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Kinky Sex Gone Wrong: Legal Prosecutions Concerning Consent, Age Play, and Death via BDSM

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Abstract

This commentary begins by describing the author's research and expert witness practice serving sex and gender minorities, especially practitioners of BDSM/kinky sex. Then, it reviews the three most common reasons that BDSM is legally prosecuted. First, consent: was this assault, rape, and/or kidnapping, or was it consensual kinky sex that either got out of hand or is now being strategically employed to punish the other partner? Second, age play: was this adult trying to have sex with children or was he (and it is virtually always men) intending to age play with an adult who is pretending to be an adolescent? Third, death by kinky sex: was this a person who murdered their lover or was this an accidental death? Finally, this article concludes with recommendations for kinksters who wish to assure consent and safe play, and for litigators involved in the prosecution of kinky sex.

Keywords BDSM · Breath play · Consent · Age play · Sexuality

People involved in kinky sex, also known as kinksters, are part of a large and growing subculture of sex and gender minorities (SGM) who are outside of the norms of conventional gender presentations or sexual behavior/relationships. Kinksters frequently engage in BDSM—an acronym for Bondage and Discipline (B/D), Dominance and submission (D/s), and Sadism and Masochism (S/M)—which is a set of erotically charged interactions using a mix of negotiated power exchange, intense sensations, role play, costuming, and sometimes (but not always) genital stimulation (Brown, Barker, & Rahman, 2020). Rising public interest and participation in kinky sex has resulted from some liberalization of sexual attitudes (Laumann et al., 2006), increasing availability of pornography and other sexually explicit materials (SEM) (Albright, 2008; Vogels & O'Sullivan, 2019), and media attention to any form of sexuality deemed salacious enough to bring in viewers (Weiss, 2006). Kinky sex is so popular now that it has become mainstream, as indicated by the popularity of the book *Fifty Shades of Gray* and subsequent series of movies (Barker, 2013; Khan, 2017; Vogels & O'Sullivan, 2019).

Prior to the recent boom in cultural awareness and popularity, kinky subcultures were much smaller and frequently associated

with gay spaces and subcultures (Langridge & Barker, 2007). Such small subcultures created a loosely knit collection of associates who knew the rules of the space, including how to play, with whom, when, and when not to (Langridge & Barker, 2007; Sagarin, Lee, Erickson, Casey, & Pawirosetiko, 2019). The vast influx of new members to the subculture has destabilized older norms and values and created more situations in which communication is poor, consent is unclear, play is unsafe, and people get hurt (Langridge & Barker, 2007; Sagarin et al., 2019). Some of these situations result in legal prosecution, and many of those cases revolve around determining whether the events constitute a botched consensual kinky sex scene or a crime.

In both my academic research and practice as an expert witness, I have noticed that when kinky sex becomes problematic enough to require criminal proceedings, it is generally in one of three categories. First, consent: was this assault, rape, and/or kidnapping, or was it consensual kinky sex that either got out of hand or is now being strategically deployed to punish the other partner? Second, age play: was this adult trying to have sex with children, or was he intending to age play with an adult who is pretending to be an adolescent?¹ Third, death by kinky sex: was this a person who murdered their lover, or was this an accidental death?

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¹ While the number of women prosecuted for sex crimes is increasing (Cortoni, Babchishin, & Rat, 2017), most people prosecuted for sex-related crimes are men (Zinzow & Thompson, 2015) and all of the defendants in my practice to date have been men.

This article first describes my research and qualifications and then explains some details of my expert witness practice. Next, it reviews the three most common reasons in my expert witness practice for criminal prosecution of BDSM. Finally, this article concludes with recommendations both for kinksters who wish to play safely and for legal professionals adjudicating these cases.

Research and Expert Witnessing

This section explains my background in both research and expert witnessing. The first portion summarizes my 25-year study of polyamorous families with children and subsequent research on BDSM. Next, this section explains my qualifications for expertise and summarizes my expert witnessing practice.

Research

In 1996, I began to study polyamory, and almost immediately respondents started telling me about their dual engagement in consensual nonmonogamy and BDSM (Sheff, 2005a, b, 2011; Sheff & Hammers, 2011). After my dissertation, I shifted focus from polyamory to BDSM and in 2005 began the *Overlapping Identities Study* to examine the various identities that polyamorists reported overlapped with their own—kink/BDSM, swinging, and fetishes—using focus groups and a questionnaire to examine respondents' individual and shared experiences. The *Overlapping Identities Study* produced three primary findings: (1) there are several important reasons for the significant overlap between populations who practice polyamory and BDSM, (2) fetishes are so closely aligned with BDSM/kink that separating them is not useful analytically, and (3) swinging is distinct enough to merit its own study.

Subsequently, in 2007 I began the *Are You Kinky?* study to examine kink subcultures. That study used a mix of participant observations and interviews. For participant observations, I would attend kinky parties in collective sex spaces (Frank, 2019) such as “dungeons” (spaces in warehouses or the basements of private homes that have specialized equipment, furniture, and rooms to facilitate kinky sex) and conventions to recruit participants for interviews, observe community interactions, and attend practitioner's panels to learn about their current practices. Prior to attending public kinky events, I would contact event organizers in order to secure permission to recruit participants and observe. While collecting field data in kinky settings, I was distinguishable as a researcher by wearing more clothing than the average attendee, verbally informing participants around me that I was there to collect data, carrying a small notebook in which to take field notes, and engaging only in observation and conversation (no play).

Since then, I have continued to observe kinky community interactions, present at kink conventions, and attend others'

presentations at those conventions.² When I present at academic³ and NGO⁴ conferences, I also attend others' sessions pertinent to BDSM in order to educate myself on emerging academic research and kink community thought, practices, and interactions. Furthermore, I continually read online discussions among kink community members. While I cannot explicitly collect data in these semiprivate online conversations because of participant consent and privacy issues, it allows me to retain current knowledge regarding BDSM community norms, values, expectations, identities, and practices.

Expert Witnessing

Qualifications that make me an expert in sex and gender minorities include education, research, and certification. In 2005, I earned my doctorate in sociology from the University of Colorado in Boulder, with a dissertation on polyamorous people in the U.S. that became the first wave of data collection in the *Longitudinal Polyamorous Families Study* (Goldfeder & Sheff, 2013; Pallotta-Chiarolli, Sheff, & Mountford, 2020; Sheff, 2005a, b, 2006, 2011, 2013, 2016a, b, 2020; Sheff & Hammers, 2011; Sheff & Tesene, 2015). At CU, I was lucky to learn ethnographic methods such as in-depth interviewing and participant observation from Dr. Patricia Adler, a giant in ethnographic methods. Later, I trained as a Court Appointed Special Advocate (CASA), learning legal procedures relevant to children in the child welfare system and how to evaluate and report on children's well-being. Between 2012 and 2017, I served as a CASA for the Fulton County Juvenile Court in Atlanta, Georgia. Additionally, I qualified as a Certified Sexuality Educator (CSE) with the American Association of Sexuality Educators, Counselors, and Therapists (AASECT) in 2012 and have since provided continuing education for counselors and therapists seeking CE units from AASECT. This amassed experience and ongoing research qualifies me an expert in sex and gender minorities, especially kinksters and polyamorous families with children.

In 2013, I began serving as an expert witness in custody cases related to polyamory and since then have provided background information, parental assessments, and testimony in seven cases related to polyamory. In contrast to the civil nature of the cases I witness for in family courts, the nine criminal cases on which I have served concern BDSM. This article later explores those criminal cases in greater depth.

² For example, DragonCon; Endless Poly Summer; Frolicon; Dark Odyssey; Sex Down South; South East Leather Fest (SELF); etc.

³ For example, the American Association of Sexuality Educators, Counselors, and Therapists; American Psychiatric Association; American Psychological Association; American Sociological Association; Society for the Scientific Study of Sexuality; and Society for the Study of Social Problems; etc.

⁴ For example, Atlanta Polyamory Weekend; Finding Freedom; Lov-ing More; SexPosCon; Woodhull Summit for Sexual Freedom; etc.

While custody cases often require interviews of parents, children, other significant caretakers, and therapists or doctors, most of the kinky cases rely on police reports and (especially in age-play cases) transcripts of interactions between the undercover agent and the suspect. Evaluating information from the transcripts utilizes the coding skills I developed as an ethnographer analyzing qualitative data, as well as the knowledge developed conducting research in the field. Initially, the transcripts also contained images that the suspect would exchange with undercover officer, and I quickly found that the endless parade of genitalia became incredibly wearing.⁵ After I began charging an additional fee for each image, litigation staff replaced most images with descriptions and only included the most important images to limit the number I was required to view.

Legal clients usually find me in one of two ways. For custody cases, polyamorous families are often aware of my research and frequently contact me independently before arranging for me to speak with their lawyers. In contrast, BDSM cases almost always begin with the lawyer contacting me, either because they have found my publications or heard about me from other lawyers or the National Coalition for Sexual Freedom. While many of the civilian criminal cases involve a public defender who is attempting to stretch limited resources to provide adequate defense, military courts appear to provide the defense with more plentiful resources.

Criminal Prosecution of Kinky Sex Cases

Using examples from my expert witness practice, this section explores the criminal prosecution of BDSM. Thus far in my practice, criminal cases related to BDSM cluster in three main areas: consent, age play, and death.

Consent or Assault?

Legal definitions of voluntary sexuality emphasize sex among consenting adults (Archard, 2019; Moser, 2019). Consent is of primary concern for many sex and gender minorities (Cowling, 2017), and especially those who use collective sex environments (Frank, 2019) or engage in kinky sex (Beres & MacDonald, 2015; Lehmilller, 2019; Martin, Smith, & Quirk, 2016). Diagnosing problematic or illegal sexual behaviors also hinges on consent, and the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association, 2013)—the reference that psychiatrists use to diagnose mental illness—distinguishes between consensual kinky sex (termed a paraphilia) and problematic kinky sex (termed a paraphilic disorder) that involves nonconsenting partners or creates problems for the kinkster (Moser, 2019). Paraphilic disorders

are far more likely to lead to criminal prosecution than are consensual paraphilias (Moser, 2019). The upcoming revision of the International Classification of Diseases and Related Health Problems (ICD-11) has removed sadomasochism from the list of paraphilias and thus eliminated diagnoses related to consensual kinky behaviors (Krueger et al., 2017).

Consent Among Kink Community Members

Because consent is so important to the BDSM community, kinksters have debated the nature of true consent and concluded that it is an agreement generated between informed adults absent coercion (Barker, 2013; Pitagora, 2013; Williams, Thomas, Prior, & Christensen, 2014) and used consent to distinguish kinky sex from abuse (Kieran & Sheff, 2016; Ortmann & Sprott, 2013). Consent is a key element of power exchange in which kinksters negotiate transferring personal power from one person to another and underlies both mottos of kink communities both “Safe, Sane, and Consensual” (SSC) and “Risk Aware Consensual Kink” (Williams et al., 2014, p. 2; see also Downing, 2007). In some cases, kinksters will negotiate consensual nonconsent, a form of interaction in which the play “hinges on blatantly playing with and often purposefully obscuring consent. [and is] blanketed in the trappings of non-consent” (Williams et al., 2014, p. 4). Crucially, even consensual nonconsent is negotiated among the participants.

Lack of awareness of kink community norms (Taormino, 2012; Weiss, 2006) and inebriation (Curry et al., 2018; Giami, 2015; Wiseman, 1996) can both interfere with establishing true consent. My own and the research of others (Barker, 2013; Ortmann & Sprott, 2013; Pitagora, 2013) indicates that people who are new to kink communities or engage in kinky sex without community guidance are less likely to have the skills required to successfully negotiate consent with their partners and are thus at greater risk of nonconsensual kinky sex. Kinksters are far more invested in the appearance of coercion through power exchange than in actual coercion, and indeed people with SM interests score lower in victim blaming and higher in empathy (key measure of coercion) than nonkinky or “vanilla” people (Martin et al., 2016).

Criminal Prosecution Related to Consent

Several of the criminal cases for which I have provided expert witness services involve distinguishing between a consensual kinky sex scene that went wrong and assault. In one case, a man and woman had repeatedly joked about him grabbing her genitalia in public, something they termed “Trumping” in reference to Donald Trump’s publicly disseminated admission that he “grabs women by the pussy” (Chen, Pain, & Zhang, 2018). After joking about it for several months, the woman told the man “I want you to Trump me” and he grabbed her genitalia and then yelled “Trump!” This upset the woman, who later went to the police

⁵ I found that I could tolerate only so many “dick pics.”

to say she had been accosted. The man was confused, thinking that he had gained her consent for the action. The woman was upset, feeling embarrassed and violated by an action she decided she did not actually want to endure. This case highlights the complexity of consent in kinky sex (Pitagora, 2013; Williams et al., 2014). The man thought he had established consent when she said “I want you to Trump me,” and the woman apparently did not think she had given consent for that action to occur in that moment, in a crowded public space with onlookers who were not aware of their negotiation.

In another case, a man and woman had been consuming methamphetamines for several days before embarking on a kidnapping scene in which she attempted to flee a parked car and he grabbed her and dragged her back to the car. High on meth and sleep-deprived, the woman was unable to utter the designated safeword and began to panic and attempted to fight off her lover. Bystanders, unaware of the negotiated context of the role-playing kidnapping scene, intervened to restrain the man until police arrived and arrested him. Upset and afraid, the woman quickly left the scene prior to the arrival of the police and the man was taken into custody. Luckily for the man (and somewhat uncommon for kinky play), the two had a written agreement that structured the kidnapping scene which the man was able to provide for police in his bid to prove that it was a consensual interaction rather than true kidnapping and assault.

As an expert witness in these cases, I generally do not provide an opinion as to whether or not the specific interaction was consensual. Rather, via testimony I provide the judge and jury with information about kinky sex, how someone might willingly engage in what to others (especially “vanilla” people with no kinky sex experience) might appear to be an abusive relationship, and the ways in which people in BDSM relationships often establish and maintain consent. In two cases, I have interviewed the accused perpetrator to investigate their claims of consent, but most often the lawyer chooses to have me provide education and then they apply that information to the case themselves.

Age Play or Predation?

One of the most popular forms of kinky interaction is age play, a range of activities in which adults pretend to be a different age than their true chronological age, and other adults interact with the age-players but retain their true age (Bauer, 2018; Rehor, 2015; Weiss, 2006). Age play is distinct from pedophilia (the desire for sex with prepubescent children), hebephilia (the desire for sex with pubescent children), and ephebophilia (the desire for sex with postpubescent children under 18 years old) (Blanchard et al., 2009) because the desired partner is a consenting adult pretending to be a child, rather than an actual child. While it is easier to discern someone's age when interacting with them in person, meeting age-play partners online can introduce difficulties establishing the partner's true age (Craft, 2012). Age play routinely involves role play, a form of interaction that is

extremely common among kinksters (Rehor, 2015; Sixma, 2009). In Rehor's (2015) study of women who had willingly participated in at least one kinky interaction in the last year for their own sexual pleasure, 87.59% of the respondents reported engaging in some form of role play and 46.67% had acted out a sexual fantasy or role play. Among kinksters, role play is so widespread that players sub-specialize into types of communities (Sixma, 2009; Taormino, 2012; Wiseman, 1996).

The Popularity of Age Play

Most age play is regression where the kinkster pretends to be younger, and fewer kinksters engage in progressive age play in which they pretend to be older (Rehor, 2015). In a study of women associated with kink communities who had engaged in a kink-related activity for their own pleasure in the last year, 53.83% of the respondents had participated (in any form, including watching) in age regression play, with 14.6% as the “top,” 29.62% as the “bottom,” 36.05% as top or bottom, and 35.40% observing (Rehor, 2015). In contrast, only 9.39% of the respondents had participated in age progression play, with 0.79% as the top, 0.87% as the bottom, 1.45% as top or bottom, and 8.24% observing (Rehor, 2015).

While there is a smaller subculture of people who engage in adult diaper play (termed adult babies/diaper lovers, or ABDL) in which adults pretend to be infants by wearing diapers and using infant paraphernalia such as bottles and pacifiers (Zamboni, 2018), the more popular form of age play in kink communities is among adults pretending to be children or adolescents (Taormino, 2012). There are even specific subcultures arranged around adolescent age play, such as the Lolita subculture which has categories of Lolitas ranging from Victorian to Goth and Eros (Gatlin, 2014; Robinson, 2014). In these cases, the adults are aware of their true age and the actual chronological age of their adult partners but pretend to be younger in order to enhance the sexual or social experience (Bauer, 2018; Gatlin, 2014; Rehor, 2015; Robinson, 2014; Zamboni, 2018).

The Importance of Fantasy

For kinksters, the ability to engage realistically in a fantasy is crucial for successful/believable role play. In fact, in their study of college students and community members, Ahlers et al. (2011) found that men with “paraphilic interests” are more likely to report engaging in fantasy (59%) rather than behavior (44%). Again, the fantasy element of age play is crucial for understanding that the adults engaged in age play do not think they are playing with actual children, but rather are engaged in a consensual sexual activity with other adults who are pretending to be babies, children, or adolescents (Bauer, 2018; Gatlin, 2014; Kieran & Sheff, 2016; Rehor, 2015; Robinson, 2014; Zamboni, 2018).

Criminal Prosecution of Age Play

Criminal prosecution of what might be age play usually involves a sting in which undercover police officers pose as young girls online in an attempt to snare men who are seeking to engage in sexual interactions with underage girls. Generally, this involves establishing contact through a variety of websites and then moving the discussion to an alternate form of social media (i.e., Facebook⁶ or Kik) or texting. Because the interaction begins online, it can be difficult to determine the actual ages of those involved, something that proves disastrous for men attempting to age play who are prosecuted for seeking sex with young girls. Experienced kinksters often meet in person and negotiate age play with direct interaction, something that allows them to see the other person and be certain that their intended play partner is indeed an adult woman who is enthusiastically agreeing to pretend to be 14, rather than an actual 14-year-old (or a police officer pretending to be a 14-year-old girl). Those who are new to kinky sex or just beginning to explore the possibility of age play are more likely to meet people online and thus subject to making several mistakes, including failing to adequately establish the other person's real identity or the fact that they are engaged in role-play. People with more contact with kink community norms have learned to establish their partners' chronological ages and communicate carefully regarding consent. Those without access to kink communities are more likely to seek out age-play interactions online (Albright, 2008; Craft, 2012; DeHaan, Kuper, Magee, Bigelow, & Mustanski, 2013; Vogels & O'Sullivan, 2019) and less likely to take the steps more experienced practitioners use to structure their consensual play (Barker, 2013; Frank, 2019; Wiseman, 1996).

The challenge here is determining whether the adult male is attempting age play poorly or was truly trying to have sex with young girls and claiming it was age play later in order to evade prison time. Part of my expert witnessing services involve reading through the transcripts of the discussions between the undercover officer and the defendant in order to discern the presence or absence of age play. Many English-speaking kinksters negotiate consent and tend to use a range of specific words when they are age playing and when assessing the transcripts I used qualitative ethnographic coding techniques (Saldaña, 2015) to search for the presence or absence of those words, phrases, ideas, and interactions.⁷ I then write a report specifying the presence or absence of elements indicative of age play, attempts at negotiation, and evidence of fantasy role play. Similar to the type of testimony I provide in consent cases, for age-play cases

⁶ Facebook is becoming a less common format for age-play discussions because Facebook content monitors have become quite adept at identifying and reporting suspicious or illegal activity to law enforcement officials.

⁷ I intentionally do not list those words here or provide other specifics that would easily enable a sexual predator to mimic age play in order to evade or muddy prosecution.

I frequently provide information about the difference between age play and pedophilia, explain the fantasy of online or social media sex, and how someone might intend to age play but fail to negotiate properly if they are unfamiliar with the norms of kink communities.

Kinky Accident or Murder?

When done correctly, the vast majority of kinky sex does not end in death, disability, or even permanent injury. In fact, most injuries incurred during BDSM scenes are to the skin and heal over time, especially for younger participants (Moser, 1999), though advanced age can increase the likelihood of injury to skin and the length of time it takes to heal (Pinson, 2019). Perhaps the most common form of accidental death by kinky sex is via restricting oxygen and or blood flow to the brain during sexual interactions. Erotic asphyxiation—colloquially termed *breath play* among kinksters/people involved in BDSM—is a very common activity among teenagers, kinky people, and possibly many others who practice it in private. Choking or restricting airflow is designed to heighten pleasure and intensify orgasm significantly (Martz, 2003; Mehdi, Nimkar, Darwish, Atallah, & Usiene, 2015), particularly in connection with drug use (Perlman et al., 1999) and is especially common among men (Martz, 2003), notably Caucasian men under 30 years old (Breitmeier et al., 2003). There are four primary types of erotic asphyxia: “(1) compression of the neck as seen in hangings and strangulations; (2) obstruction of the airway associated with smothering by a plastic bag; (3) mechanical compression of the chest; and (4) exclusion of oxygen by inhalation of another gas” (Shields et al., 2005).

Asphyxiation brings about brief euphoria (Centers for Disease Control and Prevention, 2010) and is so common that records document people who enjoyed it in the Nineteenth-Century (Tarr, 2016). Children sometimes play “the choking game” in which they strangle themselves to produce a feeling of lightheadedness (CDC, 2010). The choking game can have significant negative health impacts from hypoxia, including long-term disability and even death. The Centers for Disease Control reported 82 deaths due to “strangulation activities” among youth between 1995 and 2007 (CDC, 2010). Factors that place youth at greatest risk for strangulation-related injuries or death include being between 11 and 16 years old, living in rural areas, mental health risk factors, and substance use (CDC, 2010), as well as being an “inept practitioner” of autoerotic asphyxia (Cowell, 2009).

Usually a sexual act performed in private and most people are not aware of others performing breath play unless the person accidentally strangles themselves, autoerotic asphyxiation is self-choking while masturbating with the intent of heightening orgasm via hypoxia (Breitmeier et al., 2003; Cooke, Cadden, & Margolius, 1994; Gosink & Jumbelic, 2000; O'Halloran & Dietz, 1993; Uva, 1995) but generally not the intent of death

(Mehdi et al., 2015). Erotic asphyxia can also go terribly wrong in partnered sex when the person who is choking the other does not release the air constriction rapidly enough (Roma, Pazzelli, Pompili, Girardi, & Ferracuti, 2013; Sandler, 2018).

With fatal erotic asphyxia, it can be difficult to distinguish accidental death from murder (Myers et al., 2008) or suicide (Mehdi et al., 2015; O'Halloran & Dietz, 1993; Tournel, Hubert, Rougé, Hédouin, & Gosset, 2001). In previous cases, defendants have argued that their partners consented to the breath play during erotic encounters and the death was accidental, something some legal scholars (Edwards, 2016; Sandler, 2018) have found problematic when male defendants disguise “cruel and misogynist conduct as a strategy to manipulate trial and sentencing outcomes” (Edwards, 2016). Others have found that defendants who were not under the influence of drugs or alcohol and had a well-documented past interest or practice of BDSM were the least likely to be found guilty of murder and more likely to avoid serving prison time for death via erotic strangulation (Sandler, 2018). When considering the capacity to consent to dangerous sexual actions, scholars concerned with social justice caution against “establishing these limits based on normative assessments about specific sexual acts poses too great a threat to the liberty interests of women and sexual minorities” (Craig, 2014, p. 103) and conclude that “the failure of law to exclude morally inculpable unconscious sex between ongoing sexual partners reveals the limits of law, and in so doing suggests the need to reevaluate the law’s conception of the relationship between sexual liberty and sexual integrity” (Craig, 2014, p. 103).

Criminal Prosecution of Breath Play or Murder

While breath play is usually a private activity between consenting adults, it becomes a criminal matter when someone dies as a result (Busby, 2012; Cooke et al., 1994; Edwards, 2016; Khan, 2016; Roma et al., 2013). The case for which I testified was a retrial of a man who had been convicted of murder for what he claimed was the accidental death of his boyfriend in a breath play scene. The two were high on narcotics and having sex in a hotel room when the defendant restricted the deceased’s airflow for too long, resulting in his death. When the defendant realized what had happened, he freaked out and wrapped the body in a sheet before fleeing the hotel. The cleaning staff found the corpse the next morning.

This case was complicated by a number of factors, primary among them racism, homophobia, and sex negativity. When the defendant—a working-class African American gay man—attempted to inform his original public defender about the tragic events of that night in order to prepare for the first trial, the public defender respond that he “didn’t want to hear any of that weird faggot shit” and the jury would not either. The original public defender also did not think that they should mention the drug use during the initial trial. Unable to explain

what happened that night without reference to drug use and kinky sex, it is unsurprising that the defendant was convicted of murder in his initial trial.

Granted a new trial due to stunningly incompetent legal representation at the first trial, the defendant was able to provide more detail about events surrounding his boyfriend’s death in his second trial. During that trial, I testified to the parameters of kinky sex and the commonality of breath play, as well as the popularity of “chemsex” (having sex while high on drugs) among gay men and many other subcultures (Ahmed et al., 2016; Power et al., 2018; Schmidt et al., 2016) and people’s tendency to take more sexual risks (Melendez-Torres & Bonell, 2017; Power et al., 2018) and make poor decisions (Boyer et al., 2017; McKirnan, Ostrow & Hope, 1996; Moore et al., 2016) when intoxicated. Of all the cases for which I have provided expert witness services, this case underlined most effectively the ways in which social factors can complicate the prosecution of already challenging cases involving BDSM. Too poor to hire a private attorney, accused of the most serious crime, and subject to racism, homophobia, and kinkphobia, the defendant in this case faced far worse outcomes than did the defendants in the other cases listed here.

Recommendations

Using the information gained from the above experiences, this section provides recommendations for practical use of these conclusions. These recommendations are for both kinksters who wish to play safely and litigators involved in cases related to BDSM who wish to effectively defend or prosecute people claiming to have been involved in consensual kinky sex activities.

Kinksters

Kinksters who wish to engage in consensual kinky sex and avoid criminal prosecution should consider four primary recommendations. These include playing sober, finding training from experienced practitioners, clarifying consent, and using extreme caution with breath play.

Play Sober

In two cases discussed above—kidnapping and murder—the kinksters were under the influence of drugs while playing, which significantly impaired their judgment about how far to take their respective scenes. Participating in potentially risky sex while high, drunk, or sleep-deprived from extended drug use can be extremely dangerous. Many public play spaces that cater to kinksters will not allow alcohol consumption on the

premises and encourage attendees to maintain sobriety prior to arrival and during their play. Practiced kinksters will often refrain from engaging in play while mood altered in part because it is safer and also to ensure true consent. One of my respondents in the *Are you Kinky?* study affirmed that “If someone has to be drunk to play then I don’t want to play with them, they clearly have unresolved issues about their kinks that need to be dealt with first.”

Get Training

Inexperienced kinksters are more likely to make mistakes, some of which can be detrimental to their partners’ well-being. By seeking mentoring and training in kinky practices, nascent kinksters can learn how to carefully negotiate consent, gain skills in implement usage (i.e., where to land blows on the back to avoid damaging kidneys), and safety protocols (i.e., how to recognize a “safeword” when the person is gagged). Perhaps even more importantly, kinksters who seek training can receive socialization into the kinky community and learn norms and values of sex positivity, the importance of consent, and respectful power exchange.

Clarify Consent

Several cases above, especially the “Trumping” case and the age-play cases, revolve around inadequate consent. It is crucially important to clarify consent in kinky play, both in person and online. This is such an important issue in kink communities that they spend considerable thought and effort providing trainings in methods for negotiating consent, writing books on consent, and discussing it in many different online fora. Because the distant nature of Internet communications makes it especially difficult to establish true consent, kinksters who play online should take extreme precautions to clearly negotiate the boundaries of the fantasy. In online age play, this should always include establishing the person’s true age as well as their fantasy age. For those kinksters who wish to engage in edge play, getting consent in writing can help to both clarify the boundaries of the scene and provide documentation of negotiated consent if something goes wrong.

Extreme Caution with Breath Play

Because breath play is among the most dangerous kinky activities in which people can engage, kinksters should use extreme caution when choking each other. As previously discussed, playing sober, getting safety training to help recognize the signs of distress before the scene goes too far, and carefully establishing consent are all important to breath play. Additionally, the type of breath play kinksters select can have significant safety implications. The safest form of breath play is covering the nose and

mouth with a hand or plastic, because it is the easiest to remove in an emergency and does not interfere with blood circulation. Any neck compression can not only deter breath, but also inhibit blood circulation to the brain. Blood vessels that have collapsed under pressure can be slow to begin circulating blood again, even after the pressure is released. Because it is much safer to inhibit breath through the nose and mouth than use neck compression, kinksters should use the first method and avoid the second when performing breath play.

Litigators

While recommendations for kinksters focus on the steps they should take to play carefully, the recommendations for litigators focus on being aware of the potential impacts cultural and personal biases can exert during the prosecution of cases related to kinky sex. Usually, a private issue, personal sexual tastes, and behaviors come under significant scrutiny during trials related to kinky sex. Cultural factors like sex negativity (Rubin, 1984) and kinkphobia (Downing, 2013, 2015; Hughes & Hammack, 2019; Khan, 2016; Mesli & Rubin, 2016; Rutledge, 2017; Wright, 2006) shape general attitudes toward sexuality, including those of law enforcement officers, lawyers, judges, and jury members. These attitudes are further inflected by the individual characteristics of the person in question, attributes such as race, social class, and sexual orientation can significantly impact the ways in which people interpret sexual acts. Litigators involved in BDSM-related cases must be aware of the intersections of all of these complex issues and the impact they may exert on the case.

Sexual Biases

Sex negativity describes the set of attitudes, behaviors, and beliefs that cast sexuality as a dangerous and largely immoral realm in which decent people only dabble occasionally in order to procreate (Rubin, 1984; Sears, 2016). Sex-negative societies encourage sexual asceticism, and sex is largely constructed as being particularly risky, problematic, or perhaps adversarial (Williams, Prior, & Wegner, 2013). Negativity about sexuality is linked not only to prejudices associated with various sexual practices, but also to sexism, racism, homophobia, and ageism (Glickman, 2000; Mesli & Rubin, 2016). The impact of sex negativity goes beyond the bounds of religious life to affect science, medicine, provision of social services (Foucault, 2012a; Williams et al., 2013) and law enforcement (Foucault, 2012b; Williams, Thomas & Prior, 2015) with often unconscious bias against others who are different (Lee, 2005).

Kinkphobia is deeply embedded in sex-negative attitudes that inform everything from law enforcement to mental healthcare diagnosis and practice (Downing, 2013; Hughes & Hammack, 2019; Khan, 2016; Mesli & Rubin, 2016; Rutledge, 2017; Wright, 2006). For many years, sexologists (Ellis, 1926 [1903]; Krafft-Ebing, 1898 [1886]) and

psychiatrists (Freud, 1938) pathologized sadomasochism as unhealthy, psychopathic, or perverted, though later scholars have contested these classifications because they were based on small samples of people in prisons and mental hospitals and did not examine consensual relationships among more normative people (Foucault, 2012a; Kleinplatz & Moser, 2005; Moser, 2002). Even though recent revisions in psychiatric diagnoses related to BDSM emphasize practitioners' emotional comfort with their sexual practices and consent of their partners (Kieran & Sheff, 2016; Marshall & Kingston, 2018; Parker, McClure, & Patterson, 2015), being accused of having kinky sexual desires can still have detrimental consequences such as alienation from family and friends (Califa, 2000) harassment (Wright, 2010), loss of a job or custody of a child (Kleinplatz & Moser, 2005; Wright, 2014), physical attack (Iannotti, 2014), public excoriation, and incarceration (Attias, 2004).

Racism

Racism is a constant and virulent element of society in the U.S. (Bonilla-Silva, 2006; Omi & Winant, 2014) and influences the ways in which people are able to express their sexualities (Bailey & Stallings, 2017; Bhambhani, Flynn, Kellum, & Wilson, 2018; Collins, 1996, 2005). Men of color are subjected to a multitude of negative stereotypes, such as being on the down-low (clandestinely having sex with men while pretending to be heterosexual and monogamous with women, see Malebranche, 2008), dirty, loud, predatory, and diseased (Bhambhani et al., 2018; Calabrese et al., 2018; Collins, 2005; Han et al., 2015). Women of color are similarly misrepresented as hypersexual, fetishized, exoticized others (Collins, 1996, Greene, 1996; Rosenthal & Lobel, 2018), and transgender people of color are subject to some of the most negative stereotypes and highest rates of gender-related violence (Sausa, Keatley, & Operario, 2007).

The more intersecting marginalized identities an individual possesses, the more likely they are to experience of some type of disadvantage related to one of the marginalized identities (Collins, 2005; Field, 2016; Lee, 2005; Nelson & Probst, 2004). Disadvantage can be cumulative when people have multiple marginalized identities, such as being a person of color who is both subject to racism and a sexual minority who is impacted by sex negativity. Being gay, Black, and kinky compounds disadvantage, intensifies stigma, and increases both the frequency and impact of discrimination (Field, 2016). Litigators must be aware of the cumulative and pernicious impacts that marginalization can exert on their clients, both before and during legal proceedings.

Awareness and Caution

Litigators and kinksters alike should pay careful attention to the cultural biases that shape attitudes, practices, and prosecution concerning BDSM. While everyone involved in unconventional sexual behaviors risks social censure, people unprotected by social advantages are more vulnerable to the discriminatory impacts of this sexual stigma than are those shielded by racial and/or class privileges (Sheff & Hammers, 2011). This insulation provides greater social latitude to engage in and redefine sexual or relational “deviance” than that available to those burdened by racism, poverty, inadequate education, limited job prospects, and other forms of discrimination (Collins, 1996, 2005; Sanday, 2007; Sheff & Hammers, 2011; Steinbugler, 2005). Defendants' intersecting social locations can significantly impact the outcome of the trial: A black man accused of raping a white woman or a transgender person accused of assaulting a lover will face a far more hostile legal climate than a white cisgender woman accused of kidnapping a black man or choking her husband during sex. Regions with greater social conservatism often have higher rates of sex negativity, and kinksters who cross gender boundaries or have same-sex relationships will encounter greater difficulty in court than cisgender people in heterosexual relationships.

Kinksters should use caution to play safely and ensure consent, especially by maintaining sobriety during kinky sex and learning safer sex techniques to play safely and establish clear consent. Litigators should use caution when assessing kinky sex cases. Biases like sex negativity, kinkphobia, and racism can significantly affect the prosecution of kink-related cases. It is clear that many people bungle their kinky sex scenes, often due to players' inexperience and lack of education in kinky cultural norms, values, and practices. However, rising public awareness of the existence of and the details around kinky sex might give some perpetrators ideas about how to pretend that they were intending kinky sex when in truth they are hiding sexually predatory behaviors. Distinguishing between bungled kinky sex and criminal acts requires awareness of bias, fine assessment of details, and astute legal counsel.

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