifested in different ways — the assault never happened, she must have consented to all of it, she colluded with another complainant, and so on. This discounting was evident in a number of contexts — perhaps most pronouncedly with (former) intimate partners,[257] women in the sex trade,[258] and one-time hookups, particularly where more than one other person was involved.[259]

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248 *Cross*, *supra* note 92 at paras 13, 19.
249 *DC*, *supra* note 92 at para 9.
250 *Tompkins*, *supra* note 101 at para 64.
251 *Reid*, *supra* note 101 at paras 10, 18, 32.
252 See e.g. *Bear-Knight*, *supra* note 92 at para 117; *Pacheco*, *supra* note 101 at para 88.
253 *Hunter*, *supra* note 92 at para 178.
254 *Ibid* at para 185; *JA* ONCA, *supra* note 231 at paras 17, 37.
255 Bichard et al, *supra* note 211 state at 1184: "The potential onset of dyspraxia, amnesia, and unconsciousness itself (in as little as four seconds) are disabling: the very organ that is needed to withdraw consent is compromised by the activity to which that consent applies. The term 'consenting kink' is therefore a potentially fatal misnomer."
256 *DK*, *supra* note 58 at para 23.
257 See e.g. *A(C)*, *supra* note 90.
258 See e.g. *Stratton*, *supra* note 69; *Davidson*, *supra* note 69.
259 See e.g. *Hunter*, *supra* note 92; *AE*, *supra* note 76; *Hillier*, *supra* note 92.

Judges sometimes found reasons to explain why women would make up these allegations, invoking stereotypes about the vengeful spouse,[260] the spouse seeking advantage in family law proceedings,[261] or women pursuing criminal injuries compensation.[262] The role of sexual history evidence is particularly pervasive in these cases where agreeing to engage in rough sex in the past is used improperly to influence credibility and findings around consent to rough sex during the incident in question.[263] In other cases, it was difficult to fathom why judges thought women would put themselves through the trauma of a sexual assault trial, where they would face questioning about whether they enjoyed being injured, in order to falsely accuse men of violent sexual assault.[264]

Cases involving intimate partners are particularly challenging for the Crown where the complainant admits to any level of rough sex in the past. For example, in *A(C)*,[265] the complainant was in an intimate relationship with the accused in which he sometimes tied her up and engaged in dominant/submissive sexual activity. On the night in question, the complainant's hands were bound. While they were engaging in mutual oral sex, he began to rub her vagina very hard, and she testified that she asked him to stop and told him he was hurting her. Instead of stopping, he intensified the pressure. She suffered a vaginal hematoma that required surgery.[266]

The judge's dismissal of the complainant was so riddled with stereotypes that the outcome was inevitable. He began by explicitly undermining her credibility because she did not leave the accused immediately and in fact stayed with him for two years and continued to have a sexual relationship with him. The narrative of "why didn't she leave" ran through the judgment, despite her explanation that she had nowhere to go and would have been homeless. In fact, when she did leave, she moved to a cheap motel. The judge implied that she falsely "represent[ed] herself" as an abuse victim so that she could get access to free storage that a woman's shelter was offering.[267] The trial judge was not satisfied that the accused intended to cause her bodily harm nor that it was even foreseeable. But he went further and completely rejected the complainant's testimony that she asked him to stop, instead, portraying her as a scorned woman who only made the allegations once the relationship ended.

In *Seaton*,[268] the complainant and the accused had been in a relationship, and he was staying overnight at her home with his parents, who were visiting. The complainant acknowledged consensual sex on that night but alleged a sexual assault in the morning, after his parents had gone, where the accused spat on her, called her derogatory names, and slapped her in the face. She acknowledged that she was used to having "aggressive sex" with the accused but said that they had never engaged in sexual activity like this.[269] The accused admitted that the sex took place but described it as consensual and as consistent with their

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260 See e.g. *A(C)*, *supra* note 90.
261 See e.g. *DC*, *supra* note 92.
262 See e.g. *DK*, *supra* note 58.
263 See e.g. *A(C)*, *supra* note 90 at paras 2, 17.
264 See e.g. *Hunter*, *supra* note 92 at para 183.
265 *Supra* note 90.
266 *Ibid* at para 2.
267 *Ibid* at para 9.
268 *Supra* note 92.
269 *Ibid* at para 18.

usual sexual practices. He admitted spitting on her, "covering her mouth and nose," "holding her neck," and calling her derogatory names.[270] Thus, the only live issue in the case should have been consent.

Nonetheless the trial judge went into a great deal of detail about inconsistencies in her evidence with respect to the date on which the events took place and the fact that the complainant did not report the sexual assault until after the accused had begun harassing her with text messages. The judge mentioned the abrogation of the doctrine of recent complaint and the stereotypes about a single complainant's testimony being "inherently suspect or untrustworthy,"[271] but then was clearly influenced by both. The trial judge made no explicit finding about consent — he simply rejected all of her evidence as "unreliable and incredible"[272] despite the admissions of the accused that rough sex did take place.[273]

We also saw the discrediting of women in the context of the sex trade. In *Davidson*,[274] for example, the accused was charged with sexually assaulting three women in similar circumstances. The trial judge inaccurately described what he did to the first complainant, DB, as "choking,"

> much like a wrestler using a wrestle choke hold. This activity went on for some time, and D.B. was fearful that she was going to lose consciousness. She went limp, faking that she had blacked out. She testified that she was unable to say anything because the choke hold was so severe.[275]

The second complainant, NT, described a similar incident where the accused asked her if he could choke her until she passed out. He had "the crook of his elbow around her windpipe and was squeezing her tighter and tighter. She recalled at one point he even stuck some fingers down her throat."[276] NT also faked unconsciousness and at one point the accused tried to revive her with CPR. The third woman, JG, described being slapped several times during sex.[277]

All three women described the accused as deeply apologetic after these events took place. DB admitted that she was a drug addict although she was in a methadone program at the time of trial. NT was clearly still struggling with drugs at trial and ultimately passed out in the witness stand. The judge had a reasonable doubt that NT and JG had colluded with each other and thus rejected the Crown's similar fact application and rejected their identification of the accused.[278] He accepted only the evidence of DB, finding that the accused had an obligation to ensure that DB was informed about what he was going to do.[279]

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270 *Ibid* at para 47.
271 *Ibid* at para 81.
272 *Ibid* at para 82.
273 In acquitting the accused of criminal harassment, the judge blamed the complainant for not answering the accused's harassing text messages. See *ibid* (where the judge noted that "if she did not want to talk to him anymore, and had another boyfriend, all she had to do was say so, and that would have been the end of it" at para 87).
274 *Supra* note 69.
275 *Ibid* at para 12.
276 *Ibid* at para 33.
277 *Ibid* at para 67.
278 *Ibid* at para 153.
279 *Ibid* at para 167.

In *Stratton*,[280] the complainant was addicted to drugs and agreed to let the accused beat her in exchange for money for drugs so long as he did not cause her bodily harm. There were many hours of video footage of the abuse the accused perpetrated against the complainant, but the only incidents the trial judge found to constitute sexual assault were those when she was clearly unconscious from drug intoxication. The trial judge had a reasonable doubt that she may have consented to the other abuse despite her clear protests.[281]

There are also cases involving younger, vulnerable complainants hooking up with men for sex, whose credibility is suspect for doing so.[282] Elaine Craig has analyzed the abuse in *Hunter*,[283] which involved a young woman with limited hearing who met the accused online and agreed to a "dominant-submissive" sexual encounter with him and his female friend.[284] The complainant testified to being "deep throated" by the accused, who thrust his penis down her throat to the point where she was gagging, choking, and could not breathe.[285] She tried to push him away and communicate her lack of consent, but she was unable to speak and had the much larger accused's stomach covering her face. The accused described her as a willing participant throughout. Craig points out

> the absurdity of [the accused] testifying that the complainant was gagging and coughing, had lost her breath, her nose was running, her eyes were glassy, and her face was turning red and then asserting that he did not see or hear any indication that "she was in any state of discomfort."[286]

The trial judge had a reasonable doubt both that the complainant consented and that the accused had an honest belief in consent, even though he took no steps to ascertain consent.[287]

VI. CONCLUSION

Our study leads us to conclude that consent should not be a defence to causing bodily harm in a sexual context unless bodily harm was not reasonably foreseeable at the time it was inflicted. We acknowledge that denial of a consent defence where bodily harm has resulted may be experienced by some women as repudiation of their sexual freedom or autonomy,[288] and some may choose not to report such violence to police. While the case for individual liberty may be compelling at an abstract level, our case law review shows that the cases reaching the criminal courts do not involve "rough sex games gone wrong." Rather, they are overwhelmingly cases where complainants assert that they did not consent to any sexual contact at all. Even had we found large numbers of cases where women agreed to bodily harm, the clear risks to women's safety and a context in which systemic sexual violence is

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280 *Supra* note 69.
281 *Ibid* at 10.
282 See e.g. *AE*, *supra* note 76, where the trial judge acquitted three men who used extreme violence against a young woman who had initially agreed to some form of rough sex. On appeal, the judge's reasoning was called "dangerously close to engaging in the myth- and stereotype-based thinking that continues to linger in the legal landscape like a fungus," essentially implying that she got what she asked for: *ibid* at para 153.
283 *Supra* note 92.
284 *Ibid* at para 8.
285 *Ibid* at para 19.
286 Elaine Craig, "The Legal Regulation of Sadomasochism and the So-Called 'Rough Sex Defence'" (2021) 37:2 Windsor YB Access Just 402 at 409.
287 *Hunter*, *supra* note 92 at paras 179, 183.
288 See generally Olson, *supra* note 20.

a mechanism of women's subordination weighs heavily against allowing a consent defence.[289]

As Susan Edwards and Julie Bradwell argue, legitimizing sadomasochism through a consent defence when bodily harm is caused will effectively legalize men's violence against women.[290] Consent must also be barred for strangulation. Helen Bichard et al found that strangulation has physical and psychological effects more profound than waterboarding, which has been banned as a form of torture.[291] Lise Gotell makes a compelling case that a legal doctrine allowing "consent" to bodily harm would reify some neo-liberal notion of the autonomous woman, able to freely agree to violent acts despite her containment by the structures of poverty, racism, disability, and misogyny.[292]

Prosecution of sexual and domestic violence is already seriously hampered by discriminatory beliefs about women's sexuality and their credibility.[293] Allowing a consent defence when bodily harm is caused fuels pernicious pornographic scripts that cast women as stimulated by male violence, adding to the beleaguered burden of proof in such cases. The "straw woman" behind the argument is the betraying woman who "likes" to be violently abused and injured but who then wrongfully accuses her partner of assault. The heart of this argument relies on age-old beliefs: that women lie, that they will use allegations of assault as revenge, or "cry rape" as cover for their promiscuity or their shameful depravity.

These discriminatory stereotypes are now deployed in gruelling cross-examinations that are damaging to complainants, whatever the outcomes of the trial. In one case, for example, the complainant was forced to a endure a "particularly humiliating" hours-long questioning while a videotape was repeatedly freeze-framed and she was asked if she was orgasming during a violent gang rape.[294] To degrade a complainant in this manner in a courtroom full of people, to ask her if she was enjoying being sexually brutalized, is a demonstration of how the rough sex defence breathes new life into the "she asked for it" myth. When the victim has died, their surviving family members are haunted by the spectacle of hearing their loved one's life and worth debased by the rough sex defence.[295]

The discriminatory impact of any legitimized rough sex defence will be exacerbated by the harmful stereotypes about certain groups of women. It may be more plausible to suggest that women stereotypically viewed as violent, strong, wild, independent, or unpredictable — Indigenous and Black women for example — enjoy or invite rough sex. And women who are drug-addicted, criminalized, or entrapped in the sex trade will be similarly discredited as

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289 Craig, "Capacity to Consent," *supra* note 20 at 130.

290 See e.g. Edwards, "Strangulation," *supra* note 19; Julie Bradwell, "Consent to Assault and the Dangers to Women" (1996) 146 New LJ 1682.

291 Bichard et al, *supra* note 211 at 1184. See also Busby, *supra* note 20 at 340–41.

292 See e.g. Gotell, *supra* note 20.

293 Jennifer Koshan, ''The Judicial Treatment of Marital Rape in Canada: A Post-Criminalisation Case Study'' in Melanie Randall, Jennifer Koshan & Patricia Nyaundi, eds, *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi* (Oxford: Hart, 2017) 257 at 265–66; Melanie Randall, "Sexual Assault Law, Credibility, and 'Ideal Victims': Consent, Resistance, and Victim Blaming" (2010) 22:2 CJWL 397 at 404–405.

294 *Bohorquez*, *supra* note 88 at para 41.

295 See e.g. Aly Thomson, "'There Will Be No Forgiveness:' Mother of Murder Victim Tells Hearing," *The National Post* (13 August 2018), online: <nationalpost.com/pmn/news-pmn/canada-news-pmn/parole-eligibility-hearing-set-for-halifax-man-who-strangled-off-duty-cop>.

complainants even when they suffer bodily harm or death because these women are typically constructed as consenting to anything.[296]

Finally, the notion expressed by some that any prohibition on a consent defence to bodily harm should only come into play if the injury caused is grievous, irreversible, or results in death, must be problematized.[297] Such line-drawing exercises cannot provide strong social messaging or deterrence because they are focused on avoiding consequences rather than acts where bodily harm is foreseeable. Given that our criminal law already defines "bodily harm" as any sort of interference with the life or health of another that is more than trivial or transitory, this form of prohibition would require prosecutors, experts, and judges to engage in determining when the injuries inflicted cross the line into "grievous" or "irreparable." It presents a significant risk of normalizing very violent behaviour, inching acceptable male violence up further to the limit of maiming or killing women. While we acknowledge that cases are more likely to come to the attention of police and prosecutors where more serious injuries have been caused, requiring prosecutors to prove grievous or irreversible harm normalizes an "acceptable" level of violence against women.

It is time for our highest court to affirm *Welch* and *Jobidon* and recognize that there is no social utility in causing foreseeable bodily harm to women. Alternatively, Parliament should amend the *Criminal Code*, barring consent as a defence where bodily harm, including serious psychological harm, is proven unless that harm was unforeseeable. Consent defences should also be precluded where strangulation is involved. Explicit amendments must be made to the sexual history provisions to clarify that a past history of consensual violent sex is not admissible to prove consent on a subsequent occasion. This is a matter of great urgency because of clear threats to women's safety and their very lives.

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[296] As was argued at Barton's trial. See Part I, Introduction, above.
[297] See e.g. Tanovich, *supra* note 20 at 94; Pa, *supra* note 19 at 81–82.